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EDITORS

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(20 Okla. 634, 95 Pac. 254.)

Fraudulent conveyance — creditors' action — limitation.

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sufficient to aver in appropriate language the lack of any other available assets.

Trial — demurrer to evidence — effect.

3. A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrer.

(Dunn, J., dissents in part.)

(April 13, 1908.)

ERROR to the District Court for Canadian County to review a judgment in defendants' favor in an action in the nature of a creditors' bill brought to set aside a conveyance of land alleged to have been made in fraud of plaintiff's rights. Reversed.

Statement by **Dunn, J.**:

November 4, 1903, Katherine Ziska, plaintiff below, and plaintiff in error here, secured a judgment for $1,700 in the district court of Lancaster county, Nebraska, against Frank R. Ziska, her husband, in a suit for divorce and alimony. On September 7, 1904, she instituted a suit on said judgment in the district court of Canadian county, Oklahoma, suing out an attachment on a quarter section of land described as the N. W. ¼ of section 17, township 12, range 6 W. of I. M., and on the trial of the cause, on November 21, 1904, secured judgment against Frank R. Ziska in the sum of $1,834, in which the attachment was sustained and the land ordered sold as required by law. On January

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I. Introduction.

"Generalities, . . . which with reference to so many cases are founded in truth, sometimes come to be taken, by frequent repetition, as axioms, behind which, as a bulwark, we seldom in any case look." M'Nairy v. Eastland, 10 Yerg. 310.

It is hard to think of any subject that could have suffered more from the evil mentioned in the above quotation than that relating to conditions precedent to equitable remedies of creditors. The frequent repetition of such expressions as "equity will never assume jurisdiction where there is an adequate remedy at law," or "a creditor cannot come into equity until he has exhausted his remedy at law," as if they were axioms applicable to all cases, has tended to complicate what would otherwise be a very simple subject. In addition to this, statutes making actions at law and in equity triable in a single court, and statutes prescribing the procedure as to creditors' bills and bills in aid of execution, have added their mite to the confusion, so that upon looking at the authorities, even in separate jurisdictions, it is hard to find a consistent line of cases on any branch of the sub-

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6, 1905, she filed this suit in the district court of Canadian county against Frank R. Ziska and F. M. Ziska. The amended petition alleges that, in April, 1880, plaintiff and defendant Frank R. Ziska were married, and lived and cohabited together until about the 1st day of November, 1901, at which time defendant abandoned her; that, on the 27th day of July, 1903, she instituted an action for divorce and alimony, in which case, on the 4th day of November, 1903, judgment was rendered for an absolute divorce and for $1,700 alimony; that the said judgment has become final; that, on the 7th day of September, 1904, plaintiff instituted her action in the district court of Canadian county against Frank R. Ziska on the judgment above mentioned, and caused an attachment to be issued and levied on the land, and that, on the 21st day of November, 1904, by the consideration of the said court, she secured a judgment against Frank R. Ziska in the sum of $1,834 and costs of suit, and an order that said attachment be sustained and the land sold as required by law to satisfy the said judgment; that, on the 12th day of August, 1893, while plaintiff and defendant Frank R. Ziska were living together as husband and wife, they purchased the said land, which was paid out of the separate estate of this plaintiff, and the legal title to said lands taken in the name of the defendant Frank R. Ziska; that, on November 30, 1901, and after the abandonment of the plaintiff by defendant, a deed was made by the said Frank R. Ziska to his brother, which purported to convey to the said brother, F. M. Ziska, the tract of land in question, and the said deed was recorded in the office of the register of deeds of Canadian county on the 12th day of December, 1901; that the said deed so made as aforesaid was made by the said Frank R.

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ject. There is not as much actual conflict, however, as appears on the surface, many of the decisions themselves being correct, although the rules relating thereto have been carelessly and inaccurately stated. A careful examination of all of the cases fixes the idea very firmly in the mind that most of the trouble has come from a misunderstanding of the adequate remedy at law rule and the exhaustion of the remedy at law rule, which are often incorrectly referred to as if one were the equivalent of the other. It is necessary only to look behind these two "bulwarks" to discover how the confusion and conflict largely arose, and to determine what the true rules governing equitable assistance to creditors are or ought to be.

It should be stated at the outset that what is here meant by conditions precedent to equitable remedies of creditors are the conditions prerequisite to such relief as is granted under the ancillary jurisdiction of courts of equity, in aid of the legal remedy when the legal remedy is ineffectual or fruitless. The question is, How far must the creditor go at law before he can have this relief? It is not here intended to take up questions relating to creditors' remedies when the jurisdiction of equity is original, as, for example, to enforce trusts. There are, strictly speaking, no conditions precedent to equitable relief in this class of cases as this term is used with reference to creditors' actions, as here the creditor comes into court in the first instance. The cases, however, in which the question of conditions precedent has been raised and discussed with reference to its bearing upon the original jurisdiction of courts of equity, have been collected and grouped under one subdivision of the note, and they are important as marking the boundary lines of the subject.

The term "condition precedent" is therefore used in this note in its narrow sense, that is, to signify how far the creditor must push his legal remedy before he will be listened to in a court of equity. To use it in the broader sense would necessitate including all questions of jurisdiction, pleading, and practice, as well as questions relating to the merits of the claim, which is altogether beyond the scope of a note of this kind. It is therefore assumed, in the cases selected, that the equity court has jurisdiction if the preliminary legal steps have been taken (Verdier v. Foster, 4 Rich. Eq. 227); that a valid claim exists (Minneapolis Threshing Mach. Co. v. Jones, 89 Minn. 184, 94 N. W. 551; Bickerdike v. Allen, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740); that the debt is due (Ware v. Seasongood, 92 Ala. 156, 9 So. 138; Freider v. Lienkauff, 92 Ala. 469, 8 So. 758; McGhee v. Importers' & T. Nat. Bank, 93 Ala. 192, 9 So. 734; Gibson v. Trowbridge Furniture Co. 93 Ala. 579, 9 So. 370; Evans v. Thornburg, 77 Ind. 106; Scott v. Thomas, 104 Va. 330, 51 S. E. 829; Simon v. Ellison, 2 Va. Dec. 203, 22 S. E. 860); and that a creditor having obtained a lien is not obliged to sell the property with a cloud upon it, created by a fraudulent conveyance (Planters & Merchants' Bank v. Walker, 7 Ala. 926; Chardavoyne v. Galbraith, 81 Ala. 521, 1 So. 771; Gaines v. National Exch. Bank, 64 Tex. 18). Cases will also be excluded where the question is whether special statutory remedies, such as acts relating to attachment, garnishment, and supplementary proceedings, should first be exhausted, before equitable relief will be granted (First Nat. Bank v. Steinway, 77 Fed. 661; Feidler v. Bartleson, 88 C. C. A. 194, 161 Fed. 30; Sheppard v. Iverson, 12 Ala. 97; Guyton v. Terrell, 132 Ala. 66, 31 So. 83; Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143; Phillips v. Price, 153 Cal. 146, 94 Pac. 617; Gager v. Watson, 11 Conn. 172; Field v. Jones, 10 Ga. 229; Flint v. Webb, 25 Minn. 263; Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515; Monroe v. Reid, 46 Neb. 316, 64 N. W. 983; Chamberlain Bkg. House v. Turner-Frazer Mercantile Co. 66 Neb. 48, 92 N. W. 172; Sabin v. Anderson, 31 Or. 487, 49 Pac. 870; Clapp v. Smith, 16 R. I. 717, 19 Atl. 330; White

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sufficient to aver in appropriate language the lack of any other available assets.

Trial — demurrer to evidence — effect.

3. A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrer.

(Dunn, J., dissents in part.)

(April 13, 1908.)

ERROR to the District Court for Canadian County to review a judgment in defendants' favor in an action in the nature of a creditors' bill brought to set aside a conveyance of land alleged to have been made in fraud of plaintiff's rights. Reversed.

Statement by **Dunn, J.**:

November 4, 1903, Katherine Ziska, plaintiff below, and plaintiff in error here, secured a judgment for $1,700 in the district court of Lancaster county, Nebraska, against Frank R. Ziska, her husband, in a suit for divorce and alimony. On September 7, 1904, she instituted a suit on said judgment in the district court of Canadian county, Oklahoma, suing out an attachment on a quarter section of land described as the N. W. ¼ of section 17, township 12, range 6 W. of I. M., and on the trial of the cause, on November 21, 1904, secured judgment against Frank R. Ziska in the sum of $1,834, in which the attachment was sustained and the land ordered sold as required by law. On January

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I. Introduction.

"Generalities, . . . which with reference to so many cases are founded in truth, sometimes come to be taken, by frequent repetition, as axioms, behind which, as a bulwark, we seldom in any case look." M'Nairy v. Eastland, 10 Yerg. 310.

It is hard to think of any subject that could have suffered more from the evil mentioned in the above quotation than that relating to conditions precedent to equitable remedies of creditors. The frequent repetition of such expressions as "equity will never assume jurisdiction where there is an adequate remedy at law," or "a creditor cannot come into equity until he has exhausted his remedy at law," as if they were axioms applicable to all cases, has tended to complicate what would otherwise be a very simple subject. In addition to this, statutes making actions at law and in equity triable in a single court, and statutes prescribing the procedure as to creditors' bills and bills in aid of execution, have added their mite to the confusion, so that upon looking at the authorities, even in separate jurisdictions, it is hard to find a consistent line of cases on any branch of the sub-

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6, 1905, she filed this suit in the district court of Canadian county against Frank R. Ziska and F. M. Ziska. The amended petition alleges that, in April, 1880, plaintiff and defendant Frank R. Ziska were married, and lived and cohabited together until about the 1st day of November, 1901, at which time defendant abandoned her; that, on the 27th day of July, 1903, she instituted an action for divorce and alimony, in which case, on the 4th day of November, 1903, judgment was rendered for an absolute divorce and for $1,700 alimony; that the said judgment has become final; that, on the 7th day of September, 1904, plaintiff instituted her action in the district court of Canadian county against Frank R. Ziska on the judgment above mentioned, and caused an attachment to be issued and levied on the land, and that, on the 21st day of November, 1904, by the consideration of the said court, she secured a judgment against Frank R. Ziska in the sum of $1,834 and costs of suit, and an order that said attachment be sustained and the land sold as required by law to satisfy the said judgment; that, on the 12th day of August, 1893, while plaintiff and defendant Frank R. Ziska were living together as husband and wife, they purchased the said land, which was paid out of the separate estate of this plaintiff, and the legal title to said lands taken in the name of the defendant Frank R. Ziska; that, on November 30, 1901, and after the abandonment of the plaintiff by defendant, a deed was made by the said Frank R. Ziska to his brother, which purported to convey to the said brother, F. M. Ziska, the tract of land in question, and the said deed was recorded in the office of the register of deeds of Canadian county on the 12th day of December, 1901; that the said deed so made as aforesaid was made by the said Frank R.

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ject. There is not as much actual conflict, however, as appears on the surface, many of the decisions themselves being correct, although the rules relating thereto have been carelessly and inaccurately stated. A careful examination of all of the cases fixes the idea very firmly in the mind that most of the trouble has come from a misunderstanding of the adequate remedy at law rule and the exhaustion of the remedy at law rule, which are often incorrectly referred to as if one were the equivalent of the other. It is necessary only to look behind these two "bulwarks" to discover how the confusion and conflict largely arose, and to determine what the true rules governing equitable assistance to creditors are or ought to be.

It should be stated at the outset that what is here meant by conditions precedent to equitable remedies of creditors are the conditions prerequisite to such relief as is granted under the ancillary jurisdiction of courts of equity, in aid of the legal remedy when the legal remedy is ineffectual or fruitless. The question is, How far must the creditor go at law before he can have this relief? It is not here intended to take up questions relating to creditors' remedies when the jurisdiction of equity is original, as, for example, to enforce trusts. There are, strictly speaking, no conditions precedent to equitable relief in this class of cases as this term is used with reference to creditors' actions, as here the creditor comes into court in the first instance. The cases, however, in which the question of conditions precedent has been raised and discussed with reference to its bearing upon the original jurisdiction of courts of equity, have been collected and grouped under one subdivision of the note, and they are important as marking the boundary lines of the subject.

The term "condition precedent" is therefore used in this note in its narrow sense, that is, to signify how far the creditor must push his legal remedy before he will be listened to in a court of equity. To use it in the broader sense would necessitate including all questions of jurisdiction, pleading, and practice, as well as questions relating to the merits of the claim, which is altogether beyond the scope of a note of this kind. It is therefore assumed, in the cases selected, that the equity court has jurisdiction if the preliminary legal steps have been taken (Verdier v. Foster, 4 Rich. Eq. 227); that a valid claim exists (Minneapolis Threshing Mach. Co. v. Jones, 89 Minn. 184, 94 N. W. 551; Bickerdike v. Allen, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740); that the debt is due (Ware v. Seasongood, 92 Ala. 156, 9 So. 138; Freider v. Lienkauff, 92 Ala. 469, 8 So. 758; McGhee v. Importers' & T. Nat. Bank, 93 Ala. 192, 9 So. 734; Gibson v. Trowbridge Furniture Co. 93 Ala. 579, 9 So. 370; Evans v. Thornburg, 77 Ind. 106; Scott v. Thomas, 104 Va. 330, 51 S. E. 829; Simon v. Ellison, 2 Va. Dec. 203, 22 S. E. 860); and that a creditor having obtained a lien is not obliged to sell the property with a cloud upon it, created by a fraudulent conveyance (Planters & Merchants' Bank v. Walker, 7 Ala. 926; Chardavoyne v. Galbraith, 81 Ala. 521, 1 So. 771; Gaines v. National Exch. Bank, 64 Tex. 18). Cases will also be excluded where the question is whether special statutory remedies, such as acts relating to attachment, garnishment, and supplementary proceedings, should first be exhausted, before equitable relief will be granted (First Nat. Bank v. Steinway, 77 Fed. 661; Feidler v. Bartleson, 88 C. C. A. 194, 161 Fed. 30; Sheppard v. Iverson, 12 Ala. 97; Guyton v. Terrell, 132 Ala. 66, 31 So. 83; Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143; Phillips v. Price, 153 Cal. 146, 94 Pac. 617; Gager v. Watson, 11 Conn. 172; Field v. Jones, 10 Ga. 229; Flint v. Webb, 25 Minn. 263; Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515; Monroe v. Reid, 46 Neb. 316, 64 N. W. 983; Chamberlain Bkg. House v. Turner-Frazer Mercantile Co. 66 Neb. 48, 92 N. W. 172; Sabin v. Anderson, 31 Or. 487, 49 Pac. 870; Clapp v. Smith, 16 R. I. 717, 19 Atl. 330; White

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Ziska, without consideration, and with the intent that the said F. M. Ziska should hold said land in trust for the said Frank R. Ziska, and for his use and benefit, and with the intent and design to hinder, defraud, and delay the plaintiff of her interest in said land in securing support and maintenance from defendant, and hinder, defraud, and delay plaintiff from collecting any judgment for alimony which might be awarded her thereafter; that said F. M. Ziska paid nothing for said land; that said F. M. Ziska has at all times been a resident of the state of Nebraska, and never took possession of said land, or resided upon and cultivated the same, or claimed ownership thereof, and defendant Frank R. Ziska has at all times prior to the filing of this action claimed to be the owner of said land: "that the defendant Frank R. Ziska is insolvent, and has been at all times since the 1st day of December, 1901, and has no property subject to execution out of which plaintiff can make her judgment except the land heretofore described; that said deed from Frank R. Ziska to F. M. Ziska to said land is an obstruction to the process of this court, and hinders and delays plaintiff in the collection of her said judgment, rendered in this court on the 21st day of November, 1904." Plaintiff's petition was followed by a prayer for a judgment canceling said deed, and for costs of suit. To this the defendant F. M. Ziska filed a demurrer setting out, among other things, that the petition showed on its face that it did not state facts sufficient to constitute

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Sewing Mach. Co. v. Atkeson, 75 Tex. 333, 12 S. W. 812; Meier v. Waco State Bank (Tex. Civ. App.) 27 S. W. 881); and cases in which the question is whether the remedy at law should be exhausted against a corporation before proceeding against stockholders (Bogardus v. Rosendale Mfg. Co. 4 Sandf. 89; Morgan v. Lewis, 46 Ohio St. 1, 17 N. E. 558; Barrick v. Gifford, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; Ladd v. Cartwright, 7 Or. 329; Merchants' Bank v. Chandler, 19 Wis. 435; Henderson v. Turngren, 9 Utah, 432, 35 Pac. 495; Bickford v. McComb, 88 Fed. 428); and cases in which, where the representative of a decedent has wasted the estate of his intestate, the question is whether all legal remedies should be exhausted against him and his sureties, if they, or either of them, are solvent, before a creditor will be permitted to come into a court of equity to subject to his claim the estate which has passed into the hands of the heirs and distributees (Ledyard v. Johnston, 16 Ala. 548; Pyke v. Searcy, 4 Port. (Ala.) 52); and cases in which the question is whether partnership property must first be exhausted before the individual property of a partnership can be reached on a partnership claim (Hubble v. Perrin, 3 Ohio, 287); and cases in which the question is whether a creditor must first exhaust his securities before asking equitable aid to reach his debtor's property (Palmer v. Foote 7 Paige, 437); but aside from the limitations specified, the note will include all cases bearing upon the question of the legal steps prerequisite to creditors' remedies.

For cases, not included in this note, on "Exhausting remedies at law as a condition of the right of a judgment creditor to procure a receivership," see note to Minkler v. United States Sheep Co. 33 L.R.A. 546.

II. Basis of equitable relief.

The general rules relating to conditions precedent to equitable remedies of creditors are few and simple. They depend entirely upon the nature of the property sought to be reached in the first instance, and are modified to some extent by special circumstances and by statutes. When relief is granted against property subject to execution, it is upon one theory, and when aid is extended to reach property not subject to execution, it is upon an entirely different theory; and the confusion that exists is wholly due to overlooking the reasons upon which the jurisdiction rests, and in supposing that the legal steps prerequisite to relief when the creditor is pursuing property not subject to execution are also necessary where he is after property subject to execution. The reason for the rule that equity will not grant relief where there is an adequate remedy at law applies to both of these cases, but is not the same as that responsible for the rule that, before equitable aid will be extended to a creditor in certain cases, he must exhaust his remedy at law. With these points kept in mind, it will be easy to reconcile some of the authorities and to see how the courts in many instances have fallen into error.

In McCaffrey v. Hickey, 66 Barb. 489, it was said that, in an action in aid of an execution,—that is, to set aside a fraudulent obstruction interposed by the judgment debtor or other person, to the satisfaction of the debt out of the property of the debtor, which, the fraudulent obstruction being removed, was liable to be seized and sold for the payment of the debt,—the power of the court of chancery to grant the relief did not rest upon the statutory provision, but was part of the common-law jurisdiction of the court.

In other words, where the creditor has acquired a lien on property subject to execution, he has the right to sell it, but where the debtor has fraudulently transferred it to another, the title is thereby beclouded. The creditor, therefore, although entitled to sell, cannot dispose of the property at good advantage because of the fraudulent acts of the debtor. Equity here steps in, and on the ground of fraud, which is part of its common-law jurisdiction, removes the cloud upon the title so that a fair price may be realized.

On the other hand, there was formerly

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a cause of action in favor of plaintiff and against the defendant. This demurrer was overruled, to which defendant reserved an exception. He thereafter filed an answer denying every material allegation in plaintiff's petition, admitting the suit in which plaintiff secured a judgment and attachment, which are the basis of this suit, but averring that the defendant F. M. Ziska was not a party to said suit, and that no summons was ever served on him, nor was he given any notice of the pendency of the said suit, and that none of his rights were litigated therein; that he was the owner in fee simple of the land above set forth, and has been ever since the 30th day of November, 1901, and that the levy of said attachment on said land was an apparent cloud upon the title. This answer was followed by a prayer asking the court to render judgment in his favor, declaring the title to said premises to be in him, free and clear of any encumbrances, lien, or cloud caused by said suit, judgment, or attachment. Frank R. Ziska made no defense or appearance in this case. On the trial to the court, a demurrer was sustained to the evidence, to which plaintiff excepted, and the case is before us on petition in error and case made.

Mr. W. M. Wallace, for plaintiff in error:

On demurrer to the evidence, the court must treat as withdrawn the evidence which is favorable to demurrant.

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much controversy in the courts over the question whether equity, in the absence of the usual grounds for equitable interference, had any jurisdiction whatever to aid creditors to reach property not subject to execution. For a few of the cases in which this subject is discussed, see Bayard v. Hoffman, 4 Johns. Ch. 450; Hadden v. Spader, 20 Johns. 554; Donovan v. Finn, Hopk. Ch. 59, 14 Am. Dec. 531; Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454; Tarbell v. Griggs, 3 Paige, Ch. 207, 23 Am. Dec. 790; Bigelow v. Congregational Soc. 11 Vt. 283. It was probably in consequence of a conflict between the views of Chancellor Woodworth, in Hadden v. Spader, supra, and Chancellor Sanford, in Donovan v. Finn, supra, that the revisers in 1828 incorporated the provisions in the New York Revised Statutes giving the court of chancery jurisdiction in this class of cases.

In Erwin v. Oldham, 6 Yerg. 186, 27 Am. Dec. 458, the complainant obtained a judgment at law against the defendant, upon which an execution issued and was returned unsatisfied. He then filed a bill to subject certain stock of a corporation which the defendant had to the payment and satisfaction of his judgment. The single question raised by the pleadings was whether this stock could be reached in equity, and it was held that it could not be subjected to the complainant's judgment. The court said it was not pretended that there was any fraud or trust in the case to furnish a ground of equity jurisdiction; and the simple question was whether the court had power to cause stocks, credits, and rights of action by the debtor, without fraud, to be sold, or converted into money, or transferred to a creditor in payment of his debt.

In consequence of the decision of the court in the last-mentioned case, the Tennessee act of 1832, chap. 11, was passed to subject stock, choses in action, etc., to the satisfaction of the claims of creditors. Prior to that time, where the execution created no lien, the ancillary jurisdiction of chancery could not be successfully invoked. Ewing v. Cantrell, Meigs, 364.

In Pendleton v. Perkins, 49 Mo. 565, it was held that a creditors' bill would lie to subject a fund or chose in action of the debtor, even without showing fraud or some other recognized ground of equitable jurisdiction. The court said that the affirmation of the proposition that a judgment creditor who has exhausted every ordinary means to satisfy his judgments should have the aid of the court, in analogy to his ancient chancery jurisdiction, to reach his debtor's funds, whether fraudulently withdrawn or concealed, or not, seemed to be necessarily inferred from the main object of chancery jurisdiction—to furnish a remedy when the strict rule of legal practice failed. Creditors ordinarily invoked its aid to pursue the effects of their debtors that were fraudulently withdrawn from their reach. But a debtor might be a money lender, and be accumulating wealth without having expressly withdrawn property from the reach of execution, and, in the absence of statutory remedies, he might defy creditors unless chancery could subject his credits.

And in Lorman v. Clarke, 2 McLean, 569, Fed. Cas. No. 8,516, in holding that a bill to reach choses in action would be entertained in a Federal court, where authority therefor was given by a statute of the state in which the court was located, the court said that it was also of the opinion that the bill was sustainable on the general principles of equity, independently of the statute; that it would be a reproach to the administration of justice if a debtor, by converting his estate into choses in action or stocks, or if his estate consisted of such property as could not be reached by execution, should be able to hold it in defiance of his creditors.

It is not purposed to go into this question any further here, the cases having been cited to show that the jurisdiction, aside from statutes, was at least considered doubtful. At the present time, however, all question has been removed by the passage of statutes granting jurisdiction in such cases. The significance of the remark in McCaffrey v. Hickey, supra, that the jurisdiction of chancery to grant relief in aid of execution was not statutory, is therefore apparent. In those authorities in which the jurisdiction

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Edmisson v. Drumm-Flato Commission Co. 13 Okla. 440, 73 Pac. 958.

A creditor cannot attach a transfer of his debtor in property until he has recovered a judgment, and exhausted his remedy at law.

Blackwell v. Hatch, 13 Okla. 169, 73 Pac. 933; Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634.

Where the judgment debtor is insolvent and has no property subject to execution, the issuance and return of an execution unsatisfied is unnecessary to support a creditors' bill.

Towns v. Smith, 115 Ind. 480, 16 N. E. 811; Smalley v. Mass, 72 Iowa, 171, 33 N. W. 619; O'Brien v. Stambach, 101 Iowa, 40, 63 Am. St. Rep. 368, 69 N. W. 1133; Springfield Grocery Co. v. Thomas, 3 Ind. Terr. 330, 58 S. W. 557; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Sage v. Memphis & L. R. R. Co. 125 U. S. 361, 31 L. ed. 694, 8 Sup. Ct. Rep. 887; 20 Cyc. Law & Proc. pp. 699, 700.

Messrs. **Noffsinger & Hinch** for defendants in error.

Dunn, J., delivered the opinion of the court:

Under the facts in this case as disclosed by the record and the briefs of the parties, two propositions are raised for the consideration of this court. Plaintiff appeals from a judgment of the district court sustaining a demurrer to the evidence and holding it insufficient to support the allegations of the petition, and argues at length the elements of fraud which it is contended are disclosed by the conveyance of the land attached. Defendant in error joins issue in his brief on this subject, and, in addition thereto, contends that the petition shows on its face that the cause of action is barred by the statute of limitation, by virtue of paragraph 4216, 2 Wilson's Rev. & Anno. Stat. 1903,

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to reach property not subject to execution was maintained aside from statute, an important condition was imposed, and that was that the creditor must first exhaust his remedy at law, which meant only that he must first pursue property subject to execution; and the reason given for this was that the debtor ought not to be subjected to the expense of a chancery suit in an effort to reach his choses in action, when the simple inexpensive process of the law was open to the creditor to obtain tangible property. This is not the reason for the rule that equity will not interfere unless there is not an adequate remedy at law, which was of much earlier date. The place for the adequate remedy at law rule in connection with equitable remedies of creditors is pointed out in the next subdivision of the note. It should be remembered that the pursuit of the remedy at law rule arose with reference to actions to reach such property as choses in action, as just stated. When statutes came to be passed granting jurisdiction to equity courts, where jurisdiction was denied or considered doubtful, this condition was carried into these acts, and it was generally provided that relief might be granted only when execution had been issued and returned unsatisfied.

In Beck v. Burdett, 1 Paige, 305, 19 Am. Dec. 436, a leading case on the subject, the court said that there were two classes of cases where a plaintiff was permitted to come into a court of equity for relief after he had proceeded to judgment and execution at law without obtaining satisfaction of his debt. In the one case, the issuing of the execution gave to the plaintiff a lien upon the property, but he was compelled to come into equity for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff came into equity to obtain satisfaction of his debt out of the property of the defendant which could not be reached in an execution at law. In the latter case his right to relief depended upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. In the first case the plaintiff might come into a court of equity for relief immediately after he had obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same was situated, and the obstruction being removed he might proceed to enforce the execution by a sale of the property, although an actual levy was probably necessary to enable him to hold the property against other execution creditors or bona fide purchasers. The court also said that the issuing of an execution, or even a formal levy, could create no lien upon a chose in action or a mere equitable interest in personal property, which was not liable to be sold on execution. In such cases the actual return of the execution unsatisfied was necessary to give the equity court jurisdiction to decree satisfaction out of the equitable property of the defendant.

The same distinction is pointed out in other cases, and these will be quoted at length, as the point cannot be too strongly emphasized.

In Williams v. Hubbard, Walk. Ch. (Mich.) 28, it was said that there are two classes of cases in which a judgment creditor may come into equity for relief. First, in aid of his execution at law, as to set aside an encumbrance or a transfer of property made to defraud creditors; second, to have his judgment paid out of choses in action or other property of the debtor not liable to execution. Relief is given in these two classes of cases on different principles,—in the first class on the ground of fraud, and in the other on the ground that the complainant has exhausted his remedy at law and that it is inequitable and unjust for the debtor, under such circumstances, to refuse to apply any choses in action, or other

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which provides: "Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued, and not afterwards: . . . Within two years . . . an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." And, second, that the petition of plaintiff is insufficient to sustain her cause of action, for that there is no allegation that an execution issued on the judgment procured in Canadian county or elsewhere, and a return *nulla bona*, prior to the beginning of this suit to set aside this alleged fraudulent conveyance. We will first discuss the legal propositions in the order here stated.

The deed which it is sought to have annulled was made on November 30, 1901. The suit in this case was begun on the 6th day of January, 1905, and it must be conceded, under the petition filed, that if the construction of the statute invoked by defendant is made applicable to this class and character of actions, then the cause of action is barred, for there is no allegation of a discovery which would take it out of its operation. As appears in the statement of facts, the basis of the claim which plaintiff makes against her husband, to defeat the collection of which the deed is charged to have been made, is the judgment secured by her in Nebraska in November, 1903. On this judgment, on the 7th of September, 1904, she filed her suit in the district court of Cana-

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property belonging to him not liable to execution, in payment of the judgment.

There are two classes of cases in which a judgment creditor is permitted to come into a court of equity for relief. First, in aid of his execution at law, as to set aside an encumbrance or a transfer of property made in fraud of creditors. The issuing and levy of the execution gives the complainant a lien upon the property, but he is compelled to come into a court of equity for the purpose of removing some obstruction fraudulently interposed to prevent a sale on execution. In this class of cases he may come into court immediately after he has obtained a lien by the levy of his execution, and, the obstruction being removed, he may proceed to the sale of the property under his execution, and subject the proceeds thereof to the payment of his debt. Second, to have his judgment paid out of choses in action, or other property of the debtor which cannot be reached by execution at law. Relief is given in these two classes of cases on different principles,—in the first class on the ground of fraud, in the second on the ground that the complainant has exhausted his remedy at law and that it is inequitable and unjust for the debtor, under such circumstances, to refuse to apply any choses in action, or other property belonging to him which cannot be reached by execution at law, in payment of the judgment. Vanderpool v. Notley, 71 Mich. 422, 39 N. W. 574.

In Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390, the court said there are two classes of cases both commonly called creditors' suits, which, although closely allied, are clearly distinguishable. The first, a creditors' suit, strictly so-called, is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which could not be reached on execution. The general rule is that such an action cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution and its return unsatisfied. This is required because equity will not aid the creditor to collect his debt until the legal assets are exhausted, for until this is done he may have an adequate remedy at law.

The second class of cases is where property legally liable to execution has been fraudulently conveyed or encumbered by the debtor, and the creditor brings the action to set aside the conveyance or encumbrance as an obstruction to the enforcement of his lien; for, though the property may be sold on execution notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but on the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to him the conveyance is void, and he has a right to have himself placed in the same position as if it had never been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent; but, if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed.

In Schofield v. Ute Coal & Coke Co. 92 Fed. 269, the court said that a class of cases in which equity afforded relief embraced those cases in which the creditor had secured a lien or right at law, the enforcement of which was obstructed by some fraudulent conveyance or encumbrance. In this class of cases the lien or vested right of the property, and the fraudulent obstruction to the adequate enforcement of this lien or right, were the only essentials to the jurisdiction of the court of equity. Equity relieved not, as in other classes, because the remedy at law had created no lien and had no effect, but because the enforcement of the lien, secured by the legal remedy, was rendered so much less efficient by the fraudulent obstruction, that it was inadequate. It was the inadequacy, and not the utter futility, of the remedy at law, which conditioned the jurisdiction in this class of cases; and the

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dian county, and, on the 21st of November following, secured a judgment sustaining an attachment upon this tract of land, and the suit in this case was instituted in the January following. Defendant, in support of his theory, cites the cases of Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614; Fox v. Lipe, 14 Colo. App. 258, 59 Pac. 850; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807. An inspection of the cases from Colorado shows that in neither of them plaintiff had any lien on the property sought to be subjected to the payment of his judgment, and the reasoning of the court virtually places its decision on this ground. The United States case is not in point, as it does not deal with this question. In that case Carpenter, the defendant, fraudulently transferred his property to preclude Wood, the plaintiff, from subjecting it to the payment of certain judgments he held against him. Insisting that he was entirely without funds, and that his son-in-law would relieve him of these judgments by paying 50 cents on the dollar for them, defendant induced the plaintiff to sell the same at this reduced rate. Thereafter Carpenter secured title to his property, holding it in his own name, and Wood brought this suit, setting up the misrepresentations and fraud practised on him, which induced him to part with title to his judgments at 50 per cent of their face value. The suit was brought to recover damages for this deceit, and was not to set aside a fraudulent conveyance. Hence it does not apply to the case at bar. Our investigation discloses,

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return of an execution unsatisfied was neither the sole nor the best evidence of this inadequacy. In many cases this inadequacy could not be shown at all by the return of the execution, because it was possible to levy the same upon the property upon which the lien was fastened and to sell this property thereunder, notwithstanding the fraudulent encumbrance or conveyance. The difficulty was that the fraudulent mortgage, trust deed, or other obstruction compelled the purchaser under the execution to buy a lawsuit and so depreciate the value of the property at the sale that the creditor's remedy was rendered insufficient and sometimes without any practical value. In such a case he was not required to proceed with this sale and thus sacrifice both his own interest and that of his debtor, but might successfully appeal to equity to remove the fraudulent obstruction before he proceeded to the sale. Moreover the inadequacy of the remedy was generally measured by the value of the property upon which the lien had attached, or in which the right was vested, and the depreciation in the value of this lien or right, caused by the fraudulent obstruction. The issue and return of the execution unsatisfied had no tendency to establish either of these facts. It would be a mere form which neither law nor equity would require.

The point which the foregoing cases make clear is that relief, in case the creditor is after property subject to levy, does not depend upon the exhaustion of his remedy at law, but upon lien and fraud; that the exhaustion of the remedy at law rule was later in origin and was intended to be applied only in cases in which the relief sought was against property not subject to levy. It seems, at first thought, anomalous that where the property the creditor seeks to reach is subject to execution, he need not necessarily issue an execution; and that where the property he is after is not subject to levy, he must issue an execution; but the reason for the issuing of the execution in the latter case is not to reach the property not subject to execution, but to reach other property the debtor may have which is subject to execution.

A good illustration of the error into which many of the courts have fallen by mistaking the reasons upon which relief is granted in the two classes of cases is furnished in Fox v. Willis, 1 Mich. 321, in which the court said that "the right of a creditor to avoid a fraudulent conveyance grows out of the fact that he cannot otherwise be paid out of his debtor's estate. Suppose that his debtor has other property beside that embraced in a fraudulent conveyance, sufficient to satisfy his debt. A court of equity, if that fact should appear, would not set aside the fraudulent conveyance until he should exhaust the property not embraced in such conveyance. And this for the reason that he cannot complain that he is delayed or hindered in the collection of his debt when property sufficient for its satisfaction is subject to an execution at law. If he can, by pursuing his legal remedies, obtain payment of his debt, it does not lie in his mouth to complain of the fraudulent conveyance. All that he can ask is that he be paid; and the law will not presume that he cannot until, by the return of an execution, that fact is shown."

The court in the last-mentioned case has evidently confused the reasons pertaining to relief in actions to reach property not subject to levy with those applying to actions against property subject to levy, and also those given for another rule as to the necessity of lien, and referred to in a subsequent section of this note. III. b, 1 (a).

In Thayer v. Swift, Harr. Ch. (Mich.) 430, the reason for the rule requiring the exhaustion of legal remedies before resort can be had to equity was said to be that a judgment debtor should not be harassed by a suit in chancery until the creditor had availed himself of all his common-law rights to collect his judgment. This is correct, if taken to apply only to cases in which the relief asked is against property subject to levy, but it would be easy to take it as a general rule, applicable to all cases, no matter what the nature of the property sought to be reached.

A few late cases will serve to illustrate

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however, that the authorities are not altogether in harmony upon the question of whether or not the statute of limitations relating to fraud and its discovery applies in this character of cases, but it is our judgment that the better courts and the better reasoning both hold, in reason and principle, correctly in denying such application. A debtor about to be subjected to a suit or to the payment of claims of his creditors could very frequently, long prior to the time when demand could be made upon him, transfer all of his property, bring notice thereof to plaintiff, and, after the expiration of the statute of limitations relating to fraud and the claims of his creditors had matured, plead the statute, and it, thereby, instead of being a salutary one for the prevention of fraud, would prove its most potent safeguard. We hold that in this class of cases the statute of limitations, which provides that actions for relief on the ground of fraud can only be brought within two years after the cause of action shall accrue or the discovery of the fraud, does not apply in actions to set aside deeds in fraud of judgment creditors, where the plaintiff has not been guilty of such laches in securing his judgment as would render it inequitable to entertain his suit; that is, the statute will not be held to begin to run at the time of the conveyance or the discovery thereof, but at the time of securing the judgment, as this is the date of the accrual of plaintiff's cause of action.

The proposition involved is most clearly considered in the case of Mickel v. Walraven,

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the confusion which now exists as to the exhaustion of the remedy at law rule.

In ZISKA v. ZISKA, while the conclusion of the court, that the issuance and return of the execution after judgment in that case were not necessary before the conveyance of real estate would be set aside, is correct, it is evident that the court did not clearly have in mind the reason why the decision was proper, or the scope of the rule that the remedy at law must be exhausted. For example, the court says: "There is no question but that, under the ancient practice as it obtained in England, and later in the United States, and still in some courts of this country, where the courts of law and equity are separate tribunals, and where the rule was observed that equity granted relief in those cases only where the law, by reason of its universality, was not adequate, it was a practice to require the judgment creditor to have an execution issued and a return thereon *nulla bona* before equity would reach out its strong arm and render any assistance, and that this was the only proof that such courts would receive to show that the creditor was without remedy, or had exhausted the same at law."

In Lovejoy v. Chapin, 115 N. Y. Supp. 947, an action to set aside an alleged fraudulent conveyance of real estate, it was urged that the plaintiff had no right to bring the action in a court of equity for the purpose of collecting a judgment from land until he had exhausted his remedy at law; that he could not appeal to a court of equity for relief if he had a sufficient legal remedy by which to collect the amount of his judgment from the judgment debtors. And Foote, J., in upholding the contention, said that, contrary to his first impression, the authorities showed that this was a perfectly valid objection to the maintenance of the action. Equitable relief could be had only where the plaintiff was without remedy at law, and it was necessary for the plaintiff to allege and prove that he had exhausted his legal remedies without success before he could be awarded relief. It was also said that if there had been an outstanding execution, the plaintiff must still allege and prove that he had exhausted his remedy at law.

The right of a judgment creditor to attack a conveyance of property made with intent to hinder, delay, and defraud creditors in equity, irrespective of any other remedy by which he could recover the money due upon his judgment, was said, in Holland v. Grote, 193 N. Y. 262, 86 N. E. 30, to be established in New York. The court declared that it was necessary to allege and prove that the judgment creditor had exhausted his legal remedies to enforce his judgment, by alleging and proving the issuance and return of the execution unsatisfied. That fact, being alleged and proved, was conclusive evidence of the failure of legal remedies to afford the judgment creditor relief, and entitled him to maintain an action in equity to set aside the conveyance.

In Rubinsky v. Spiro, 60 Misc. 582, 113 N. Y. Supp. 852, it was said that it was too well settled to require discussion that a creditor at large had no standing in equity to set aside a fraudulent transfer of property made by his debtor, and the court goes on to say, "until after the recovery of judgment against the debtor and return of execution unsatisfied."

In Hubbard v. United Wireless Teleg. Co. 62 Misc. 538, 115 N. Y. Supp. 1016, it was said that a judgment creditors' action was a remedy given to a judgment creditor or his assignee after all legal remedies to enforce the lien had been exhausted. This was an action in aid of execution brought for the purpose of having an alleged fraudulent transfer of property set aside.

In Cress v. Belknap Hardware & Mfg. Co. (Ky.) 113 S. W. 93, it was held that, under 1907a Kentucky Statutes 1903, a petition in equity to set aside a fraudulent conveyance of real estate could be maintained "as though it had been brought on a return of 'no property,' as formerly required."

And in Kingman Plow Co. v. Knowlton (Iowa) 119 N. W. 754, it was said that, if judgment creditors brought an action to set aside a fraudulent mortgage before selling the land upon which it was an encumbrance, they must show that the mortgage

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92 Iowa, 423, 60 N. W. 633. In that case the fraudulent conveyance was made eighteen years prior to the time plaintiff secured judgment upon his original claim, which was made the basis of the suit to set aside the conveyance, and, though the court held that, owing to the laches of plaintiff, he could not recover, its reasoning upon the question involved in this case is worthy of note, and in our judgment correctly states the law. "It has frequently been held by this court that the record of a deed is notice to the world of its contents, and that, where a deed which is fraudulent as against creditors is spread upon the public records, notice to the world is given of its character, or at least sufficient information is conveyed thereby, in the absence of special circumstances, to put creditors upon inquiry as to its contents and character. Gebhard v. Sattler, 40 Iowa, 152; Bishop v. Knowles, 53 Iowa, 268, 5 N. W. 139; Gardner v. Cole, 21 Iowa, 205; Hawley v. Page, 77 Iowa, 239, 14 Am. St. Rep. 275, 42 N. W. 193; Laird v. Kilbourne, 70 Iowa, 83, 30 N. W. 9; Francis v. Wallace, 77 Iowa, 373, 42 N. W. 323. Following these cases, we must hold that plaintiff discovered the fraud in these conveyances at the time they were recorded. At the time of the discovery of the fraud, however, plaintiff's right of action had not accrued. Before he could institute his action to subject the land to the payment of his claim, he must have had a lien upon it, either by attachment or judgment. Clark v. Raymond, 84 Iowa, 251, 50 N. W. 1068; Faivre v. Gillman, 84 Iowa,

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was prejudicial to them, that the debtor was not only insolvent, but that he had not sufficient property which they could reach on execution to satisfy their judgments, or that execution had been issued and returned unsatisfied.

The question as to the exhaustion of the remedy at law may well be presented by a concrete illustration. Let it be assumed that a debtor has two creditors who have obtained judgments against him, and that the debtor, in contemplation of these judgments, fraudulently transferred a valuable piece of real estate to a third person with knowledge of the circumstances, and that one of the judgment creditors has by levy acquired a lien on this property; that subsequently the debtor became the owner of another valuable tract of land sufficient to satisfy either or both judgments, and choses in action enough to wipe out either claim. Of course it is plain that neither creditor in this case can reach the choses in action because he must first exhaust his remedy at law,—in other words, he must first sell the real estate which the debtor acquired subsequent to that fraudulently transferred, and, this being sufficient to satisfy his claim, there would be no need for a resort to equity, to reach the choses in action. But how about the creditor who has acquired a lien on the property fraudulently conveyed? If he desires to remove the cloud from his title or clear the way for his lien, can he do so? Or must he, too, first sell the real estate subsequently acquired by the debtor and open to levy? In other words, must he exhaust his remedy at law? Manifestly this is what he would be likely to do rather than to bear the expense of the equitable proceeding; but is it necessary to the jurisdiction of the equity court that he do so? If what has been said as to the reason for the exhaustion of remedy at law rule is correct, he certainly would not be obliged to sell the second piece of realty before coming into equity to reach the first. This, however, has not always been the answer of the courts, as already shown and as will be seen by an examination of the cases in the following subdivisions of this note; indeed it cannot be said to have been so answered in the majority of the cases, so prone have the courts been to remark, on almost every occasion, "without cause or provocation," that equitable relief can be afforded only when the creditor has exhausted his remedy at law. In the recent cases especially, the ancient landmarks seem to have been entirely lost sight of, the tendency of the modern authorities being to ignore the distinction pointed out by the earlier judges. This is not because of any disbelief in the soundness of that distinction, but because of the fact that it seems to have been forgotten. The better reasoned cases, however, adhere to the distinction and apply the exhaustion of the remedy at law rule only to actions to reach property not subject to execution. There are some subsidiary questions, relating to the establishment and maintenance of the lien, depending upon whether the property is realty or personalty, which will be discussed in their appropriate places; but these do not in any way complicate the problem, the solution of which ought to be made in any case without difficulty.

III. Extent to which legal remedy must be pursued.

a. As to judgments.

1. Necessity of.

The rule is elementary that a general creditor must obtain a judgment before he can have relief against his debtor in equity. Hatch v. Daugherty, 145 Mich. 569, 108 N. W. 986; State Bank v. Knox, 21 N. C. (1 Dev. & B. Eq.) 50; Bethell v. Wilson, 21 N. C. (1 Dev. & B. Eq.) 610.

The reason for this rule is the same as that which marks the limit of all forms of equitable jurisdiction—original as well as ancillary,—and that is that resort cannot be had to equity where there is an adequate remedy at law. This ancient rule has become so worn and axiomatic that the reason for it is well-nigh forgotten; and perhaps that reason might not be regarded with

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The rule requiring judgment as a condition precedent to negative relief, however, the right of a court of equity to interfere with a debtor's property pending the determination of the claim at law, rests upon a different basis. Here the question is one of policy. It is in such a case a choice between two evils,—one, the opportunity which a refusal to interfere gives the debtor to put his possessions out of reach of his creditors, and the other is the opportunity which the tying up of property before judgment would give unscrupulous creditors to harass honest debtors struggling to meet their obligations. The courts have simply said that it is better that the creditor shall be at the mercy of the debtor for this interval than that the debtor shall be at the mercy of the creditor. So the general rule is that, before a creditor can get help in equity, affirmative or negative, he must reduce his claim to judgment at law.

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In the case of Brown v. Campbell, supra, the supreme court of the state of California says: "Statute of limitations, in an action to subject property fraudulently conveyed to the payment of plaintiff's judgment, does not begin to run at the date of such conveyance, but only on the recovery of the judgment, because until it was obtained plaintiff had no cause of action." This case was similar to the case at bar, in that plaintiff began his suit against the defendant, who was a nonresident, by attaching real property which had been conveyed to an alleged fraudulent grantee, basing his action upon a foreign judgment and securing service by publication. The contention of the defendant was that the statute of limitations had run on the action, and the court said, in considering the proposition: "The cause of action stated in the cross complaint is not barred by either § 343 or subdivision 4 of § 338 of the Code of Civil Procedure. The defendant's cause of action to subject the fund in controversy, or the property from which it was derived, to the payment of the indebtedness due to him from Joseph Brown, did not accrue at the date of the alleged fraudulent conveyance, but only when he obtained a judgment against his debtor upon which an execution would issue in this state. The general rule as to the time when a creditor acquires the right to maintain an action to set aside a fraudulent conveyance made by his debtor is thus stated at page 522, 2d ed. of Bump on Fraudulent Conveyances: 'No creditor can be said to be

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mon law, when his person was withdrawn from the jurisdiction of the courts so that process could not be served upon him, there were no means of reaching his property but by outlawry, which forfeited it and enabled the creditor, in that indirect way, to charge it.

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So, under statutes allowing a suit in equity for the collection of a debt for goods sold and delivered, out of property fraudulently conveyed by the debtor to a third person, it was held that, where the debt was denied and a trial by jury demanded in the answer, the debtor was entitled to have the question of the indebtedness tried by jury. Powers v. Raymond, 137 Mass. 483.

Creditors at large are not favored in equity, and are not encouraged in their attempts to reach property and assets of their debtors and subject them to the payment of their demands, until they have exhausted all legal remedies by judgment and execution against the debtors themselves and their property. Herring v. New York, L. E. & W. R. Co. 63 How. Pr. 497.

No one but a creditor, or one having some interest or estate in the property, can maintain a suit to set aside a fraudulent transfer. Lyden v. Spohn-Patrick Co. (Cal.) 100 Pac. 236. The court said that it was the general rule, that even a creditor could not do so until after he had established his debt by the recovery of a judgment thereon.

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So, a cross bill in the nature of a creditors' bill cannot be sustained until the demand is reduced to judgment. Goff v. Kelly, 74 Fed. 327.

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Or, to put it in another way, a creditor must have completed his title at law by judgment before he can question the disposition of the debtor's real estate. Buchanan v. Marsh, 17 Iowa, 494.

Until a creditor obtains a judgment, he is in no position to assail or impeach in equity transfers and conveyances of real estate by the debtor, alleged to be fraudulent. Courts of equity are not tribunals for the establishment or collection of ordinary demands, and, at least, until judgment is recovered, the creditor has no right to come into a court of equity to interfere with, or control, the money, property, or estate of the debtor. North Hudson Mut. Bldg. & L. Asso. v. Childs, 86 Wis. 292, 56 N. W. 870.

So, creditors who have not reduced their claims to judgment should not be parties to a bill to subject the debtor's real estate to the payment of the creditors' claims. Shirley v. Shields, 8 Blackf. 273.

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In the case of Brown v. Campbell, supra, the supreme court of the state of California says: "Statute of limitations, in an action to subject property fraudulently conveyed to the payment of plaintiff's judgment, does not begin to run at the date of such conveyance, but only on the recovery of the judgment, because until it was obtained plaintiff had no cause of action." This case was similar to the case at bar, in that plaintiff began his suit against the defendant, who was a nonresident, by attaching real property which had been conveyed to an alleged fraudulent grantee, basing his action upon a foreign judgment and securing service by publication. The contention of the defendant was that the statute of limitations had run on the action, and the court said, in considering the proposition: "The cause of action stated in the cross complaint is not barred by either § 343 or subdivision 4 of § 338 of the Code of Civil Procedure. The defendant's cause of action to subject the fund in controversy, or the property from which it was derived, to the payment of the indebtedness due to him from Joseph Brown, did not accrue at the date of the alleged fraudulent conveyance, but only when he obtained a judgment against his debtor upon which an execution would issue in this state. The general rule as to the time when a creditor acquires the right to maintain an action to set aside a fraudulent conveyance made by his debtor is thus stated at page 522, 2d ed. of Bump on Fraudulent Conveyances: 'No creditor can be said to be

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jecting the land to the payment of Hatch's judgment. Execution was issued and returned *nulla bona*. On the case being appealed to the supreme court, its holding was: "It is true that more than two years elapsed from the conveyance of the land to Rosa Blackwell until the commencement of this action; but in a case like the one now under consideration it does not necessarily follow that the cause of action accrued at the time of the fraudulent conveyance, or even from the discovery of the fraud. It is a common expression that the statute of limitation runs from the discovery of the fraud, and this is the general rule. But, like all general rules, it has its exceptions. For instance, suppose that A. holds a note against B., which will mature in four years, and B. fraudulently conveys all of his property to a third person, to defraud A. The statute will not run against A. before the maturity of his note, because he would not be entitled to judgment in a court of law before that time; and a creditors' bill cannot be maintained until after judgment is recovered on the debt in a court of law, and an execution returned, 'No property found.' Counsel for appellant assume that the statute begins to run as soon as the fraudulent act is committed. This is not always true, as before stated. At any rate, the commission or even the discovery of the fraud does not start the statute to running, unless under the conditions then existing a creditor's cause of action accrues. It is true that in many cases the cause of action accrues when

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bill to remove a fraudulent encumbrance or other obstruction out of the way of a levy and sale under an execution as it is to support a simple creditors' bill. Ladd v. Judson, 174 Ill. 344, 66 Am. St. Rep. 267, 51 N. E. 838.

In Allen v. Montgomery, 48 Miss. 101, the court said that it was quite well settled that a creditor at large could not reach, in a court of equity, equitable assets of his debtor, nor could he assail a conveyance of his property fraudulently made as to him. In either case, the court administered relief in aid of the court of law or its judgment. In the former case, it was only after legal remedy had been exhausted, as by a return *nulla bona*, that the equity court took hold of equitable assets and applied them to pay the judgment. In the latter, it displaced the fraudulent conveyance so as to make bare and plain and sure satisfaction out of the property.

A general creditor cannot assail a foreclosure of a mortgage upon the ground that it was given to delay and defraud creditors, etc. Cox v. Fraley, 26 Ark. 20.

Simple-contract creditors cannot maintain a bill of review to set aside a foreclosure decree entered against the debtor. Neither can they convert such a bill into a creditors' bill. Horner v. Zimmerman, 45 Ill. 14.

Equitable rights established by state legislation may be enforced in Federal courts; but, in Smith v. Ft. Scott, H. & W. R. Co. 99 U. S. 398, 25 L. ed. 437, it was said that nothing is better settled than that a bill for such purpose must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant for which he sought satisfaction in chancery.

Simple-contract creditors have no standing in a United States circuit court sitting as a court of equity, upon a bill to set aside and vacate an assignment for the benefit of creditors as fraudulent. Cates v. Allen, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977.

A bill to set aside a sale of goods on the ground of a fraudulent preference cannot be maintained in the absence of a judgment at law upon the claim upon which it is based. Goembel v. Arnett, 100 Ill. 34.

And in Zimmerman v. Fitch, 28 La. Ann. 454, it was held that an action to annul an alleged fraudulent sale of the debtor's goods could not be maintained where, among other things, it appeared that the debt was unliquidated.

The statute authority to insert a bill in equity into a writ of attachment gives no jurisdiction in equity before judgment. Skeele v. Stanwood, 33 Me. 307.

A creditor, before judgment, and before he has a certain claim upon the property of his debtor, has not the right to call for a specific execution of the contract in his behalf. Griffith v. Frederick County Bank, 6 Gill & J. 424.

In East Sudbury v. Belknap, 1 Pick. 512, property was bequeathed to a town, the income of which was to be used for the support of the testator's children, grandchildren, and great grandchildren, if any of them should be in need of support, otherwise for the support of the poor of the town. A great grandchild of the testator was furnished support by the plaintiffs, who obtained judgment against the pauper for the amount, and then requested reimbursement from the town. It was held that the plaintiffs were entitled to reimbursement. But, in Marlborough v. Farmington, 13 Met. 328, a similar case, it was held that such relief would not be granted where the plaintiff had not recovered judgment. The court, in referring to the first-mentioned case, said that it was the only reported case in the Massachusetts reports where a similar application for relief by a sole creditor, as an unsatisfied judgment creditor, had been the subject of consideration by the court, although the principle was a familiar one in chancery courts. But it was required, as preliminary to the filing of such a bill, that judgment should have been obtained against the debtor.

A court of equity has no general jurisdiction of a bill by a creditor who has not acquired a valid judgment against his debtor, and whose debtor has ceased to exist,

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the fraud is discovered, or when a party is in law chargeable with notice thereof; but in a case like this one the statute commences to run when an execution is returned *nulla bona*, and not from the date of the fraudulent conveyance. In other words, equity will not reach out and collect a debt until the party has exhausted his remedy in a court of law. It was the duty of Hatch to commence suit on his claim against A. J. Blackwell when due, and to collect the same in the ordinary way, if possible. This he did, and found that the debtor had no property out of which it could be made. He was then entitled to commence this action within two years after the execution was returned, for his cause of action at that moment accrued. In other words, he could not maintain a creditors' bill before the execution was returned, but he could at any time within two years thereafter bring such action. A cause of action is deemed to accrue at the earliest moment when a creditor can commence the particular action." Hence it must follow that in this case the contention of defendant that the statute of limitations had run, and that the action was barred thereby, cannot be sustained.

The next proposition to which our attention is invited is that the petition is insufficient because it fails to aver that plaintiff had execution issued on her judgment and returned unsatisfied. In the case last cited, and from which we have quoted, it will be noted that the court, in discussing the question of the statute of limitations, incidently

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to apply to the payment of his debt property of the debtor in the hands of a third person. Thornton v. Marginal Freight R. Co. 123 Mass. 32.

A creditor cannot maintain a bill under the general jurisdiction of a court in equity, to reach a patent right which the debtor refuses to apply to the payment of the debt, until he has obtained judgment. Carver v. Peck, 131 Mass. 291.

In Mizell v. Herbert, 12 Smedes & M. 547, it was held that a bill to subject the debtor's distributive share in an estate to the payment of a debt could not be maintained, where the debt had not been reduced to judgment, and the estate was insolvent.

Under a statute which was held not to create a lien in favor of a seller of goods, it was held that the seller had no right or interest in the goods sold which a court of equity, before a judgment for the purchase price, could lay hold of, and by means of which equitable relief could be made effectual. Spitz v. Kerfoot, 42 Mo. App. 77.

Contract creditors who have obtained no judgment against the debtor cannot maintain a creditors' bill to recover possession of property belonging to the debtor, and have it applied to the payment of their indebtedness. Cornell v. Savage, 49 App. Div. 429, 63 N. Y. Supp. 450.

A creditor, before judgment, cannot pursue his debtor and his debtor's debtor, jointly, either under the general powers of a court of equity, or under a statute providing that, where the debtor has not property sufficient to satisfy the judgment, any equitable interest which he may have in real estate and other property may be subject to the payment of such judgment. Hays v. New Baltimore & N. H. Turnpk. & Bridge Co. 1 Handy (Ohio) 281.

Under a statute providing that usurious interest may be subjected by the creditor to the satisfaction of the debt, it was held that this could not be done before the claim had been reduced to judgment. Battle v. Shute, 3 Head, 547.

In Scott v. Chambers, 62 Mich. 532, 29 N. W. 94, it was said that it was the settled law of Michigan that creditors could not attack the interest of third parties, alleged to have been obtained by fraud, until they had obtained a standing by legal proceedings; and, so far as the bonds sought to be reached in that case were concerned, they could be pursued only by judgment creditors.

In Weber v. Weber, 90 Wis. 467, 63 N. W. 757, mere creditors at large were denied the right to invoke the equity powers of a court to attack the validity of judgments, executions, and liens, on the ground that they were procured by collusion and fraud.

A simple-contract creditor cannot question the validity of a confessed judgment of his debtor. Williams v. Brown, 4 Johns. Ch. 682.

A creditor at large cannot come into equity to set aside alleged fraudulent judgments. Frothingham v. Hodenpyl, 135 N. Y. 630, 32 N. E. 240.

The rule that a simple-contract creditor, without a lien, cannot go into equity for the collection of his debt, applies to a claim for reimbursement for money advanced to pay for personal property sold at sheriff's sale, and left in the hands of the defendant in the execution, with the privilege of repurchasing, and which was thereafter repurchased in the manner, and with the funds, mentioned, although the bill of sale, without defendant's consent, was delivered to the plaintiff. Turney v. Morrow, 26 Ala. 339.

But, in Fink v. Patterson, 21 Fed. 602, it was said that an omnibus creditors' bill, not filed to annul a particular conveyance of property alone, but directed at all of the assets of the debtors, as well those existing in the form of tangible property as those in the form of open accounts, notes due, and choses in action, generally, for the ingathering for which a receiver was necessary, could be maintained by a general creditor.

Negative relief.

In Shufeldt v. Boehm, 96 Ill. 560, it was held that a judgment was necessary to entitle a creditor to restrain the sale of the debtor's property on an alleged fraudulent execution. The court said that while great

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states that "a creditors' bill cannot be maintained until after judgment is recovered on the debt in a court of law, and an execution returned, 'No property found.'" This expression was simply applying the law to the facts of that case, and holding that the two-year statute of limitations began to run on the date of the return of this execution, which had been taken out and returned without satisfaction, and not of the date of the conveyance or its discovery. Taylor v. Bowker, 111 U. S. 110, 28 L. ed. 368, 4 Sup. Ct. Rep. 397. The defendant in support of his contention cites the following authorities: Watkins v. Wilhoit (Cal.) 35 Pac. 646; Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330; Taylor v. Bowker, supra; Adsit v. Butler, 87 N. Y. 585; Verner v. Downs, 13 S. C. 449; Burdsall v. Waggoner, 4 Colo. 256; Botcher v. Berry, 6 Mont. 448, 13 Pac. 45. The case of Watkins v. Wilhoit, supra, was a California case, and an investigation of the facts and of the opinion will show, as do many other cases where the question has been raised, that the exhaustion of plaintiff's legal remedy may be shown by an allegation that the creditor has had execution issued and returned *nulla bona;* but does not hold that this is the only way in which it may be made to appear, for in this case an execution had been issued and returned without satisfaction, and the court, holding on this point, said: "It is essential to the cause of such an action that the plaintiff should have exhausted his remedy at law, otherwise a court of equity has no jurisdiction of the

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hardship, as in the case at bar, doubtless occurs under the operation of the rule which forbids the interposition of a court of equity in cases of this character until a judgment at law is obtained, yet the rule itself is founded upon the wisest policy. If the property of an honest, struggling debtor could be tied up by injunctions upon mere unadjusted legal demands, he would be constantly exposed to the greatest hardships and grossest frauds, for which the law would afford no adequate remedy. By taking his property out of his hands before the claim was due or before its justice had been established by judgment, in many cases would be to deprive him of the means of payment, and even of the means of defending himself against a vexatious and oppressive suit. In other cases, to prevent ruin to his business pending such litigation, he would be forced into unconscionable compromises, involving losses he would be unable to bear. Moreover, such a rule would be a constant temptation to selfish and avaricious creditors to endeavor, by the institution of such suits, to obtain an unjust advantage over other creditors, and, by reason thereof, litigation would be greatly increased, to the detriment of business generally, and to the ruin of many honest, struggling debtors. Every consideration, therefore, of public policy, demands a strict adherence to the rule that forbids the institution of such suits.

Therefore, the statement of a creditor that he fears, when his debt is established, that the debtor will have disposed of his visible effects, is not a sufficient basis for equitable relief by way of injunction to prevent the debtor from disposing of his property. Dortic v. Dugas, 52 Ga. 231.

So, the fact that a surety fears he may become a creditor of his principal by being subjected to payment of the debt is not enough to stir a court of equity in his behalf before judgment. Chester v. Greer, 5 Humph. 26.

And the mere fact that a debtor who, to secure sureties on a note from loss by reason of their suretyship, mortgaged certain property to them, and subsequently, in fraud of their rights, absconded with part of the mortgaged property, and the fact that the complainant, who is one of the sureties, is fearful that the residue of the mortgaged property will not be sufficient to secure him against loss, and that he may be compelled to pay, will not authorize a resort to equity to set aside an assignment of certain property by the principal, and for other equitable relief. Williams v. Bizzell, 11 Ark. 716.

Danger that the fraudulent grantee will put the property conveyed out of his hands into the hands of an innocent purchaser for value, and thereby defeat the collection of the debt, is not a sufficient reason for allowing the creditor to proceed in equity before acquiring judgment. Austin v. Bruner, 169 Ill. 178, 48 N. E. 449.

One who had recovered a verdict in an action at law for a tort was held not entitled to equitable aid to restrain a defendant from disposing of his property before judgment could be rendered on the verdict, because of the pendency of a motion for a new trial, although it was shown that the defendant had advertised his real estate and personalty for sale at public auction. The court said that the intention of a debtor so to arrange his property as to prevent or impede the effect of an execution against him did not deprive him of his power of alienating it to any person who might purchase in good faith. Moran v. Dawes, Hopk. Ch. 365, 14 Am. Dec. 550. Considering this subject, the court said: "Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment, and upon the personal goods of the debtor by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor

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creditors' bill (3 Pom. Eq. Jur. § 1415), and the fact that an execution has been returned *nulla bona* is conclusive that the legal remedy has been exhausted"—which, in effect, simply holds that the return *nulla bona* of the execution is sufficient evidence to support an appeal to the equitable side of the court. On this point the supreme court of that state said, in the case of Harris v. Taylor, 15 Cal. 348, the plaintiff must show, in order to be entitled to relief at the hands of a court of equity, "that he has been deprived of his remedy at law, and is compelled to resort to equity for relief. If the debtor has other property which may be reached by the ordinary legal remedies, a court of equity will not interfere. It must be affirmatively shown that such remedies have been exhausted, or that a resort to them would be fruitless and unavailing;" in effect, that the averment that there was no other property would show the inadequacy of an execution. The next case cited is the case of Chandler v. Colcord, supra. The syllabus in that case holds: "To enable a creditor to assail the validity of a chattel mortgage executed by his debtor, he must not only obtain a judgment, but also a valid execution against the property of the debtor." The force of this language of the syllabus is broken when the facts are considered and the language used by the court in the rendition of the opinion is observed. The limitation upon the scope of the syllabus is shown by the following paragraph: "The law is well settled that a creditor who has no

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and those of the creditor are thus defined by positive rules, and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any interposition of equity. If courts of equity could, by injunction, compel a debtor to hold his property until a judgment should be obtained against him, they would indirectly, but in effect, alter these regulations of positive law."

A creditor on a simple contract cannot enjoin proceedings on a judgment alleged to have been fraudulently confessed by his debtor, where the former has not reduced his claim to judgment, since the creditor has no right to interfere until he has established his title, as it would lead to an unnecessary, and, perhaps, a fruitless and oppressive, interruption of the exercise of the debtor's rights. Unless the creditor has a certain claim upon the debtor, he has no concern with his frauds. Wiggins v. Armstrong, 2 Johns. Ch. 144.

A general creditor cannot have property of his debtor impounded as security for his claim. Missouri, K. & T. Trust Co. v. Richardson, 57 Neb. 617, 78 N. W. 273.

Nor can he restrain the transfer of his debtor's property. Ibid; Adams v. Miller, 4 Neb. (Unof.) 464, 94 N. W. 711.

The holder of a county order is a creditor at large, and, as such, cannot interfere by injunction with the disposition of the county's property. Montague v. Horton, 12 Wis. 599.

General creditors are not entitled to enjoin the disposition of the debtor's property, nor are they entitled to the appointment of a receiver. Uhl v. Dillon, 10 Md. 500, 69 Am. Dec. 172. The court said that, whatever may be the supposed defects of the existing laws of the state, in leaving to the debtor the absolute power of disposing of his property, and leaving the creditor to the slow and very inadequate legal remedies now provided, if such defects exist, it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authority of the law, for the purpose of remedying such defects.

General creditors cannot come into equity praying that goods of their debtor be attached and held subject to their debt because they believe that their debtor will either remove from the country, or sell the goods and pocket the proceeds, for the purpose of defeating the collection of their debt. Monroe v. Cutter, 9 Dana, 93.

The indorser of a promissory note cannot enjoin the disposition of the maker's property on the ground that it is about to be sold by a silent partner of the latter, who the plaintiff has reason to believe will leave the country with all of his effects if not prevented before the note becomes due; that the maker is insolvent; and that the goods are in the hands of an auctioneer, advertised for sale. Rhodes v. Cousins, 6 Rand. (Va.) 188, 18 Am. Dec. 715. The court said that it was well-settled law that none but a judgment creditor could have the assistance of equity to control, prevent, or interfere with, in any way, the disposition which a debtor might choose to make of his property. He might destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large could stop him by injunction.

A simple-contract creditor cannot go into equity for the purpose of stopping a judgment creditor from proceeding at law to obtain satisfaction of his judgment. Artman v. Giles, 155 Pa. 409, 26 Atl. 668.

A receiver cannot be appointed, in the absence of statutory authority therefor, in an action to set aside fraudulent conveyances and an assignment for the benefit of creditors, where the complainants have not obtained judgments. Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781.

A mere creditor at large of a corporation cannot have a receiver appointed to obtain other equitable relief. Hinckley v. Pfister, 83 Wis. 82, 53 N. W. 21.

A circuit court cannot entertain a suit in equity against a corporation in advance of recovery of a judgment at law for the payment of a simple contract debt, when such

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lien on the property covered by a chattel mortgage cannot be permitted to assail the validity of the mortgage on the ground that it was made with intent to hinder, delay, and defraud the creditors of the mortgagors. In order to do so, he must not only obtain a judgment, but must have a valid execution against the property of the mortgagor." This case is not applicable to the facts in the case at bar, for the attachment sued out in this case established a lien against this property in favor of the plaintiff. The case of Taylor v. Bowker, supra, from the United States Supreme Court, is not in point on the proposition under discussion. At the outset of the opinion Justice Harlan says: "The only point seriously insisted upon in argument, or which is necessary to be considered, is that this suit was barred by limitation." The question in the case was: Did the cause of action accrue at the time of the conveyance or transfer of the property involved, or at the time of the return of the execution, which was issued on the judgment and returned unsatisfied? The case arose in Maine, and the statute of limitations of that state, in this character of cases, is six years. "The judgment against the company was entered more than six years before the commencement of this suit. It is insisted that appellee's cause of action accrued upon the entry of the judgment; while it is contended, in behalf of appellee, that, even if the foregoing limitation has any application in a suit in equity brought in the circuit court of the United States by a citizen of another

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debt is unsecured by lien or mortgage, on the plea that the corporation is insolvent, and is about to put out an issue of second mortgage bonds for purposes and on a scheme that would work an injury to the complainants as unsecured creditors. Atlanta & F. R. Co. v. Western R. Co. 1 C. C. A. 676, 2 U. S. App. 227, 50 Fed. 790.

The complainant is not entitled to an injunction to restrain the transfer of goods pending a trial at law, on the plea that a judgment cannot be obtained until a future term of the court, at which time the goods will be placed beyond the reach and benefit of complainants. Phelps v. Foster, 18 Ill. 309.

A lessor cannot enjoin a mortgagee under a fraudulent mortgage given by his tenant, from taking possession of property mortgaged, where he has not reduced his claim to judgment. Briggs v. Austin, 129 N. Y. 208, 29 N. E. 4.

Judgments "or" other conditions.

In some cases, in holding creditors not entitled to the relief asked, the courts have gone further than necessary, and have stated the rule in the alternative; asserting that complainants cannot come into equity where they have failed to reduce their claims to judgment, or to comply with other conditions precedent to the relief asked. These cases are authority only for the rule that judgment is necessary, and are not to be taken as holding that the other conditions mentioned would be a sufficient foundation for the action in the absence of judgment.

A bill for discovery and to set aside a fraudulent conveyance must show a judgment against the debtor, or an acknowledged debt, with interest in the property, or a lien thereon created by contract or by a distinct legal proceeding. United States v. Ingate, 48 Fed. 251.

A creditor who has no judgment or lien subsequent to a fraudulent transfer of the debtor's property cannot maintain an action for relief against such conveyance. Boyle v. Thomas, 1 Chester Co. Rep. 117.

A simple-contract creditor without a lien, except in cases provided for by statute, cannot invoke the aid of equity to compel the payment of his debt. Moses v. St. Paul, 67 Ala. 168.

A general creditor having no lien, and claiming under no trust, cannot obtain the aid of a court of equity in setting aside the deed of his debtor, alleged to be fraudulent, if this fact is brought to the attention of the court. Putney v. Whitmire, 66 Fed. 385.

Before simple-contract creditors seeking to set aside a deed of assignment for fraud, and to subject the effects to the payment of their debts, can obtain the aid of a court of equity, they must show either a lien, or that they have obtained a judgment at law, the collection of which they cannot enforce without the aid of equity. Reese v. Bradford, 13 Ala. 837; Dawson v. Coffey, 12 Or. 513, 8 Pac. 838.

A simple-contract creditor, without a lien or claim by a judgment, purchase, or otherwise, has no equitable right to attack the debtor's deed for the benefit of creditors, on the ground that it was defectively acknowledged. Kennewig Co. v. Moore, 49 W. Va. 323, 38 S. E. 558.

Creditors who have not recovered judgments on their claims, and who have no liens or interest in the debtor's property, cannot assail an attachment on the property, or the good faith of the appointment of a receiver therefor. Smith v. Sioux City Nursery & Seed Co. 109 Iowa, 51, 79 N. W. 457.

Simple-contract creditors who have no express lien by mortgage, trust deed, or otherwise, cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims. Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113 14 Sup. Ct. Rep. 127.

A simple-contract creditor who has no judgment or lien upon the property of his debtor cannot enjoin the latter from selling it, or come into equity to ask its interference to preserve it until he can get a judgment. Peyton v. Lamar, 42 Ga. 131.

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state, his cause of action did not accrue until the return of execution against the company, which occurred within six years prior to this suit." And the court held "that the complainant's cause of action should not be deemed to have accrued until the return of the execution; consequently his suit was not barred by the limitation of six years." In neither of the cases, Adsit v. Butler and Verner v. Downs, supra, does it appear that plaintiff sued out an attachment or in any other manner secured a lien upon the specific property which it was alleged had been fraudulently transferred, and which it was sought to subject to the payment of the judgment. The question of the effect of such a lien was not in either of these cases, nor was it considered or discussed by the court, and, to this extent, they are not authorities in the case at bar. The case of Burdsall v. Waggoner, supra, simply holds that a party, to maintain a bill of this character, "is usually required to show not only a judgment obtained, but an execution sued out with a return of *nulla bona*, or that the writ is unsatisfied in whole or in part;" and then states: "But, even where such return is not necessary, the complainant must, by proper averment, lay sufficient ground for the relief he seeks in a court of equity. The bill should show, not only that the debtor has made a fraudulent disposition of his property, but that such disposition embarrasses him in obtaining satisfaction of his debt or judgment; there must be an averment of want of property sufficient to

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Creditors who have not reduced their demands to judgments, and who have no lien otherwise, cannot, in the absence of statute, enjoin their debtor from selling or disposing of his property. Kimbrell v. Walters's Sons, 86 Ga. 99, 12 S. E. 305; Dodge v. Pyrolusite Manganese Co. 69 Ga. 669.

Simple-contract creditors without a lien have no standing in a court of equity to secure an injunction restraining a sheriff from paying money realized from an execution sale to the judgment creditor, whose demand is alleged to be fraudulent and collusive. Kelly v. Herb, 157 Pa. 41, 27 Atl. 559.

An indorser against whom a judgment at law has been obtained on an indorsed note cannot maintain an action in equity to reach real estate transferred by the maker to another indorser, and by the latter transferred as a gift to one of the maker's children, where he has not commenced an action against either the maker or the other indorser, and does not show that their estates are insolvent, or that there is no other property which can be reached by an execution at law, since, admitting all the averments of the bill to be true, he may still have a complete remedy at law. Coombe v. Meade, 2 Cranch, C. C. 548, Fed. Cas. No. 3,188.

A creditor whose debt has never been adjudicated, and who has never taken any steps to ascertain whether there is any other property out of which his debt might be made, and who shows no reason for having failed to take such steps, cannot come into equity to set aside a sale of negroes as fraudulent. Meux v. Anthony, 11 Ark. 411, 52 Am. Dec. 274. The court said that the reason and propriety of this rule were obvious. It was already premature on his part to ask the chancellor to set aside a contract for the purpose of enabling him to procure satisfaction of a debt until he had first had his claim adjudicated by a competent tribunal. Until his claim was so adjudicated, even admitting the transfer of the property to have been fraudulent, he had no right to complain of wrong done to him. The injury, if any, was conditioned upon an event which might never happen. Ordinarily there was no reason why he should desert the common-law courts, and ask a court of chancery first to pass upon a preliminary question upon which his equitable rights were made to depend. Nor was it less obvious that the purchaser, as between himself and the vendor, had a perfect right to retain his purchase unmolested, unless it should become necessary to rescind the contract for the benefit of creditors or others whose rights had been affected by the fraudulent contract.

An action to have a certain instrument executed by the defendants decreed to operate as a deed of assignment for the benefit of all creditors cannot be maintained by a creditor at large, without any lien or trust in respect to the property in question. Dahlman v. Jacobs, 5 McCrary, 130, 15 Fed. 863. The court said that it could not be driven first to ascertain whether a creditor had a legal demand which belonged to common-law courts, and, thus having usurped common-law jurisdiction, proceed, after giving what was equivalent to a common-law judgment, to enter upon the other or equitable inquiry involved.

A bill by a creditor for an injunction and a receiver, based upon the allegation that the debtor is selling his goods and applying the proceeds to his own use and the use of others, without consideration, and thus and in other ways is wasting his resources, and is also sending large quantities of goods beyond the reach of his creditors, and also that he is insolvent, does not show sufficient ground for equitable interposition in behalf of a creditor who has no judgment, and who has not in any other manner acquired a lien upon the debtor's property. Rich v. Levy, 16 Md. 74.

A court of equity has no jurisdiction to aid a creditor at large, holding a legal demand, to reach and subject to the satisfaction of his claim an equitable interest not leviable at law, there being no trust, fraud, or lien, when such interposition is sought alone upon the allegation that the debtor is insolvent and that nothing can be made out of him at law. Under a statute permitting the creditor to proceed in equity to reach

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satisfy such debt other than the property which is alleged to have been fraudulently conveyed; for, if there be other property sufficient, then the resort to equity is unnecessary." The case of Botcher v. Berry, supra, is not applicable. On its being urged upon the court that the suit was in the nature of a creditors' bill, it said: "But there is no creditors' bill in this case. The questions discussed at the bar do not arise. Here the property had been seized. It was in the possession of the sheriff, and the question was: Did it belong to Botcher, the assignee, or to McLean & Company, the assignors? It was not necessary to wait until the claim of the attaching creditor ripened into a judgment, and the return of an execution unsatisfied, before this question could be decided." The foregoing are the authorities upon which defendant relies to sustain the proposition that, before plaintiff could sustain her action in this case, it was necessary that she have an execution issued upon her judgment and a return of the same unsatisfied, either in whole or in part.

A number of courts hold, as is seen by some of the authorities above cited, that the execution and its return unsatisfied must be pleaded, or facts showing insolvency of the alleged fraudulent debtor and the total absence of any property out of which the creditor may secure satisfaction of his judgment. Such, also, is the holding by the supreme courts in the states of Missouri and Iowa. Turner v. Adams, 46 Mo. 95; Gwyer v. Fig-

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equitable assets, judgment must have been first obtained. McKeldin v. Gouldy, 91 Tenn. 677, 20 S. W. 231.

2. Sufficiency, nature, effect.
(a) In general.

If a judgment at law is a condition precedent to the right of a creditor to obtain equitable relief, the judgment must, of course, be a valid one. It must be against the debtor, if living; but it need not have been obtained before a fraudulent transfer of the debtor's property is made, if the claim upon which it is based existed at the time of the conveyance.

A void judgment is not such a judgment as is required to support a creditors' bill. Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Wilhelm v. Locklar, 46 Fla. 575, 110 Am. St. Rep. 111, 35 So. 6; Epstein v. Ferst, 35 Fla. 498, 17 So. 414.

So, a void attachment judgment is not a sufficient judgment upon which to base a bill to reach lands fraudulently conveyed by the debtor. Millar v. Babcock, 29 Mich. 526; Nugent v. Nugent, 70 Mich. 52, 37 N. W. 706.

But an irregular judgment is a sufficient foundation for a bill in aid of execution. Griffin v. McGavin, 117 Mich. 372, 72 Am. St. Rep. 564, 75 N. W. 1061.

To an objection to a creditors' bill, on a hearing, that the judgment upon which the complainant based the creditors' bill was irregular, the court, in Hone v. Woolsey, 2 Edw. Ch. 289, said that it was not necessary to examine such objections, that they more properly belonged to the court of law, wherein the irregularity, and the manner of obtaining it, or any fraudulent or collusive means resorted to, could have been examined into; that, if the defendant did not take such a course, but suffered the judgment to stand, a court of chancery would not inquire into its regularity.

That the debtor's written statement or confession of demand does not comply with the provisions of the Code in respect to confession of judgments will not stand in the way of a bill to set aside a fraudulent conveyance of the debtor's real estate, where the debtor raises no question in regard to it, and the judgment must be deemed an honest one as to third parties, and fairly entered into as to the debtor, and standing upon his express authority and stipulation. Neusbaum v. Keim, 24 N. Y. 325.

A personal judgment or decree granted in a case in which the judgment debtor was never served with process, and never appeared, is an insufficient basis for a bill to reach real estate in the hands of a third person, even as against the latter. Tyler v. Peatt, 30 Mich. 63.

But a judgment in an attachment action or a money demand against a nonresident is sufficient to support a bill for setting aside an alleged fraudulent transfer of real estate, although the judgment is not based on personal service. Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634.

A judgment creditor cannot show himself to be a creditor of the surety's estate by merely showing judgment on final settlement against the estate of the principal, and cannot, on such showing, maintain a bill to set aside a conveyance to the surety's wife as fraudulent. State ex rel. Taaffe v. Goggin, 191 Mo. 482, 109 Am. St. Rep. 826, 90 S. W. 379.

Where the only effect of a judgment is to determine the ownership and legal effect of a contract, and is not, in any sense, a judgment for money, it is not such a judgment as will support an equitable action by the judgment creditor to set aside a conveyance of real estate. Miller v. Drane, 122 Wis. 315, 99 N. W. 1017.

A judgment against an executor *de son tort* is not a valid judgment against the estate he wrongfully represents, and such a judgment will not support a bill of a creditor of this estate against the executor, as executor of another estate. Gadsby v. Donelson, 10 Yerg. 371.

A judgment against a railway company in the same court wherein a receiver of the railway company had been appointed is sufficient to entitle the judgment creditor to the aid of equity to reach real estate of the railway company in proceedings taken

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gins, 37 Iowa, 517. In the Iowa case the court states in the syllabus: "A court of equity will not interfere to annul a voluntary conveyance claimed to be fraudulent as against judgment creditors, unless the insolvency of the debtor is shown by return of *nulla bona* or other satisfactory proof." In the Missouri case the court says the judgment creditor "must first exhaust his legal remedies, and this is usually done by obtaining judgment and execution, with return of *nulla bona*. But, where it is shown that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, its issue may be dispensed with, and the attaching creditor may resort directly to chancery for his remedy against such judgment debtor, without such prior proceedings." This is also the rule adopted in the United States Supreme Court as declared in the case of Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004: "The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must therefore show that he had done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not

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after the discharge of the receiver. Mather v. Cincinnati R. Tunnel Co. 3 Ohio C. C. 284.

A judgment against the personal representative of the deceased donor is binding on the donee for the purpose of establishing the right of the donor's creditor to maintain an action to set aside a gift as fraudulent. Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

Justice-of-the-peace judgments founded upon attachments which were never served upon the defendant personally, and to which he did not appear, are not such judgments as will entitle the owners to equitable relief. Corey v. Cornelius, 1 Barb. Ch. 571.

It is not necessary that judgment should have been obtained prior to an alleged fraudulent transfer which the creditor seeks to set aside. It is enough if the claims existed at the time of the conveyance. National Bank v. Dreyfus, 14 N. Y. Week. Dig. 160.

A claim cannot be said to have been reduced to judgment when a bill in equity is filed, although the judgment is dated the day the bill was filed, where the judge had the bill before him in chambers before that date, and the bill is therefore still objectionable on the ground that the complainants have no judgment or lien on the property sought to be reached by the bill. Coates v. Allen, 71 Ga. 787.

(b) Judgments or decrees in equity.

Under statutes making decrees for the payment of money liens upon real estate, and for enforcing decrees by execution against the person and property of the defendant, the same rules apply as to conditions precedent to other equitable relief as would apply were the judgment rendered in a court of law. Geery v. Geery, 63 N. Y. 252. The court said that, previous to modern statutes on the subject, the only way of enforcing a decree in chancery was by attachment and sequestration. The defendant was deemed to be in contempt for not obeying the decree, and the first process against him for such contempt was a writ of attachment; and if, for any reason, he could not be taken and imprisoned upon the attachment, or if, being imprisoned, he still refused to perform, the writ of sequestration could be issued, under which the sequestrators could seize and sell his personal property, and take and receive the rents and profits of his real estate.

In Tate v. Liggat, 2 Leigh, 91, it was urged that the fact that execution on decrees in chancery was given by statutory provisions dictated the propriety of entertaining a bill in chancery in behalf of the creditor at one and the same time, to ascertain and decree the debt due him, award execution for it, and remove fraudulent conveyances out of the way of the decree and execution; but the court held otherwise, saying that it could not perceive how that could possibly have such effect, or enlarge the jurisdiction of a court of equity in any respect whatever. It was only substituting a more simple and direct means of enforcing decrees than the original remedy by sequestration, which, in effect, bound all the debtor's property, real and personal, to a greater extent than any common-law executions; the rents and profits of all his lands instead of a moiety, as under an elegit; personalty from the time of awarding the commission, instead of the time of delivering the process to the officer, as in the case of a fi. fa.; and it extended to subjects which could not be reached by any common-law execution, such as dividends of bank stock.

A chancery decree for alimony is a sufficient judgment to entitle the holder to the aid of equity to set aside a fraudulent conveyance of real estate by the debtor. Hall v. Harrington, 7 Colo. App. 474, 44 Pac. 365. To the same effect is Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183.

The fact that there has been no judgment and execution on an award of alimony will not stand in the way of an action by the wife to set aside a fraudulent conveyance of real estate by the husband, made for the purpose of avoiding the decree. Twell v. Twell, 6 Mont. 19, 9 Pac. 537. The court said that it was immaterial whether a decree for alimony was called a judgment or not,

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satisfy such debt other than the property which is alleged to have been fraudulently conveyed; for, if there be other property sufficient, then the resort to equity is unnecessary." The case of Botcher v. Berry, supra, is not applicable. On its being urged upon the court that the suit was in the nature of a creditors' bill, it said: "But there is no creditors' bill in this case. The questions discussed at the bar do not arise. Here the property had been seized. It was in the possession of the sheriff, and the question was: Did it belong to Botcher, the assignee, or to McLean & Company, the assignors? It was not necessary to wait until the claim of the attaching creditor ripened into a judgment, and the return of an execution unsatisfied, before this question could be decided." The foregoing are the authorities upon which defendant relies to sustain the proposition that, before plaintiff could sustain her action in this case, it was necessary that she have an execution issued upon her judgment and a return of the same unsatisfied, either in whole or in part.

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(a) In general.

If a judgment at law is a condition precedent to the right of a creditor to obtain equitable relief, the judgment must, of course, be a valid one. It must be against the debtor, if living; but it need not have been obtained before a fraudulent transfer of the debtor's property is made, if the claim upon which it is based existed at the time of the conveyance.

A void judgment is not such a judgment as is required to support a creditors' bill. Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Wilhelm v. Locklar, 46 Fla. 575, 110 Am. St. Rep. 111, 35 So. 6; Epstein v. Ferst, 35 Fla. 498, 17 So. 414.

So, a void attachment judgment is not a sufficient judgment upon which to base a bill to reach lands fraudulently conveyed by the debtor. Millar v. Babcock, 29 Mich. 526; Nugent v. Nugent, 70 Mich. 52, 37 N. W. 706.

But an irregular judgment is a sufficient foundation for a bill in aid of execution. Griffin v. McGavin, 117 Mich. 372, 72 Am. St. Rep. 564, 75 N. W. 1061.

To an objection to a creditors' bill, on a hearing, that the judgment upon which the complainant based the creditors' bill was irregular, the court, in Hone v. Woolsey, 2 Edw. Ch. 289, said that it was not necessary to examine such objections, that they more properly belonged to the court of law, wherein the irregularity, and the manner of obtaining it, or any fraudulent or collusive means resorted to, could have been examined into; that, if the defendant did not take such a course, but suffered the judgment to stand, a court of chancery would not inquire into its regularity.

That the debtor's written statement or confession of demand does not comply with the provisions of the Code in respect to confession of judgments will not stand in the way of a bill to set aside a fraudulent conveyance of the debtor's real estate, where the debtor raises no question in regard to it, and the judgment must be deemed an honest one as to third parties, and fairly entered into as to the debtor, and standing upon his express authority and stipulation. Neusbaum v. Keim, 24 N. Y. 325.

A personal judgment or decree granted in a case in which the judgment debtor was never served with process, and never appeared, is an insufficient basis for a bill to reach real estate in the hands of a third person, even as against the latter. Tyler v. Peatt, 30 Mich. 63.

But a judgment in an attachment action or a money demand against a nonresident is sufficient to support a bill for setting aside an alleged fraudulent transfer of real estate, although the judgment is not based on personal service. Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634.

A judgment creditor cannot show himself to be a creditor of the surety's estate by merely showing judgment on final settlement against the estate of the principal, and cannot, on such showing, maintain a bill to set aside a conveyance to the surety's wife as fraudulent. State ex rel. Taaffe v. Goggin, 191 Mo. 482, 109 Am. St. Rep. 826, 90 S. W. 379.

Where the only effect of a judgment is to determine the ownership and legal effect of a contract, and is not, in any sense, a judgment for money, it is not such a judgment as will support an equitable action by the judgment creditor to set aside a conveyance of real estate. Miller v. Drane, 122 Wis. 315, 99 N. W. 1017.

A judgment against an executor *de son tort* is not a valid judgment against the estate he wrongfully represents, and such a judgment will not support a bill of a creditor of this estate against the executor, as executor of another estate. Gadsby v. Donelson, 10 Yerg. 371.

A judgment against a railway company in the same court wherein a receiver of the railway company had been appointed is sufficient to entitle the judgment creditor to the aid of equity to reach real estate of the railway company in proceedings taken

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gins, 37 Iowa, 517. In the Iowa case the court states in the syllabus: "A court of equity will not interfere to annul a voluntary conveyance claimed to be fraudulent as against judgment creditors, unless the insolvency of the debtor is shown by return of *nulla bona* or other satisfactory proof." In the Missouri case the court says the judgment creditor "must first exhaust his legal remedies, and this is usually done by obtaining judgment and execution, with return of *nulla bona*. But, where it is shown that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, its issue may be dispensed with, and the attaching creditor may resort directly to chancery for his remedy against such judgment debtor, without such prior proceedings." This is also the rule adopted in the United States Supreme Court as declared in the case of Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004: "The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must therefore show that he had done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not

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after the discharge of the receiver. Mather v. Cincinnati R. Tunnel Co. 3 Ohio C. C. 284.

A judgment against the personal representative of the deceased donor is binding on the donee for the purpose of establishing the right of the donor's creditor to maintain an action to set aside a gift as fraudulent. Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

Justice-of-the-peace judgments founded upon attachments which were never served upon the defendant personally, and to which he did not appear, are not such judgments as will entitle the owners to equitable relief. Corey v. Cornelius, 1 Barb. Ch. 571.

It is not necessary that judgment should have been obtained prior to an alleged fraudulent transfer which the creditor seeks to set aside. It is enough if the claims existed at the time of the conveyance. National Bank v. Dreyfus, 14 N. Y. Week. Dig. 160.

A claim cannot be said to have been reduced to judgment when a bill in equity is filed, although the judgment is dated the day the bill was filed, where the judge had the bill before him in chambers before that date, and the bill is therefore still objectionable on the ground that the complainants have no judgment or lien on the property sought to be reached by the bill. Coates v. Allen, 71 Ga. 787.

(b) Judgments or decrees in equity.

Under statutes making decrees for the payment of money liens upon real estate, and for enforcing decrees by execution against the person and property of the defendant, the same rules apply as to conditions precedent to other equitable relief as would apply were the judgment rendered in a court of law. Geery v. Geery, 63 N. Y. 252. The court said that, previous to modern statutes on the subject, the only way of enforcing a decree in chancery was by attachment and sequestration. The defendant was deemed to be in contempt for not obeying the decree, and the first process against him for such contempt was a writ of attachment; and if, for any reason, he could not be taken and imprisoned upon the attachment, or if, being imprisoned, he still refused to perform, the writ of sequestration could be issued, under which the sequestrators could seize and sell his personal property, and take and receive the rents and profits of his real estate.

In Tate v. Liggat, 2 Leigh, 91, it was urged that the fact that execution on decrees in chancery was given by statutory provisions dictated the propriety of entertaining a bill in chancery in behalf of the creditor at one and the same time, to ascertain and decree the debt due him, award execution for it, and remove fraudulent conveyances out of the way of the decree and execution; but the court held otherwise, saying that it could not perceive how that could possibly have such effect, or enlarge the jurisdiction of a court of equity in any respect whatever. It was only substituting a more simple and direct means of enforcing decrees than the original remedy by sequestration, which, in effect, bound all the debtor's property, real and personal, to a greater extent than any common-law executions; the rents and profits of all his lands instead of a moiety, as under an elegit; personalty from the time of awarding the commission, instead of the time of delivering the process to the officer, as in the case of a fi. fa.; and it extended to subjects which could not be reached by any common-law execution, such as dividends of bank stock.

A chancery decree for alimony is a sufficient judgment to entitle the holder to the aid of equity to set aside a fraudulent conveyance of real estate by the debtor. Hall v. Harrington, 7 Colo. App. 474, 44 Pac. 365. To the same effect is Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183.

The fact that there has been no judgment and execution on an award of alimony will not stand in the way of an action by the wife to set aside a fraudulent conveyance of real estate by the husband, made for the purpose of avoiding the decree. Twell v. Twell, 6 Mont. 19, 9 Pac. 537. The court said that it was immaterial whether a decree for alimony was called a judgment or not,

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without many exceptions. Neither law nor equity requires a meaningless form, *Bona, sed impossibilia non cogit lex.* It has been decided that, where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. Turner v. Adams, supra; Postlewait v. Howes, 3 Iowa, 365; Ticonic Bank v. Harvey, 16 Iowa, 141; Botsford v. Beers, 11 Conn. 369; Payne v. Sheldon, 63 Barb. 169. This is certainly true where the creditor has a lien or a trust in his favor." And the court in the syllabus says: "Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting his remedy at law." Here, again, we notice that the necessity for the issuance of an execution and its return without satisfaction is limited to those cases where there is no trust and no lien upon the specific property in favor of plaintiff. The attachment which plaintiff had levied upon the land here in controversy, and which was sustained as to the defendant F. R. Ziska, in her suit against him, was a lien upon this land, and reached all of the right, title, or interest of any kind in and to the same held and owned by him. If the conveyance made was not fraudulent, but in good faith, or if debtor had sufficient other property subject to execution on this judgment, then plaintiff took nothing by this attachment; while, on the other hand, if the conveyance was fraudulent and there

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or whether an execution might have been issued thereon. It was a debt of record, ascertained by the adjudication in a court of competent jurisdiction, and the respondent thereby became a creditor within the meaning of the Montana statute. Proceedings by attachment and the recovery of a judgment for the amount of alimony due would not have aided her in the collection of her debt, or placed her in any better or stronger position than before such proceedings had been commenced. It was not necessary to have any further proceedings or adjudication to establish the respondent's debt and claim, and a creditors' bill was her only remedy to aid her in the collection of what a competent court had declared she was justly entitled to.

A deficiency decree in equity on a mortgage foreclosure proceeding is a sufficient judgment to meet the requirement that a creditor must first reduce his claim to a judgment before seeking the aid of equity to reach real estate fraudulently conveyed by the debtor. Robinson v. Springfield Co. 21 Fla. 203.

A deficiency judgment in a court of equity on a mortgage foreclosure on which execution has been issued and a return *nulla bona* made thereon is a sufficient basis for a creditors' bill, under chapter 278, 2 How. Stat. Clement, B. & Co. v. Oceana Circuit Judge, 119 Mich. 605, 78 N. W. 666.

But an interlocutory deficiency decree on a mortgage foreclosure proceeding, the amount of which has not been determined, is not sufficient to authorize a bill to set aside an alleged fraudulent conveyance. Cotes v. Bennett, 183 Ill. 82, 55 N. E. 661.

An unconditional judgment rendered in an accounting proceeding is final, and will form a sufficient basis for equitable proceedings to reach property fraudulently conveyed, although subsequently the court made further findings in the accounting as to credits which were to be applied on the judgment. Applegate v. Applegate, 107 Iowa, 312, 78 N. W. 34.

(c) Judgments of other jurisdictions.

There has been some conflict in the United States courts as to the right of creditors to found their equitable action on judgments of courts of other jurisdictions, the prevailing opinion being against it.

A judgment of a court of a sister state, and return of an execution unsatisfied there, is insufficient, where the creditor makes no effort to obtain judgment in the jurisdiction in which the equitable action is brought, and does not show the impossibility of obtaining one. National Tube Works Co. v. Ballou, 146 U. S. 517, 36 L. ed. 1070, 13 Sup. Ct. Rep. 165. The court said that where it was sought by equitable process to reach equitable interests of the debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought.

But, in First Nat. Bank v. Steinway, 77 Fed. 661, it was held that the rule laid down in the last-mentioned case was complied with where a judgment was obtained in a court of common pleas of Allegheny county, in Pennsylvania, and the writ of fieri facias issued thereon against the defendants therein was returned *nulla bona*, and a creditors' bill was brought in the United States circuit court for the western district of Pennsylvania.

A judgment rendered in a district court of another district will not satisfy the requirement as to judgment, such judgment being effective only for the purpose of evidence. United States v. Ingate, 48 Fed. 251.

The remedy at law cannot be exhausted by the recovery of a judgment in a foreign jurisdiction, and by fruitless efforts to enforce it there. Claflin v. McDermott, 20 Blatchf. 522, 12 Fed. 375.

That a foreign judgment creditor has had executions issued in the state in which the judgment was rendered, which executions have been returned unsatisfied, is not sufficient, since such judgments are only contract debts. Walser v. Seligman, 21 Blatchf. 130, 13 Fed. 415.

A creditors' bill in a United States circuit court of one district cannot be supported by a judgment and return of an execution of a United States circuit court of

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was lacking other property, it was void as to her, and she was entitled to have the land sold, and all of the rights of the adverse holder foreclosed, and the avails of the same subjected to the payment of her claim. Kimbro v. Clark, 17 Neb. 403, 22 N. W. 788; Arper v. Baze, 9 Minn. 108, Gil. 98; Westervelt v. Hagge, 61 Neb. 647, 54 L.R.A. 333, 85 N. W. 852; McKinney v. Farmers' Nat. Bank, 104 Ill. 180; Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108; Taylor v. Dunlap Stone & Lime Co. 38 Kan. 547, 16 Pac. 751. The supreme court of the state of Nebraska in the case of Kimbro v. Clark, supra, held in the syllabus as follows: "Where an attachment is levied upon real estate belonging to a nonresident debtor, or which it is claimed is owned by him, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor, if any, in the land, which he may enforce after judgment by an action in the nature of a creditors' bill. Such an action may be maintained even though the original judgment was obtained without other service than by publication in a newspaper." In the case of Arper v. Baze, supra, the court said: "A creditor may levy an attachment upon real estate of his debtor previously transferred with intent to defraud creditors, and thereby acquire a lien on the property." In the case of McKinney v. Farmers' Nat. Bank, supra, the court says in the syllabus: "Creditors have the right to treat conveyances of their debtors made to hinder, delay, or defraud them as void; and their election

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another district. Union Trust Co. v. Boker, 89 Fed. 6.

But, in Alkire Grocery Co. v. Richesin, 91 Fed. 79, it was held that a judgment creditor in a state court, who had sued out an execution, and obtained a *nulla bona* return, might file a creditors' bill based thereon in the circuit court of the United States for the district comprising the county in which the judgment of the state court was rendered. To the same effect is Feidler v. Bartleson, 88 C. C. A. 194, 161 Fed. 30.

And in Merchants' Nat. Bank v. Chattanooga Constr. Co. 53 Fed. 314, a judgment of a state court of another state was held to be such a judgment as would authorize a United States court to assert and maintain jurisdiction of a creditors' bill.

And in Wilkinson v. Yale, 6 McLean, 16, Fed. Cas. No. 17,678, it was held that a Federal court might take jurisdiction on judgment and execution of a state court.

An objection that complainants have not a sufficient judgment at law to support a bill in the Federal circuit court for the district of New York for an injunction *pendente lite* to restrain the defendant insurance company from paying the proceeds of insurance policies which were alleged to have been fraudulently assigned, until the question of fraud could be inquired into, was held not available, where there was a decree of the circuit court of the United States for the district of Florida in favor of creditors, to which both the creditors and claimant were parties, as well as the debtor, in which, upon similar issues, the amount of their debts respectively was adjusted for the same purpose. Ætna Nat. Bank v. Manhattan L. Ins. Co. 24 Fed. 769. In this case the court pointed out that the debtor had died, leaving the sum due on the policies as part of his estate, if it belonged to his estate, within the jurisdiction of the court, with no other creditors, so far as appeared.

It is generally held in the state courts that the creditor must base his action for equitable relief on a domestic judgment.

A creditor seeking an injunction on a foreign judgment is no more than a creditor at large. Buchanan v. Marsh, 17 Iowa, 494.

A creditor cannot, by reason of a judgment in a court of a sister state, maintain a bill to set aside a fraudulent conveyance, since his position is only that of a general creditor. Crim v. Walker, 79 Mo. 335.

Until a judgment rendered in another state is prosecuted in a local court to judgment, the holder is but a creditor at large, so far as his right to the aid of equity to reach real estate fraudulently transferred is concerned. Carter v. Bennett, 6 Fla. 214.

A judgment of a Federal court is not a sufficient basis for a suit in chancery in a state court. Bevans v. Henry, 49 Ala. 123.

In Illinois, the judgments in the circuit courts of the United States are not such as will authorize a creditors' bill to be exhibited in the state courts. Steere v. Hoagland, 39 Ill. 264; Winslow v. Leland, 128 Ill. 307, 21 N. E. 588.

But, in Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861, it was held that the fact that the judgment upon which a bill in the state court was based was rendered in a Federal court did not deprive the state court of jurisdiction, the defect being one of evidence only. It was said that, while the court might have rendered a decree on insufficient evidence, this was a mere error which in no way affected the jurisdiction of the court. The point, however, was not really necessary to the decision.

In Ladd v. Judson, 174 Ill. 344, 66 Am. St. Rep. 267, 51 N. E. 838, however, the court, without referring to the last-mentioned case, but citing the two earlier Illinois cases above mentioned, said that it was well settled that a judgment at law necessary to give the court jurisdiction in such cases must be a judgment in the jurisdiction where the bill is filed.

Where the object of the bill is to reach assets of the debtor by the aid of a court of equity which cannot be reached at law, a domestic judgment must be obtained. Turner Bros. v. Alabama Min. & Mfg. Co. 25 Ill. App. 144.

An action in the nature of a creditors' bill, to ascertain and recover unpaid stock

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to treat them as void is shown by attaching the property so conveyed, and such attachments, when levied, will become a lien upon the property with the same effect as if no fraudulent conveyances had been made."

The question now presented to us, since, as we have seen, the existence of an attachment upon this land created a lien in favor of plaintiff, is, What is the law in reference to the issuance of an execution and its return unsatisfied? Is this necessary? We conclude from an examination of the authorities that it is not. Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317; Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799; Francis v. Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Dawson v. Sims, 14 Or. 561, 13 Pac. 506. In the case of Level Land Co. No. 3 v. Sivyer, supra, the court says: "One having a specific lien, by judgment or otherwise, may maintain suit to remove fraudulent or invalid obstacles standing in the way of its enforcement without showing issue of an execution and return thereof unsatisfied." In the case of Francis v. Lawrence, supra, the court speaks as follows: "A creditor who obtains a lien by levy of attachment on lands can maintain a creditors' bill to set aside a fraudulent conveyance thereof." In the case of Dawson v. Sims, supra, the supreme court of Oregon holds that "the lien created by an attachment duly levied upon the property of the debtor is a sufficient foundation for the jurisdiction of a court of equity to aid, by means of a creditors' suit, in removing fraud-

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subscriptions, cannot be maintained before judgment and return of execution unsatisfied in the state of the forum. Rule v. Omega Stove & Grate Co. 64 Minn. 326, 67 N. W. 60.

A judgment and return of *nulla bona* in Tennessee were held not a sufficient foundation for an action in equity to charge choses in action in Mississippi. Dick v. Truly, Smedes & M. Ch. 557.

A judgment of a sister state is not available as a foundation for a bill by a creditor to impeach a deed of trust as fraudulent. Berryman v. Sullivan, 13 Smedes & M. 65.

A judgment of a court of a sister state will not support a bill in chancery to subject lands alleged to belong to the judgment debtor to the satisfaction of a judgment. Farned v. Harris, 11 Smedes & M. 366.

A judgment of the circuit court of the United States for the district of Nebraska will not be considered as a domestic judgment, for the purpose of the maintenance of a creditors' bill. First Nat. Bank v. Sloman, 42 Neb. 350, 47 Am. St. Rep. 707, 60 N. W. 589.

In New Jersey, a judgment of a United States court of the same district in which the state equity court is located is held to be a sufficient judgment to afford a basis for equitable relief; but a judgment of a court of a sister state is held to be insufficient.

In Vanderveer v. Stryker, 8 N. J. Eq. 175, it was held that a judgment obtained in the United States circuit court for the same district as that in which the equity court was located in which a bill was filed to set aside an alleged fraudulent conveyance of real estate complied with the requirement that a complainant must have a judgment as a condition precedent to equitable relief. It was said: "A judgment in the district court of the United States for New Jersey is as satisfactory evidence of the existence of a debt as the judgment of our supreme court; and an execution issued from the district court has the same power and territorial extent as an execution from our supreme court; and, if an execution from that court fails to yield to the plaintiff his judgment debt, it is as entire a failure as if his execution had issued from our supreme court. The ground of relief in this court is, that the complainant has obtained an execution at law, upon which any property in this state, tangible, or that can be reached by execution at law, might be reached and made available; that the defendant has no property which can be reached by execution at law, but that he has property which a court of equity will subject to the payment of the judgment and execution."

A creditor who has obtained judgment on his claim only in a sister state, and who has neither attachment nor other lien, cannot maintain an action in equity to reach real estate of his debtor. Davis v. Dean, 26 N. J. Eq. 436.

A judgment of a court of a sister state does not establish a lien on real estate of a living debtor, so as to afford a sufficient basis for an action in equity to set aside a fraudulent conveyance of the property. Guy B. Waite Co. v. Otto (N. J. Ch.) 54 Atl. 425.

In the last-mentioned case, Merchants' & M. Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272, infra, V. g, 2, was relied on as changing the rule as to the effect of foreign judgments, declared in Davis v. Dean, supra, and as further deciding that, where a bill alleges that judgments recovered upon the debt were recovered in a court of a foreign state, and that the debt is due, and that there is no other estate or property on which to levy, and these allegations are admitted by general demurrer, complainant has a right to relief, and that the demurrer should be overruled. The decision, however, was held not to affect the decision in Davis v. Dean, supra, for, in the Borland Case, infra, the bill was filed against the estate of a deceased debtor who had died insolvent.

A return unsatisfied of an execution of the United States circuit court is not a sufficient exhaustion of the legal remedy to authorize an action in equity in a state court, and the fact that the court in which

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ulent impediments or conveyances which prevent the creditor from laying hold of the property and applying it to the payment of his debt." In Minnesota, in the case of Scanlan v. Murphy, supra, the court, giving the fraudulent conveyance act its full force, and holding the transfer as to the judgment creditor absolutely void, and the judgment rendered subsequent to the transfer a lien on the land, holds that "it is only necessary that the plaintiff shall have a lien by judgment on the real estate, subsequent to the fraudulent conveyance. . . . It is not necessary, therefore, for the creditor to follow his legal remedy further than to recover and docket his judgment." It will be observed that these authorities all sustain the proposition that, where there is a lien, then it is not necessary to pursue the action in a court of law further than the establishment of such lien. There are very many other respectable authorities holding that, where the bill or petition alleges that the debtor is insolvent and that the issuance of execution would be of no practical utility, he need not pursue his legal remedy further than to recover and docket his judgment, and this especially where a lien is thereby established.

There is no question but that, under the ancient practice as it obtained in England, and later in the United States, and still in some courts of this country, where the courts of law and equity are separate tribunals, and where the rule was observed that equity granted relief in those cases only where the

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the judgment was rendered was sitting within the limits of the jurisdiction of the state court cannot give the plaintiff any better claim to equitable relief than he would have had if the judgment had been rendered in any other state or territory of the United States. Tarbell v. Griggs, 3 Paige, 207, 23 Am. Dec. 790.

The remedy at law is not exhausted as to the state jurisdiction on the judgment of a district United States court in New York by the issuance of an execution to the United States marshal, and the return of the execution unsatisfied. There must be a recovery of judgment in one of the courts of the state, and the return of the execution thereon unsatisfied. Davis v. Bruns, 23 Hun, 648.

A foreign creditor cannot invoke the aid of equity to reach property declared by statute to be a trust in favor of creditors until he has sued his judgment over and issued execution thereon, which has been returned unsatisfied. McCartney v. Bostwick, 31 Barb. 394, reversed in 32 N. Y. 61, but on the ground that the jurisdiction of the court in this class of cases is original. See infra, VI. d.

A judgment obtained in a sister state cannot be enforced in the courts of equity of South Carolina. McLure v. Benceni, 37 N. C. (2 Ired. Eq.) 513, 40 Am. Dec. 437.

In Broughton v. Slusher, 2 Tenn. Ch. App. 305, statutes giving judgment creditors whose executions have been returned unsatisfied in whole or in part, the right to reach equitable assets of their debtors in equity, were held not applicable to one who obtained judgment against the debtor in a sister state, and had execution returned unsatisfied there. The court said that a judgment debtor, under a judgment rendered in another state, with a return of *nulla bona* against him in such state, might have ample property to satisfy any judgments that might be obtained against him in the local state, and there could be no reason whatever for subjecting his property in such cases to this extraordinary sequestration. The court continued: "Let us suppose that one of our own citizens, during a visit to another state, had suit brought against him and judgment rendered, and that he had property sufficient in this state, entirely free from encumbrance to satisfy such judgment. Should his property be subject to sequestration here because there was a return of *nulla bona* against him in another state? Obviously not."

But, in Watkins v. Wortman, 19 W. Va. 78, a judgment of a court of another state was held to be a debt, for the recovery of which the creditor was entitled to all the remedies applicable to other debts. It was therefore held to be unnecessary to bring an action at law upon such a judgment before instituting a chancery suit to avoid a fraudulent conveyance by the debtor, under a statute permitting action before a judgment, to set aside fraudulent conveyances.

In Ballin v. Merchants' Exch. Bank (Ballin v. J. & E. B. Friend Lace Importing Co. 78 Wis. 404, 10 L.R.A. 742, 47 N. W. 516, it was held that judgments of the United States courts of the Wisconsin districts were to be treated as domestic judgments of a superior court of the state, for the purpose of supporting an action by a judgment creditor of a corporation to sequester the property of the corporation.

And, under a statute providing that "judgments of courts of record of this state, and of courts of the United States, rendered within this state, shall be liens on the real estate of the debtor within the county in which the judgment is rendered," it was held that the judgment of the Federal court for the district of Kansas could not be regarded as that of a foreign court, and was therefore held a sufficient judgment to support a creditors' bill. Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727.

And, in Bush v. Arnold, 50 Mo. App. 8, it was held that a proceeding in the nature of a creditors' bill to subject a legacy to the satisfaction of plaintiff's judgment could be maintained in a state court on a judgment of a United States court. The court said that it had no doubt that one who had recovered such a judgment was entitled to

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law, by reason of its universality, was not adequate, it was a practice to require the judgment creditor to have an execution issued and a return thereon *nulla bona* before equity would reach out its strong arm and render any assistance, and that this was the only proof that such courts would receive to show that the creditor was without remedy or had exhausted the same at law. But, under our modern practice, a great many of the old forms and proceedings are no longer observed, and in our courts to-day, where law and equity are both administered in one form of action and by the same courts, the reason for the rule is passed and gone, and, when the reason is gone, the rule should and does go with it. Such is the law, in our judgment, in this jurisdiction, and such do we believe to be its declaration by the best authorities. 20 Cyc. Law & Proc. p. 726; Ryan v. Spieth, 18 Mont. 45, 44 Pac. 403; Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438; Lee v. Orr, 70 Cal. 398, 11 Pac. 745; Merry v. Fremon, 44 Mo. 518; Fleischner v. First Nat. Bank, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. The text in 20 Cyc. Law & Proc. supra, is as follows: "It has been held that the creditor must aver, not only that he has reduced his claim to judgment, but that he has had a return of an execution thereon unsatisfied in whole or in part, and that the place of such averment cannot be supplied by an allegation of a total want of property. This is put upon the ground that courts of equity are not tribunals for the collection of debts,

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prosecute in a state court any supplementary proceedings in equity to procure the satisfaction of such judgment, where the conditions were such that the state court would have jurisdiction of an ordinary action between the parties.

3. Proceedings at law affecting judgment.

Upon the granting of a new trial to a debtor, a defendant in an action upon which a creditors' bill had been based, such creditors' bill should be stayed until the final determination in the original case. Drew v. Dwyer, 1 Barb. Ch. 101.

In Butchers' & D. Bank v. Willis, 1 Edw. Ch. 645, the fact that a judgment upon which an execution had been issued and returned *nulla bona*, and a creditors' bill, based thereon, had been filed, was afterwards set aside, was held to be fatal to the creditors' bill. It was also held that the defect could not be cured by subsequently securing another judgment, and bringing the same to the attention of the court by a supplemental bill.

And where a judgment which was made the foundation of a creditors' suit was reversed and vacated on appeal, the creditors' suit based thereon and dependent upon it was dismissed. Kudrna v. Ainsworth, 65 Neb. 711, 91 N. W. 711.

But, the mere fact that a debtor has appealed from a judgment rendered against him does not present a sufficient ground to bar a creditors' bill to set aside a fraudulent conveyance by the debtor, based on the judgment appealed from, where the debtor, on appealing, did not obtain a stay of execution by filing a bond. Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405.

And in Barnett v. East Tennessee, V. & G. R. Co. (Tenn. Ch. App.) 48 S. W. 817, it was held that a judgment creditor having a judgment in a state court against an insolvent corporation, and from which an appeal is pending, may, nevertheless, successfully base thereon the right to intervene in a creditors' suit against the insolvent corporation, which is pending in the Federal court of the same district.

b. As to execution, levy, and return.

1. As to property subject to levy.

(a) Necessity of lien.

(1) The general rule.

It having been determined that the general rule requires the creditor to reduce his claim to judgment before he can ask equitable aid to reach his debtor's property, of whatever name or nature, the next question arising is, What steps must he take, if any, after obtaining judgment, to get the help of a court of equity to reach his debtor's property? At this point it becomes necessary to consider the kind of property the creditor is after. As heretofore stated (see supra, II.), the rules governing relief where the property is subject to levy, and where it is not, are different. These two classes of property will be considered separately, and the rules relating to that subject to levy will be first taken up.

Whether the creditor wishes to satisfy his judgment out of real estate, or seeks to lay hold of tangible personal property, he must, in jurisdictions where the judgment itself is not made a lien by statute, take such additional measures as will perfect a lien, since the theory upon which relief is granted is that the creditor's title is obstructed or beclouded by the fraudulent acts of the debtor in conveying the property to another; and that the title ought to be cleared up to enable the creditor to enforce his lien by an advantageous sale. The lien, therefore, is, next to judgment, the great requisite in this class of cases. It is rightfully the only legal step required, since the rule as to exhaustion of the remedy at law does not apply here. Some of the apparent conflict in the authorities may be explained by the fact that the laws of different jurisdictions vary as to the steps necessary to perfect a lien upon real and personal property.

In Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786, the court said that no creditor could be said to be delayed, hindered, or defrauded by any conveyance until some property out of which

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although resort may be had to them after all legal means have been exhausted. But, after all, the fruitless execution, although generally conclusive, is only evidence that the creditor has no adequate remedy at law, or that he has exhausted his legal remedy. It is not, however, the only possible means of proof. Ordinarily neither law nor equity requires a meaningless form. Accordingly it has been decided in many cases that a judgment creditor whose judgment would have been a lien on the property but for the fraudulent conveyance may proceed at once to have the conveyance set aside. If he alleges and proves that the debtor is insolvent and that the issuing of an execution would be of no practical utility, he need not show that he has pursued his legal remedy further than to recover and docket his judgment." The supreme court of the state of Oregon, in Fleischner v. First Nat. Bank, supra, holds: "The issuance and return of an execution is not a necessary preliminary to the right to maintain a creditors' suit to set aside conveyances by the debtor and to uncover assets, where the debtor is alleged to be insolvent." The case of Merry v. Fremon, supra, was one wherein it was sought to set aside certain conveyances because of their fraudulent character. The court says: "It is generally necessary to show the issuance of an execution and a return of *nulla bona*, but it may be dispensed with where it is shown that the debtor was insolvent." The supreme court of the state of Montana, in the case of Ryan v. Spieth,

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he had a specific right to be satisfied was withdrawn from his reach by the fraudulent conveyance. Such specific right did not exist until he had bound the property by judgment, and, in the case of personal property, by execution delivered to the sheriff, and had shown that he was defrauded by the conveyance, in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquired a specific right to be satisfied out of the property conveyed, and showed that he was a creditor, and was delayed, hindered, and defrauded by the conveyance. When a party had thus brought himself within the terms of the statute, he was entitled to the assistance of a court of equity to remove the impediment to his legal rights; and the lien, frustrated by fraud, would be considered as still subsisting in equity.

In Stephens v. Whitehead, 75 Ga. 294, on a bill by judgment creditors on whose judgment an execution had been issued and returned *nulla bona*, against different purchasers of goods from their debtor, which purchases were alleged to be fraudulent, the general doctrine was stated, although not applied, that, ordinarily, a lien is a necessary condition precedent to the maintenance of a creditors' bill.

In Balls v. Balls, 69 Md. 388, 16 Atl. 18, the court said that, except where changed by statute, it was an invariable rule that the holder of a debt cognizable at law could not obtain relief in equity until he had shown that his legal remedies were inadequate. If he sought to subject real or personal estate to the payment of his debt, he must obtain a lien upon it. When he had so acquired an interest in his debtor's property, he would be in a condition to ask the aid of a court of equity if, in other respects, he could show a case within its jurisdiction.

To sustain a bill on the theory that it is in aid of execution, a lien on the property sought to be reached must exist at the time the bill is filed. Blish v. Collins, 68 Mich. 542, 36 N. W. 731.

Before a creditor can reach tangible personal property in the hands of a fraudulent transferee, he must, in addition to the adjudicated claim, show that he has some lien upon the property, or some specific and definite rights in respect to it. Wilson v. Harris, 21 Mont. 374, 54 Pac. 46. The court quoted with approval the reason given by Mr. Bump, in his Treatise of Fraudulent Conveyances, § 535, as follows: "A creditor must establish his demand at law, and obtain a lien upon the property before the transfer interferes with his rights, or he has any title to claim relief in equity. No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance."

In Westheimer v. Goodkind, 24 Mont. 90, 60 Pac. 813, the court said that, in any case, and in all cases, whether the relief sought was legal or equitable, the creditor or other person who, as plaintiff or defendant, would avoid a sale or transfer for the reason that it was made with intent to defraud him of his demand, must have a lien or charge upon, or an interest in, the particular property which he desired to have subjected to the payment of his claim. As to a general creditor, such a sale was voidable in the sense that, when he should have acquired a lien upon the property affected, but not before, the sale would become inoperative as to him, not only from the date when the lien was interposed, but *ab initio*. So that, when it was said that a transfer made with intent to defraud creditors was void as to all creditors, nothing more was meant than that it was inoperative as to lien creditors who assailed it, and that, when successfully so attacked, the nullity related back to the time when the debts or obligations were unsecured.

Section 4490 of the Civil Code of Montana, providing that "every transfer of property . . . with intent to delay or defraud any creditor or other person, of his demands, is void against all creditors of the debtor . . ." is but declaratory of the common law. The transfer therein denounced as void is so only as to, and at the

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supra, involving the rule as to personal property and in which it was sought to set aside certain transfers on the ground that they were fraudulent, held: "A complaint in equity to reach and have applied to a judgment, property of the judgment debtor alleged to be fraudulently concealed, which shows that there is no property subject to execution and what has become of it, need not also allege, as a prerequisite to equitable relief, that an execution was issued and returned unsatisfied." Under these authorities, and under the facts in this case, the judgment creditor having secured a lien upon the property, and averring in her petition that "the defendant Frank R. Ziska is insolvent and has been at all times since the 1st day of December, 1901, and has no property subject to execution out of which plaintiff can make her judgment except the land heretofore described," we hold that it was unnecessary for her to allege and prove the issuance of execution and its return *nulla bona*, and that, cause of action not being barred, the petition states a cause of action.

This conclusion brings us to a consideration of the evidence introduced in the case by plaintiff to sustain her petition. The only evidence offered, aside from documentary proof, is found in the testimony of plaintiff and her former husband, the alleged fraudulent grantor. This has been carefully read by the entire court, and the majority thereof finds that, while there is no direct proof upon some material allegations of the petition, it cannot be said, from a consider-

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instance of, creditors having liens or charges upon, or special interest in, the property transferred. Ibid.

A creditor who would avoid in equity a sale or transfer by the debtor of his property, for the reason that it was made with intent to defraud him of his demands, must have a lien or charge upon, or interest in, the particular property which he desires to have subjected to the payment of his claim, or he must have exhausted his legal remedies. The mere fact that he is a creditor does not authorize him to attack an alleged fraudulent sale by the debtor, but, if he seeks the aid of a court of equity to enforce his rights, it must clearly appear that he has placed himself in a position to have the court enforce his rights, in subjecting the particular property to the payment of his demands, by the removal of obstacles fraudulently interposed, and that he is remediless in collecting his just claims in a court of law. Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114.

In Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614, the court said that where the creditor sought to remove a fraudulent obstruction to the collection of his judgment, and to enforce a claim against the property which ought to be subjected thereto, it was requisite that the judgment should be made a lien upon the property which was to be subjected to it. Where the writ was thus operative, the lien might possibly be acquired by the execution, but otherwise the judgment must be either a lien under the statute when entered, or must be made one by the taking of those steps which the statute pointed out. That, in some way, the lien must be acquired and existing at the time the bill was filed, was clearly settled. In the case at bar, the bill was to cancel alleged fraudulent conveyances, and the court held that, since the creditor had neither had the execution levied upon the interest, and the interest sold and the title transferred to him, nor had taken the necessary steps to make the judgment a lien, he was wholly without right to the relief which he sought.

A bill to set aside deeds alleged to have been made for the purpose of hindering, delaying, and defrauding creditors cannot be maintained where the complainant had no lien on the property, no execution having been issued within one year from the date of the judgment. Newman v. Willetts, 52 Ill. 98.

In a proceeding to set aside a sale of real estate, there must exist a judgment lien by statute, in which case the title must be in the judgment debtor, or a lien by levy. Wells v. Dalrymple, Fed. Cas. No. 17,392.

Without a judgment at law binding the lands of the debtor, equity has no jurisdiction to entertain the bill of a creditor, filed to set aside a fraudulent conveyance of the debtor's lands, or to enable the creditor to reach the mere equitable estate of the debtor. The judgment lien is the necessary foundation of the equitable jurisdiction in either case, and equity lends its aid to make that lien effectual whenever it cannot be enforced by an execution at law. Vint v. King, Fed. Cas. No. 16,950.

Creditors who have never obtained a lien are not in a position to attack a chattel mortgage on a stock of merchandise, given to part of the defendants by the debtor's wife, to whom the goods had been sold. Krolik v. Root, 63 Mich. 562, 30 N. W. 339.

A bill to set aside a judgment against the debtor as fraudulent, and to reach property covered thereby, cannot be maintained, where it fails to show that the plaintiff has acquired a lien on the property, or that he has recovered judgment upon which an execution has been issued and returned unsatisfied. Castle v. Bader, 23 Cal. 76.

A creditor of a mortgagor cannot vacate and annul an order authorizing the receiver of the mortgagor to sell certain personal property to pay the liens thereon, and obtain an order requiring the receiver to pay the amount of a judgment obtained by the creditor, where the creditor has acquired no lien, either legal or equitable, upon the property, since the remedy, if any, is to obtain an order of the court, directing a disposition of the proceeds. Sullivan v. Miller, 106 N. Y. 635, 13 N. E. 772.

A creditor at large, or before judgment,

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ation of the entire testimony and the relationship to each other of all the parties to the suit, that there is no evidence, either direct or circumstantial, which tends in some degree to support the allegations. The rule in this state on the question presented is very clearly announced in the syllabus in the case of Edmisson v. Drumm-Flato Commission Co. 13 Okla. 440, 73 Pac. 958, where it is held: "A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrant."

With this for a measure by which to consider the evidence offered, it is our judgment that the trial court erred in sustaining the demurrer thereto, and the case is accordingly reversed. The writer hereof is unable to yield his assent to the conclusion reached by a majority of the court on the sufficiency of the evidence to sustain the petition, and dissents from this portion of the opinion, concurring with the other Justices as to the balance.

Williams, Ch. J., and Hayes, Kane, and Turner, JJ., concur.

Dunn, J., dissents in part.

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is not entitled to the interference of this court, by injunction, to prevent his debtor from disposing of his property in fraud of the creditor. In order to enable him to contest the validity of encumbrances of the debtor's property, he must have some specific claim or lien on such property. And a bill filed by a creditor of a firm, to restrain an execution creditor of an individual partner from enforcing his lien upon the partnership property, forms no exception to the general rule. Mittnight v. Smith, 17 N. J. Eq. 259. 88 Am. Dec. 233.

In Haston v. Castner, 31 N. J. Eq. 697, the court said that, in the court of chancery, the wide rule, taken from Loomis v. Tifft, 16 Barb. 541, appeared to have been adopted, that, if there had been a putting away of lands out of the reach of creditors, as equity had jurisdiction in case of frauds, relief would be afforded to this class of creditors, irrespective of the circumstance whether they had a lien on the land or not. But this was plainly a departure from the principle of all the decisions referred to in the opinion, in which, in this class of circumstances, the foundation of equitable intervention was expressly based on the existence of the creditor's lien on the property.

In Guy B. Waite Co. v. Otto (N. J. Ch.) 54 Atl. 425, the court said that it had always been the law of New Jersey that a creditor of a living debtor, who sought to set aside alleged fraudulent conveyances of land by his debtor, and to charge lands as held in trust for the debtor with the payment of his debt, must have a lien on the lands for the debt by judgment, attachment, or otherwise.

In Texas, the system of practice is one of blended law and equity. In Cassaday v. Anderson, 53 Tex. 535, it was said to be proper, under this practice, for a creditor to combine in one suit an action to recover a judgment upon his demand, and also to set aside a conveyance of land made by the debtor, on the ground that it was made in fraud of his rights as a creditor. Such a proceeding is sustained upon the ground that the remedy in equity would be more adequate, and the conveyance, unless set aside, would be a cloud upon the title, preventing the ultimate satisfaction of the judgment which might be obtained. The aid of the court is therefore invoked to remove the cloud caused by the alleged fraudulent conveyance as an obstruction to a fair sale in satisfaction of the judgment, rather than for the purpose of enforcing a lien on the land. But the vital question involved in this case, which was an action in trespass to try title, was whether the creditor, by filing such a blended action, thereby acquired a lien which would bind the property, so that, after judgment, a purchaser of the property at judicial sale would acquire priority over a purchaser at an execution sale under another judgment, pending the prior suit. And it was held that the equitable proceeding, to bind the property, must be based upon a lien; that is, that, while the fraudulent conveyance might be set aside before the creditor had acquired a lien, there must be a lien in order to bind the property as against judgment creditors who procure the property to be sold by execution *pendente lite*. So that, even in Texas, it would seem that the safer practice would be to proceed in the usual way to acquire a lien before invoking the aid of equity to set aside a fraudulent conveyance.

In Noyes v. Brown, 75 Tex. 458, 13 S. W. 36, it was held that, where a creditor had garnished a chose in action belonging to the debtor, equity would not aid him to enforce it, since, under the Texas statute, no lien is created by such proceeding.

A court of equity will not grant its aid by appointing a receiver in favor of mere general creditors whose rights rest only in contract, and are not reduced to judgment, and who have acquired no lien upon the property of the debtor. Cahn v. Johnson, 12 Tex. Civ. App. 304, 33 S. W. 1000.

In this class of cases, the equitable relief sought rests upon the fact that the execution has issued and a specific lien has been acquired upon property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a

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full price for the property, that the suit is brought. Jones v. Green, 1 Wall. 330, 17 L. ed. 553.

In Lazarus Jewelry Co. v. Steinhardt, 50 C. C. A. 393, 112 Fed. 614, the court said that an examination of the last-mentioned case showed that the judgments in question did not constitute liens. That it was obvious that, if the judgments had created liens, the court would not have held that it was necessary to show the issuance and levy of the execution.

In Schofield v. Ute Coal & Coke Co. 92 Fed. 269, the court said that there were opinions, indeed, in which it was pertinently said, as it was said in Jones v. Green, supra, that the right of a judgment creditor to come into equity rested upon the fact that an execution had been issued and a specific lien had been acquired upon the property of the debtor by its levy. This was a true statement where the lien which the creditor sought to enforce was acquired by such a levy, but no case had been called to the attention of the court in which it had been held that it was necessary to issue an execution and make a levy which would create no lien, before a suit could be maintained to remove a fraudulent obstruction to the enforcement of a lien already created without the levy.

In Robison v. Gumaer, 43 Colo. 310, 95 Pac. 935, it was said that an issuance of an execution and the return unsatisfied were not a sufficient exhaustion of the remedy at law to enable a creditor to come into equity to subject real estate standing in the name of the debtor's wife to the payment of plaintiff's judgment, the rule in Colorado being that, save in the Federal court, the judgment does not, in itself alone, constitute a lien upon the realty of the judgment debtor even in the county where it is rendered; but he is required to go a step further, and secure a specific lien upon the interest of the judgment debtor in the real estate by means of which he seeks satisfaction, and this he may do in at least three ways; *viz.*, by levy of an execution thereon in the manner provided by law, where the realty can be identified; by filing a transcript of the judgment in the office of the clerk and recorder of the county wherein the property is situated, and thus securing a statutory lien, which binds all interest in realty then owned or afterward acquired by the judgment debtor during the period of six years from the entry of the judgment; or by attachment of realty before judgment, and omission to merge the attachment lien through levy of execution or filing of the judgment transcript.

A creditor without a lien or right thereto upon chattels covered by a chattel mortgage, executed by his debtor, and in the absence of a judgment which might, by execution, be enforced against such chattels, cannot come into a court of equity to attack the mortgage on the ground that it lacks a statutory affidavit. Wolcott v. Ashenfelter, 5 N. M. 442, 8 L.R.A. 691, 23 Pac. 780.

But, in Schofield v. Ute Coal & Coke Co. supra, it was held that it is not necessary, in order to authorize a creditor to come into equity to remove a fraudulent obstruction to the enforcement of his lien on real estate, that he shall have acquired a specific lien fixed by the levy of an execution. A general statutory lien created by the filing of a transcript of a judgment is all that is required. The court said that, under the statutes of Colorado, and under those of many other states, the lien of the judgment attached to the real estate of the debtor when the judgment, or a transcript of it, was recorded or filed in the proper office in the county where the land was situated. The issue, levy, and return of the execution without the collection and payment of any part of the judgment neither increased nor diminished the force and efficacy of that lien.

And in Alnutt v. Leper, 48 Mo. 319, the court said that a specific judgment lien was not necessary in order to support a creditors' bill. In this case, the action was to reach real estate alleged to have been conveyed by the deceased debtor in his lifetime.

In Hunt v. Weiner, 39 Ark. 70, the court said that the general rule undoubtedly is that a court of chancery will not interfere in aid of the collection of a debt while a remedy at law exists. But there are exceptions as well established as the rule itself. One of these exceptions is the case of a creditor who has a lien for his debt; that is, for example, on real estate by judgment, or on personal property by suing out execution, and his debtor interposes a fraudulent encumbrance or transfer which obstructs and embarrasses the pursuit of the legal remedy, thus preventing a sale at a fair valuation. There equity will aid the legal right by removing the obstruction, and enabling the creditor to obtain a full price for his property.

But the fact that a conveyance of property sought to be set aside was made before the judgment became a lien upon the land does not stand in the way of equitable relief. Bennett v. Stout, 98 Ill. 47.

And, under the Iowa practice, judgment creditors whose debtor has made an assignment for the benefit of creditors are entitled to intervene in a mortgage foreclosure proceeding, and attack the validity of the mortgage, the mortgage being valid as to the assignee. They may do this, although their judgments are not liens upon the land which it is sought to foreclose, and they have not caused executions to be issued upon their judgments and returned *nulla bona*, since, when they obtained the judgments, they had a right to proceed in equity to establish a lien upon any property fraudulently conveyed by their debtor; and while a creditor may levy execution on property which a debtor has fraudulently conveyed, he is not obliged to do so, but may proceed in equity to have the property subjected to his judgment, as the relief sought does not conflict with any right of the assignee, and is not of a character which could be obtained through him. The right thereto is

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not in any manner affected by the assignment. Hitt v. Sterling-Goold Mfg. Co. 111 Iowa, 458, 82 N. W. 919.

Under statute 13 Eliz. chap. 5, to entitle a creditor to set aside a fraudulent conveyance by his debtor, it is not necessary that a creditor should have a lien or charging order on the property conveyed. Where, however, the creditor has no lien, he is not, in addition to such relief, also entitled to have the property applied in satisfaction of his claim. Reese River Silver Min. Co. v. Atwell, L. R. 7 Eq. 347.

A requirement that the creditor must have an interest in the property, or a lien created by contract, or by some distinct legal proceeding, is satisfied by the creditor's right of subrogation to the rights of a lienor. D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780.

As to necessity of lien, see also infra, III. b, 1 (b).

(2) Absence of lien; remedy at law.

The existence of a lien which is obstructed by the acts of the debtor, as has already been stated, is the foundation of equitable relief, where the property the creditor is after is subject to levy. There is an intimation in some of the cases that, in the absence of lien, the creditor may go into equity, provided he has exhausted his remedy at law. This is an unsound rule. It finds expression mostly in negligent remarks of the court in misapprehension of the reason for the rule as to the exhaustion of legal remedies. Even if the debtor has no other property and execution is returned unsatisfied, where the property sought to be reached is such that a lien may be acquired upon it, a lien must exist before a creditor may assert that his legal remedy is obstructed.

To entitle the judgment creditor to go into chancery to subject the equitable estate of his debtor to the satisfaction of the judgment, if he has no lien, he must exhaust his legal remedy; namely, cause execution to be issued and returned unsatisfied. Roper v. McCook, 7 Ala. 318.

A complainant must show either that he has acquired a lien on the property which is the subject of a creditors' bill to set aside a fraudulent conveyance, or that judgment has been rendered on which execution has been issued and returned *nulla bona*. Castle v. Bader, 23 Cal. 76.

Until a creditor in some manner obtains a lien on his debtor's property, or has exhausted his remedies at law, or has done what is equivalent thereto, he cannot question in equity a fraudulent conveyance or encumbrance of his property, made by such debtor, and have the same set aside. Goode v. Garrity, 75 Iowa, 713, 38 N. W. 150.

The issuance of an execution and its return *nulla bona*, in the absence of any lien, are necessary conditions precedent to equitable aid in behalf of the judgment creditor, if the facts do not bring his case within the statute as to fraudulent conveyances.

Kroger v. Roger Wheel Co. 1 Ky. L. Rep. 419.

Where it is sought to set a conveyance aside for fraud, and it does not appear that the creditor did or could obtain any specific lien upon the property by either a judgment or a levy under the execution, he must show that an execution was issued which had been returned unsatisfied at the time the suit was commenced. The creditor's right to relief depends upon his having exhausted his legal remedies, without being able to obtain satisfaction of the judgment. The issuing of an execution and its return unsatisfied are essential to his right to maintain the action. Hyde v. Chapman, 33 Wis. 391.

In Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317, it was said that the holder of a judgment which was not a lien, in order to set aside a fraudulent conveyance so that a lien might attach, must generally allege and show issue and unsatisfied return of an execution.

In Hyman v. Landry, 135 Wis. 598, 116 N. W. 236, it was said that, in the case of the existence of a fraudulent transfer of real estate, interfering with the collection of a judgment against the fraudulent grantor, the judgment creditor had two methods of obtaining relief: (a) By obtaining a lien upon the lands by levy under an execution issued upon the judgment, and then prosecuting an action in equity to remove the cloud upon such lien; (b) by exhausting the remedy at law to collect the judgment from leviable assets of the judgment debtor, if there be any, and then prosecuting an action in equity to annul the fraudulent transfer so far as to enable the judgment to attach to the land.

Failure of the complainant whose execution has been returned unsatisfied, and who is seeking to reach property of a corporation said to have been fraudulently conveyed, to allege that he has obtained a specific lien upon the property sought to be subjected to the satisfaction of his judgment, will not defeat the action. Klosterman v. Mason County C. R. Co. 8 Wash. 281, 36 Pac. 136. The court said that the complaint showed that the plaintiff had exhausted his legal remedies without avail, and that he was in a situation to perfect a lien on the property upon the removal of the alleged fraudulent deed, and that was all that was necessary to be set forth in a complaint in such action.

In Tarbell v. Millard 63 Mich. 250, 29 N. W. 722, it was held that, while a bill in aid of execution may be based upon the levy of the execution upon the real estate to which the bill relates, yet, as to personal property not levied upon, upon which property the complainant has no lien, a return of the execution unsatisfied is a necessary prerequisite to equitable relief.

Where, by statute, a judgment is not a lien upon land, and a complainant does not show that he has exhausted his remedies by an execution, or any reason why he did not enforce his judgment against his debtor,

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he cannot seek the aid of equity to set aside an alleged fraudulent conveyance of real estate by the debtor. Swayze v. Swayze, 9 N. J. Eq. 273.

But, in Spence v. Repass, 94 Va. 716, 27 S. E. 583, it was correctly held that the return of an execution unsatisfied was not sufficient to entitle a creditor to equitable aid to reach tangible personal property, in the absence of lien.

(3) Expiration of lien.

A creditors' bill to set aside a fraudulent conveyance of real estate cannot be maintained where the lien of the judgment has expired. Partee v. Mathews, 53 Miss. 140; Fleming v. Grafton, 54 Miss. 79.

Where the lien on the land has expired before the bringing of a suit, equity cannot be invoked to set aside a conveyance of the land, as against a debtor not shown to be insolvent. Smith v. Ellison, 80 Ark. 447, 97 S. W. 666.

The fact that the lien of a judgment had expired by reason of a period of more than ten years having elapsed since it was docketed, where no new lien upon the land had been acquired by the levy of an execution thereon, was held, in Evans v. Hill, 18 Hun, 464, to be fatal to the right of a judgment creditor to maintain a bill in equity to set aside a fraudulent conveyance of real estate by the debtor.

In Miller v. Melone, 11 Okla. 241, 56 L.R.A. 620, 67 Pac. 479, it was said that when it appeared from the record that a judgment had become dormant, or what was known in common parlance as "outlawed," so that an execution could not be legally issued thereon, it would not support a creditors' bill.

An action under the Ohio statutes to reach equitable assets of the debtor was held not maintainable where based on a dormant judgment. Simpson v. Hook, 6 Ohio C. C. 27.

In Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924, it was held that a judgment more than ten years old, with execution unsatisfied, would not support a bill to set aside fraudulent conveyances by the debtor. The court said that, under the statutes of Missouri, no scire facias could issue to revive it, and that execution could not be issued upon it. The creditor was then in the position of a general creditor, and it was held necessary for him to sue on his judgment and reissue execution.

In Mellier v. Bartlett, 106 Mo. 381, 17 S. W. 295, the court was asked to overrule the last-mentioned case, but it refused to do so. The court said it had seen nothing to change its views of the law in the case before it. When the plaintiff suffered the time within which his judgment could be revived by scire facias to elapse, his judgment became a mere cause of action. It lost many, if not all, the essentials that characterized the judgment. The court held that when he instituted suit on this judgment after ten years, the defendants had a right to a jury trial. They might have shown that the judgment was paid, and were entitled to a jury on that issue. They could also have put in issue the assignee's title to the judgment under an assignment.

In Kirkpatrick v. Means, 40 N. C. (5 Ired. Eq.) 220, it was held that a court of equity cannot interpose in behalf of a legal demand until a creditor has tried the legal remedies and they have proved ineffectual. It is necessary, therefore, that the creditor should, in all instances, have reduced his demand to judgment, and that he should further show that he issued an execution, and either that it was returned *nulla bona*, or that the debtor had not a legal title to any property, but only the equitable property, out of which satisfaction is sought in equity. For this reason it was held that where, after the return of an execution *nulla bona*, the debtor became entitled to a distributive share of an estate, this could not be reached where no reason was shown why the judgment could not have been revived and satisfaction obtained by execution.

In Scoville v. Shed, 36 Hun, 165, it was said that when a judgment debtor transfers to a fraudulent transferee the legal title of property subject to sale on execution, a judgment creditor may disregard the conveyance, sell the property while in the hands of the fraudulent transferee under an execution, and, if possession is withheld from the purchaser, he may establish the fraudulent transfer, and recover the property in ejectment or replevin. This was the common-law remedy which had existed since the statute 13 Eliz. chap. 5. Instead of resorting to this legal remedy, a judgment creditor may maintain an action to set aside the fraudulent conveyance in aid of his execution; but if, by lapse of time, or for any cause, a sale cannot be had under the execution, such an action cannot be maintained.

But, in Merry v. Fremon, 44 Mo. 518, where the object of the bill was to reach property the deceased debtor had had conveyed to a third person in trust for the debtor while she lived, and, after her death, for the use and benefit of her children, it was held that the fact that the lien on the judgment had expired was not fatal to the action, where the claim had been allowed in the probate court, and the estate was insolvent. The court said it was doubtless true that the creditor in this class of cases, before resorting to chancery, must first exhaust his legal remedies, whatever they might be. In doing so, he might create a lien upon the property sought to be subjected. The creation of such a lien was perhaps an ordinary incident to such preliminary proceeding at law. But the lien was the incident, and not the object, of the proceedings. It was not necessary that he should show the existence of a lien upon the property proposed to be charged, although such lien might ordinarily exist in such cases as an incident to the judgment. The lien of the judgment was created and

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But the general observations in the last-mentioned case, to the effect that a lien is not a necessary prerequisite to equitable jurisdiction to reach real estate, probably are intended to apply to cases in which it is impossible to obtain a lien. Wherever it is possible for the plaintiff to obtain a lien, a lien is necessary, because, in such cases, an adequate remedy at law is provided.

Where judgment has been rendered in an attachment action against real estate, the fact that the judgment has become dormant will not stand in the way of a creditor's action to set aside a fraudulent conveyance of the property, since the creditor is entitled to enforce a specific lien acquired by attachment. Coulson v. Saltsman, 71 Neb. 495, 98 N. W. 1055.

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(b) Acquirement of lien.

(1) In general.

It may be stated as a general rule that, except where judgment is of itself a lien on the debtor's property, as it is in the case of real estate in some jurisdictions, a lien must be acquired by execution before a creditor can get equitable relief against his debtor. An exception is, however, made in the case of attachment liens in some jurisdictions. See infra, III. b, 1 (c).

In Tappan v. Evans, 11 N. H. 311, the doctrine was said to be laid down that, where property is subject to execution, a creditor who seeks to have a fraudulent conveyance or obstruction to a levy or sale removed may file a bill in equity as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of execution. Stone v. Anderson, 26 N. H. 506.

Failure to sue out an execution is fatal to the maintenance of a creditors' bill to set aside an assignment for the benefit of creditors as fraudulent. Heacock v. Durand, 42 Ill. 230.

The preliminary step required of a creditor before equity will aid to enforce a judgment at law by compelling a discovery and account against the debtor, or against any third person who may have possessed himself of the debtor's property, or placed it beyond the reach of execution at law, is that the judgment creditor should have made an experiment at law, and bound the property by actually suing out execution. Hendricks v. Robinson, 2 Johns. Ch. 283.

In Bassett v. St. Albans Hotel Co. 47 Vt. 313, it was held that the levy of an execution was a necessary condition precedent to a bill in equity to set aside a fraudulent conveyance of property by the debtor. The theory of that case is that, if the sale and conveyance were fraudulent, as alleged, the creditor should and could have taken the property in satisfaction of the judgment, and the court could decree a sale and conveyance of so much of the property as he had taken void. Without a levy, it is said that a court of chancery could not have granted him any relief on the ground of fraud, without setting aside the entire sale and conveyance. The court said: "For aught that is alleged or shown, that sale and conveyance might have been valid between the parties thereto, and only void as to creditors of the defendant company. Hence, the orator should have seized upon and set off in satisfaction of his debt a specific portion of the property, so that the court of chancery could have decreed the sale and conveyance void as to that portion only, and have allowed them to stand good between the parties as to the remainder of the property."

Failure of the judgment creditors to sue out executions on judgments is not fatal to the maintenance of an action in equity to subject a debtor's property to the satisfaction of the judgments, where a statute makes the judgment itself a lien on the debtor's property, real or personal. Lazarus Jewelry Co. v. Steinhardt, 50 C. C. A. 393, 112 Fed. 614.

(2) As to real estate.

Where the action is to remove fraudulent encumbrances upon real estate, the question whether a judgment creditor ought to issue execution should be considered in the first place with reference to the establishment of the lien. The foundation for relief in this class of cases being the lien, if the judgment is by statute made a lien upon the land, then the issuance of execution is unnecessary, except in those jurisdictions which erroneously hold that the remedy at law must be exhausted before resort can be had to equity in any case, or in those jurisdictions where personal property is by statute made the primary fund for the satisfaction of the execution. In some instances the issuance of execution is required for the purpose of perfecting the lien on the land by levy. The lien being necessary in all cases, such steps must be taken to perfect it, of course, as are required in the

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he cannot seek the aid of equity to set aside an alleged fraudulent conveyance of real estate by the debtor. Swayze v. Swayze, 9 N. J. Eq. 273.

But, in Spence v. Repass, 94 Va. 716, 27 S. E. 583, it was correctly held that the return of an execution unsatisfied was not sufficient to entitle a creditor to equitable aid to reach tangible personal property, in the absence of lien.

(3) Expiration of lien.

A creditors' bill to set aside a fraudulent conveyance of real estate cannot be maintained where the lien of the judgment has expired. Partee v. Mathews, 53 Miss. 140; Fleming v. Grafton, 54 Miss. 79.

Where the lien on the land has expired before the bringing of a suit, equity cannot be invoked to set aside a conveyance of the land, as against a debtor not shown to be insolvent. Smith v. Ellison, 80 Ark. 447, 97 S. W. 666.

The fact that the lien of a judgment had expired by reason of a period of more than ten years having elapsed since it was docketed, where no new lien upon the land had been acquired by the levy of an execution thereon, was held, in Evans v. Hill, 18 Hun, 464, to be fatal to the right of a judgment creditor to maintain a bill in equity to set aside a fraudulent conveyance of real estate by the debtor.

In Miller v. Melone, 11 Okla. 241, 56 L.R.A. 620, 67 Pac. 479, it was said that when it appeared from the record that a judgment had become dormant, or what was known in common parlance as "outlawed," so that an execution could not be legally issued thereon, it would not support a creditors' bill.

An action under the Ohio statutes to reach equitable assets of the debtor was held not maintainable where based on a dormant judgment. Simpson v. Hook, 6 Ohio C. C. 27.

In Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924, it was held that a judgment more than ten years old, with execution unsatisfied, would not support a bill to set aside fraudulent conveyances by the debtor. The court said that, under the statutes of Missouri, no scire facias could issue to revive it, and that execution could not be issued upon it. The creditor was then in the position of a general creditor, and it was held necessary for him to sue on his judgment and reissue execution.

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jurisdiction in which the equitable action is brought. Whether the judgment should be first docketed depends upon whether the statutes require it to be docketed to establish the liens.

Where the property the creditor seeks to reach is real estate, the lien is established by judgment. Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786; Balls v. Balls, 69 Md. 388, 16 Atl. 18; Post v. Roach, 26 Fla. 442, 7 So. 854.

To enable a creditor to resort to equity, he must bring himself within the rule which requires that he must first obtain judgment at law if he wishes to proceed against real property. West v. M'Carty, 4 Blackf. 244.

In Greenwood v. Brodhead, 8 Barb. 595, the court said that a creditor must proceed to obtain a lien on the property before he can interfere to control it. If it were real estate, he would obtain the lien by judgment.

Prior to the enactment in 1849 of what came to be § 2 of chap. 133 of the West Virginia Code, a creditor could not resort to a court of equity to impeach a conveyance for fraud without having first reduced his demand to judgment. This made it a lien upon the debtor's real estate, and the fraudulent conveyance being an obstruction to the enforcement of the lien, equity interposed for the removal of the obstruction. Frye v. Miley, 54 W. Va. 324, 46 S. E. 135.

In Wylie v. Basil, 4 Md. Ch. 327, the court said that, prior to the act of 1835, chap. 380, the principle appeared to have been well established that a creditor could not claim the aid of a court of equity in following real estate fraudulently conveyed away by his debtor without first obtaining judgment at law. This step was deemed necessary in order to create a lien upon that description of property.

In Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460, the court said that when a creditor had, by a judgment, established his debt, by the statute he acquired a lien upon all the real estate of his debtor to satisfy his debt. If the debtor had fraudulently conveyed away, or encumbered, his real estate, so as to interpose an obstacle which embarrassed the creditor in appropriating it by legal process in satisfaction of his debt, then the creditor might file his bill to remove out of the way such fraudulent conveyance or encumbrance. It was not necessary for him to take out execution upon his judgment. The judgment constituted a lien upon the land, and there was no necessity of compelling the creditor, as a mere matter of form, to incur the further expense at law of issuing an execution. It was perhaps most advisable for him to do so. It might avoid a contest with a subsequent execution creditor; for, although the judgment was a lien upon the land, an execution upon a subsequent judgment would acquire, upon its delivery to the officer, by virtue of the statute, a prior lien upon the property. As between the debtor and creditor, however, the issuing of an execution was not necessary in order that the creditor might acquire a right to exhibit his bill for relief.

In Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599, it is held that a creditor need not cause an execution to issue and be levied upon the real estate before bringing an action to remove an obstruction which prevents a legal lien from operating upon the property, since the judgment is a lien upon the land.

In Vanderveer v. Stryker, 8 N. J. Eq. 175, it was held that the previous issuance of an execution was not necessary so far as the object of the bill in that case was to subject the debtor's equitable interest in real estate to the satisfaction of the creditor's judgment.

Where a debtor has interposed an inequitable obstacle to the collection of a debt, as by clouding the title to his real estate by an encumbrance or fraudulent transfer of it, a judgment creditor may proceed at once to have it removed. He obtains a lien on the land when he recovers judgment, and he has a right to stop there and proceed to have the title freed from its obscurity. The suit in that case is to aid his remedy at law, and he is not required even to issue an execution. Multnomah Street R. Co. v. Harris, 13 Or. 198, 9 Pac. 402.

The court will compel a discovery of real estate without the issuance of execution. Rose v. Lloyd, 1 Clark (Pa.) 333.

An action in the nature of a creditors' bill, brought to set aside certain conveyances of real estate as fraudulent, cannot be maintained, even if based on an equitable judgment in an action for a partnership accounting, where the judgment has not been docketed and execution issued. Geery v. Geery, 63 N. Y. 252.

Where no lien would exist unless execution were issued within a year from the rendition of the judgment, proof of the issuance of an execution within the year is indispensable to an action to set aside an alleged fraudulent conveyance of land. Weis v. Tiernan, 91 Ill. 27.

A bill to reach real estate cannot be maintained before any attempt has been made for the collection of the judgment at law by the issuance of an execution thereon. Jones v. Green, 1 Wall. 330, 17 L. ed. 553. This ruling rests upon the theory that the lien is acquired by levy.

In Postlewait v. Howes, 3 Iowa, 365, it was held that the fact that execution could not issue on the complainant's judgment until revived by scire facies would not prevent the judgment creditor from having his equitable remedy to subject property to the satisfaction of his judgments, where the judgments continued to be liens on the property. The court said there might have been no right to issue execution, but, for all other purposes, the judgments continued in full life and had legal existence. And it was proper to bear in mind that the jurisdiction in such cases was exercised not to aid legal process, but independent of, and without reference to, such process. The ob-

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ject was to remove an obstacle which it was alleged had been fraudulently interposed to prevent the collection of the judgments. As such creditors, they had the right to ask its removal, though, when removed, they should even be turned over to their proper independent legal remedy to obtain the process of law to make the sale.

A judgment creditor cannot maintain a bill to redeem a mortgage of a leasehold estate before he has taken out execution, because, until execution, the plaintiff has no lien on the leasehold estate. Shirley v. Watts, 3 Atk. 200.

In Maine, where a judgment does not create a lien upon the real estate of the debtor, the principle is established that the creditor should make a levy upon the real estate of his debtor if he would have the assistance of a court of equity to enable him to obtain satisfaction upon the estate itself, which has been fraudulently conveyed, and not from the proceeds of its sale. Webster v. Clark, 25 Me. 313.

To the same effect, also, is Dana v. Haskell, 41 Me. 25, wherein, in holding that a levy of execution was necessary because the judgment was not a lien, it was said that, before a court of equity would interfere in behalf of a creditor, he must show that he has an interest in the matter to which the bill relates.

In the last-mentioned case it was said that Hartshorn v. Eames, 31 Me. 93, was supposed to be in conflict, to some extent, with Webster v. Clark, supra, but the court said that, though the point that there had been no levy upon the land and no lien created which would give the plaintiffs an interest in the land was distinctly taken in Hartshorn v. Eames, and though, from some expressions used in the opinion, it might be inferred that the judge by whom it was drawn might not have deemed such interest in the land necessary to authorize the interposition of a court of equity, the case did not turn upon that point. It appeared that the legal title to the land was never in the defendant, and consequently a levy could not have been made upon the legal estate; and further, although a decree was entered that the defendant should pay the plaintiffs the amount of their debt, that decree was based upon considerations aside from the alleged fraudulent transfer of real estate.

In Webster v. Withey, 25 Me. 326, it was held that a bill to reach real estate alleged to have been conveyed to a third person to avoid the debtor's creditors, and for the purpose of being held in trust for him, could not be maintained, where the creditor had claimed no title to the estate by making a levy upon it, or by any conveyance from any person, and where his execution had not been placed in the hands of an officer.

Where the execution is returned unsatisfied, but no levy is made on the real estate, a bill to reach such property cannot be maintained since a levy is necessary to establish the lien. McKibben v. Barton, 1 Mich. 213.

To support a bill to reach real estate, a creditor must have perfected his claim by obtaining judgment, and levying upon the estate. Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54.

A creditor who has made a levy under an execution on the debtor's interest in real estate is in possession of such a lien as will authorize resort to equity to enjoin the transfer of the property, and to subject it to the payment of the debt. Sheafe v. Sheafe, 40 N. H. 516.

A creditor need not go further than to docket his judgment, to enable him to maintain an action to set aside a fraudulent conveyance of real estate. Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799.

A judgment creditor who has docketed his judgment in the county where the debtor resides, and upon which an execution has been issued and returned unsatisfied, need not docket the judgment in a different county before filing a bill to set aside a fraudulent conveyance of real estate, made by the debtor in the latter county, since, by the debtor's transfer of the property, he has parted with his interest in it, and therefore has no property in the county where the real estate is situated that could be reached by execution. Lanahan v. Caffrey, 40 App. Div. 124, 57 N. Y. Supp. 724.

An objection to an application for the appointment of a receiver in a creditors' bill is not good where the judgment is a lien because obtained before the passage of a statute requiring judgments to be docketed; and a revival of a judgment by scire facias does not render a second docketing necessary, so far as respects the original debt and costs. Clark v. Dakin, 2 Barb. Ch. 36.

It is not necessary that a creditors' bill show that judgment was docketed in a county where one of the debtors lived, where it appears that the execution was issued to the proper counties, and the requisite return was made and filed by the sheriff, and it does not appear that the defendants owned real estate anywhere. Millard v. Shaw, 4 How. Pr. 137.

In order that a judgment creditor be entitled to the aid of equity to secure payment of a judgment rendered in the supreme court, it is not essential for him to show that it was docketed in the county to which the execution was issued, since an execution on such a judgment may be directed to any county in the state. Youngs v. Morrison, 10 Paige, 325.

In Gilbert v. Stockman, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, it was held that where the fraudulent transfer of land was made before the judgment was docketed, a bill to set it aside could not be maintained, where no execution had been issued. This decision is based on the ground that, under a statute which makes a judgment, when docketed as required, a lien for a certain time on prop-

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erty which the debtor "may have at the time of docketing thereof," etc., judgments docketed subsequent to the transfers were not liens, and that, in the absence of a lien, the remedy at law must be exhausted. Two judges dissented, and Pinney, J., in an able opinion, maintained that such judgments constituted liens on land previously fraudulently transferred. This dissenting opinion is in accord with the weight of authority on the question.

The last-mentioned case was followed in French Lumbering Co. v. Theriault, 107 Wis. 627, 51 L.R.A. 910, 81 Am. St. Rep. 856, 83 N. W. 927, in which it was held that a judgment rendered and docketed after the fraudulent transfer of the debtor's real estate did not become a specific lien upon the property. It was said in the syllabus by Marshall, J., that, under such circumstances, "(a) a judgment creditor can obtain a specific lien on the real property of the judgment debtor by levy thereon under an execution issued on the judgment, and then equity will aid him to remove the impediment to an advantageous sale thereof and enforcement of the lien, created by the fraudulent transfer. (b) Equity will not aid a judgment creditor till he actually obtain a specific lien by attachment of the property under writ of attachment, or levy thereon under an execution, or he has exhausted all his legal remedies to collect his claim. The last condition mentioned being satisfied, equity will enforce the creditor's right to a lien on the property in an action to annul the fraudulent transfer of the property, so that the judgment may attach thereto. (c) If the fraudulent vendor die before a specific lien shall have been obtained on the property, the judgment cannot be enforced by execution . . . and a lien be thereby secured which equity will protect."

In Colorado, in order to entitle a creditor to the aid of equity to reach real property fraudulently taken in the name of another, in a different county from that in which the judgment was rendered, the creditor must have had a transcript of the judgment filed in the county where the land sought is located, since otherwise the judgment is not a lien on the property, and a lien is necessary to subject it to sale on execution through a creditors' bill. Barnes v. Beighly, 9 Colo. 475, 12 Pac. 906.

A creditor must sue out an elegit before he can go into equity to reach the equitable interest of his debtor in real estate. Neate v. Marlborough, 3 Myl. & C. 407. It was urged in this case that the issuance of the writ was unnecessary, because it was the judgment itself, and not the writ of elegit, which gave the lien upon the land. But the Lord Chancellor said, in reply to this, that it was not correct to say, according to the usual acceptation of the term, that the creditor obtained a lien by virtue of his judgment. What gave a judgment creditor a right against the estate was only the act of Parliament (13 Edw. 1, chap. 18). The act gave him, if he pleased, an option by the writ of elegit,—the very name implying that it was an option,—which, if exercised, entitled him to have a writ directed to the sheriff to put him in possession of a moiety of the lands. The effect of the proceeding under the writ was to give to the creditor a legal title which, if no impediment prevented him, he might enforce at law by ejectment. If there were a legal impediment, he then came into chancery, not to obtain a greater benefit than the law—that is, the act of Parliament—had given him, but to have the same benefit by the process of chancery which he would have had at common law if no legal impediment had intervened.

In Bennet v. Musgrove, 2 Ves. Sr. 52, the right of a creditor by elegit to set aside a fraudulent conveyance in equity was sustained.

In Manningham v. Bolingbroke, 2 Dick. 533, a creditor brought an action of debt and obtained a judgment, but, before he had sued out execution, the defendant conveyed his estate, to prevent the execution from having effect. A bill was then filed for discovery and relief. It was objected on demurrer that the plaintiff had not proceeded to an elegit, and was therefore premature. It was held that, the bill being to be relieved against fraud, the defendant must answer. This, however, is a very imperfect report of this case, as the writ of elegit was issued, but the demurrer went on the ground that there was no return of it.

But, in Taylor v. Spindle, 2 Gratt. 44, it was held that the issuance of an elegit is not a condition precedent to equitable relief.

The question has arisen whether an execution should be returned where the action is to reach real estate; but, since the lien is not preserved as to this class of property by keeping the execution outstanding, it is immaterial whether the writ be returned or not. For a consideration of this question with reference to personal property, see infra, III. b, 1 (b) (3).

In Kittel v. Augusta, T. & G. R. Co. 65 Fed. 859, the court said that when real property which would be subject to levy if it stood in the debtor's name had been fraudulently conveyed, it was necessary, in order to clear the title, to take out execution, but not to have the writ returned unsatisfied. In such case the creditor did not acquire a lien, strictly speaking, by the judgment alone, but, by virtue of the execution founded thereon, he acquired the right to obtain possession which was in the nature of a specific lien attached to, or an interest in, the property, or of a trust in his favor, by means of which he might remove the fraudulent or inequitable obstruction. As a levy in a suit at law would be unavailing, the ground of the equitable jurisdiction was merely to aid the legal right by removing the obstruction. In such a case the bill, coming in aid of the execution, enabled the creditor to obtain the full price for the property. When legal assets of the debtor had been fraudulently

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transferred, the foundation of the equitable jurisdiction was the specific right or equity in the property. This jurisdiction attached in cases of fraud in aid of the legal right. In such cases it was sufficient if the execution upon the judgment was either unsatisfied, or, after action brought in its aid, that it was outstanding.

An outstanding execution is not necessary to enable judgment creditors to maintain an action to set aside a fraudulent assignment by the debtor of a leasehold interest in land, and the fact that the execution has been returned unsatisfied before the commencement of the action will not therefore defeat it. Haswell v. Lincks, 87 N. Y. 637.

A judgment creditor, even after the return of an execution unsatisfied, may maintain an action to set aside a fraudulent conveyance of, or encumbrance upon, the real estate of the debtor, or an interest therein, since it is not necessary that an execution should be outstanding to create or preserve a specific lien upon the land, as it is in the case of personal property, because the lien necessary to support the action is effected by the docketing of the judgment. Buswell v. Lincks, 8 Daly, 518.

In Royer Wheel Co. v. Fielding, 31 Hun, 274, it was said that it would be sacrificing substance to mere form if it should be held that the return of an execution during the pendency of the suit would deprive the creditor of the right to continue its prosecution as to the debtor's real estate when a further execution could be immediately issued to render the judgment effectual in case it resulted in setting aside the alleged illegal disposition of such property. This case was reversed on another point in 101 N. Y. 504, 5 N. E. 431.

Whether an execution was issued and returned unsatisfied is immaterial where the action is to set aside a fraudulent transfer of property upon which the judgment is, by statute, a specific lien. Cornell v. Radway, 22 Wis. 260.

(3) As to personalty.

A lien must be obtained on personal property by execution on the judgment. Balls v. Balls, 69 Md. 388, 16 Atl. 18; Post v. Roach, 26 Fla. 442, 7 So. 854; West v. M'Carty, 4 Blackf. 244.

To bind personal property, the execution must be delivered to the sheriff. Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786; Bishop v. Halsey, 3 Abb. Pr. 400; Mutual Assur. Soc. v. Stanard, 4 Munf. 539.

Prior to the act of 1855, chap. 380, the issuance of a fieri facias was necessary to the establishment of a lien on personal property. Wylie v. Basil, 4 Md. Ch. 327.

Prior to the act of 1849, when the property fraudulently conveyed and sought to be subjected was personal property, a creditor was required not only to obtain a judgment, but also to take out execution and have it levied or returned, so as to show that he had exhausted all legal remedies. Frye v. Miley, 54 W. Va. 324, 48 S. E. 135.

If personal property liable to execution is pursued, the lien must be acquired by levy under such process. Greenwood v. Brodhead, 8 Barb. 595.

In Angell v. Draper, 1 Vern. 399, it was held that a bill for an accounting and a discovering of debtor's goods in the hands of a third person could not be maintained where the creditor failed to sue out execution before he brought his bill.

In Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460, the court said that, if it was the personal property of the debtor which the creditor wished to reach and appropriate to the payment of his judgment, he must take out an execution upon his judgment before he could exhibit his bill; for it was by the execution, and not by his judgment, that he acquired a lien upon the personal property.

Where, until execution, no lien could be acquired on the property sought to be reached by the creditor, it was held that a bill in equity could not be maintained, where no execution had been issued. Clark v. Banner, 21 N. C. (1 Dev. & B. Eq.) 608.

An execution is necessary in order to create a lien on personal property of the debtor, to entitle the execution creditor to the aid of equity to interfere by an injunction to prevent the sale of the debtor's goods on a chattel mortgage alleged to be fraudulent. Glorieux v. Schwartz, 53 N. J. Eq. 231, 28 Atl. 470, 1134.

A cause of action for conversion in favor of a debtor, if considered as property, must be proceeded against by execution by the creditor before he can maintain a creditors' bill under a statute making all forms of property, real and personal, subject to levy. Raymond v. Blancgrass, 36 Mont. 449, 15 L.R.A.(N.S.) 976, 92 Pac. 648.

Relief will not be granted against the chattels of a debtor where the plaintiffs, when they file their bill, are simple-contract creditors of the defendant upon the promissory note which they are prosecuting at law, and when the only additional fact that appears in the case is that, since the filing of the bill, they have entered judgment upon their note, since one who seeks aid with respect to personal estate must show an execution giving him a legal preference or lien upon the chattels, and must have pursued it to every available extent. Brinkerhoff v. Brown, 4 Johns. Ch. 671. The court said that equity did not, as of course, assume jurisdiction in taking executions upon judgments at law into its own hands. Such power would be oppressive to the debtor and to the court. The presumption was that the court which rendered judgment was competent to enforce it; and it was only in special cases in which property could not be found to satisfy it that equity interfered to discover and reach property, but the legal remedy by execution must first be tried.

In Hendricks v. Robinson, 2 Johns. Ch. 283, the court said that the suing out of an execution is not, perhaps, sufficient of itself, and without some further act, to

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stop the alienation of even a legal interest, or of the goods and chattels of the debtor for a valuable consideration to a stranger to the execution. A seizure, a taking into possession, an inventory, or some other act amounting to what is understood by an actual levying of the execution, is requisite to create a bar to the subsequent bona fide sale, the words of the statute being that no execution "shall bind the property of the goods but from the delivery to the sheriff; and it does not appear to have fixed upon that period as absolutely binding the goods under all circumstances, but only that the lien shall not be carried further back than that period."

In Spence v. Repass, 94 Va. 716, 27 S. E. 583, it was said that a lien on tangible personal property by a levy thereon must first be obtained before the aid of equity can successfully be invoked to set aside a fraudulent conveyance of it by the debtor.

The fact that an actual levy has not been made on an execution will not prevent a judgment creditor from setting aside a chattel mortgage of the debtor's property on the ground that it was not filed in the proper office, since an execution delivered to the sheriff, without actual levy, creates a lien on all the judgment debtor's personal property within the county from the time of its delivery. Stewart v. Beale, 7 Hun, 413, affirmed in 68 N. Y. 629.

Outstanding execution.

The question whether an execution against personal property should be kept outstanding, or whether it should be returned before starting the equitable action, is merely one of keeping the lien alive. The action being to remove encumbrances in the way of the creditor's lien, the lien must, of course, subsist at the time the action is brought; hence, the rule that the execution should be kept outstanding. The notion that the execution should be returned evidently arises from the erroneous idea that the remedy at law must be exhausted before a resort to equity can be had in any case. See supra, II., and infra, IV. b, 1 (d).

In McElwain v. Willis, 9 Wend. 548, Nelson, J., said that there is a class of cases in which the aid of chancery may be invoked in behalf of the judgment creditor in the collection of his debt, to remove some fraudulent or inequitable obstruction interposed by the defendant to the collection of the judgment, independently of which the remedy would be ample at law. In such cases, the property out of which the judgment creditor is seeking to satisfy his debt must be subject to the judgment, if real, and to execution, if personal, property. The jurisdiction of the court rests upon the right or title of the complainant to the property in question, acquired by the proceeding at law upon the judgment or execution, and consequently the return of the latter by the officer is not only not essential, but would be fatal to the relief.

In Buswell v. Lincks, 8 Daly, 518, Daly, J., said that the remark of Judge Nelson in the last-mentioned case, to the effect that the return of the execution is not only not essential, but would be fatal to the relief, applies where the fraudulent conveyance is an obstruction to enforcing the execution by levy and sale of personal property. To that extent it is correct, and was properly applied in that case, the obstruction there being an assignment for the benefit of creditors.

In the last-mentioned case, Daly, J., said that the equitable aid of the court to set aside a fraudulent conveyance is given where the one invoking it has a lien upon the property which is obstructed by the conveyance. In the case of personal property, a judgment creditor acquires, by the issuing of an execution, a lien upon the personal property of the debtor, as against a fraudulent conveyance, and the aid of the court is given in that case to remove the obstruction in the way of the execution, which cannot be done if the execution has been returned, or the lien under it is at an end.

An action by attachment creditors to set aside a fraudulent transfer of the debtor's property may be had where the creditors have recovered judgment and issued an execution, although the execution has not been returned. Heye v. Bolles, 33 How. Pr. 266. The court said that, by issuing the attachment, the plaintiffs acquired a lien upon the property of the debtor. And this lien, after the plaintiffs had recovered judgment, entitled them to the equitable intervention of the court to set aside a fraudulent transfer of the property upon which the lien had attached, or any fraudulent obstacle in the way of enforcing the lien, it being the design of the Code that the attachment should be a security for the satisfaction of the judgment, if the plaintiff recovered one. To maintain such an action it was not necessary that the execution should be returned, for it was not only not essential, but it would be fatal, to the relief sought, and the execution might be the very instrument by which, when the court had removed the impediment to its operation, the judgment creditor would obtain the perfect satisfaction of his rights.

An execution levied on personal property should be outstanding in order to authorize a bill in aid of execution. A bill will therefore not lie where the officer has, by his return, placed the writ beyond his control. Studley v. Ann Arbor Sav. Bank, 112 Mich. 181, 70 N. W. 426.

It is not a condition precedent to equitable aid to set aside a fraudulent assignment of the debtor's goods that the execution shall have been returned *nulla bona*, since a return of the execution might defeat the purpose of a suit by extinguishing the lien. Hunt v. Weiner, 39 Ark. 70.

But, in Wilcox v. Payne, 28 N. Y. S. R. 712, 8 N. Y. Supp. 407, in holding that, under the New York Code authorizing judgment creditors, after return of the execution, to maintain an action against debtors

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and any other person to compel the discovery of anything in action or other property belonging to the judgment debtors, or any money, thing in action, or property due them, or held in trust for them, and to prevent the transfer thereof or the payment or delivery thereof to any other person, an action may be maintained to set aside a fraudulent assignment for the benefit of creditors, standing in the way of an execution held by the sheriff for the collection of the judgment, although the execution has been returned unsatisfied, the court said that judgment creditors have two remedies: One, to set aside unlawful or fraudulent transfers standing in the way of an execution issued to and held by the sheriff. To maintain such an action it is indispensable that the execution be held by the sheriff at the time of the commencement of the action. The other is a proceeding under the Code, after an execution has been returned unsatisfied. In such case, where tangible property cannot be found, judgment creditors are entitled to maintain a bill in equity in the form brought in the case at bar, to reach any property belonging to the debtors which they may be able, under the order of the court, to appropriate, through the instrumentality of a receiver, to the payment of their judgment.

The Code proceeding referred to is that authorizing the creditor to pursue property not subject to execution. The remark that execution should be held by the sheriff at the commencement of the action is applicable, as has been seen, only to actions to reach personal property subject to execution.

In Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965, on a bill in equity to set aside chattel mortgages on personalty as fraudulent, it was held that it was not fatal to the right to maintain the bill that the execution had been returned, where jurisdiction was properly taken to reach moneys and choses of action of the defendant. The court said, however, that the more usual course was to issue and deliver an execution to the sheriff, and then to bring an action in its aid.

The return of execution *nulla bona* is not a condition precedent to an action in aid of execution to reach tangible property of the debtor. Paulson v. Ward, 4 N. D. 100, 58 N. W. 792. The court said that, in such an action, it was neither necessary nor proper to show a return *nulla bona*. The execution should remain outstanding, particularly where the property was personalty, whereon a lien existed only by virtue of the levy, and it could do no harm and was the better practice in any case. The action was not strictly a creditors' bill. That action was intended to discover assets, and to reach equitable and intangible estates and interests that could not be reached by the common-law process, and also to set aside fraudulent conveyances. The action in aid of legal process, while closely allied to the creditors' bill proper, was yet clearly distinct. It was never employed to discover assets or to reach intangible assets. It could be employed only where there were tangible assets, in their nature subject to execution, and upon which the plaintiff had obtained a specific lien. Where the lien depended upon the levy of execution, a return of the execution would, of course, destroy the lien; hence, it was generally said in these cases that execution must remain outstanding.

In Fecheimer v. Hollander, 6 Mackey, 512, 1 L.R.A. 368, a bill to set aside an alleged fraudulent assignment by the debtor for the benefit of creditors was held maintainable although there had been a return of an execution *nulla bona*.

As to outstanding executions, see also Del Valle v. Hyland, 40 N. Y. S. R. 924, 15 N. Y. Supp. 901, infra, III. b, 2.

(c) Rule as to attachment and garnishment liens.

The purpose of actions to reach real and personal estate which the debtor has endeavored to put beyond the reach of judgment or execution lien creditors being to clear away the cloud upon the latter's title, so that they may sell the property at greater advantage than they otherwise could if the legal title remained in a third person, the question has arisen whether an attachment lien is a sufficient title for the purpose. It will be observed that the reason applying in the case of judgment or execution lien creditors for clearing away the fraudulent obstructions does not exist in the case of attachment lien creditors. The latter are not in a position to sell the attached property, and are therefore hardly yet ready to complain that their title to it is clouded. The great objection to relief in aid of the attachment lien is that the claim is not yet established by judgment; that it may never be; in which case, useless litigation would be incurred. Where the claim has been reduced to judgment, however, it would seem that the subsequent steps at law, taken for the purpose of establishing a lien, could be dispensed with, as here a lien has already been fixed by attachment. The authorities on attachment liens as conditions precedent to equitable relief are, however, in conflict.

The objection to equitable jurisdiction in aid of attachment is well stated by Judge Brewer in Tennent v. Battey, 18 Kan. 324, in which it was held that the mere suing out of an attachment and causing it to be levied did not create such a lien as would support a creditors' action to set aside an alleged fraudulent assignment. In giving the opinion of the court, he said that, while an attachment was doubtless a specific lien, it was a lien of very uncertain tenure. It was subject to defeat by the dissolution of the attachment, on motion, or a judgment in favor of the defendants on the merits of the claim. The grounds for attachment given by the Kansas statute were many. Some of them implied no wrong on the part of the defendant. Suits in attachment were common. Motions to dissolve

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came in almost every case; and the experience of every practitioner would testify that a large percentage of attachments issued and levied finally failed. Attachment liens did not in Kansas, as in some states, require a judicial order for their creation. The mere affidavit of a creditor was sufficient, and that affidavit, too, alleging only in general terms the existence of one of the statutory grounds for attachment. Hence, while it was a specific lien, it was a lien for a very uncertain claim. It was also said that it would be no advantage to the creditor in the maintenance of the action save in the mere matter of time, and that to allow it would often occupy the time and attention of the court with useless litigation.

In Scales v. Scott, 13 Cal. 76, a bill to set aside a judgment alleged to have been fraudulently confessed was held maintainable by an attachment creditor, although he had obtained neither judgment nor execution.

And in Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605, an attaching creditor was held to have a sufficient lien on the goods attached to authorize him to intervene in a creditors' bill brought by other creditors to determine the right of priority between partnership and individual creditors, and which affects the disposition of the goods attached.

But, in Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669, in holding that an attachment of real estate fraudulently conveyed did not form a sufficient basis for a resort to equity by the attaching creditor to have the fraudulent conveyance set aside, it was said that "the claim of the creditor should be certain before he can concern himself with the debtor's frauds, and it cannot be made certain except by judgment. A claim that is merely asserted ought not to be sufficient. It may be conceded that an officer has the right to defend his possession of the attached property, and often the defendant's acts may be inquired into; but it does not seem to follow that, because an officer may do this, the plaintiff may prosecute an independent action, not to preserve the possession, but to clear up the title. When the claim has become certain, he may inquire into the title. Possession may be preserved to preserve the attachment lien, but nothing more is necessary until the claim is made certain. . . . Plaintiff has no right under his attachment beyond that of using such measures as may be necessary to preserve his security until he can reduce his claim to judgment; the attachment is but a provisional remedy, that can avail nothing beyond fixing a lien on the property pending the inquiry into the merits of the claim."

And in McMinn v. Whelan, 27 Cal. 300, it was held that a lien by attachment upon premises cannot be rendered effectual for the purpose of impeaching a conveyance thereon until judgment is obtained.

A fraudulent conveyance of land cannot be said to obstruct the enforcement by legal process of a creditor's right to take property affected by the transfer, within the meaning of a statute providing that a creditor can avoid the act or obligation of his debtor for fraud under such circumstances, where the creditor has acquired only an attachment lien, and has not yet proceeded to judgment. Aigeltinger v. Einstein, supra.

Simple-contract creditors of a corporation, claiming no title or interest in or lien upon the property of the corporation, save by attachment, cannot, in the absence of special equities, ask a court of chancery to interfere and take charge of its property, oust its officers of its management, control, and direction, place the same in the hands of a receiver to be sold, to await the decree upon their claims when established by judgment or decree, and that of other creditors. Dodge v. Pyrolusite Manganese Co. 69 Ga. 665.

The fact that a mere contract creditor has commenced an attachment suit upon his claim and caused an attachment writ therein issued to be levied upon a stock of merchandise belonging to the debtor, subject to executions of certain judgment creditors, does not authorize him to resort to a court of equity to enforce his demand. Detroit Copper & Brass Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751.

By commencing an attachment suit and the service of garnishee process the attaching creditor does not acquire such a lien upon property in the hands of the garnishee as will authorize a court of equity to interpose its restraining power to prevent him from disposing of it before a judgment and execution are had in the proceeding at law, where the statute has not in terms made such service a lien upon the effects of the debtor in the hands of the garnishee. Bigelow v. Andress, 31 Ill. 322.

In Clark v. Raymond, 84 Iowa, 251, 50 N. W. 1068, it was held that a creditor could not maintain a bill in the nature of a creditors' bill for the appointment of a receiver to have the lands levied upon, which had been fraudulently conveyed, and the rents, issues, and profits thereof, subjected to the payment of the judgment in an action at law when it was recovered. But this decision was based on the theory that the attachment of this real estate, as the property of the debtor, created no lien as against him, because he had no legal interest whatever in the property. The court adds: "If the attachment suit were to proceed to judgment against him, and a sale of the property had, on special execution, the sale and deed would convey no title. It would be necessary to resort to a creditors' bill to set aside the conveyances to his son, and the subsequent conveyance by his son to his daughter."

An attachment lien is only inchoate, and must be perfected by judgment before resort can be had to equity. Morton v. Graffin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

In Martin v. Michael, 23 Mo. 50, 66 Am. Dec. 656, an attaching creditor was held to stand in no better position than one who sues by the ordinary process of the court, with respect to his right to equitable aid

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to annul fraudulent judgments, and that he therefore was not entitled to such relief before judgment at law.

After the decision of the court in the last-mentioned case, a change was made in the law by the act of January 14, 1860, which has continued in force ever since, and is now found in § 448, Rev. Stat., whereby any attaching creditor may maintain an action for the purpose of setting aside any fraudulent conveyance, assignment, charge, lien, or encumbrance of or upon any property attached in any action instituted by him. Fisher v. Tallman, 74 Mo. 39.

But, in the absence of statute, an attachment creditor cannot maintain an action to redeem land covered by his attachment from a mortgage executed by the debtor, since an ordinary creditor before judgment and execution has no certain claim upon the property of his debtor, and has no concern with conveyances of any kind affecting such property. Ibid.

In Weil v. Lankins, 3 Neb. 384, it was held that the fact that the creditor had a lien by attachment would not enable him to maintain a creditors' bill in the absence of a judgment.

Before obtaining judgment on his demand, an attachment creditor cannot maintain an action in the nature of a creditors' bill to have an alleged fraudulent conveyance of real estate set aside. Weinland v. Cochran, 9 Neb. 482, 4 N. W. 67.

But, where the attachment action has proceeded to judgment, it is different. In First Nat. Bank v. Hollerin, 31 Neb. 558, 48 N. W. 392, it was held that where real estate of the debtor has been attached, and the action has proceeded to judgment, and an order of sale has been made, a creditor may proceed to set aside a fraudulent conveyance of the property.

An action may be maintained to subject real estate to the lien of an attachment and to the satisfaction of a judgment obtained thereon, although no execution has been issued on such judgment before the commencement of the proceedings. Grandin v. First Nat. Bank, 70 Neb. 730, 98 N. W. 70.

Where real estate has been attached and judgment has been rendered in the attachment action, a creditor may come into equity to set aside a fraudulent conveyance thereof, although no execution has been issued on the judgment. Coulson v. Saltsman, 71 Neb. 495, 98 N. W. 1055.

The doctrine was enunciated in Talbott v. Randall, 3 N. M. 367, 5 Pac. 533, that the jurisdiction of equity to interfere by injunction with an alleged fraudulent conveyance of real estate could only be invoked in behalf of creditors who had established their claims by a judgment in a court of law, and would not be exercised on behalf of mere contract creditors, or creditors at large, whose claims were not reduced to judgment. The court said that this rule could not be avoided by suing out an attachment, since a creditor, by such a proceeding, did not establish his debt; that he only differed from other general creditors in that the law, for special reasons named in the suit, lent to him the auxiliary aid of a writ of attachment, but such a proceeding did not establish the debt, nor did it tend to establish the debt any more than did the ordinary sworn complaint of the plaintiff in an action at law tend to establish the debt for which the action was brought.

A lien obtained by attachment by a creditor whose claim was not reduced to judgment was held, in Artman v. Giles, 155 Pa. 409, 26 Atl. 668, insufficient to support a bill to prevent a creditor from proceeding at law to obtain satisfaction of his judgment.

Where a garnishment proceeding is begun under statutes which, like the Michigan statutes, had not contemplated the enforcement of a lien, but simply the application of the plaintiff's demand, when that is established, or, alternatively and contingently, the personal liability of the garnishee, the creditor does not acquire thereby a position which will entitle him to the aid of equity to reach alleged fraudulent conveyances made by the corporation. Childs v. N. B. Carlstein Co. 76 Fed. 86. The court said that even if it were conceded that the statutory proceeding, by the analogy of its effect upon the property of the debtor to that of a statutory or contract lien, appropriated the property to the use of the creditor *sub modo*, this would not avail the complainants, who sought to make it the foundation of equity jurisdiction, since the very completeness and amplitude was the strongest possible denial of complainant's right to supplement this proceeding by a concurrent suit in equity.

In New York the decisions are conflicting. In Falconer v. Freeman, 4 Sandf. Ch. 565, it was held that the fact that the complainants were mere creditors at large would not prevent them from maintaining a creditors' bill where their remedy under the attachment pursuant to the statute against nonresident debtors was obstructed by alleged fraudulent transfers. The court said that it was as valid and effectual a lien in favor of all creditors as was made in favor of the plaintiff at law by issuing an execution which he was prevented by some fraud of his debtor from levying on movable property, and the court perceived no reason in principle why equity should not interfere to aid the enforcement of the lien under the attachment for the benefit of all the creditors, without preference, as it constantly did to aid the execution creditor in maintaining his priority over all others.

An action to set aside the fraudulent transfer of a debtor's property may be maintained when the creditor has acquired a lien on the property of the debtor by attachment, and has recovered judgment in the attachment action. Heye v. Bolles, 2 Daly, 231.

In Greenleaf v. Mumford, 19 Abb. Pr. 469, 30 How. Pr. 30, the court considered that it was not an open question whether, when an attachment was issued under the Code of Procedure, the plaintiff in the action obtained such a lien on the property

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attached as would entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacle in the way of the realization of the lien in case the plaintiff should recover a judgment. It was held that the attachment entitled the plaintiff to proceed in equity.

In Mechanics' & T. Bank v. Dakin, 51 N. Y. 519, the plaintiff commenced an action on a promissory note against a nonresident, and attached the defendant's debt secured by a bond and mortgage. A judgment was obtained in the suit, and an execution was issued, but was not returned. After the giving of the note, but before the commencement of the suit, the bond and mortgage were assigned, and then the creditor's action to set aside the assignment as fraudulent was begun. It was urged that the execution should have been returned unsatisfied. It was held that the attachment created a lien, and that the creditor's action would lie. The court said that, while the proceeding was not technically what is called a creditors' bill, requiring a previous return of the execution unsatisfied, and asking for a general appropriation of the debtor's equitable assets for the payment of the debt, nor yet a bill in aid of the execution simply, where a levy had been made upon property liable to seizure and sale upon execution, it came within the range of well-settled principles. It was an action to enforce a specific lien. The plaintiff had a specific lien upon the mortgage in question. He had perfected his lien by a judgment settling the question of liability and the amount. He had issued an execution which would authorize the application of the mortgage to the payment of his debt but for the assignment. The court thought that the request that the assignment be declared in fraud of creditors was well made, and equity required it to be granted.

The last-mentioned case, however, was rendered by the court of appeals commission, and was argued prior to the decision in Thurber v. Blanck, 50 N. Y. 80, a similar case decided by the court of appeals, the court in the latter case reaching the opposite conclusion on different grounds. In the Thurber Case it was held that debts and choses in action were to be regarded as legal assets under the attachment laws whenever that process acted directly upon the legal title, but that, whenever they were so situated as to require the exercise of the equitable powers of the court to place them in that situation, they must be treated as they always had been, as equitable assets only; and therefore that, after the title was in a third person, they could not be attached. It was also held that the provisions of the Code with reference to attachment constituted a complete system for the collection of debts in the cases and manner therein specified. And the court said that the mode therein provided must be pursued, and that, unless property was so situated as to be attachable and convertible according to those provisions, it could not be attached at all. It was not competent to institute another action to make a proper case for issuing an attachment, or to place property in a situation to be subject to this process.

In other words, this is not a decision that an attachment lien may not be enforced in equity; but that, as to choses in action that have been fraudulently transferred, the remedy at law must be exhausted; that the action cannot be maintained in aid of the attachment, as the choses in action so situated cannot be attached.

In People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 20 L.R.A. 446, 32 N. E. 775, the court said that the impression seemed to have prevailed that there was an irreconcilable conflict between Thurber v. Blanck and Mechanics' & T. Bank v. Dakin, supra. In the Thurber Case the court was dealing with an attempt on the part of the attaching creditor to reach equitable assets, while, in the Dakin Case, the attaching creditor had, by the recovery of judgment and the issue of execution, acquired the right to have the attached property applied to the satisfaction of the execution; but, in the assertion of this right, he found the way obstructed by the interposition of a conveyance of the property by his debtor which was apparently valid, but which was in fact void.

In the Cauffman Case, it was held that an attaching creditor has the right to come into a court of equity to prevent the application of the attached property to the payment of prior liens created by the mortgage of an insolvent debtor's real property, and by the confession of alleged fraudulent judgments, and issuance of executions thereon, and a levy upon tangible property of the debtor. The court said that it must be apparent that, unless such a right existed, the remedy by attachment would be lost in many cases. The sheriff must sell the property under the prior executions, and apply the proceeds to their payment, and the plaintiff would be in no better condition than if his attachment had not been issued. It would seem to be illogical to accord to the plaintiff the right to attach property fraudulently transferred, and yet to deny him the right to have the lien preserved until he could merge his claim in a judgment, and issue final process for its collection. The court said the case would be different if executions had not been issued upon the fraudulent judgments. That the mere existence of a fraudulent transfer would not be sufficient to authorize a court of equity to entertain an action at the suit of an attaching creditor to set it aside, but that, when it was sought to make use of such a transfer for the purpose of removing the attached property from the jurisdiction of the officer who had it in his custody, it was found that nothing but the equitable arm of the court could prevent the consummation of the wrong.

In Whitney v. Davis, 148 N. Y. 256, 42 N. E. 661, the court said that all the Cauffman Case decided was that special circum-

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stances might exist, and, if shown to exist, that they would authorize the granting of relief at the instance of an attaching creditor, though prior to judgment and execution, in order to preserve the debtor's property in a condition where a recovery by the attaching creditor could be made effective. It was not intended to hold that an equitable action was within the power of the attaching creditor to maintain ordinarily prior to judgment and execution, nor to introduce any innovation upon the settled rule. It was considered, however, that, where the debtor's property was about to be transferred beyond the reach of the sheriff in whose hands it was, a case was presented where the court might properly extend its equitable arm and stay the threatened transfer. It was held that the fraudulent transfer of real estate in the state by one nonresident to another, so as to prevent a levy of an attachment, was not such a circumstance as would authorize, on general equity powers, independent of statute, an action by an attachment creditor, suing on a money demand, to set aside such transfers, before he had established his claim against the debtor.

In Hart v. A. L. Clarke & Co. 127 App. Div. 679, 111 N. Y. Supp. 886, affirmed 194 N. Y. 403, 87 N. E. 808, it was held that an attaching creditor could not, independent of statute, maintain a bill in equity to bring under the lien of his attachment personal property alleged to have been transferred by his debtor to a third person, which was not in possession of the sheriff, and which was not subject to attachment by the sheriff as property capable of manual delivery. The court said that the Cauffman Case and the Whitney Case, supra, must be read together, and, when thus read, they were not in conflict. That the Cauffman Case had been followed only in those cases where the property which the plaintiff sought to bring under the lien of his attachment was capable of manual delivery to the sheriff by reason of the warrant of attachment under subdivision 2 of § 649 of the Code of Civil Procedure, and actually in his possession under executions alleged to have been issued on judgments fraudulent as against the plaintiff.

In Hart v. A. L. Clarke & Co. supra, it was held that an attachment on property capable of manual delivery will not authorize an action to set aside a transfer of it, where it is claimed by a third person, and the statute provides that the plaintiff, by giving an undertaking, may compel the sheriff to retain it until the rights of the parties can be determined in the ordinary way.

In Bates v. Plonsky, 28 Hun, 112, it was said that if the property sought under attachment is of a tangible nature, such as the debtor's stock in trade of boots, shoes, and fixtures, the creditor may maintain an action to secure the priority of his rights under the attachment over an assignment executed by the debtor for the benefit of his creditors, and over other executions issued upon judgments confessed by him in favor of other defendants.

And an action to enjoin a sheriff and fraudulent transferees and fraudulent judgment creditors under confessed judgments from disposing of certain proceeds of a certain judgment until the plaintiffs, as attaching creditors, could obtain judgment on their claims, was held maintainable where the attachments had been levied on tangible property. Tannenbaum v. Rosswog, 22 Abb. N. C. 354, 6 N. Y. Supp. 578. To the same effect, Keller v. Payne, 22 Abb. N. C. 352, note, 1 N. Y. Supp. 148.

But, in Bowe v. Arnold, 31 Hun, 256, affirmed without opinion in 101 N. Y. 652, it was held that creditors, by seizing property claimed to be that of the debtors, could not, by force of their seizure alone, maintain, under the attachment statutes, an action to set aside an alleged fraudulent disposition previously made of it by the debtors. It was said that, to authorize the creditors to maintain such an action, it was necessary under the Code (§ 1871) that they should first recover judgment and cause an execution to be issued thereon and returned unsatisfied.

In the last-mentioned case it was said that it was not intended to be held in Bates v. Plonsky, supra, that creditors seizing property claimed to be that of the debtors could, by force of their seizure alone, maintain an action to set aside an alleged fraudulent disposition made of it by the debtors. All that was held was that the plaintiffs were entitled to enjoin the disposition of the proceeds until the action could be tried for the purpose of determining the conflicting rights of the different parties to such proceeds; and whether the action could be maintained was not a point before the court at that time for determination. All that was then presented and decided was that there was sufficient to enjoin the disposition of the proceeds until a final hearing and determination could be had.

In Mills v. Block, 30 Barb. 552, it was held that a levy under attachment does not give the attachment creditor such a lien as will authorize him to enjoin the disposition of proceeds that might arise through the sale of the debtor's property under an execution on a prior judgment.

In New Hampshire there is also an apparent conflict of opinion.

In Dodge v. Griswold, 8 N. H. 425, the doctrine was enunciated that an attachment bound the land upon which it was levied in such a manner that the creditor would have a right to hold all the interest which the debtor had at the time of the attachment to satisfy his debt, provided he obtained a judgment in the attachment suit, and, within thirty days thereafter, sued out an execution, delivered it to an officer, and caused the land to be seized by virtue thereof. It was said that the attachment gives no present interest in the land, no title passes, no right of possession is acquired, and no title to have the land applied to satisfy the claim. Whether such a right will ever ac-

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crue to a creditor depends upon a contingency. If he fail to obtain judgment and to have his extent commence within thirty days after judgment, his title under the attachment is lost. It is therefore said that his claim upon the land is very little, if anything, more than a mere expectancy, the probability of a future title depending upon events that may never happen. And it is held that, under such a state of facts, a bill cannot be sustained.

But, in Stone v. Anderson, 26 N. H. 506, it was held that an attachment levied upon property fraudulently conveyed by the debtor as against the attaching creditor was a sufficient lien thereon to maintain a bill to remove obstructions which the debtor had caused to be placed on the property attached. The court said that, although it had been held in England and New York, and probably in other jurisdictions, that a bill could not be filed to set aside fraudulent conveyances until the creditor had obtained a judgment, yet this doctrine was believed to be founded upon the fact that, where it prevailed, no attachment was made upon mesne process, as in New Hampshire, and no lien obtained on the property until judgment. The judgment operated as a lien, and, as soon as that was obtained, the bill might be filed. It was the lien upon the property which gave the party the right to his bill in equity.

The apparent conflict between these two New Hampshire cases may be explained by the fact that, at the time of the decision of Dodge v. Griswold, supra, it had not been held that an attachment was a lien. See brief in Stone v. Anderson, 26 N. H. 515.

Other courts, however, hold the attachment lien sufficient.

An attachment lien is sufficient to support an action in equity to set aside a fraudulent assignment of the property attached, especially under a statute providing that an attachment can issue only upon due proof of plaintiff's claim, but that, as to third persons, the attaching creditor shall be deemed to be a "purchaser in good faith and for a valuable consideration." Hahn v. Salmon, 10 Sawy. 183, 20 Fed. 804.

Where a judgment creditor has, by levy of an attachment, obtained a lien upon goods of the debtor, he may enjoin as fraudulent a sale under distress for rent. Cogburn v. Pollock, 54 Miss. 639.

In Montana Nat. Bank v. Merchants' Nat. Bank, 19 Mont. 586, 61 Am. St. Rep. 532, 49 Pac. 149, it was held that a court of equity would interfere to protect an attachment lien where proceedings supplemental to execution would have been idle and inadequate.

An attachment lien is a sufficient basis for a bill in equity to set aside a fraudulent conveyance. Bainbridge v. Allen, 70 N. J. Eq. 355, 61 Atl. 706.

In Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365, an attachment lien was held to be a sufficient lien to support an injunction bill to set aside as fraudulent certain confessed judgments and a conveyance of personal property, and to restrain the defendants from selling or disposing of the property conveyed and levied upon.

The last-mentioned case was followed on this question in Williams v. Michenor, 11 N. J. Eq. 520.

Any attaching creditor having a lien upon the property of his debtor by authority of statute may, prior to the recovery of judgment, maintain an action in equity to enforce his legal right. Robert v. Hodges, 16 N. J. Eq. 299.

Creditors who have filed with the clerk of the court out of which an attachment issued an affidavit of their debt, and who have been admitted by rule as creditors under the attachment, may maintain a bill to reach real estate of which the debtor is alleged to be the real owner. Curry v. Glass, 25 N. J. Eq. 108.

Where a statute provides that a writ of attachment, immediately upon its issue, becomes a lien on the lands of the defendant, and remains so until the debts of the plaintiff in attachment and other applying creditors are satisfied, or a judgment shall pass against them, it was held that a lien acquired by the suing out of the writ was sufficient to entitle the plaintiff in attachment to file a bill in equity to free the subject of his lien from all obstructions his debtor had created in fraud of his creditors. Cocks v. Varney, 45 N. J. Eq. 72, 17 Atl. 108.

In Francis v. Lawrence, 48 N. J. Eq. 508, 22 Atl. 259, it was held that where a creditor had obtained a lien by attachment on the debtor's property, neither the issue and return of execution, nor judgment, was a condition precedent to the maintenance of an equitable action to reach the assets of the debtor. The court said that the reason that the court of chancery would not take cognizance of a claim of a general creditor was that, until such claim had ripened into a judgment, the creditor had no lien to be enforced against the property. The court of chancery, in these cases, came in to aid the law in enforcing the lien, and, to this end, to sweep away any impediment which might have been interposed which would prevent the creditor from enjoying the fruits of his proceedings at law; and issuing a return of an execution unsatisfied was taken by the court as plenary proof, if any was required, not only that the plaintiff had exhausted his legal remedy, but that the defendant was without other property to answer the judgment. An attachment did the same thing. The issuing of an attachment was the resort of the creditor to his legal remedy, and the return of the attachment was a bringing into court of all the property of the defendant. It was there to answer the debt, not only of the plaintiff, but of the applying creditors.

But, in Melville v. Brown, 16 N. J. L. 367, which is out of harmony with the other New Jersey cases on the subject, in holding that an attaching creditor, before he obtains judgment, has no right to call in

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question the fairness of a judgment against his debtor, Hornblower, Ch. J., said that a judgment was a lien upon land and an execution upon personal property. But the plaintiff in attachment, before judgment, had no such lien. It was true the defendant in attachment could not recover the possession and control of the property without satisfying or securing the plaintiff; not, however, because the plaintiff had a lien, but because the statute had impounded the goods for the double purpose of compelling an appearance by the defendant, and ultimately satisfying the plaintiff, if anything was due him. The plaintiff in attachment, then, acquired no more right to inquire into the fraud of a prior judgment than one who had commenced his suit by capias or summons. He was, after all, only a suitor claiming to be a creditor, who might turn out not to be such; or, if a creditor, might have other resources from which he might receive satisfaction.

Dawson v. Sims, 14 Or. 562, 13 Pac. 506, is one of the leading cases wherein the doctrine is enunciated that an attachment lien is a sufficient basis to entitle a creditor to the aid of equity to set aside fraudulent obstructions to the sale of the property under the attachment or to protect his lien thereon prior to the recovery of the judgment. The court said that, while the property of a debtor ought not to be tied up or disturbed by a court of equity in behalf of a creditor who has not established the validity of his claim, nevertheless, this rule ought to be relaxed if it would be promotive of justice. A matter of practice is not of as much consequence as a proper administration of justice; and, if it appears that the debtor is about to dispose of his property before a judgment at law can be obtained, there can be no injustice, upon attachment proceedings commenced, to tie up the property of such debtor by injunction until the fraudulent impediments can be removed.

A creditor need not wait until his action in which the attachment was issued has ripened into judgment, and an execution thereon has been returned unsatisfied, before beginning his action to reach assets of his debtor which have been transferred for the purpose of defrauding creditors. An attachment lien is a sufficient basis. Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288.

To support a creditors' bill, the lien of an attachment is sufficient, and it is not necessary to reduce the claim to judgment, issue an execution, and secure a return *nulla bona*. Benham v. Ham, 5 Wash. 128, 34 Am. St. Rep. 851, 31 Pac. 459. The court said that where a lien has been obtained by attachment on the property in controversy, and it appears by the bill that the debtor is insolvent, and the issuing of an execution will be of no practical utility, the obtaining of the judgment and the issuance of an execution thereon are not necessary prerequisites to equitable interference.

An attaching creditor, in order to protect his lien on the attached property, is entitled to an injunction restraining the foreclosure of an alleged fraudulent mortgage thereon before a judgment has been rendered in the attachment proceeding. Meacham Arms Co. v. Swarts, 2 Wash. Terr. 412, 7 Pac. 859.

And where, by statute (Rev. Stat. § 3186), every owner and holder of any lien or encumbrance on land is given the same right of action as the owner in fee and possession, to test the liability and validity of any other claim, lien, or encumbrance on such land, or any part thereof, a creditor having, by an attachment, acquired a specific lien upon land fraudulently conveyed, is, by such statute, given the right to maintain a bill in equity to test the validity of the conveyance. Evans v. Laughton, 69 Wis. 138, 33 N. W. 573.

A lien acquired by garnishment before a judgment is a sufficient foundation upon which to invoke equitable jurisdiction to remove fraudulent impediments which may stand in the way of laying hold of the property and applying it to the payment of the demands of attaching creditors. Matlock v. Babb, 31 Or. 516, 49 Pac. 873.

In Chandler v. Dyer, 37 Vt. 345, the court, in holding that an attaching creditor can come into equity to redeem land before judgment and levy, from a prior encumbrance, said that, practically, the attachment differs but little from a mortgage. Like a mortgage, it is no proof of a subsisting debt until adjudicated upon. The mortgagee, like the attaching creditor, is not obliged to resort to the lands mortgaged,—he may collect his debt out of other lands or property of his debtor;—his debt may be paid before a decree of foreclosure expires, and he may never get any legal title to the lands mortgaged. In short, a mortgage, like an attachment, is merely security for a debt. The main differences are that one arises from contract, the other, by proceedings *in invitum;* the one takes the whole land by foreclosure, if not redeemed; the other, by levy, takes only enough by appraisal to pay the debt; the one has a right to possession upon breach of condition; the other, only until six months after levy of execution. But, whatever the special difference by which the creation or processes of execution are perfected, their main object, their substantial ends, are the same,—the security of the debt.

A complainant who has instituted an attachment suit on a judgment of the United States court of a sister state, and has secured a lien on real estate by prosecuting his attachment suit to judgment, may resort to a court of equity to remove obstructions to the legal title to the property, and to subject the property to the payment of his debt, without first issuing an execution on the judgment, and having it returned *nulla bona*. Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co. 48 Fed. 584. The court said that the reason for the rule requiring judgment, etc., was that the claim must be rendered certain; otherwise, the proceeding to vacate the

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fraudulent transfer of title, and to remove obstacles placed in the way of the successful operation of the execution, might be entirely fruitless, if, after all, the creditor failed to obtain judgment on his claim. In the case at bar, the claim was not only certain, but it had back of it a judgment conclusive and binding; and, under the law of the forum where the attachment suit was instituted, the complainant had secured and fixed his lien upon the real estate. Why should the complainant be compelled to proceed to execution when all the purchaser could obtain by a sale thereunder would be a lawsuit before he could get rid of the legal title of the respondents?

(d) Exhaustion of remedy at law.

(1) In general.

When a creditor has obtained a judgment and taken every step necessary to establish a lien upon property of the debtor which has been fraudulently conveyed to a third person, or fraudulently encumbered, must he do anything more before going into a court of equity for relief? In other words, must he exhaust his remedy at law? When the reason for granting equitable relief as to property subject to levy is kept in mind, this question ought easily to be answered. But the courts have been so careless in stating the rule, even when the decision has been right, that the rule has often been inaccurately or incorrectly given, which, as already pointed out, has led to great confusion and much apparent, as well as actual, conflict in the cases. As stated supra, II., it is only where the creditor seeks to reach property not subject to levy that he is required to exhaust his remedy at law. If this had always been remembered there would have been need for no conflict in the decisions as to the conditions precedent to relief where the property pursued is such as is subject to levy. How the conflict has arisen will appear in the following subdivisions of the note.

In Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004, it was said that, whenever a creditor has a lien upon property for the debt due him, he may go into equity without exhausting legal process or remedies.

To set aside a fraudulent conveyance of real and personal property levied upon, it is not necessary that the creditor exhaust his legal remedies in his effort to obtain satisfaction of his judgment. Brainard v. Van Kuran, 22 Iowa, 261.

It is not necessary that creditors who are seeking to reach and subject the rights and interests of the debtor in certain real and personal property conveyed by the wife to a trustee, to the payment of their debts, which have been reduced to judgment, and upon which executions have issued, to show that they have exhausted their remedies at law. Hutchinson v. Maxwell, 100 Va. 169, 57 L.R.A. 384, 93 Am. St. Rep. 944, 40 S. E. 655.

In Mississippi, a judgment creditor may resort to equity, not only for the purpose of subjecting property to his judgment which cannot be reached by execution, after he has pursued the remedy at law to a return of *nulla bona* on his execution, but also before he has exhausted his remedy at law, in order to remove obstructions to a fair sale of the property liable to execution. Lewis v. Cline (Miss.) 5 So. 112.

In Smith v. Muirheid, 34 N. J. Eq. 4, it was held that where the complainant comes into equity to obtain its assistance in aid of an attachment lien for the benefit of himself and other creditors, it is not necessary for him to show that the debtor, at the time of the filing of the bill, was insolvent.

In Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390, the court said that it had been held that, if an execution had not been returned unsatisfied, an execution must be issued and an action brought in aid of the execution then outstanding; but that the prevailing, and, as the court thought, on principle, the better rule was that the creditor need only proceed at law far enough to acquire a lien upon the property sought to be reached before filing his bill to set aside a fraudulent conveyance. The extent to which he must proceed to do this would depend upon the nature of the property. If it were personal, there must be a levy; for, until this was made, he had no lien; if it were real estate, it was enough to obtain judgment and docket it in the county where the lands were situated.

Where a creditor has recovered judgment, sued out execution, and levied it on property in which his debtor has the equitable, but not the legal, estate, he is entitled to the aid of a court of equity to reach such property without going a step further, and compelling the debtor to assign his interest by ca. sa. Perry v. Nixon, 1 Hill, Eq. 335.

But, in Harris v. Taylor, 15 Cal. 348, in referring to an alleged fraudulent conveyance of an interest in ditch property, the court said that the conveyance, however fraudulent as to creditors, was valid as between the parties, and no one could impeach it without showing that he had been injured by it. He must show that he had been deprived of his remedy at law, and was compelled to resort to equity for relief. If the debtor had other property which might be reached by ordinary legal remedies, the court of equity would not interfere. It must be affirmatively shown that such remedies had been exhausted, or that a resort to them would be fruitless and unavailing.

And in Emery v. Yount, 7 Colo. 107, 1 Pac. 686, it was held that a bill to set aside an alleged fraudulent conveyance of real estate by a debtor, which fails to allege that the debtor is insolvent, or that he has not other property amply sufficient to satisfy plaintiff's judgment, and does not aver that an execution has been issued upon such judgment, or that any effort of any kind has

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ever been made to procure the satisfaction thereof, is fatally defective.

In Drahos v. Kopesky, 132 Iowa, 497, 109 N. W. 1021, it was held that before a creditors' bill to subject real estate in the name of a third person to the satisfaction of a judgment could be maintained, there were at least two prerequisites: One, the insolvency of the judgment defendant; and two, the existence of the judgment lien, or a situation such that it would be established on setting aside the conveyance or sale.

In the absence of insolvency, fraud, or concealment, a creditor cannot, on the theory that he has a right to clear up doubts, make that which is remote or obscure, present, clear, and certain, and ascertain and fix the rights and interests of all persons claiming to own real estate upon which he asserts a lien, certain as a decree in equity can declare them before sale, maintain an action to have the interests of the debtor in certain lands assessed and set apart and subjected to payment of a judgment held by the plaintiff. Kalona Sav. Bank v. East, 133 Iowa, 190, 109 N. W. 887. The court said that the proposition was equivalent to saying that, without any allegation of insolvency, a judgment creditor might fix his eye upon certain real estate, the property in fee simple of his debtor, and respecting which such debtor had done no act in denial of or affecting his title, and might then go into equity and have the title of his debtor in such property bound and quieted by decree before taking any step to subject the same to the payment of his debt. It was held that the bill could not be maintained as a statutory creditors' bill except where the legal remedies had proved ineffectual, or there was an affirmative showing of insolvency.

A distinction is made in some of the cases as between actual fraud and constructive fraud; holding that, in the latter case, the remedy at law must be exhausted after the acquirement of lien.

Where the title of the defendants against whom an action is brought to set aside a conveyance of real estate is not alleged to be fraudulent, it is not enough that the plaintiff has recovered judgment which is a lien upon the property. His remedy at law must be followed up. Towle v. Janvrin, 61 N. H. 605.

In Miller v. Hughes, 33 S. C. 530, 12 S. E. 419, it was held that when a creditor files his complaint to set aside a conveyance for actual moral fraud committed by a combination and collusion of his debtor, who was alleged to be insolvent, with a third person, the failure to allege that he had recovered judgment, and obtained a return of *nulla bona* of his execution issued to enforce the same, was not fatal to the complaint on demurrer. The court said that fraud was peculiarly a matter of equitable cognizance, and that, when fraud was alleged, and the further allegation was made that such fraud was injurious to the creditor's rights, a court of equity had jurisdiction. In such a case, the creditor did not ask the aid of equity upon the ground that he could obtain no relief at law, but his claim to the aid of equity was based upon the fraud which had been practised upon him, and from which the court of equity had jurisdiction to relieve him.

In Meinhard Bros. v. Youngblood, 37 S. C. 231, 15 S. E. 950, 16 S. E. 771, the decision in the last-mentioned case was approved, it being held that simple-contract creditors, suing for themselves and other creditors, may set aside attachments upon the ground of actual moral fraud in their inception. To the same effect, Meinhard v. Youngblood, 41 S. C. 312, 19 S. E. 675.

In Dunphy v. Gorman, 29 Ill. App. 132, on a bill to set aside a fraudulent conveyance of real estate, it was said that a grantee whose title was tainted with fraud had no right to insist that all other means to collect a demand of the debtor should be exhausted before he was disturbed in his title to the real estate fraudulently conveyed to him, since the conveyance was made with the fraudulent intent of defeating creditors, and, in such case, it was void as to the creditor, who had the right to place himself in the same position he would have occupied had it never been made.

For other cases maintaining the necessity of exhaustion of the remedy at law, in addition to those cited under this general subdivision, see supra, II.

(2) Issuance of execution.

The rule adopted in the early New York cases is that, after the lien attaches to the debtor's real estate by judgment, an execution must be issued and placed in the sheriff's hands, after which the bill in equity may be filed. This is on the theory that personal property is the primary fund for the satisfaction of the debt. The execution need not be returned, as the presumption is that the sheriff will do his duty and satisfy the execution out of personal property if he can find it. This rule, that personal property must first be exhausted, is not the equivalent of the rule that the remedy at law must be exhausted, for there might be real estate standing in the name of the debtor, besides the property which he had fraudulently conveyed, and which the creditor was seeking to reach. The rule that the remedy at law must be exhausted would require the creditor to take this real estate and sell it before he could proceed in equity to set aside the fraudulent conveyance of the debtor's other property. The rule that personal property is the primary fund would not require him to do so.

There is no general equity rule, however, requiring the remedy at law to be exhausted as to personal property before the creditor is entitled to proceed against the debtor's real estate. This is not the theory upon which relief is granted. See supra, II. The statutory rule, however, in New York, is that personal property is the primary fund for the satisfaction of an execu-

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tion. The sheriff is directed to satisfy the writ out of the personal property of the debtor, and, if sufficient personal property cannot be found, to satisfy it out of the debtor's real property. It is probably to clear the way for the execution to act upon the real property fraudulently conveyed, that the New York rule requiring execution to be issued, but not returned, was adopted. If personal property is, by statute, made the primary fund, this rule is sound, because, even if the fraudulent transfer of real estate were set aside, the execution could not be levied if there were personal property out of which it could be satisfied.

The mistake is made in supposing that the requirement that the execution issue is on the theory that the remedy at law must first be exhausted. To require the execution to be returned would be to require the remedy at law to be exhausted; that is, it would compel the sheriff, in lieu of personal property, to levy upon real estate other than that alleged to have been fraudulently conveyed. The execution, if returned, however, can do no harm, for the purpose of issuing the execution, where the creditor seeks to reach real property, is not to perfect the lien, but to get other property. The return, therefore, does not affect the lien, but only shows that there is no other property subject to levy; which, while not a condition precedent to an action to reach realty, would certainly not stand in the way of it.

As to outstanding execution, see supra, III., b, 1, (b), (2) and (3).

Before a judgment creditor is entitled to the aid of equity to set aside a fraudulent conveyance of real estate, an execution must issue on his judgment, and be placed in the hands of the proper officer for collection, as personal property of the debtor is the primary fund for the payment of the judgment debt, and an execution to reach such property is the regular and known method of ascertaining whether it exists or not. It is presumed that the sheriff does his duty, and will levy upon personal property if it can be found; but, to raise this presumption, the writ must be in his hands. McCullough v. Colby, 5 Bosw. 477.

Where the bill is in aid of an execution at law to set aside an encumbrance of property, made to defraud creditors, an execution must have been issued, and it is not necessary that it should have been returned. Williams v. Hubbard, Walk. Ch. (Mich.) 28.

A bill may be sustained as to fraudulent conveyances although the return of the execution was made before the return day, since, for this purpose, it is only necessary to show that execution has been issued. Beach v. White, Walk. Ch. (Mich.) 495.

The creditor must exhaust the personal property of the judgment debtor before having recourse to real estate. It is essential to show that an execution has been issued. Buswell v. Lincks, 8 Daly, 518; North American F. Ins. Co. v. Graham, 5 Sandf. 197; Bishop v. Halsey, 3 Abb. Pr. 400; Parshall v. Tillou, 13 How. Pr. 7; Allyn v. Thurston, 53 N. Y. 622; Liethenburg v. Herdtfelder, 33 Hun, 57, affirmed in 103 N. Y. 302, 8 N. E. 526.

In Fox v. Moyer, 54 N. Y. 125, the court said that, in an action to have a conveyance of real estate declared fraudulent and void as to plaintiff's judgment, it has sometimes been held that the lien of the judgment alone gave the plaintiff his standing in a court of equity, without any execution. But the weight of authority seemed to be that the judgment, with an execution issued and not returned, was necessary to enable the plaintiff in such a case to maintain his action.

In Mechanics' & T. Bank v. Dakin, 51 N. Y. 519, the court said that where the debtor possessed property which, in its nature, was liable to seizure on sale upon execution, but that, by fraudulent encumbrances upon the same, the execution could not be enforced, the aid of the court of chancery was invoked to remove the encumbrances, that the process of the law might be effectually enforced in such case. It was indispensable that the execution should have been issued, but not that it should have been returned. Its return would be fatal to the relief sought.

In Adsit v. Butler, 87 N. Y. 585, a judgment creditor was held not entitled to equitable relief against the real property of a judgment debtor which had been fraudulently conveyed, until an execution had been issued upon the judgment, and an effort made to collect the same out of the property of such debtor. The court said that the execution must have been issued and returned unsatisfied, or must have been outstanding.

The last-mentioned case, on account of some general expressions used in the argument, has been supposed to hold that the remedy at law must be exhausted before an appeal can be made to equity. If this is what the court meant, what was said in that respect was *obiter*, for the question was whether relief could be granted where no execution had been issued.

In Easton Nat. Bank v. Buffalo Chemical Works, 48 Hun, 557, 1 N. Y. Supp. 250, it was held that an action to vacate a judgment which prevents plaintiff's judgments from becoming valuable liens upon the real estate of the debtor could not be maintained unless execution had been issued on the judgments, and was outstanding at the time the action was commenced, or had been returned unsatisfied.

The distinction between the issuance of an execution for the purpose of exhausting the remedy at law, and its issuance for the purpose of perfecting the lien, or of putting the creditor in position to sell the property when equity shall have cleared the title, should be kept in mind.

In Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226, it was said that, if the object of a bill is to obtain satisfaction of a judgment by a sale of the equitable estate, it must be alleged that execution has been issued. This requirement is not based wholly upon the ground of showing that the judgment cred

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itor has exhausted his remedy at law, for, if so, it would be necessary to show a return of the execution unsatisfied, which, however, is not essential. The execution, however, must be sued out, for, if the estate sought to be subjected is a legal estate, and subject to be taken on execution, the ground of the jurisdiction in equity is merely to aid the legal right by removing obstructions in the way of its enforcement at law. If the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment creditor is bound, nevertheless, to put himself in the same position as if the estate were legal; because the action of the court converts the estate so as to make it subject to the execution, as if it were legal. The ground of the jurisdiction, therefore, is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest, subject to prior encumbrances, or, according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the encumbrancers, according to the order in which they may be entitled to participate.

In Weightman v. Hatch, 17 Ill. 281, it was held not necessary for a creditor to have issued an execution before proceeding in equity to set aside a fraudulent conveyance of land. The court said that, the grantee's title being tainted by fraud, he had no right to say that all other means to satisfy the debt should be exhausted before he could be disturbed in his title.

And, in McCalmont v. Lawrence, 1 Blatchf. 232, Fed. Cas. No. 8,676, it was held that chancery has jurisdiction of a bill filed by a judgment creditor for relief against a conveyance of land by his debtor, made with intent to defeat the judgment lien, or to hinder or delay satisfaction of the judgment, whether execution has been issued thereon or not.

(3) Return of execution.

If the lien can be acquired only by execution or by execution and levy, and the lien has, in this manner, been perfected, must the execution be returned? The idea that execution should be returned *nulla bona* before a creditor may reach property subject to levy by an equitable action can arise only on the supposition that the remedy at law must first be exhausted before the court can interfere. As already stated, all the conflict and confusion in the cases on this question comes from failure to distinguish between the theory upon which relief is granted in this class of cases. The fallacy of the position that the remedy at law must always be exhausted before coming into equity is well shown when the effect of the return of execution on the life of the lien on personal property subject to levy is considered. See supra, III., b, 1. (b), (3). The dilemma in which the creditor is left by the rule that the remedy must be exhausted is this: He must have a lien to maintain his action. If he must exhaust his remedy at law,—the proof of his having done so being the return of execution unsatisfied,—what is he to do? If he has the execution returned, he loses his lien; therefore his action fails. If he does not have his execution returned, he saves his lien, but does not exhaust his remedy at law; therefore his action fails. So, whether he takes one course or the other, the creditor is bound to be turned out of court. Of course, the answer is that he is not bound to exhaust his remedy at law, and that the courts which hold that execution must be returned unsatisfied before the creditor can reach property subject to levy have misconstrued the fundamental principle upon which relief is granted in this class of cases.

In Logan v. Logan, 22 Fla. 561, 1 Am. St. Rep. 212, it was held that the return of an execution unsatisfied is unnecessary when the creditor seeks the aid of a court of equity for the satisfaction of a judgment out of the property of his debtor, the title to which property has been in the debtor, but has been fraudulently transferred, it being sufficient for the creditor to show a judgment at law and execution to entitle him to resort to equity to vacate such fraudulent conveyance.

A bill not filed for the purpose of reaching equitable assets not subject to levy and sale, but for the purpose of removing an obstruction which the complainant alleges has been fraudulently interposed to prevent a levy and sale of the property of the defendant in the judgment, which is subject to be seized and sold under execution in satisfaction of the judgment lien, may be maintained without a return of the execution *nulla bona*. Stephens v. Beal, 4 Ga. 319.

In Dillman v. Nadelhoffer, 162 Ill. 625, 45 N. E. 680, it was said to be well settled by the decisions of the courts of Illinois that a bill in equity to remove a fraudulent conveyance out of the way of an execution might be filed as soon as judgment was rendered, and without waiting until execution was returned. To the same effect are Andrews v. Donnerstag, 171 Ill. 329, 49 N. E. 558, affirming 70 Ill. App. 236; Scott v. Aultman Co. 211 Ill. 612, 103 Am. St. Rep. 215, 71 N. E. 1112, affirming 113 Ill. App. 581; Binnie v. Walker, 25 Ill. App. 82; Lane v. Union Nat. Bank, 75 Ill. App. 299, affirmed in 177 Ill. 171, 69 Am. St. Rep 216, 52 N. E. 361; First Nat. Bank v. Chapman, 77 Ill. App. 105; Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. 31; Mohawk Bank v. Atwater, 2 Paige, 54.

The fact that executions, issued before the bill was filed to reach real estate, were not levied until one day after the bill was filed, was held not to affect the complainant's right to maintain the action. Redden v. Potter, 16 Ill. App. 265. The court said that the principle to be deduced from the cases was that the complainant must have

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a judgment capable of being enforced, that may be operative *in præsenti;* and that, if so, he may proceed at once by bill to remove a fraudulent encumbrance out of his way without waiting to issue an execution.

An averment that a special execution is in the hands of the sheriff at the time of exhibiting a bill to set aside a fraudulent conveyance of real estate is not fatal to the maintenance of the bill, since, in this class of cases, the creditor need not show a return *nulla bona.* Fusze v. Stern, 17 Ill. App. 429.

Where the judgments are liens upon the equitable interest of the debtor in real estate, and the object of the bill is to remove an alleged fraudulent conveyance thereof, it is not necessary that an execution should have been issued on the judgments and returned *nulla bona.* Austin v. First Nat. Bank, 47 Ill. App. 224.

In French v. Commercial Nat. Bank, 79 Ill. App. 110, the issuance and return of an execution *nulla bona* was held to be unnecessary to entitle a judgment creditor to the aid of equity to reach personalty of the debtor fraudulently transferred and placed beyond an execution.

In French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 262, it was held that the fact that the sheriff, at the request of the creditor's attorney, returns the execution before the time allowed therefor, is immaterial in an action to set aside a fraudulent transfer by the debtor of a stock of merchandise, since the return *nulla bona* is necessary only where the object of the bill is to reach and apply equitable assets of the judgment debtor. In this case, the question whether it was essential that an execution should have been in the hands of the sheriff, and a lien thereby kept alive, was not up. As to the effect of outstanding execution, see supra, III., b, 1, (b), (3).

It is not necessary that execution be returned *nulla bona* before a suit to reach equitable interests in real estate is begun. Armstrong v. Keifer, 39 Ind. 225.

But, for other Indiana cases on exhaustion of remedy at law, see infra, III., b, 1, (d), (4).

In Iowa, the cases are in conflict. In the early case of Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108, it was correctly held that, where a creditor seeks the aid of equity to remove out of the way of an execution a pretended conveyance of real estate which is alleged to be fraudulent, a return of the execution *nulla bona* is unnecessary.

In the later cases, the Iowa courts seem to consider an exhaustion of the legal remedy necessary. In Gwyer v. Figgins, 37 Iowa, 517, it was held that the return of an execution *nulla bona,* or other proof of insolvency, was necessary before a creditor could come into equity to set aside an alleged fraudulent conveyance of real estate.

In Banning v. Purinton, 105 Iowa, 642, 75 N. W. 639, it was said that, if a judgment might be satisfied from other property of the judgment debtor, there was no occasion for interfering with an alleged fraudulent mortgage, or of seeking the intervention of a court of equity. The jurisdiction of that court could not be invoked by a creditor until his remedies at law had been exhausted. Therefore, in the absence of the issuance of an execution and its return *nulla bona,* a creditor, to entitle himself to equitable aid to set aside a mortgage, must establish the debtor's insolvency.

See also, on the same point, Drahos v. Kopesky, 132 Iowa, 497, 109 N. W. 1021, supra, III., b, 1, (d), (1).

In Michigan, a return of execution unsatisfied is not a condition precedent to the maintenance of a bill in aid of execution. Wilson v. Addison, 127 Mich. 680, 87 N. W. 109.

Levy by a creditor on the interest of a debtor in an electric light plant owned by a municipality was held, in Campbell v. Western Electric Co. 113 Mich. 333, 71 N. W. 644, to be sufficient to entitle the creditor to the aid of equity in an action in aid of execution, to reach the interest of the debtor in such plant, without first causing the return of the execution *nulla bona.*

In Banning v. Armstrong, 7 Minn. 40, Gil. 24, it was held that the doctrine that the plaintiff must show a return of an execution *nulla bona* before being entitled to equitable relief does not apply to an action to set aside a fraudulent assignment which clouds and embarrasses the plaintiff's right to sell under his execution.

The doctrine that a creditor cannot obtain the aid of equity to subject equitable assets, such as cannot be taken on execution, until he has reduced his demand to judgment, and pursued his debtor to insolvency at law by a return *nulla bona* on an execution, has no application to a bill by a creditor with a judgment lien on real estate, to set aside a fraudulent conveyance thereof by the debtor, where the statute of frauds denounces absolute nullity upon every gift, grant, conveyance, etc., made, etc., with intent to hinder, delay, and defraud creditors. In such a case the lien is sufficient. Pulliam v. Taylor, 50 Miss. 551.

Where the sheriff, upon failure to find goods and chattels of the debtor upon which to levy an execution, levied upon real estate, it was held that the creditor could proceed in equity to set aside a fraudulent conveyance thereof before a return of the execution. Howard v. Raymers, 64 Neb. 213, 89 N. W. 1004.

All that a judgment creditor who seeks the aid of equity against real estate of his debtor need do is to show a judgment at law creating a lien on such estate. He is therefore not bound to show, as a condition precedent to such right, that an execution has been issued upon the judgment and returned unsatisfied. Schmidt v. Opie, 33 N. J. Eq. 138.

After an execution has been levied, it is not necessary that it should be returned unsatisfied, to support a bill to set aside a fraudulent conveyance of the debtor's real estate. Kinmouth v. White, 61 N. J. Eq. 358, 48 Atl. 952

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Under 2 Gen. Stat. p. 1418, § 18, a lien is created on the personal property of a debtor by the issuance of a fi. fa., and placing same in the hands of the proper officer for service. This lien is sufficient to authorize the execution creditor to maintain a bill in equity to set aside a fraudulent conveyance of personalty. Hall v. Nash, 58 N. J. Eq. 554, 43 Atl. 683.

In Montgomery v. McGee, 7 Humph. 234, it was held that the equitable estate of a debtor in real property could be subjected to the creditor's claim without the return of execution *nulla bona*, the lien of the judgment upon the equitable real estate being sufficient to sustain the jurisdiction of the court.

Where a debtor's equity of redemption under a trust deed to lands was, by statute, made subject to sale on execution, and the creditor issued execution on his judgment, and thereby acquired a lien, it was held that an equitable action to reach the debtor's interest was maintainable, although there was no return of *nulla bona* on the execution. Harrison v. Battle, 16 N. C. (1 Dev. Eq.) 541.

In Rhode Island it has been held that the return of execution unsatisfied is not a condition precedent to an action in equity to reach the debtor's real estate, where the creditor has obtained a lien by attachment. McKenna v. Crowley, 16 R. I. 364, 17 Atl. 354.

But, in First Nat. Bank v. Randall, 20 R. I. 319, 78 Am. St. Rep. 867, 38 Atl. 1055, it was said that a conveyance without consideration, and for the purpose of hindering and defrauding creditors, was not void if the debtor had other property sufficient to satisfy his debts, and from which the complaining creditor could get his pay, and that the rule was settled in Rhode Island that the best and most conclusive evidence that the debtor had no other property was the return of an execution unsatisfied.

In this case, the grounds upon which equitable relief is granted where the action is to set aside fraudulent conveyances, and where the action is to reach assets not subject to levy are recognized, but the court was of the opinion that both proceedings were subject to the same general rules. It was said that "the office of equity is to supplement, and not to supplant, the law. Hence, when the remedy at law is adequate, equity does not need to interpose." In this case, the action was brought on a foreign judgment, and no lien whatever was acquired, so that the decision itself is sound, although the statement of the rule governing recovery in the two classes of cases mentioned is incorrect. The decision in the McKenna Case, supra, was recognized so far as applicable, where a lien had been obtained by attachment on the property alleged to have been fraudulently conveyed.

In Cornell v. Radway, 22 Wis. 260, it was held that, where the judgment of the plaintiff is, by statute, a specific lien upon the land without the issue or levy of an execution, the plaintiff is entitled to the aid of the court, whether execution has been issued and returned unsatisfied or not. This decision was approved in Galloway v. Hamilton, 68 Wis. 651, 32 N. W. 636.

But, in Ellis v. Southwestern Land Co. 108 Wis. 315, 81 Am. St. Rep. 909, 84 N. W. 417, it was said that, for many years, the law had been settled in Wisconsin that a creditor was not entitled to maintain an action in equity to set aside a fraudulent conveyance until he had exhausted his remedy at law by obtaining a judgment against his debtor, issuing execution thereon, and having it returned unsatisfied. The Wisconsin cases cited by the court in support of this rule, however, so far as applicable, do not support the rule here set out, where the creditor has obtained a specific lien on the property.

The distinction between the two classes of actions is pointed out in Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317, in which it was clearly held that one having a specific lien, by judgment or otherwise, may maintain a suit to remove a fraudulent or invalid obstacle standing in the way of its enforcement, without the issuance and return unsatisfied of an execution.

In Arkansas the execution must be returned. In Clark v. Anthony, 31 Ark. 546, it was held that, to entitle creditors to the aid of equity to set aside a deed of a debtor to his wife as fraudulent, to declare a lien upon the lands so conveyed, to subject part of them to the payment of a judgment in their favor against the debtor, which, upon return of execution, remain unsatisfied for want of property out of which to make the debt, it is necessary for them to show that they have a valid unsatisfied judgment upon a cause of action which accrued before the conveyance of the property; that they have issued process upon their judgment, and have been unable to find property of the defendant free from encumbrances out of which to make the debt; that the debtor was possessed of property out of which the debt might, in part or in whole, have been satisfied; that he had conveyed the property with intent and for the purpose of defrauding his creditors.

In Euclid Ave. Nat. Bank v. Judkins, 66 Ark. 486, 51 S. W. 632, the court said that, prior to the act of 1887, Sandels & H. Dig. 3134, the rule obtained requiring the plaintiff in a proceeding in equity to set aside a fraudulent conveyance as to creditors, to reduce his claim to judgment at law, and to have execution issued and returned *nulla bona* as prerequisites to the relief sought. This was necessary in order to show that the plaintiff did not have a complete remedy at law. It was the method prescribed for showing the insolvency of the debtor, and that the creditor could not collect his debt at law.

To entitle one to maintain a creditors' bill, he is usually required to show not only a judgment obtained, but execution sued out, with a return *nulla bona*, or that the writ is unsatisfied in whole or in part.

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Burdsall v. Waggoner, 4 Colo. 256. This was said with reference to an action to reach real estate.

In Kentucky it has been uniformly held that the return of execution unsatisfied is a condition precedent to equitable relief in this class of cases.

In Wickliffe v. Lyon, 5 J. J. Marsh. 84, the court said that the doctrine is too well settled to permit it to be doubted that fraudulent conveyances are obligatory on the grantor, and are bad as to two descriptions of persons only,—purchasers for a valuable consideration without notice, and creditors; and that, to enable a creditor, as such, to procure a decree canceling deeds of conveyance as fraudulent, he must, if his demand is purely legal, show his judgment and execution returned no property found.

A bill to restrain a debtor from making fraudulent transfers of his property and choses in action cannot be maintained before the creditor has obtained judgment and has had execution returned *nulla bona*. Wooley v. Stone, 7 J. J. Marsh. 302.

In Halbert v. Grant, 4 T. B. Mon. 580, it was held that a bill to set aside transfers of land, slaves, and other estate of the debtor could not be maintained where it was not shown that any execution was issued on the judgments and returned unsatisfied. The court said that the rule was so well settled that a creditor must not only obtain a judgment, but issue execution and procure its return in a case where his demand was purely legal, before he could apply to a court of equity for redress against fraudulent encumbrances on the estate of the debtor, that it need not discuss the subject nor review the cases where the principle had been adjudicated.

The doctrine that a return *nulla bona* must be alleged and shown before a court of equity will entertain a petition to set aside a voluntary or fraudulent conveyance of real estate in order to satisfy a legal demand was said by the court, in Martz v. Pfeifer, 80 Ky. 600, to be too well settled in Kentucky to admit of controversy.

Suits in equity by creditors to set aside fraudulent conveyances by their debtor, if commenced before a judgment has been recovered and an execution has been issued and returned *nulla bona*, are premature and and cannot be maintained. Napper v. Yager, 79 Ky. 241.

Where the demand is purely a legal one, the creditor cannot invoke the aid of a court of equity to assail as fraudulent a conveyance made by his debtor, or one made by a third person at the debtor's instance, of property really belonging to him, save in two ways. He must first obtain a judgment and a return *nulla bona;* or, if he desires to proceed against the property at the outset, then he can do so only by suing out and prosecuting an attachment, as provided by the Code of Practice. Kyle v. O'Neil, 88 Ky. 127, 10 S. W. 275.

A petition to reach real estate transferred by the debtor to his wife, on the ground that such conveyances were voluntary, cannot be maintained, where it fails to show that the creditor has exhausted his remedy at law by obtaining judgment, suing out execution, and having a return of no property found. Evans v. Reay, 3 Ky. L. Rep. 193.

Before a creditor can maintain an action in equity to set aside a conveyance as fraudulent, he must have a judgment against his debtor, and a return of no property. Cundiff v. Bross, 4 Ky. L. Rep. 893; Disney v. Sawyers, 4 Ky. L. Rep. 896; Hill v. Cannon, 6 Ky. L. Rep. 591; Brewer v. Hill, 9 Ky. L. Rep. 329; Meyer v. Ruff, 13 Ky. L. Rep. 254, 16 S. W. 84.

A creditor has no right to proceed against his debtor's debtor otherwise than as garnishee until after the latter has failed to make a response satisfactory to the plaintiff, unless the plaintiff proceeds upon a judgment and execution returned no property found as to all or part of his debt. Brown v. Ferguson, 5 Ky. L. Rep. 420.

A return of no property must, in the absence of grounds for attachment, be alleged and shown before a court of equity will entertain a petition to set aside a conveyance as fraudulent. Buckler v. Wells, 14 Ky. L. Rep. 78.

Prior to the act of 1896, a fraudulent conveyance could not be set aside by a creditor unless he had procured an attachment, or had execution on the judgment returned *nulla bona*. Johnson v. Bonfield, 19 Ky. L. Rep. 300, 40 S. W. 697.

In an action to set aside an alleged fraudulent conveyance, and subject the property conveyed to satisfy the plaintiff's debt against the grantor, when no attachment or the ground of nonresidence has been levied, a general demurrer should be sustained to the petition if there has not been previously a personal judgment against the debtor, and an execution thereon returned "no property found." Beadles v. Jones, 9 Ky. L. Rep. 986, 7 S. W. 916.

Creditors who have not shown themselves to be creditors by judgment and execution are not entitled to impeach in equity a deed of real estate on the ground that it is fraudulent. Allen v. Camp, 1 T. B. Mon. 231, 15 Am. Dec. 109.

In Howe v. Whitney, 66 Me. 17, an action was brought by a judgment creditor who had had an execution issued, but not placed in the hands of a sheriff, to set aside a transfer of real estate as fraudulent. It was held that, in the absence of a return *nulla bona*, the action could not be maintained. In this case, after the judgment, the debtor died, and eight months afterwards an alias execution was issued and returned unsatisfied. The court said that the judgment creditor could not enforce the execution against his deceased debtor. Nor could it be made to appear by the return of an officer eight months after the death of the judgment debtor that the execution could not have been collected from him while living, unless a return that no property of the deceased debtor could be found to satisfy the execution, eight months after his decease.

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is to be deemed equivalent to the return *nulla bona* in an execution against one in full life and vigor.

In Brown v. Bank of Mississippi, 31 Miss. 454, it was said that it would be universally agreed that a creditor could not go into a court of equity to subject equitable assets or choses in action of his debtor to the payment of his debt until he had first obtained a judgment at law upon his debt, and issued execution, and had a return *nulla bona;* and that the same rule was well established with regard to a creditor proceeding to subject the property alleged to have been fraudulently conveyed.

The rule is the same in South Carolina. In Verner v. Downs, 13 S. C. 449, it was held that execution and return *nulla bona* were conditions precedent to a right of the creditor to maintain a bill to set aside a fraudulent conveyance of real estate. The court said that it was only when the creditor had exhausted his legal remedy without satisfying his debt that he could demand the aid of a court of equity. The highest evidence of the exhaustion of such remedy was the record evidence offered by the return of the sheriff upon the execution. The plaintiff, in producing such return of *nulla bona*, was not required to give independent proof of the insolvency of his debtor. Enjoying the advantages arising from the simplicity and inexpensiveness of this means of exhibiting the condition of his debtor's estate, it was unreasonable to permit him to disregard these simple means of proof, and cast upon the court and the party the onerous issue of the insolvency of the defendant on general evidence. Hence it was that the courts of equity have held as a rule of convenience, founded on the clearest reason and equity, that the plaintiff must issue his execution and procure its return before applying to the court of equity for aid.

In McMahan v. Dawkins, 22 S. C. 314, it was held that an action to set aside a debtor's voluntary conveyance of real estate could not be maintained unless the creditor had exhausted his legal remedies. The court said that this was the only ground upon which he could come into equity, and that, while it was not necessary to allege in the complaint a return *nulla bona*, yet that was sufficient evidence of the fact that all legal remedies had been exhausted. It was, too, one of the probative facts which showed the necessity under which the plaintiff was to resort to the property covered by the deed which he sought to set aside, and it was the foundation for the charge of legal fraud on account of which such deeds were frequently assailed. It must appear, therefore, in the evidence, or the action would fail.

In Compton v. Patterson, 28 S. C. 152, 5 S. E. 470, it was held that a return of execution *nulla bona* was necessary to the maintenance of an action to set aside a transfer of real estate alleged to have been purchased by the debtor, and transferred to his wife and children.

In Ryttenberg v. Keels, 39 S. C. 203, 17 S. E. 441, the rule was recognized that only a creditor who has sued out execution on his judgment, and had the same returned *nulla bona*, is in a position to maintain a bill in equity to set aside a fraudulent assignment for creditors by his debtor, and subject the assigned property to the payment of his judgment.

In Rose v. Lloyd, 1 Clark (Pa.) 333, it was held that a discovery of personal property would not be compelled until an execution has been issued and returned *nulla bona*.

In Beidler v. Douglas, 35 Ill. App. 124, it was said that, in order to sustain a creditors' bill to reach the property of the debtor in the hands of a third person, the existence of a judgment and the return of an execution unsatisfied are essential jurisdictional facts; and, unless they are made to appear in some manner, a court of equity is without authority to grant relief. In this case there was no judgment, so that the decision is correct; but the general rule stated is not in accord with the Illinois decisions.

In Brown v. John V. Farwell Co. 74 Fed. 764, it was held that the issuance of an execution was a condition precedent to an action to set aside the fraudulent transfer of real and personal property. The court said that the great weight of authority was to the effect that the creditor should have issued execution and had it returned *nulla bona* before bringing his bill to reach the assets of the debtor.

The rule that the jurisdiction of chancery to subject equitable interests in realty to the satisfaction of a judgment was originally strictly ancillary, and depended upon the exhaustion of the legal remedy, was relaxed in Tennessee, in the cases of M'Nairy v. Eastland, 10 Yerg. 310; Stark v. Cheathem, 2 Tenn. Ch. 300.

In M'Nairy v. Eastland, supra, it was held that where a creditor sought to reach real estate, the legal title to which was in a third person, but the equitable estate of which was in the debtor, the issuance and return of execution were unnecessary. The court said that, as a question affecting merely the jurisdiction of a court of chancery, it was believed that the principle, traced to its origin, would be found to be this: that a creditor who went into a court of chancery to obtain satisfaction of a merely legal demand must show that he had proceeded to such extent at law as to give him title to proceed in equity; that, in the earlier cases, it seemed to have been held necessary that, if satisfaction was sought to be obtained out of the equitable title in personal assets, there must be not only a judgment, but an execution issued and put in the hands of the sheriff in the county where the equitable assets were situated. The actual issuance of the execution and its reception by the sheriff in the proper county were necessary to give a lien, and the lien authorized the party having it to go into chancery. So, if a creditor sought to obtain satisfaction of his legal demand

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out of equitable real estate, he must obtain a judgment at law; for, in such a case, it was the judgment, and not the issuance of an execution, which conferred a lien on real estate, and, having such judgment and lien, the creditor might pursue the equitable real estate in chancery.

In Embree v. Reeve, 6 Humph. 37, in holding that, after the issuance of executions to the county in which the judgment was recovered, and the return of *nulla bona*, it was not a condition precedent to an action to discover and reach a beneficial interest of the debtor in certain leasehold interests, that execution be also issued to the county where the property was located, in order to establish a lien thereon. The court, in commenting on the language of the last-mentioned case, with respect to personal assets, said that what was said incidentally in that case of equitable personal assets did not, by any means, import that a judgment creditor might not subject them in equity to the satisfaction of his demand when he showed by the return of *nulla bona* that he had exhausted his legal remedies, but that, according to the earlier cases, he had title to proceed in equity short of this exhaustion of legal remedies if he would place an execution in the hands of the sheriff where the equitable personal assets were situated, thereby creating thereon a lien, on the foot of which he might proceed in equity. It was not intended to show that he had exhausted his legal remedies. He could not go into a court of chancery to obtain satisfaction of his judgment unless he also issued an execution to the county where the equitable personal assets were situated, for the purpose of creating a lien.

A lien of a creditor's judgment on the debtor's equitable real estate will sustain equitable jurisdiction to reach the same, although there has been no return of execution *nulla bona*. Montgomery v. McGee, 7 Humph. 234.

The issuance of an execution to the county of the debtor's residence was held sufficient to entitle a creditor to maintain a bill to reach equitable interests of the debtor in real estate, although the bill was based on a judgment rendered in a different county. Stark v. Cheatham, supra. The court said it might be considered as the settled law of Tennessee that equitable realty might be reached in chancery upon the strength of the judgment with as little formality as was required to reach the legal estate at law. That is to say, as one might always have his execution for the latter, so he might always have his bill for the former, the judgment itself being a sufficient foundation for either remedy.

In Frothingham v. Hodenpyl, 135 N. Y. 630, 32 N. E. 240, it was said that, until a creditor has established his claim by judgment, and execution has been issued thereon and returned unsatisfied, he cannot maintain an action in equity to set aside alleged fraudulent judgments and to restrain the collection of executions issued thereon. The question in this case was whether a creditor at large could obtain equitable relief; and the court, in a very brief opinion, made the above *obiter* statement, which is not in harmony with other New York cases, and is of little value as an authority on the question of the exhaustion of the remedy at law.

A creditors' bill to set aside a fraudulent conveyance, which failed to allege that the plaintiff had prosecuted his claim to judgment and had issued an execution thereon, and had the same returned *nulla bona*, was held insufficient, in Morrow Shoe Mfg. Co. v. New England Shoe Co. 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 698.

In Howell v. Cooper, 37 Barb. 582, it was said that judgment creditors must exhaust their remedy at law by the issue of an execution and return thereof unsatisfied, in whole or in part, before they will be in condition to demand that the mortgage given for a bona fide consideration be declared invalid and the foreclosure thereof perpetually enjoined. There is, however, no careful consideration of the question of exhaustion of the remedy in this case; and it appeared that the creditor had merely docketed his judgment. He had therefore made no effort to exhaust the personalty by the issuance of an execution, under the New York rule. See, supra, III., b, 1, (d), (2).

But, in Baldwin v. Ryan, 3 Thomp. & C. 251, it was held that, in an action by creditors to remove encumbrances from real estate, it is unnecessary to show the issue and return of an execution unsatisfied. This is in harmony with the rule mentioned in the last subdivision.

(4) Rule where debtor has property open to levy.

What has been said with reference to the necessity of return of an execution unsatisfied to entitle a creditor to execution applies to the requirement that the creditor prove that at the time of bringing the action sufficient property other than that pursued does not exist, out of which an execution could be made, since the return *nulla bona* is merely the proof of this fact. A group of these cases is made, however, because the point was raised in this form. It should be remembered that the question whether other property existed at the time of the conveyance alleged to be fraudulent, and the question whether the debtor owned such property at the time the equitable action was begun, are different. In the former case the fact is important as bearing upon the question of fraud; in the latter it relates merely to the question whether the remedy at law has been exhausted. The authorities are pretty evenly divided as to the necessity of exhausting the remedy at law as a condition precedent to equitable relief.

In Botsford v. Beers, 11 Conn. 369, it was held that a creditor is not obliged to proceed against other lands upon which execution might have been levied before he can

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come into equity to reach land upon which levy has actually been made. The court said it supposed the principle too well settled to admit of controversy that lands fraudulently conveyed were still open to the creditors of the fraudulent grantor, and that a court of chancery would give its aid to perfect the title of the levying creditor where such aid was necessary. That there were other lands might be proper evidence to show that the conveyance was not fraudulent, but these facts could not be set up by a fraudulent grantee to protect a conveyance admitted to be fraudulent.

It is not necessary in the District of Columbia to exhaust a remedy against personal property before resorting to the heir's real estate except in the matter of the administration of the estates of deceased persons. Clark v. Walter F. Bradley Coal, Lime, & Cement Co. 6 App. D. C. 437.

A creditor who seeks to remove a fraudulent conveyance or encumbrance out of the way of his execution may file his bill for that purpose as soon as he has obtained his judgment and before he has made any effort to satisfy it out of other property of the debtor. It is unnecessary for him to establish the insolvency of the debtor before resorting to a court of equity to reach property of the debtor. Hughes v. Noyes, 171 Ill. 575, 49 N. E. 703.

In Rhead v. Hounson, 46 Mich. 243, 9 N. W. 267, it was held that, on a bill in aid of execution, the insolvency of the debtor was not a condition precedent to equitable jurisdiction. It was said to be important only as it bore on the question of fraud in the conveyance attacked.

In Gibbons v. Pemberton, 101 Mich. 397, 45 Am. St. Rep. 417, 59 N. W. 663, where land was attached and judgment rendered in the action, it was held that insolvency was not a condition precedent to an action in aid of the execution. The court said that the attached property, whether real or personal, was subject to the attachment lien; and the sole question in such cases was whether the transfer by the debtor of the identical property, whether real or personal, was in fraud of creditors. If the attachment was not dissolved, the lien was good as against the debtor, and it made no difference how much other property he might own.

But, in Brock v. Rich, 76 Mich. 644, 43 N. W. 580, it was held that when the personal property was sufficient to satisfy the creditor's judgment and all costs, there was nothing which would justify a resort to the debtor's real estate, even though fraudulently conveyed. This case was followed by Pierce v. Rich, 76 Mich. 648, 43 N. W. 582, which grew out of the same facts. These cases appear to be in conflict with the other Michigan authorities, to which, however, there is no reference. The reason given for the decision in the Brock Case was that, the personal property being sufficient, there was no need to resort to equity. This is not a sufficient reason, except on the theory that the statutes of the state make personal property the primary fund for the satisfaction of an execution.

In Spooner v. Travelers' Ins. Co. 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305, the court said that, where a creditor had acquired a legal lien on the property of his debtor, and the suit was one to set aside a transfer thereof made for the purpose of defrauding creditors, which was an obstruction or an impediment in the way of the creditor's enforcing his legal right to subject the property to his lien, he had the right to be placed in the same position that he would have occupied had the transfer never been made, and the grantee, because of the fact that his title was tainted with fraud in fact, had no right to say that all other means to satisfy the debt should be exhausted before he should be disturbed in his title. Hence in such an action the creditor was not bound to allege or prove that the debtor had no other property out of which the debt could be satisfied, or that the debtor was insolvent, or that an execution had been returned *nulla bona*.

The Minnesota statute, Gen. Stat. 1894, § 4222, makes all such conveyances void as to creditors irrespective of the question whether the debtor has other property, and, when the creditor once acquires a lien on the property so transferred, the lien itself is sufficient to confer jurisdiction upon a court of equity to set aside the transfer as an obstruction to the enforcement of the creditor's legal rights. Ibid.

Proof that the judgment debtor had no other property sufficient to satisfy plaintiff's judgment, or that execution had been issued and returned unsatisfied, is not necessary where the action is not to reach equitable assets, but to set aside a fraudulent transfer of the debtor's lands, which obstructs the collection of plaintiff's judgment. Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183.

In Patton v. Bragg, 113 Mo. 595, 35 Am. St. Rep. 730, 20 S. W. 1059, it was held to be no objection to a bill to set aside as fraudulent a conveyance of land upon which the creditor's judgments were liens, that the debtor had an interest in his father's land upon which the creditor's judgments were also liens, and that it was not for the defendants to question his right to levy upon either.

In Westerman v. Westerman, 25 Ohio St. 500, it was said that the mere fact that the evidence showed that the debtor had other property was no defense to a creditors' bill to set aside a fraudulent sale of land by such debtor; the creditor might levy his judgment upon the land and cause it to be sold to the satisfaction of his judgment, and the fraudulent sale would be held a nullity irrespective of the other property of the debtor.

And in Hoffman v. Kiefer, 19 Ohio C. C. 401, it was said *obiter* that, where a debtor has made fraudulent conveyances of his property, a creditor need not first exhaust other assets of the debtor before assailing the validity of these fraudulent transfers

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in a court of equity, but that he may proceed in the first instance to set aside the fraudulent conveyance and reach that particular property, and it would be no defense to an action of that kind by a creditor to set forth that there was other property available, without the aid of equity, sufficient to discharge the indebtedness.

The right of a creditor to subject to the payment of his debt the property of his debtor fraudulently conveyed does not depend upon the question of the insolvency of the debtor. Halfpenny v. Tate (W. Va.) 64 S. E. 28. The court said that insolvency was often an element going to show fraud, but that the creditor's right to pursue the property fraudulently conveyed was not controlled thereby. While a different rule might prevail in different jurisdictions, it was not the law of West Virginia, that the creditor must first exhaust the debtor's other property. The statute of West Virginia against fraudulent conveyances gave an absolute right to creditors to a suit in equity to annul a fraudulent conveyance, and they were not compelled first to subject other property of the debtor to execution or otherwise.

On the contrary, in Meux v. Anthony, 11 Ark. 411, 52 Am. Dec. 274, an action to set aside the sale of negroes as fraudulent, the court, after showing the necessity of judgments as a preliminary step to equitable relief, said *obiter* that it was but just that the creditor should show also that he had failed in the ordinary mode of collection to make his debt, and that, independent of the property so conveyed in fraud of his rights, there was not sufficient to satisfy his debt. For, if there was other property sufficient for that purpose, it was an act of capricious intermeddling with the contracts of others to permit him to interfere to set it aside. As between the vendee and vendor, the contract was valid, and he who came to rescind it and take from the possession of the vendee the property so purchased, on the ground that he was a creditor whose rights were affected by such transfer, must show that he had a debt adjudged to be due him, and that, after having resorted to the ordinary process for that purpose, he had failed to make his debt; or he must by distinct averments and allegations show such circumstances as would excuse him for having failed to do so.

In Stephens v. Parvin, 33 Colo. 60, 78 Pac. 688, the court said that the rule regarding an allegation of insolvency was based upon the proposition that if a debtor was solvent, he might do with his property what he would, unless by conveying it he rendered himself insolvent; and the purchaser or donee of the property should not be subjected to litigation if the debtor had other property out of which the creditor could be paid.

And in Baugh v. Boles, 35 Ind. 524, it was held that an action by a surety in which he asks judgment for the amount he was compelled to pay on the bond of his principal, and that a transfer of real estate by the latter to his infant child be set aside as fraudulent, cannot be maintained where it is not shown that the principal had not and has not property out of which the debt can be made without interfering with the property conveyed to the infant; and an allegation that at the time of the transfer the principal was greatly involved in debt, and had not sufficient means to pay, does not sufficiently show the necessity of selling the land.

In Morgan v. Olvey, 53 Ind. 6, it was held that one seeking to set aside an alleged fraudulent transfer of real estate must show that the debtor did not have other property subject to levy and sale with which his judgment might have been satisfied, in order to make the necessity of resorting to the property in question proper.

In Bruker v. Kelsey, 72 Ind. 51, the court said that the same reason on which the rule was founded which required it to be averred that the grantor in an alleged fraudulent conveyance had not other property at the time of the conveyance, out of which the debt could be made, required a corresponding averment in reference to the time of the commencement of the action. The court said that the conveyance was valid between the parties thereto, and third parties were not allowed to attack it unless it was necessary to do so in order that justice be done. If there was other property in the hands of the debtor when the conveyance was made, ample to pay all his debts, or if, when the suit was commenced, he had other property subject to sale on execution, out of which the plaintiff's debt could be made, justice did not require or permit that the conveyance be set aside in order that resort might be had to the real estate so conveyed. The principal rule of pleading was that the complaint show affirmatively a complete right to resort to the land for the satisfaction of the debt, and that could not be unless, when made, the conveyance was fraudulent as against creditors, and unless the right of action which then arose was shown to continue to exist at the time when the suit was brought.

In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment, at the time the suit was brought, that the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal. Brumbaugh v. Richereek, 127 Ind. 240, 22 Am. St. Rep. 647, 26 N. E. 664. The court said that a creditor was not authorized to interfere with any disposition which his debtor might make of his property so long as he was not injured thereby. The debtor might convey his property with the intention of defrauding his creditors, but, if he still retained property subject to execution out of which the debt might be collected, the creditor could not complain. So, also, if the debtor conveyed all his property with like fraudulent purpose, retaining nothing, but, when the creditor sought to collect the

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Plaintiff must show in such a case not only that the grantor in such conveyance had no other property subject to execution at the date of the conveyance, but that he had no such property at the time of the commencement of the action and filing of the complaint. Taylor v. Johnson, 113 Ind. 164, 15 N. E. 238; Winstandley v. Stipp, 132 Ind. 548, 32 N. E. 302; Slagle v. Hoover, 137 Ind. 314, 36 N. E. 1099; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381.

So, an omission to find facts showing that the grantor had no property other than the land out of which the debt sued for might have been made, either at the time of the conveyance, or from that time up to the time the suit was brought, was held fatal to a judgment setting aside a conveyance of real estate at the suit of the creditor. Hartlepp v. Whiteley, 129 Ind. 576, 131 Ind. 543, 28 N. E. 535, 31 N. E. 203.

And a complaint failing to allege that the fraudulent grantor had no property subject to execution at the time the suit was brought is fatal. Line v. State, 131 Ind. 468, 30 N. E. 703; Jackson v. Sayler, 30 Ind. App. 72, 63 N. E. 881.

In Parrott v. Crawford, 5 Ind. Terr. 103, 82 S. W. 688, it was held that the defendant who, by way of cross relief, seeks to have a conveyance to plaintiff set aside as fraudulent, must aver that the indebtedness was contracted prior to the alleged fraudulent conveyance, and that the debtor is insolvent, and that he had no property subject to execution at the time the suit was commenced.

It was said in Hill v. Denney, 106 Iowa, 726, 77 N. W. 472, that, if it is the rule that an attachment creditor, before judgment, may under some circumstances proceed in equity to remove encumbrances from real estate, he must at least show that the relief which the action at law would afford would not be adequate, and that, where there was nothing in the petition to justify the conclusion that the interest of the debtor in the land subject to the mortgage was not sufficient to satisfy the claims of the plaintiffs, or that they might not be satisfied from other property owned by him, it was held to be insufficient.

In Riddick v. Parr, 111 Iowa, 733, 82 N. W. 1002, it was said to be a familiar rule of the law that, unless a judgment debtor was insolvent, the judgment creditor might not invoke the aid of equity to set aside an alleged fraudulent deed of real estate.

A bill in equity to set aside a fraudulent encumbrance or conveyance of real estate by a debtor cannot be maintained until it has first been ascertained that, at the date of the institution of such proceeding, the alleged fraudulent grantor was not, outside of the property so conveyed, possessed of sufficient estate which could be seized for the satisfaction of the claim in question. If the payment of such claim can be enforced without resort to a court of equity to have a trust declared, or conveyance of real estate set aside as fraudulent, resort to that court is not proper. Therefore, where there is no showing on such a bill at the time of its filing that the deceased did not have ample means subject to execution with which to satisfy in full the claims of all his creditors, equity will not entertain jurisdiction of the bill. Bradley v. Larkin, 5 Kan. App. 11, 47 Pac. 315.

In Smith v. Ratcliff, 1 Ky. L. Rep. 316, it was said that the ordinary legal remedies must be resorted to by a creditor without success, before he is entitled to resort to equity to reach real estate.

In Martz v. Pfeifer, 80 Ky. 600, the court said that one of the principal reasons for the chancellor disclaiming jurisdiction where the demand against the debtor was purely legal was that the remedy at law was ample for coercing payment and that, the conveyance being good as between the parties to it, that remedy must be exhausted before the rights of third parties would be interfered with for the purpose of satisfying the creditor's demand. This was an action to reach property subject to execution.

In Zimmerman v. Fitch, 28 La. Ann. 454, it was held that an action to annul an alleged fraudulent sale of the debtor's goods could not be maintained where, among other things, it appeared that it was not alleged in the petition that there was not property enough of the debtor's left to pay the plaintiff's claim. Citing Civil Code, art. 1972 (1967) and art. 1971 (1996).

In Morsell v. Baden, 22 Md. 391, it was held that, before a creditor could vacate a deed of manumission, he must have exhausted the real and personal estate of the debtor, and have shown its insufficiency for the payment of the debts.

In Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460, it was held that a creditor could not have a conveyance of property made for the purpose of defeating his judgment set aside if the debtor was still in possession, and was still the owner of property enough to satisfy the judgment, which had been levied upon and was at the disposal of the sheriff, since the assistance of a court of equity was not necessary to aid the complainant in his legal remedy to obtain satisfaction of his judgment.

A creditors' bill to reach property fraudulently conveyed is defective if it simply alleges that the execution was returned "no personal property out of which to be collected," if the bill contains no allegation that there is no real estate on which to levy. Bayley v. Bayley, 66 N. J. Eq. 84, 57 Atl. 271. The court said that, if the debtor had other property subject to a judgment and execution sufficient to satisfy the debt, there was no necessity for the creditor to resort to equity. If his debt could be satisfied out of the property upon which his judgment was a lien, it was inviting only useless litigation for him to question con-

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In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment, at the time the suit was brought, that the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal. Brumbaugh v. Richereek, 127 Ind. 240, 22 Am. St. Rep. 647, 26 N. E. 664. The court said that a creditor was not authorized to interfere with any disposition which his debtor might make of his property so long as he was not injured thereby. The debtor might convey his property with the intention of defrauding his creditors, but, if he still retained property subject to execution out of which the debt might be collected, the creditor could not complain. So, also, if the debtor conveyed all his property with like fraudulent purpose, retaining nothing, but, when the creditor sought to collect the

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veyances made by the debtor which, however they might have been intended, did not operate as a fraud upon him.

But for New Jersey cases holding a return *nulla bona* unnecessary to equitable relief, see supra, III., b, 1, (d), (3).

In Payne v. Sheldon, 63 Barb. 169, the court said that, if the property sought to be reached was liable to sale on execution, then it must appear that it had been made subject to the lien of the judgment and "that there is some necessity" for asking the aid of the peculiar powers of a court of equity. So far as real estate was concerned, the lien was effected by docketing the judgment in the county where the lands were situated; as to goods and chattels, by issuing execution to the sheriff of the county where the property was situated, and levying on the same. The lien being thus placed upon the property, the creditor was in a situation to ask relief if there were "an existing necessity." To show that, it must appear that the particular property sought to be reached and sold was necessary for the satisfaction of the judgment; for, if there were sufficient other property liable to sale, and there were no impediment to a fair sale of the same, then there was no necessity for applying for aid; so it must be alleged in the pleading, and if denied proved on the trial, that there was not sufficient other property liable to sale on execution out of which to satisfy the judgment. In this case the court clearly recognizes the distinction between property subject to levy and property not subject to levy, saying that, in the latter case, it was necessary to exhaust the remedy at law, while, in the former, it was necessary to perfect the lien and to show "that there is some necessity for asking the aid of the peculiar powers of a court of equity." It is here that the court goes astray, for the peculiar necessity is the cloud on the title, while the court takes it to be that the necessity consists of the fact that there is no other property subject to levy. If the creditor must show that there is no other property subject to levy, he must exhaust his remedy at law, and therefore there would be no distinction in that respect between property subject to levy, and property not subject to levy. The court seemed to be of the opinion that, while the execution need not be returned, the fact that there was no other property must be averred and proved on the trial. In other words the remedy at law must in fact be exhausted, but it need not be proved by the return of the execution. This is exalting form before substance. It is manifestly unsound, and not in accord with the better reasoned New York cases. The statement was, moreover, *obiter*. It is, however, by just such expressions that the subject has been confused.

In Mackey v. Wallace, 26 Tex. 526, it is held necessary that a creditors' bill to procure payment of a judgment from excess of land owned by the debtor over what he was entitled to as a homestead should aver that the debtor has no other property liable to be taken on execution in satisfaction of his debt. The court said that, if the proceeding could be maintained, it must be when the creditor could not obtain satisfaction of his judgment in the ordinary way; and it must be in subordination to the right of the debtor to point out property and to possess the homestead of his own selection. This case, turning upon the debtor's right under the homestead statutes, does not weigh against the rule that the remedy at law need not be exhausted in actions to reach property subject to execution.

In Howard v. Devol, 15 Wash. 270, 46 Pac. 235, it was held that, before one holding a judgment for deficiency on mortgage foreclosure can attack a prior lien on real estate, or ask that the property be subjected to his lien, the plaintiff must show either that the debtors are insolvent, or that execution has been issued against them for the deficiency on the foreclosure judgment and returned unsatisfied.

In Hall v. Joiner, 1 S. C. 186, it was held that a simple contract creditor in a case *inter vivos* has no standing in a court of equity to set aside a fraudulent conveyance. The court then goes on to say, *obiter*, "He must exhaust his remedy at law, and it is only after judgment, and in aid of his execution, or to have a discovery of assets after satisfaction at law has failed, that he can appeal to a court of equity."

(5) Effect of levy upon property owned by debtor.

In Wales v. Lawrence, 36 N. J. Eq. 207, it was held that a levy by a creditor of an execution upon the property of one joint debtor, sufficient to pay the execution, precludes him from maintaining a creditors' bill to reach real estate fraudulently conveyed by the other joint debtor.

But the mere fact that an execution has been levied upon personal property, the title of the debtor in which, however, is in dispute, was held, in Cox v. Dunham, 8 N. J. Eq. 594, not to render it necessary first to try out the title to the personal property before seeking the aid of equity to set aside fraudulent conveyances of real estate, made by the debtor.

And the issuing of attachments on a judgment will not prevent a creditor from maintaining a bill to reach assets fraudulently conveyed, unless the defendant shows that the creditor's claim can be realized in the attachment proceeding. Weightman v. Washington Critic Co. 4 App. D. C. 136.

(e) Demand.

Where the creditor has exhausted his remedy at law, and seeks a discovery of the debtor's interest in the assets of a partnership of which he is a member, a request and refusal to expose and apply such assets before the bringing of the equitable suit is not an additional condition precedent thereto. Treadwell v. Brown, 44 N. H. 551.

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2. As to property not subject to levy.

There is no conflict as to the general rule that the remedy at law must be exhausted before a court of equity will help a creditor to lay hold of the debtor's property not subject to execution. As stated supra, II., this is the only true place for the application of the rule as to the exhaustion of legal remedies.

Failure to aver that the execution was returned is fatal to a creditors' bill. Beardsley Scythe Co. v. Foster, 34 How. Pr. 97.

A complaint in a creditors' action must show that execution has been issued to the proper county and returned unsatisfied. Tabor v. Bunnell, 10 N. Y. Week. Dig. 551.

The creditor must exhaust his remedy against real as well as personal estate of the debtor before he can come into equity to obtain satisfaction out of property which he is unable to reach by such execution. Corey v. Cornelius, 1 Barb. Ch. 571.

In so far as a bill seeks to reach a fund produced by sale under execution on a fraudulent confession of judgment, it should allege an unsatisfied execution. Kittel v. Augusta, T. & G. R. Co. 65 Fed. 859. The court said that the return of an unsatisfied execution is necessary where it is sought to reach choses in action, avails of property fraudulently conveyed, or equitable assets, or where there is a statute to that effect.

To support an action to reach equitable interests or assets which are not the subject of levy and sale by execution, the remedy at law by its ordinary process must first be exhausted. This can be evidenced only by the return of the execution unsatisfied, which, for the purpose of such equitable remedy, is a condition precedent. Kerr v. Dildine, 60 Hun, 315, 15 N. Y. Supp. 58.

In order to reach a fund represented by a county warrant in favor of the debtor, it must be shown that the judgment debtor has neither personal nor real property subject to levy or execution sufficient to satisfy the judgment upon which the bill is based. Clark v. Bert, 2 Kan. App. 407, 42 Pac. 733.

A creditors' bill is so defective as to form no foundation for equitable relief as against fraudulent assignments by a debtor of his property, where it appears on the face of the bill that it was filed before the return day of the execution, and it is not alleged that the complainant had obtained a lien by the issuing of the execution. McElwain v. Willis, 3 Paige, 505. The court said that, although the complainant considered the return of the execution a mere matter of form, which would not essentially vary the rights of the parties, as the defendants had no property on which the execution could be levied, yet it was a form essential to the jurisdiction of the court to decree satisfaction of that judgment out of the equitable assets or choses in action of those defendants.

In Wiltshire v. Marfleet, 1 Edw. Ch. 654, it was held that a debtor would not be enjoined from disposing of the proceeds of goods fraudulently obtained before judgment. The court said that creditors could have their remedy against a debtor only after the return *nulla bona* upon an execution issued under the judgment at law.

Nor will a creditors' bill properly so called lie for the collection of a decree in equity, an execution not having been returned unsatisfied. In this respect a money decree in equity stands upon the same footing as a judgment at law. Winslow v. Leland, 128 Ill. 304, 21 N. E. 588.

In Preston v. Colby, 117 Ill. 477, 4 N. E. 375, it was held that where the debtor, after judgment, turns out to his creditor real estate which, if converted into money, will be ample to pay the debt, a remedy against this property must first be exhausted before the creditor will be permitted to proceed against other assets of the debtor.

A creditor must obtain a judgment on his debt, and endeavor to coerce the payment by execution, before he can go into equity to procure satisfaction out of property that cannot be reached on execution. He must exhaust his legal remedies without success before he can resort to the equitable estate of his debtor. Until that is done, it does not appear but that he has an ample remedy at law, and a creditor may not, after obtaining judgment against his debtor without first suing out an execution, ask the aid of a court of equity to remove an obstacle in the way of his collection by execution. Ishmael v. Parker, 13 Ill. 324.

In Fox v. Moyer, 54 N. Y. 125, the court said that the object of a creditors' bill is to reach choses in action and equitable assets of the judgment debtor which cannot be reached by execution. Before such a bill can be filed, it is always necessary that an execution be issued to the county where the judgment debtor resides, and returned unsatisfied.

In Payne v. Sheldon, 63 Barb. 169, it was said that the debtor's assets applicable to the payment of his debts were divided into two classes; one, when the property was made subject to a lien by a judgment, and was liable to seizure and sale by process of execution, and consisted of real estate and personal property; the other consisted of choses in action not liable to levy and sale on execution. If the judgment creditor sought to obtain satisfaction out of the class of property beyond the reach of execution, it must appear that he had exhausted his remedy at law; and the only evidence of that fact that would be received by the rules of law was the issuing and return *nulla bona* of an execution against the property of the judgment debtor liable to sale on execution. The statute providing for the filing and prosecution of the judgment creditors' bill, so-called, required this.

In Mechanics' & T. Bank v. Dakin, 51 N. Y. 519, it was said that, under the New York law and practice, where the debtor had equitable assets which could not be

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reached by an execution, an execution must be issued upon the judgment, for the purpose of making the amount upon the property of the debtor liable to execution, if such might be found, and returned unsatisfied if none could be found. This was a necessary preliminary. All the cases agreed that no such bill could be sustained until the remedy at law had been exhausted by the return of an execution unsatisfied.

In Schofield v. Ute Coal & Coke Co. 92 Fed. 269, the court said that one class of cases in which equitable relief will be afforded includes cases in which the creditor's remedy at law is utterly ineffectual to reach the property of his debtor, or to fasten any lien or claim upon it, as where a creditors' bill is exhibited to reach choses in action, equitable interests, or property of the judgment debtor that has been fraudulently conveyed beyond the reach of the judgment and execution. The utter failure of the remedy at law is the sole ground of the jurisdiction in equity, and hence it is that it has sometimes been held that the return of an execution unsatisfied, as proof of this futility, is essential to the maintenance of the suit.

Where an action in the nature of a creditors' bill is brought to reach equitable assets and choses in action, it is essential to show execution returned unsatisfied; and this is necessary in order to prove that the creditor's legal remedy is exhausted. Buswell v. Lincks, 8 Daly, 518; Grenell v. Ferry, 110 Mich. 262, 68 N. W. 144; Davidson-Wesson Implement Co. v. Parlin & O. Co. 72 C. C. A. 525, 141 Fed. 37; Taylor v. Gillean, 23 Tex. 508.

Equitable assets can be reached only after the remedy at law has been exhausted, the evidence of which is the return of an execution unsatisfied. Harvey v. Brisbin, 143 N. Y. 151, 38 N. E. 108.

A creditors' suit to reach equitable property cannot be commenced until the creditor has exhausted his remedy at law by the issuing of an execution to the proper county, and having same duly returned unsatisfied. Parshall v. Tillou, 13 How. Pr. 7.

A creditors' bill to reach assets of a debtor which are not subject to execution cannot be maintained until the recovery of a judgment, the issuance of an execution thereon, and its return unsatisfied. Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350; Russell v. Chicago Trust & Sav. Bank, 139 Ill. 538, 17 L.R.A. 345, 29 N. E. 37.

This rule was recognized in Darcey v. Lake, 46 Miss. 109.

If choses in action are pursued, the execution must be returned unsatisfied. Greenwood v. Brodhead, 8 Barb. 595.

A bill to reach choses in action cannot be maintained while the execution is still out. Vanderpool v. Notley, 71 Mich. 422, 39 N. W. 574.

To reach mere choses in action not liable to seizure and sale under execution, the legal remedy must first be exhausted by the return of an execution unsatisfied. Parish v. Lewis, Freem. Ch. (Miss.) 299; Bishop v. Halsey, 3 Abb. Pr. 400.

Where an execution is still out and active at the time a creditors' bill is filed, no necessity is legally apparent for seeking the aid of equity to discover and subject to judgment any nonleviable interest of the debtor; therefore, as to such interests, no relief will be given in equity on a bill in aid of an execution levied upon real estate alleged to have been fraudulently conveyed by the debtor, although, as to such real estate, relief is given. McCullough v. Day, 45 Mich. 554, 8 N. W. 535.

A bill to recover assets not within reach of execution, if considered as a creditors' bill in the ordinary sense, should allege that execution has issued upon the judgment and has been returned unsatisfied. Moyer v. Riggs, 8 Kan. App. 234, 55 Pac. 494.

In Allen v. McRae, 91 Wis. 226, 64 N. W. 889, it was said that, where a bill is not brought in aid of an existing levy, it cannot be maintained unless it appears that the claim has been reduced to judgment, and that an execution has been returned unsatisfied.

In Chicago, D. & V. R. Co. v. St. Anne, 101 Ill. 151, it was held that judgment must be recovered and execution returned unsatisfied to entitle complainants to maintain a creditors' bill under the statute.

A creditor cannot come into equity to reach the equitable assets of his debtor while he causes the debtor's body to be held in custody, since his right to proceed against the property of the debtor by execution is thereby suspended and his remedy at law is not thereby exhausted. Tappan v. Evans, 11 N. H. 311.

Failure to show that there is no attachable property in the state is fatal to the maintenance of an action in the nature of a creditors' bill by a nonresident creditor against a nonresident debtor, to reach funds in the hands of the clerk of a district court, since it must be made to appear that the legal remedy is exhausted. Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478.

A bill cannot be maintained in equity by a bondholder of a corporation to reach moneys alleged to have been converted by the president of the company to his private use, where the complainant has not obtained judgment on his bond against the company, and execution has not been issued and returned unsatisfied. Van Weel v. Winston, 115 U. S. 245, 29 L. ed. 387, 6 Sup. Ct. Rep. 22.

To entitle a judgment creditor to invoke the aid of equity to attack the validity of an assignment by his debtor of a judgment in favor of the debtor, he must cause an execution to be issued and a return *nulla bona* to be made thereon. Henderson v. McVay, 32 Ala. 471.

An action to reach lands to which the defendant is supposed to have only an equitable title cannot be maintained unless execution has been issued and returned unsatisfied. Bevans v. Henry, 49 Ala. 123.

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A bill to reach a debtor's equity of redemption in real estate must aver that an execution has been issued and duly returned *nulla bona*, and such fact must appear before a court of equity has jurisdiction over the property of the debtor sought to be sold by a creditor. Shea v. Dulin, 3 MacArth. 339.

In Moshier v. Meek, 80 Ill. 79, where a bill to enforce a vendor's lien failed because there was no lien, the court said that relief could not be granted on the ground simply that the complainant was a creditor, where he had not shown that he had resorted to and exhausted his legal remedies. The statute required that the claim should be pushed to a judgment, and the return of *nulla bona*, before equity would aid in reaching equitable interests and rights.

In Tobin v. Wilson, 3 J. J. Marsh. 63, it was said that a fieri facias on a replevin bond must be returned "no property" to authorize a bill to subject the debtor's choses in action to the creditor's claims.

When a creditor comes into equity to reach the equitable interests of his debtor in land, he must show a judgment which would, in case the legal title to the property were in the debtor, be a legal lien thereon, and an execution returned unsatisfied; but it is not necessary, in such a case, to show a levy of an execution on the land which he seeks to reach. Bigelow Blue Stone Co. v. Magee, 27 N. J. Eq. 392.

A creditor must bring his action at law, and establish his legal demand, and issue a fieri facias, to show that satisfaction can in no other manner be had, before he can have the aid of equity to reach the debtor's equitable assets. Frost v. Reynolds, 39 N. C. (4 Ired. Eq.) 494.

To entitle a creditor to the aid of equity to subject to the payment of his demand equitable assets of the debtor, he must first establish the indebtedness by a judgment at law, and second, he must establish that the debtor has no property that can be reached by a fieri facias, by a return *nulla bona*, or, under special circumstances, by some other sufficient proof. Hook v. Fentress, 62 N. C. (Phill. Eq.) 229.

In Meissner v. Meissner, 68 Wis. 336, 32 N. W. 51, the court said that if a proceeding by petition and by motion of one creditor to reach money in the hands of a court, apparently belonging to another creditor of a common debtor, might take the place of a creditors' action, it was of the opinion that the petitioning creditor must show that he had exhausted his remedy at law against the common debtor, or he must show a specific lien upon the particular property or money sought to be reached, either by an attachment, or execution levied upon the same, or upon the property from the sale of which the fund had arisen.

A creditors' bill to set aside an assignment of, and to reach the proceeds of, a policy of insurance, cannot be maintained where no execution has issued on the judgment on which the suit is founded, since the creditor must first exhaust his remedy at law by the recovery of a judgment and the issuing of an execution thereon, and the return of the same unsatisfied. Genesee River Nat. Bank v. Mead, 18 Hun, 303.

In McCaffrey v. Hickey, 66 Barb. 489, the court, in holding that a sum of money representing the value of a colt could not be reached in an action in aid of an execution, said that, to authorize the commencement of a creditors' suit, strictly so called, not only must a judgment have been recovered, but an execution upon it must have been issued and returned unsatisfied, in whole or in part.

One who has obtained a judgment for alimony cannot maintain a creditors' bill to reach the income of a trust fund created for the benefit of the judgment debtor until an execution has been issued to the proper county and returned unsatisfied; since a judgment for alimony, under the New York Code, is a judgment for a sum of money, which will be enforced by execution. Miller v. Miller, 7 Hun, 208.

In Humphreys v. Atlantic Mill. Co. 98 Mo. 542, 10 S. W. 140, the general rule was recognized that a claim in the shape of an open account will not support a creditors' bill to reach the proceeds of a draft. It was said that, in such a case, a creditor, before appealing to equity, must show that he has exhausted his power at law. In general, it must be shown that judgment has been recovered, and that execution has been issued and returned *nulla bona*.

In Dunlevy v. Tallmadge, 32 N. Y. 457, an action to reach equitable assets, it was held that a judgment creditor of individual members of an alleged insolvent partnership could not maintain an action in equity to adjudge an assignment of personal property null and void, where execution was not issued until seven days after the suit was begun, which was returned *nulla bona* a month after the case was at issue. The court said that the return of the execution unsatisfied was essential, though there was nothing that could be reached by an execution at law.

An attachment or judgment lien is not necessary to enable a judgment creditor of a corporation to go into equity to reach its assets which have been transferred to a stranger, where the assets are equitable, and he has exhausted his remedies at law. Williams v. Commercial Bank, 49 Or. 492, 11 L.R.A.(N.S.) 857, 90 Pac. 1012, 91 Pac. 443.

In Del Valle v. Hyland, 40 N. Y. S. R. 924, 15 N. Y. Supp. 901, the rule stated in Buswell v. Lincks, 8 Daly, 518, that, before equity will assist a judgment creditor to reach personal property fraudulently conveyed, an execution must be outstanding in the hands of an officer for service, was held not to apply where the objects sought to be reached were choses in action, because of an express provision of statute (Code, §§ 1871, 1872), making the return of execution *nulla bona* necessary. But the court might have said that the rule did not, independent of statute, apply to choses in action. The

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rule that the execution must be outstanding applies only to personal property subject to levy.

For demand before return of execution, see infra, IV., d, 5.

IV. What amounts to exhaustion of remedy at law.

a. In general.

In the cases under this subdivision of the note, the question before the court was whether the necessary steps had been taken to acquire a lien or to exhaust the remedy at law, the assumption being that the exhaustion of the remedy at law is a condition precedent to the maintenance of the equitable action.

The exhaustion of legal remedies is evidenced by the issuance of execution and its return unsatisfied. Harvey v. Brisbin, 143 N. Y. 151, 38 N. E. 108.

In Manchester v. McKee, 9 Ill. 511, the court also said that a creditors' bill whereby the complainant sought to subject certain lands which he could not reach by execution to the payment of judgments against the debtor was sufficient if it showed the recovery of the judgments, and that executions had been issued upon the judgments, which had been returned unsatisfied excepting as to a small amount of each. This, said the court, showed prima facie that he had exhausted his legal remedy.

In Gates v. Boomer, 17 Wis. 456, creditors whose executions had been returned unsatisfied sought to set aside, as fraudulent, a deed executed by the debtor before judgment was rendered. The action was held maintainable.

A creditor cannot be said to have failed to have exhausted his remedy at law because of the fact that he holds certain warehouse receipts as security for his debt at the time of the filing of the bill, where it also appears that the court had enjoined the warehouse keeper from surrendering them, and that the creditor, to obtain them, had given a bond conditioned that he would account for their value, since a permission to take the goods upon giving of the bond to account for their value was in no sense giving him an opportunity to avail himself of his security, but was merely constituting him a trustee or a receiver, acting under leave of the court. Johnson v. Miller, 50 Ill. App. 60.

The issuance of an execution and its return *nulla bona* is sufficient to entitle a judgment creditor to the aid of equity in removing fraudulent obstructions upon the debtor's real estate, calculated to make an execution sale unproductive. The objection to the maintenance of the action was that the legal remedies had not been exhausted. First Nat. Bank v. Gibson, 60 Neb. 767, 84 N. W. 259.

A creditors' bill showing the issuance of an execution, and its return *nulla bona*, together with an allegation that the debtor did not have property subject to execution, either at the time of the conveyance made, or the action brought, out of which a creditor's claim could be collected, sufficiently shows that an ordinary legal remedy would not afford relief, and entitles a creditor to the aid of equity to subject lands of the debtor, alleged to have been fraudulently conveyed, to the payment of his judgment, although the complaint does not show the value of the real estate conveyed. Sherman v. Hogland, 73 Ind. 472.

Proof that the debtor has some property subject to execution, but not enough to satisfy the judgment of the creditor, is not sufficient to show the failure on the part of the creditor to exhaust his legal remedies. McConnell v. Citizens' State Bank, 130 Ind. 127, 27 N. E. 616.

A bill to reach land conveyed by a corporation, which neither alleges insolvency of the defendant at the date of the suit, nor existence of no property, cannot be maintained, it not appearing that the land conveyed was land owned by defendant, or that the officer made any attempt to find or levy on any lands, equities of redemption, or stock, as commanded by the writ. Kittel v. Augusta, T. & G. R. Co. 65 Fed. 859.

The issuance of an alias execution after the first execution has been issued to the proper county and returned unsatisfied will not prevent the maintenance of a creditors' bill based on the original execution unless it appears that sufficient property may be realized on the alias to satisfy the judgment, where it appears that the purpose of the bill is to reach property not liable to execution. Thomas v. McEwen, 11 Paige, 131. The court said that, to prevent the right of the creditor to proceed in equity upon the return of the first execution merely, while an alias fieri facias was in the hands of the sheriff, it must distinctly appear that the sheriff had levied, or, at least, that he could levy, upon sufficient property under the execution in his hands to satisfy the whole of the complainant's debt.

Where the original execution was returned unsatisfied, and a second execution was levied on property of the debtor insufficient to satisfy the claim, it was held that the return of the first writ was not so far disproved by the second, or the inference of insolvency which would be authorized by the first so far contradicted by the last, that the first return could no longer be regarded as proper ground for equitable relief. It was held that the bill could be maintained on the first return. Helm v. Hardin, 2 B. Mon. 231.

The recovery of a second judgment by a judgment creditor is not a bar to his maintaining a creditors' bill on an execution issued and returned *nulla bona* on the first judgment. Howard v. Sheldon, 11 Paige, 558.

In Willis v. Moore, Clarke, Ch. 150, the vice chancellor intimated that when an execution issued to the counties where the defendants resided had been returned unsatis-

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fied, and another execution was out in the hands of a sheriff of another county, a creditors' bill could not be filed until the return of such other execution, unless the complainants alleged in their bill that there were some fraudulent obstructions to the collection of the debt under such execution, or that the property in such county would, in any event, be insufficient to pay the judgment debt.

An execution having been issued to the proper county, and returned unsatisfied, the creditor, upon the issuing of another execution to a different county, may bring his creditors' bill without waiting until the return of the second execution unsatisfied, unless there has been a levy on the property of the debtor under the second execution, sufficient to satisfy the judgment. Cuyler v. Moreland, 6 Paige, 273. The court said that where the right to file a creditors' bill once exists by the return of an execution unsatisfied, if the defendant had either real or personal property which was a proper subject of sale on execution, but which was fraudulently transferred or encumbered for the purpose of protecting it from the execution of the creditor, and had other property which could be reached only by the aid of the court, the judgment creditor might sue out a second execution, so as to obtain a specific lien upon the property which was subject to sale thereon, and might file a bill in equity for the double purpose of removing the obstruction which had been fraudulently interposed against the execution at law, and also to reach other property of the defendant which could not be sold under such second execution.

An averment that a judgment debtor is in possession of the property sought to be reached by a creditors' bill, on its face shows the right to make a levy thereon, and such a bill is, therefore, defective, in that it does not comply with the rule requiring a creditor first to exhaust his legal remedies for the collection of his judgment, or show that such remedies are inadequate before seeking relief in equity. Wilkinson v. Goodin, 71 Mo. App. 394.

In Williams v. Sexton, 19 Wis. 43, it is held that the fact that a debtor has real estate subject to execution shows that the creditor has not exhausted his legal remedies, and is therefore fatal to his right to relief in equity.

In Starr v. Rathbone, 1 Barb. 70, a motion for a receiver in a creditors' action was denied on the ground that the bill alleged that the defendant was the proprietor of a hotel entertaining numerous guests, and receiving money from them from time to time, and that he had a large amount of furniture and other personal property in his hotel, it therefore appearing that the remedy at law was not exhausted, because of the fact that the defendant had property which, from aught that appeared, might be reached by an execution at law.

While the question of exhausting the legal remedy relates strictly to the steps necessary to be taken after judgment, still, the obtaining of the judgment is generally considered as a step in the process of exhausting the remedy at law. Considered as such, see supra, III., a, 2 and 3, as to what amounts to exhaustion as to judgment.

b. Regularity of proceedings at law.

It is not intended in this note to go into questions of practice, but a few cases are here grouped as bearing in some degree on the question of whether the remedy at law has been exhausted, the contention being that the remedy was not exhausted, because of irregularity of proceedings at law.

In a creditors' bill, regularity of the complainants' proceedings in obtaining their judgment at law, or in issuing and returning an execution, or in executing the same, will not be considered, since the defendant must apply to a court of law for relief in that respect. Barnard v. Darling, 1 Barb. Ch. 218.

An irregularity in the issuance of an execution or its return must be taken advantage of by motion to set aside, made to the court from which it issued. It cannot be made in an equitable proceeding by a creditor to reach the assets of the debtor. How v. Kane, 2 Pinney (Wis.) 531, 2 Chand. (Wis.) 222, 54 Am. Dec. 154.

Return of an execution to the office of a wrong clerk will not stand in the way of an application for the appointment of a receiver in a creditors' bill against the judgment debtors, since the remedy at law is exhausted by the sheriff's return upon an execution, which is all that is necessary to give a court of equity jurisdiction. Clark v. Dakin, 2 Barb. Ch. 36.

In order to support a creditors' bill based upon the issuance and return of an execution unsatisfied, the execution must be returned and filed with the clerk of the court from which it issued, where a statute so requires. Winslow v. Pitkin, 1 Barb. Ch. 402.

That the sheriff improperly returns an execution unsatisfied when he is notified by the judgment debtors that they are the owners of certain land which they request him to advertise and sell, but which he refuses to do, will not prevent the creditor from filing his bill, where there is no fraud or collusion between the creditor and the sheriff. Stoors v. Kelsey, 2 Paige, 418.

Failure of the sheriff to file an execution until after the creditor's action is brought, where it has been indorsed as unsatisfied before the action is begun, will not defeat the action, on the theory that it was begun before the execution was returned. Iselin v. Henlein, 16 Abb. N. C. 73, 2 How. Pr. N. S. 211.

Where a creditors' bill is based on the return of an alias fi. fa., it is not necessary that it should appear upon the face of the bill that the first execution was regularly issued and returned. Williams v. Hubbard, 1 Mich. 446.

A fraudulent assignee of land cannot object to the execution upon which a creditors'

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suit was founded, because the writ was issued within thirty days after the recovery of a judgment, since this renders the writ voidable on the application of the judgment debtor, but does not impair its force as to strangers. Green v. Burnham, 3 Sandf. Ch. 110.

In Warmoth v. Dryden, 125 Ind. 355, 25 N. E. 433, on an appeal to equity by a creditor to set aside a fraudulent conveyance of real estate by the debtor, proof of the issuance of an execution, and its return *nulla bona*, was held to establish prima facie the insolvency of the debtor, although the clerk failed to affix the seal of the court to the execution.

Where a scire facias is sued out to revive a judgment, praying an award of execution therefor, which writ is returned *nihil*, and a second or alias writ is sued out upon the return of the first, which is also returned *nihil*, and judgment is awarded and execution is sued out, to which the sheriff returns "no property found," and a bill is filed to set aside a fraudulent sale made by the debtor, the bill is not open to the objection that a proper judgment and execution at law are not shown. Barrow v. Bailey, 5 Fla. 9. The court said that the proceedings on the scire facias were strictly regular, according to the rules of law, and consequently the writ of scire facias awarded thereon was a legal and valid process, and being returned *nulla bona* by the proper officer, a creditor was well entitled to seek the aid of a court of equity.

An execution cannot be impeached on the ground that it directed the sheriff to levy upon the defendant's land whereof he was seised on February 1st, when directions might have been given from January 26th, since, if the day had been wholly omitted, the sheriff would have been authorized to take all the lands the defendant had when he received the execution; so that the legal remedy was exhausted by the issuing and return of the process. Green v. Burnham, supra.

Although an execution is extremely defective, and subject to be vacated and set aside on motion for informality, it cannot be questioned collaterally on a creditors' bill to set aside a fraudulent conveyance of real estate by the debtor. Wright v. Nostrand, 94 N. Y. 31. The court said that the official return of the officer upon the execution furnished sufficient evidence of the exhaustion of legal remedies against the debtor to authorize the institution of a suit to reach other property to satisfy it.

But, where a statute requires the return of an execution unsatisfied, in whole or in part, an execution issued on a judgment docketed January 12, directing a levy on real estate possessed by the debtor on January 13, is not sufficient to form a basis of a creditors' bill, where another statute provides that executions, to authorize the sale of real estate, shall command the officer to whom they are directed to cause the amount of the judgment to be made of the real estate of the person against whom the judgment was rendered, which such person shall have had at the time of the docketing of the judgment, specifying such time, or at any time afterwards, in whose hands soever the same may be. Manning v. Merritt, Clarke, Ch. 98.

And it was held that an execution issued without leave of the court, after the expiration of five years from the rendition of the judgment on which it was issued, would not support a creditors' bill, in Aultman & T. Co. v. Syme, 23 App. Div. 344, 48 N. Y. Supp. 231; but, on appeal, it was held that such an execution was not void, but voidable. S. C. 163 N. Y. 54, 79 Am. St. Rep. 565, 57 N. E. 168.

c. County to which execution must be sent; return.

The usual requirement is that the execution must be sent to the county of the debtor's residence, and that an attempt must be made to levy on property there before the remedy at law can be said to have been exhausted.

The execution must be directed to the county where the judgment debtor resided at the time the execution was issued. Smith v. Fitch, Clarke, Ch. 265.

Or it must be issued to the county in which some of them reside, if there are judgment debtors. Wilbur v. Collins, Clarke, Ch. 315.

Because a statute does not specify to what county an execution shall be issued, it does not follow that it is only necessary to issue it to the sheriff of the county in which judgment is rendered to entitle the creditor to equitable relief. Durand v. Gray, 129 Ill. 9, 21 N. E. 610. The court said that, the purpose of the issuance of the execution being to establish a material fact, namely, that the defendant had or had not property whereon an execution might be levied, it was manifest, first, that, if the plaintiff in execution knew that the defendant in execution had property in a particular county, he should send an execution to that county; second, that the execution should be sent also to any and every county in which there was a legal presumption that the defendant in execution had property. If the person resided and did business in the same county, it was legally presumed that he had property there liable to execution, for ownership was presumed from possession, and insolvency was exceptional, and must always be proved.

In Crabb v. Hill, 17 Ky. L. Rep. 44, 30 S. W. 415, it was said that, under the Kentucky statutes, in order that a creditor may maintain a creditors' bill on an execution returned *nulla bona*, he must show that the execution was issued to the county of the debtor's residence, or the county in which the judgment was rendered.

The fact that the debtor had property in the county to which the execution was directed, which was not the county in which the judgment was rendered, nor the county in which the debtor resided, does not ex-

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cuse noncompliance with the statute. Nashville, C. & St. L. R. Co. v. Mattingly, 101 Ky. 219, 40 S. W. 673.

In Tanner v. Howard, 1 Ky. L. Rep. 343, it was held that, in equitable proceedings to reach real estate of the debtor, the petition must allege that the execution of the common-law judgment was directed to the county in which the judgment was rendered, and returned, as required by the Code.

Since the remedy for subjecting choses in action by bill in equity is purely statutory, the statute must be complied with; and where the statute requires a fieri facias upon a judgment or decree to be returned "no property," a bill cannot be maintained where the writ is not sent to the proper county, and therefore is not returned by the proper officer. Moore v. Young, 1 Dana, 516.

The issuance of an execution to the county where the debtor resided, and its return "no property found," and the issuance of an execution also to the county wherein the judgment was rendered, and its return "no property found," together with proof that the debtor had no real estate subject to execution, is sufficient to authorize a court of equity of the county wherein a debtor resided to grant to the creditor equitable aid in subjecting to the payment of his judgment the debtor's property, under the Kentucky Code, § 70. Martin v. Byrd, 19 Ky. L. Rep. 1030, 42 S. W. 1112.

A failure to show that an execution was issued either to the county wherein a firm was situated, or to the county of the residence of any member of the firm, together with a failure to show the time of the return, is fatal to the right of a creditor to equitable relief. Preston v. Wilcox, 38 Mich. 578.

A judgments creditors' bill based on a judgment obtained in the supreme court should show that the defendant resided in the county at the time when, and to which, the fi. fa. was issued. Hope v. Brinckerhoff, 3 Edw. Ch. 445.

In an ordinary creditors' bill under the statute, it would be necessary to allege that the plaintiff had issued the execution to the county where the judgment debtor resided, and that it had been returned *nulla bona*. Cooper v. Clason, 2 Edm. Sel. Cas. 320.

The complainant has not sufficiently exhausted his legal remedy in an action in the supreme court, where the execution can issue to any part of the state, where the execution is issued and returned unsatisfied only in the county where the venue is laid, if the defendant has available property in the county where he resides at the time, out of which the execution can be satisfied. Child v. Brace, 4 Paige, 309.

An execution must be issued to the county where the defendant resides at the time of its issuance. Merchants' & M. Bank v. Griffith, 10 Paige, 519.

Where an execution may be sent to another county of the state, it must be sent to the county where the judgment debtor resides at the time of the issuance of the writ, in order to exhaust the legal remedy. Wheeler v. Heermans, 3 Sandf. Ch. 597. The court said that, as a general proposition, a man's personal property is presumed to be at the place of his residence. Hence, the necessity of showing in creditors' suits a return of an execution issued to the county where the defendant resides.

In Reeder v. Wheaton, 7 Paige, 663, 34 Am. Dec. 366, it was said that where the judgment is in the supreme court, so that an execution may be issued to any part of the state, or where the bill is founded upon the decree of the court of chancery, the process of which court may also be sent into any county, the complainant who comes into equity for relief upon the ground that he has exhausted his remedy by execution on the judgment or decree must show that he has issued his execution to the sheriff of the county where the defendant resided at the time such execution was issued, or he must show a sufficient legal excuse for not doing so.

In Bowe v. Arnold, 31 Hun, 256, affirmed without opinion in 101 N. Y. 652, the court said that an action may be maintained by judgment creditors after the issuing of an execution upon their judgment against the property of the debtor, to remove obstructions and set aside fraudulent dispositions of the debtor's property, preventing the execution from being made effectual. In this class of cases the court interposes under its general equitable authority to relieve creditors where no adequate legal remedy can be applied at law for that purpose. But this jurisdiction extends no further than to authorize the interference of the court after a judgment has been recovered and an execution issued upon it to the proper county, against the property of the debtor.

Where the purpose of the bill was to obtain the cancelation of prior judgment liens on the land, under the claim that such judgments had been paid, and an execution was issued to the county in which the defendant resided, and returned *nulla bona*, it was held that the plaintiff did not need to have executions issued to the counties in which the lands were situated, in order to entitle him to the equitable relief sought. Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275.

If a debtor is a nonresident, an execution should issue to the county wherein the judgment roll was filed, where a statute makes this a condition precedent to equitable relief. Campbell v. Foster, 16 How. Pr. 275.

In Minkler v. United States Sheep Co. 4 N. D. 507, 33 L. R. A. 546, 62 N. W. 594, it was held that a creditor was not entitled to have a receiver of a corporation appointed, in the absence of a showing that execution had been issued to the county of its proper place of business, as fixed by the charter. The court said that the law had gone upon the theory that a debtor's possessions will be found in the county of his residence, and not elsewhere, and that the simple issuance of the execution to the sheriff of any county other than that of the defendant's residence did not show any bona

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fide attempt on the part of the creditor to collect the debt through the process of the lower courts. By the appointment of a receiver, the debtor was at once stripped of his property. It was taken from his control, passed into the hands of an instrumentality of the court, and was thenceforth devoted to such purposes as the court directed. The remedy was at once harsh and somewhat oppressive. It was no hardship to the creditor that, before he could avail himself of any remedy that stripped his debtor of control of his own property, he should be compelled to show that he had exhausted unsuccessfully all milder means.

In Embree v. Reeve, 6 Humph. 37, a return of an execution made by the sheriff of the county wherein the judgment was rendered was held sufficient to entitle a creditor to the aid of equity to discover and reach a beneficial leasehold interest of the debtor in a different county. The objection in this case was not that the remedy at law had not been exhausted, but that it was necessary to acquire a lien on the property, and that this could be done only by sending the execution to the county where the property was located.

In Riddle v. Motley, 1 Lea, 468, it was held unnecessary to send execution to the county where the chose in action sought to be reached was located. It was held a sufficient exhaustion of the legal remedy to have execution returned *nulla bona* in the county in which the judgment was recovered.

The issuing of executions against each of several judgment debtors in the counties of their residence, and the return of the same unsatisfied, will entitle the creditor to seek the aid of equity to reach the debtor's real estate, title to which is held by a third person. Minneapolis Threshing Mach. Co. v. Hanrahan, 9 S. D. 520, 70 N. W. 656.

In Northwestern Iron Co. v. Central Trust Co. 90 Wis. 570, 63 N. W. 752, 64 N. W. 323, it was held that the issuance of an execution to a county which was not the place of residence of the debtor, and where the creditor had no reason to expect to find property of his debtor, did not show an effort in good faith to collect the debt by execution. The court said that this was especially true where the creditor knew that, in another county, the debtor had a place of residence and business, and a large amount of property subject to levy under his judgment.

But the fact that an execution was not issued to the county where the debtor resided is wholly immaterial where the action is to set aside a fraudulent conveyance of real estate, since it is not necessary, in such a case, to issue an execution at all. Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390.

The fact that the execution is not sent to the county of the debtor's residence is not a valid objection, unless the debtor shows that he had visible property in that county, subject to levy. Rugely v. Robinson, 19 Ala. 404.

Where the debtor removes after rendition of judgment, the issuance of an execution to the original county, together with proof that the debtor had no property whatever subject to execution, is sufficient to authorize a court of equity to give to the judgment creditor equitable aid in reaching a judgment in which the debtor has an interest. Sayre v. Thompson, 18 Neb. 33, 24 N. W. 383.

It is no objection to a bill for discovery that execution was not delivered to any sheriff in the judicial district in which the action was brought, where the statute provides that, "whenever an execution shall have been issued, etc., but shall have been returned unsatisfied, in whole or in part," and there is nothing in it defining the county to which the execution must have issued. The execution in this case was issued to the county in which the defendant resided, and no suggestion was made that there was anything fraudulent or collusive in the return. Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219.

Where it is sought by a creditors' bill to set aside an assignment by the debtor, it is not necessary to show that an execution was issued to the county where the debtor resided, and returned *nulla bona*. Cooper v. Clason, 2 Edm. Sel. Cas. 320.

That the execution was not issued to the county where the defendant resides will not constitute a good objection to an application to appoint a receiver of the property of the judgment debtor. Strange v. Longley, 3 Barb. Ch. 650.

The issuance and return of an execution to the county wherein a judgment was rendered is a sufficient exhaustion of the legal remedy to authorize a creditor to seek the aid of equity to reach equitable property of the debtor. Riddle v. Motley, 1 Lea, 468.

And where the statute prescribes, as indispensable to equitable jurisdiction to reach choses in action, that there shall be a return "by the proper officer" of "no property" on a fieri facias, a return by an officer of a different county from that in which the judgment is rendered, there being no suggestion that the defendant resides in the county in which the return is made, is insufficient to justify equitable relief. The court said the statute should certainly be understood as contemplating a return by an officer of the county of the defendant's residence or domicil, or of the county in which the judgment was rendered, when it does not appear that the defendant resided elsewhere. Rhodes v. Cobb, 4 Dana, 23.

d. Return of execution.

1. Sufficiency of.

A return of an execution must expressly show that the debtor had no property subject to levy, in order that a creditors' bill may be based thereon. Therefore a return showing that the sheriff had levied on cer-

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tain property of the defendant, and that the same was released by instructions of the attorney for the plaintiff, and "the same is returned unsatisfied," will not authorize a resort to equity by the creditor. Buckeye Engine Co. v. Donau Brewing Co. 47 Fed. 6.

It is not an objection to a creditors' bill to reach the debtor's equitable interest in real estate that there was no return *nulla bona* upon executions issued on complainant's judgment, where the executions were returned "wholly unsatisfied," especially where a statute, in express terms, authorizes the plaintiff in execution, when his execution against the property of the defendant has been returned "unsatisfied in whole or in part," to file a bill in chancery to discover and subject any property of the defendant to the payment of such judgment. Alexander v. Tams, 13 Ill. 221.

In Scheubert v. Honel, 152 Ill. 313, 38 N E. 913, the following indorsement appeared on the execution: "The sheriff will return this writ no property found and no part satisfied forthwith," signed by the plaintiff's attorney, followed by the indorsement of the sheriff to the effect that there was no property found, and the execution was in no part satisfied. This was held insufficient to authorize a creditors' bill. The court said that the return failed to show that the creditor had exhausted his legal remedies, but that, on the contrary, it appeared that the sheriff had made no effort whatever to collect the judgment. That the return was, in substance, the act of the creditor's attorney, and that, in making it, the sheriff exercised no responsibility whatever. The court held that it must be shown that the execution was returned by the sheriff by reason of his inability to find property whereon to levy.

Where it appeared that the sheriff had levied upon a considerable amount of personal property as belonging to the defendants, and all that was shown in regard to it was a statement in the sheriff's return that such property had been taken from him by the coroner by writs of replevin, and that, by direction of the plaintiff's attorney, he returned the writs no part satisfied, and the sheriff did not say he demanded any property of the defendants, it was held that the complainant should have shown that, without any fault of the sheriff or the plaintiff in execution, or by some instrumentality of the defendants, the property so levied upon could not have been made available to the payment of the respective judgments, in full or in part. Gauler v. Wohlers, 12 Ill. App. 594.

The fact that an officer's return to an execution includes the words "returned with schedule" is not sufficient to impeach the return by raising the presumption that the debtor had property as to which the legal remedy was not exhausted. Thompson v. Yates, 61 Ill. App. 262.

An execution returned which shows no property found as to a partnership, and that there exists property which may be subject to the payment of the debt, belonging to some individual composing the firm, is a sufficient return *nulla bona* for a creditors' bill under a statute requiring the return *nulla bona* before a creditor can come into a court of equity and demand relief. Ticonic Bank v. Harvey, 16 Iowa, 141.

A return of an execution, "This writ came in my hands for service January 28, 1908. No property being found, this writ is returned unsatisfied. (Signed) J. H. G.," is not sufficient to authorize a creditors' bill, as it does not appear that the writ related to the debtor, neither does it show that he did not have sufficient property to satisfy it, nor that it was returned by one having authority. Baxter v. Pritchard, 113 Iowa, 422, 85 N. W. 633.

And an objection that the return of a deputy sheriff was insufficient, on the ground that it was evidence only that the debtor had no property in his bailiwick, which is less than the county, was held untenable, in Dana v. Banks, 6 J. J. Marsh. 219. The court said that it did not appear from the bill or the return of the officer that the authority of the officer who made the return was circumscribed by boundaries less than the limits of the county.

A return of an execution *nulla bona* by a coroner when the execution was not directed to that officer is void, and thereafter will not support a creditors' action to set aside a conveyance of land, where, as in Kentucky, a return *nulla bona* is required before equity will interfere for such a purpose. Johnson v. Elkins, 90 Ky. 163, 8 L.R.A. 552, 13 S. W. 448.

The return by a sheriff, indorsed on an execution, that he has property on hand that he cannot sell, for want of bidders, will not support an injunction restraining disposition by a debtor of his property, granted at the request of a judgment creditor in a creditors' bill proceeding. Eldred v. Camp, Harr. Ch. (Mich.) 162.

A return upon an alias execution that the defendants had no goods or chattels, lands or tenements, etc., is a sufficient return upon which to found a creditors' bill, although it does not in terms negative the fact that either of them had any separate property. Williams v. Hubbard, 1 Mich. 446.

In Albright v. Texas, S. F. & N. R. Co. 8 N. M. 422, 46 Pac. 448, where certain property of a corporation had been levied on, after which the president of the company claimed that the property did not belong to it, whereupon the sheriff, upon the refusal of the creditor to give an indemnifying bond, returned the execution with the statement of such facts, it was held that this statement was not equivalent to a return *nulla bona*, in the absence of any statement to the effect that the officer had made a diligent search, and had been unable to find other property of the debtor.

A return that the sheriff could find no goods, chattels, or real estate of the within-named defendants in his bailiwick out of which the execution could be collected was held sufficient to show that complainant had

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exhausted his remedy at law. The objection was that the return showed that there was merely no joint property out of which the debt could be collected, and did not preclude the idea that there might be separate property of either of the defendants from which the debt might be made. Winchester v. Crandall, Clarke, Ch. 371.

The objection that the execution was returned by the sheriff before the expiration of sixty days from its receipt is not available where the return indorsed on the writ bears date within the sixty days, but where the writ was not filed until after that term had expired, since the return speaks from the date of its filing. Green v. Burnham, 3 Sandf. Ch. 110.

Under a statute providing that when the judgment debtor has not property subject to levy sufficient to satisfy the judgment, any equitable interest which he may have in lands and other property shall be subject to the payment of such judgment by action, the return of execution "no goods" was held insufficient to authorize equitable relief, since it did not show that there were no lands subject to execution. State Bank v. Oliver, 1 Disney (Ohio) 159.

A return of no personal property and a levy upon an equitable interest of the debtor in land is a return of the execution unsatisfied. Since the levy upon the equity is a nullity, its return will be treated as surplusage. Such a return is therefore not open to the objection that it negatives merely the existence of personal property. It therefore justifies the filing of a creditors' bill. House v. Swanson, 7 Heisk. 32.

Under a statute providing that whenever an execution against the property of a judgment debtor shall have been issued upon a judgment for the payment of money, and shall have been returned unsatisfied in whole or in part, the judgment creditor may commence an action against the judgment debtor, or any other persons, for a discovery and to reach equitable assets, it is not necessary that the return on the execution be set forth *in hæc verba*, so that the court can determine whether or not the execution was unsatisfied, the allegation that the sheriff returned the execution wholly unsatisfied being sufficient. Daskam v. Neff, 79 Wis. 161, 47 N. W. 1132.

2. *Conclusiveness of.*

When an execution has been returned *nulla bona*, may the remedy at law be said to be exhausted, or rather, is this sufficient proof of the exhaustion of the legal remedy? Or, in addition to that, is the creditor obliged to show that the debtor actually had insufficient property out of which the execution could be made? The rule is that when the execution issuing to the proper court has been returned unsatisfied, the way is open to the creditors' action.

The return of the sheriff on an execution *nulla bona* is conclusive of the question that the creditor has exhausted his legal remedies, and is entitled to maintain his equitable action. Coffield v. Parmenter, 2 Neb. (Unof.) 42, 96 N. W. 283.

In Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, the court said that, to remove all uncertainty, the official return is conclusive evidence that the creditor has exhausted all legal remedies without succeeding in collecting his debt. It is a benefit to both parties.

In Hall v. McGregor (W. Va.) 64 S. E. 736, it was held that an officer's return of no property found on the execution is conclusive between the parties as a basis of a suit in equity to enforce a judgment against real estate, unless in case of fraud and collusion in the procurement of such return for the purpose.

In order to maintain a bill to set aside fraudulent deeds, it is only necessary for the plaintiff to allege and prove, for the purpose of maintaining the action, that execution has been issued on his judgment and returned unsatisfied. He thereby establishes the insolvency of the defendant, and shows prima facie that he has exhausted his legal remedy. Quinn v. People, 146 Ill. 275, 34 N. E. 148, affirming 45 Ill. App. 547.

When a creditor has issued execution upon his judgment, and the same is returned by the proper officer unsatisfied, the requirement that a creditor must exhaust all legal remedies to collect his judgment before he can invoke the aid of equity by a creditors' suit is complied with. Hopkins v. Joyce, 78 Wis. 443, 47 N. W. 722.

In Jones v. Green, 1 Wall. 330, 17 L. ed. 553, it was said that the court looked only to the execution and the return of the officer to whom the execution was directed. The execution showed that the remedy afforded at law had been pursued, and, of course, was the highest evidence of the fact. The return showed whether the remedy had proved effectual or not, and from the embarrassments which would attend any other rule the return was held conclusive. The court would not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. If the return were false, the law furnished to the injured party ample remedy.

A return *nulla bona* is a sufficient reply to the contention that the creditors could have enforced their judgments,—that the value of the property upon which they have special liens is ample to pay off the debts,—since the court will not entertain inquiries as to the diligence of the officer endeavoring to find property on which to levy. Bidwell v. Huff, 103 Fed. 362.

It is not necessary to show that the marshal into whose hands an execution comes has searched for the property, if he returns that he can find no property. Suydam v. Beals, 4 McLean, 12, Fed. Cas. No. 13,653.

Where the execution has been returned *nulla bona*, it is not necessary for the complainant seeking equitable relief against his debtor to show that the latter had not, at the time the suit was instituted, any prop-

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erty out of which the debt might be collected. Wyatt v. Wyatt, 31 Or. 531, 49 Pac. 855.

The issuance of an execution and its return *nulla bona* is always evidence that the legal remedy has been exhausted, and dispenses with any other proof that the debtor is without property other than that which the creditor seeks to reach by his bill. Goddard v. Fishel-Schlichten Importing Co. 9 Colo. App. 306, 48 Pac. 279.

The return of an execution *nulla bona* before return day, based on a denial of property subject to levy by the debtor, is sufficient, and the debtor will not thereafter be permitted to attack the validity of the return on the ground that he has had property subject to levy. Lewis v. Lanphere, 79 Ill. 187.

In Randolph v. Daly, 16 N. J. Eq. 313, it was said that it was not necessary to aver that a debtor firm was insolvent in order to entitle the complainants to subject to the judgment of the creditors the individual property of one of the partners, alleged to have been fraudulently conveyed. The court said that the partnership property might be amply sufficient to satisfy all the debts of the firm, yet it might be so covered up or placed beyond the reach of process as not to be amenable to execution at law, and to render the interference of equity essential to the ends of justice. All that could be required was that it should appear by the bill that the complainant had exhausted his remedy at law, and that the aid of equity was necessary to enable him to obtain satisfaction of his judgment.

In Williams v. Kemper, 99 Minn. 301, 109 N. W. 242, it was said that, in Spooner v. Travelers' Ins. Co. 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305, a statement not necessary to the conclusion reached, to the effect that, in an action in the nature of a creditors' suit to reach equitable assets, the complaint must allege that the debtor is insolvent, and has no other property from which the creditors' debt may be satisfied, was not an accurate statement, where the complaint alleged the fact that judgment had been recovered and execution issued and returned unsatisfied, because the conclusion that the creditor had exhausted all legal remedies necessarily followed from the allegation of such ultimate fact, which was the best evidence that the debtor was insolvent and had no other property out of which judgment could be paid.

Where the plaintiff in an action in the nature of a creditors' suit to reach property, the legal title of which is held in trust by a third person for the use and benefit of the debtor, alleges that judgment has been recovered against the debtor, and that execution has been issued and returned unsatisfied, it is sufficient without further setting out that the debtor is insolvent and has no other property. Williams v. Kemper, supra.

The return of an execution *nulla bona* in Kansas also gives a judgment creditor a standing in equity to set aside conveyances by his debtor which tend to defeat the collection of his debt, and therefore, when such a return is made, it is unnecessary to allege the insolvency of the debtor. Breitkreutz v. National Bank, 70 Kan. 698, 79 Pac. 686.

The insolvency of a debtor is sufficiently established by showing that executions had been issued upon a judgment against several joint debtors, and had been duly returned "no property found," to authorize a creditor to seek the aid of equity to set aside a fraudulent conveyance of real estate by one of the debtors. Quinn v. People, 146 Ill. 275, 34 N. E. 148.

It is not necessary to aver in a creditors' bill based on a return of execution *nulla bona* that, at the time of any conveyance or transfer by the debtor with intent to hinder and delay creditors, he did not retain enough property to pay his debts, since the return is sufficient prima facie to establish the insolvency of the debtor, and the absence of property subject to execution. Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968.

The return of an execution that the defendants, who were partners, are not, either in their partnership name or as individuals, seised or possessed of any real estate or personalty which could be seized or taken by virtue of the execution, is prima facie evidence of a want of property subject to levy, both as individuals and as a partnership; and is sufficient to give a creditor a standing in a court of equity to obtain satisfaction of his judgment out of the individual property (real estate) of one of the partners, which is alleged to have been fraudulently conveyed by such partner. Randolph v. Daly, 16 N. J. Eq. 313.

In Montgomery v. Turney, 85 Ky. 55, 2 S. W. 562, it was held that the fact that the debtor might have had other property outside of that fraudulently conveyed, subject to execution, sufficient to pay the debt, and that the creditors, while the execution was in the hands of the sheriff, had it, but failed or refused to have it levied upon, and contrived to have the land in question subjected to the payment of the debt in order to deprive the husband of the grantee of his marital rights, would not stand in the way of an equitable action to reach the same.

The return of an execution "no property found" makes a prima facie case, and authorizes the bringing of an action in the nature of a creditors' bill to reach property fraudulently conveyed, notwithstanding the execution defendant may have had some property subject to execution which was not found by the sheriff, but not enough to pay all his debts, or all of his debt to the plaintiff. Lee v. Lee, 77 Ind. 251.

Under a statute providing that, when execution is returned "no property found," the creditor may resort to his equitable action to subject any "equitable or legal interest, and all other property" of the debtor to the satisfaction of the judgment, he is not required to know that the return of

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the officer is true. Clements v. Waters, 90 Ky. 96, 13 S. W. 431.

The right conferred upon general creditors by § 439 of the Kentucky Civil Code, to proceed in equity by way of attachment upon property fraudulently conveyed, depends upon the existence of a valid execution returned "no property found." Not on the truth of the return, but on the fact that execution was so returned. Farmers' Nat. Bank v. National Bank, 4 Ky. L. Rep. 451.

A return *nulla bona* on an execution is sufficient to authorize equity to subject property purchased by a debtor in the name of his wife to the payment of complainant's judgment, it being unnecessary to show in addition thereto that, at the commencement of the suit, the debtor was not the owner of sufficient property to satisfy the judgment, against which execution could have been had. Whiteside v. Hoskins, 20 Mont. 361, 51 Pac. 739.

The rule that the remedy at law must be exhausted is satisfied where it appears that the creditor's claim was reduced to judgment, and execution thereon was returned unsatisfied, although the evidence tended to show that each of the parties defendant to the judgment was possessed of the equity of redemption in certain real estate, where it also appeared that the interest of both was only nominal, on account of the excess of the indebtedness secured over the value of the property, which was mortgaged, and that each of the parties was execution-proof, and, between them, owned no property except that in dispute. Wade v. Ringo, 62 Mo. App. 414.

If an execution is issued to the county where the debtor resides, and it is returned *nulla bona*, it forms a sufficient basis for a creditors' bill, although it is shown that the debtor had real estate of uncertain value in another county, mortgaged to secure the debt reduced to judgment. Thompson v. LaRue, 59 Neb. 614, 81 N. W. 612. The court said that, upon a full consideration of the evidence, it did not appear that the judgment debtors possessed sufficient property without resort to a court of equity to satisfy the judgment, and this view of the case was decisive of its merits.

In Nebraska Nat. Bank v. Hallowell, 63 Neb. 309, 88 N. W. 556, it was urged that executions issued on various judgments and placed in the hands of the sheriff were returned by the direction of the judgment creditors, and that, at the time, the debtor had property subject to execution out of which the judgment on the claim in suit could have been made; but the return was held to be conclusive of the fact stated therein, for the purpose of the maintenance of the bill. The court said the rule seemed to be settled by the great weight of authority that the return of the officer could not be inquired into in the creditors' suit, but that the remedy was by direct proceeding in the court out of which the execution issued, or by an action against the officer.

Where the creditor alleges that execution on his judgment has been returned wholly unsatisfied, it is not necessary for him to show that the judgment remains unsatisfied, or that there is no other property of the judgment debtor out of which the debt can be made. Manning v. Jagels, 71 N. J. Eq. 41, 63 Atl. 492. The court said that an allegation that an execution was returned unsatisfied on a judgment sought to be collected included the lack of other property to be levied on, and the exhaustion by the judgment creditor of his legal remedy.

The return of "no property" by the sheriff upon execution is sufficient to justify an action in the nature of a creditors' bill to set aside a conveyance of real estate, made by the debtor and his wife; and to show that there was some personal property that might have been seized would not affect the plaintiff's right, unless it was also shown that he knew of its existence, and omitted to act upon the knowledge. Meyer v. Mohr 1 Robt. 333.

Where the statute provides that an action to reach equitable assets may be brought after an execution has been issued to the sheriff of the county where the judgment debtor resides, and the same has been returned unsatisfied, and the creditor has complied with this condition, such an action is maintainable, although the debtor has real and personal property out og which the judgment could be collected. Bank of Montreal v. Gleason, 14 N. Y. Civ. Proc. Rep. 377, 16 N. Y. S. R. 768, 1 N. Y. Supp. 658.

Where the execution is returned unsatisfied, the creditor need not also say that the debtor was insolvent, or had no property out of which a judgment against him could be made, before an equity court will entertain an action to set aside a fraudulent conveyance. Page v. Grant, 9 Or. 116.

But, in Mackey v. Wallace, 26 Tex. 526, it was said that it was not sufficient that it be shown that an execution was issued and returned *nulla bona*, that the averment of such a return was not an allegation that the debtor had not property subject to execution, although it was conceded that such a return might be good evidence in support of such an allegation.

The presumption that the legal remedy has been exhausted by the return *nulla bona* is not overcome by showing that the debtor has some interest in certain real estate, without any showing as to its extent or value. Oppenheimer v. Collins, 115 Wis. 283, 60 L.R.A. 406, 91 N. W. 690.

The return of the sheriff that the defendant has no property subject to levy may be overcome by proof that, at the time the bill was filed, the creditors' judgment was a lien on real estate of the defendant in execution, and that there was no reason why the plaintiff in execution could not have obtained an alias execution, levied it upon the real estate, and sold the same and satisfied the judgment. Metz v. McAvoy Brewing Co. 98 Ill. App. 584.

In Northwestern Iron Co. v. Central Trust Co. 90 Wis. 570, 63 N. W. 752, 64 N. W.

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323, it was said that where it is necessary to exhaust the legal remedy, an effort to exhaust must be made in good faith. It must appear not only that the creditor has recovered a judgment, but that he has made an effort to collect his judgment by execution, and that his execution has been unavailing. The court must be satisfied that there has been an effort in good faith to collect the judgment, and that the remedy at law has been fairly exhausted without avail. Ordinarily, the issuing of an execution on a judgment, and its return unsatisfied, are, in the first instance, sufficient evidence of these facts; but, if it appears that no effort in good faith was made to find property whereon to levy, and that the debtor owned property subject to levy within the state, which might, with reasonable diligence, have been found, the case does not call for the interposition of a court of equity.

In Albany City Bank v. Dorr, Walk. Ch. (Mich.) 317, it was held that where the officer returns the execution unsatisfied, on his own responsibility, a bill is maintainable, although the debtor informed the creditor before the return of the writ that he had sufficient real estate with which to satisfy it. The court said that, while the defendant insisted that it was the complainant's duty to inform the officer that defendant had lands within his bailiwick, and to point them out to be levied upon, he seemed to forget that he was under a greater obligation to pay the judgment without waiting for an execution.

But, in Meyer v. Mohr, 1 Robt. 333, 19 Abb. Pr. 299, it was held that the return of an execution unsatisfied is sufficient to authorize the bringing of a creditors' action. Proof of the existence of personal property belonging to the debtor that might have been seized on an execution is not sufficient to defeat a creditors' bill to subject property of the debtor in the hands of third persons to the payment of the judgment, unless it is also shown that the judgment creditor thus seeking the aid of equity knew of the existence of this property.

And in Merchants' Nat. Bank v. Sabin, 34 Fed. 492, it was held that a creditors' bill which shows that the debtor had property within the knowledge of the creditor, subject to execution, is demurrable, even though it also alleges the issuance and return of an execution *nulla bona*. On this subject the court said: "It is necessary to have the execution returned before any relief can be given, and it must be alleged in the bill that the legal remedy has been exhausted by the creditors without being able to obtain satisfaction of the debt. If the return of the officer upon the execution set forth in the bill of complaint shows the remedy afforded is ineffectual, it is sufficient. The court does not inquire how diligent the officer is in his effort to find property subject to levy, and his return is conclusive; but it must appear, however, by the allegations in the bill, that the legal remedy is not effective. A party who seeks a court of equity, in a case like this one, is required to show in his bill distinctly all the facts which entitle him to such aid, for the court will not grant the relief claimed, or interfere, if there is a plain and adequate remedy at law."

And where a debtor pointed out to a complainant in a creditors' bill, prior to his filing the bill, sufficient real estate, subject to levy, to pay the judgment, although in a different county from that to which the execution was directed, the court, in Freeman v. Michigan State Bank, Walk. Ch. (Mich.) 62, denied the complainant equitable relief, on the ground that he had not, in good faith, exhausted his legal remedies.

And in Wharton v. Fitch, Walk. Ch. (Mich.) 143, an injunction in a judgment creditors' bill was dissolved where it appeared that the debtor informed the officer having the execution that he owned real estate in fee simple more than ample to satisfy the judgment, and that he was willing to have the execution levied thereon, and offered to point it out to the officer, and that the officer refused to levy thereon, because directed not to do so by the judgment creditor's attorney.

But, in Leonard v. Forcheimer, 49 Ala. 145, it was held that the statutory right of a defendant in execution to designate the property he would have first sold would not stand in the way of a bill to reach real estate voluntarily conveyed without fraudulent intent, where he told the sheriff that he had other property which the officer might hunt for, since, if the debtor had other property, he ought to have shown it to the sheriff.

3. Return on or before return day.

The question has often been raised whether the return of the execution on or before the return day is a sufficient exhaustion of the legal remedy to lay the foundation for a creditors' bill. The theory of the authorities denying relief where the execution has been so returned is that it is the duty of the plaintiff to hold the execution until the last day, so that he may find the debtor's property, if he can, and, failing in this, the remedy at law has not been exhausted. Where it has been held that the bill may be filed before the return day, it it said that the sheriff, so long as he acts in good faith, may use his own judgment as to returning the execution before that time, and that the debtor must look to the officer for redress for any damage he may suffer by a false return. Most of the modern statutes, however, have been so worded as to permit the return of the writ at any time within a definite period named therein. In Esselman v. Wells, 8 Humph. 482, it was urged that the return of an execution before the return day was illegal and could be treated as a nullity, on the ground that it was the duty of the sheriff to retain the execution in his hands until the return day, to the end that he might levy upon any property of the defendant

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which might be found before the day fixed by law for its return; and that, this not having been done, it could not be held that the complainant had exhausted his legal remedy. But it was held that whether the execution was prematurely or improperly returned were questions belonging to another forum, in a proceeding against the sheriff.

The return of an execution on the return day, where a creditors' bill based thereon is not filed until after the return day, is sufficient. Williams v. Hogeboom, 8 Paige, 469.

A return of an execution before the return day is not an obstacle in the way of a creditors' bill. Barth v. Heider, 7 D. C. 71; Field v. Chapman, 15 Abb. Pr. 443; Suydam v. Beals, 4 McLean 12, Fed. Cas. No. 13,653.

A return of execution may be made before the return day if there is no property out of which to satisfy the same. Whitehead v. Hellen, 74 N. C. 679.

The legal remedy may be exhausted before the expiration of the time allowed by law for the return of the execution, and therefore a return of an execution before that time is not fatal to the maintenance of a creditors' bill. Bassett v. Orr, 7 Biss. 296, Fed. Cas. No. 1,095.

In Bowen v. Parkhurst, 24 Ill. 257, the court said that all executions from the circuit court were, by law, returnable in ninety days from and after their date. The officer having it in charge had that time in which to find property to levy upon. He must make his levy within that time, and after that the writ was powerless. In general, it was his duty to hold the writ during all that time, but he might take the responsibility of making an earlier return to it of *nulla bona*, especially after he had made a personal demand upon the defendant to turn out property, and he had refused so to do. When the return was made and the execution was unsatisfied, in whole or in part, and the defendant had no property out of which it could be satisfied, a case had arisen for the interposition of a court of chancery. His return became a matter of record, and was conclusive as between the parties to the judgment and the officer, only to be questioned in an action for a false return. It showed prima facie that the creditor had exhausted his legal remedy, and chancery had jurisdiction. A return could not be compelled before the expiration of ninety days, but the sheriff might take the responsibility of making it at an earlier day.

The sheriff need not return the execution before the expiration of the time allowed by law, but, if he takes the responsibility, and does return it before that time, the creditor may, under the statute, exhibit his bill. Young v. Clapp, 40 Ill. App. 312, affirmed in 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

The return of an execution before the return day, where the creditors' bill is not filed until after the return day, is only an irregularity, and an objection thereto must be made in the court wherein the execution was issued. The complainant, after the return day has passed, has a right to consider his remedy at law as exhausted, and to file his bill in equity to reach the effects of the defendant which cannot be levied on by the sheriff. Platt v. Caldwell, 9 Paige, 386.

It is not a good objection to a creditors' bill that the execution was made returnable in less than sixty days, since the defect in the writ makes it irregular, and not void, and the defendant's remedy is by motion to set it aside in the court whence it issued. Rider v. Mason, 4 Sandf. Ch. 351.

In Forbes v. Logan, 4 Bosw. 486, it was held, Bosworth, Ch. J., dissenting, that a creditors' suit to set aside an alleged fraudulent assignment could be maintained although it was begun on the sixtieth day after the receipt by the sheriff of the execution on the judgment on which it was founded, and although the execution was, at the request of plaintiff's attorney, returned on the seventh day after its receipt by the sheriff, and the complaint was verified on the fifty-fourth day after the execution was received.

The doctrine that a creditors' bill to set aside a fraudulent conveyance of personal property may be based on the return of the execution *nulla bona* before return day is also established in the District of Columbia as to creditors' bills to reach personal property. It was applied in Mehler v. Cornwell, 3 App. D. C. 92; Clark v. Walter T. Bradley Coal, Lime, & Cement Co. 6 App. D. C. 437. In the Mehler Case it was also held that the fact that the execution was returned *nulla bona* before the return day by the order of the attorney for the judgment creditor would not be sufficient to bar the creditor's right to equitable relief.

In Mississippi the doctrine also obtains that the return of an execution by a sheriff on his own motion before return day is sufficient. Ward v. Whitfield, 64 Miss. 754, 2 So. 493. The court said that if there was no property subject to execution while the writ remained in the sheriff's hands, there existed no presumption that the condition of the debtor would be changed before the return day. A creditor was not bound to desist from an effort to subject the equitable assets of his debtor in the hope or expectation that, by some chance, he might thereafter acquire legal assets.

In Steward v. Stevens, Harr. Ch. (Mich.) 169, it was said, on the contrary, that, until the return day of the execution, it was the duty of the officer to seize and sell any property of the defendant found within his county, and that the execution could not therefore be considered as legally returned unsatisfied until that day.

And in Thayer v. Swift, Harr. Ch. (Mich.) 430, a return of an execution before the return day was held to be insufficient to authorize a creditors' bill.

And in Smith v. Tompson, Walk. Ch. (Mich.) 1, it was held that the return of an execution on the day before it was re-

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turnable was insufficient to support a creditors' bill.

The return of execution more than a month before the return day will not support a creditors' bill, although the bill itself was not filed until after the return day. Stafford v. Hulbert, Harr. Ch. (Mich.) 435.

A bill to reach choses in action cannot be maintained where the execution was returned before the return day. Beach v. White, Walk. Ch. (Mich.) 495.

But, in Williams v. Hubbard, 1 Mich. 440, it was held that the fact that a levy might be made on the return day of the execution did not make return of the execution on the return day a day too soon to be the basis of a bill to reach equitable assets. The court said that, although the sheriff might keep the writ in his hands until the last moment of that day, for the purpose of making search for property upon which to levy, yet, he was required to return it upon that day, and, if the officer were given full credit for a faithful performance of his duty under the law, the writ might well be presumed to have been returned on the last moment of that day.

In Field v. Hunt, 22 How. Pr. 329, 13 Abb. Pr. 320, it was said that, had the objection been urged that sixty days had not elapsed between the issuing of the executions upon the judgment at law and the commencement of the equitable actions, the court would have felt constrained to hold the objection well taken.

In Forbes v. Waller, 25 N. Y. 430, the court said that, before resorting to the equitable powers of the court to compel the satisfaction of a judgment out of the choses in action of a debtor, it was fit and proper that the legal remedy should be exhausted, not only in form, but in reality and in good faith. Hence, the courts held that the debtor could not be subjected to the costs and annoyance of a creditors' bill under a statute providing for filing of such bills, until not only an execution against the property of the debtor had been issued to the proper county and had been returned unsatisfied, but until the return day of the execution had passed.

Of course, much may depend upon the language of the statutes relating to the return of the execution.

Where, by the Code, an execution is to be returned after sixty days, it can hardly be said, declared the court, in Knauth v. Bassett, 34 Barb. 31, that, under the Code, an execution has a return day.

In Howe v. Cobb, 3 McLean, 270, Fed. Cas. No. 6,767, it was held that, under the Michigan statute of 1838, providing that whenever an execution against the property of the defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill, etc., the return of execution unsatisfied before the return day was sufficient to authorize a creditors' bill. It was said that, if there was a false return, the officer was responsible.

Where the statute provides that execution shall be returned "within" a certain number of days, the creditor is not obliged to wait until the expiration of the time mentioned before proceeding in equity to set aside a fraudulent deed to real estate. Reeves v. Sherwood, 45 Ark. 520. The court said that when it became apparent that the effort to raise the debt by execution would be fruitless, it would be unreasonable to require the creditor to hold his other remedies in abeyance until the return day of the writ, and thereby afford the debtor the opportunity of effecting measures to evade all subsequent proceedings.

Where the Code provides that an execution is returnable "within sixty days after its receipt by the officer," and the statutes provide that, whenever an execution against the property of a defendant shall have been issued on the judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, to compel a discovery of any property or thing in action belonging to the defendant, etc., it is sufficient if the execution is returned within the sixty days allowed, provided it is returned without collusion between the sheriff and the creditor. Renaud v. O'Brien, 35 N. Y. 99. The court said that the time allowed for the return of an execution was for the benefit of the sheriff, to prevent an action or compulsory proceedings against him before he had had a reasonable time to execute the process. If the sheriff had made an honest return that he could find no property of the defendant in his county, there could be no reason for staying the proceedings of a creditor in resorting to a court of equity for relief against the fraudulent disposition of property by a judgment debtor.

Under the statute making execution returnable "within sixty days," a return before the expiration of such time is sufficient to support a creditors' action. Davelaar v. Blue Mound Invest. Co. 110 Wis. 470, 86 N. W. 185.

Under a statute providing that a bill may be filed "whenever" an execution shall have been issued and returned unsatisfied, the sheriff may return the execution before the period allowed by law therefor, and such a return will support the bill. First Nat. Bank v. Gage, 79 Ill. 208.

Under the statute authorizing a creditors' suit "whenever" an execution against a judgment debtor shall have been issued and returned unsatisfied, in whole or in part, a judgment creditors' bill will not be retained if filed before the return day of the execution, nor will it be retained if the execution is returned unsatisfied before the return day. Second Nat. Bank v. Dwight, 83 Mich. 192, 47 N. W. 111.

A return of an execution is not objectionable because made before the day named in it for the return. Dana v. Banks, 6 J. J Marsh. 219. The court said that the only object of the law in requiring that there should be at least thirty, and not more than

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ninety days between the teste and return day of the execution, was to secure the interest of the creditor by allowing full time for the officer to levy it, and yet preventing a long and unnecessary delay. But this provision did not prevent the officer from acting under the execution immediately.

Where, by statute, executions may be made returnable at any time not less than twenty nor more than ninety days from the time an execution shall be issued, a creditors' bill will not lie, where it appears from the return that, including the day of delivery and the return day, there were not nineteen days in which the marshal might have levied. Second Nat. Bank v. Dwight, supra.

A creditors' bill cannot be filed until after the return day of an execution has passed, although it is returned unsatisfied before that time; since the court cannot legally know or presume, previous to the return day of the execution, that the judgment will not be satisfied. Cassidy v. Meacham, 3 Paige, 311.

4. Effect of collusion as to.

While creditors' bills may now generally be based on executions returned before the return day, there must be an effort made in good faith to find property on which to levy. Any collusive return of the writ would be fatal to relief in equity.

A creditors' bill will be dismissed where it appears that the creditor has issued an execution upon his judgment, and procured its immediate return unsatisfied, when in fact no effort whatever has been made by the officer to find the property, and when in fact the debtor has tangible visible property from which the amount of the judgment can be realized. Bassett v. Orr, 7 Biss. 296, Fed. Cas. No. 1,095.

In Congden v. Lee, 3 Edw. Ch. 304, the court refused to require the tenants of certain real estate on which complainant's judgment was a lien to attorn and pay their rents to a receiver theretofore appointed, where it appeared that the complainant and the sheriff who had the execution in charge and had returned it *nulla bona*, both knew of the real estate, upon which it could have been levied.

A bill to reach choses in action cannot be maintained where the execution has been returned at the direction of the execution creditor. Williams v. Hubbard, Walk. Ch. (Mich.) 28.

Stirlen v. Jewett, 165 Ill. 410, 46 N. E. 259, also holds that the return of an execution by a sheriff at the request of the execution creditor, without having made any bona fide effort to find any property of the debtor on which to levy, will not support a creditors' bill.

An execution returned by a sheriff on the order of the plaintiff's attorney was also held insufficient in Hartley v. Atkins, 64 Ill. App. 502.

It is a good defense to a creditors' bill to obtain satisfaction of a judgment out of the equitable interests and choses in action of the debtor, that such debtor had property out of which the judgment might have been satisfied, in whole or in part, and that the sheriff had omitted to levy on such property by collusion with the plaintiff. The fraudulent act of the plaintiff vitiates the return of the execution, and deprives him of his action in the nature of a creditors' bill. Forbes v. Waller, 25 N. Y. 430.

Where a judgment creditor seizes, on an execution directed to the county wherein the judgment was obtained, property of the debtor apparently sufficient to satisfy his judgment, and he prevents the sheriff from selling it, and thereafter causes another execution to issue to another county, a return of *nulla bona* on the latter execution, under the foregoing facts, will not bring him within the rule authorizing creditors whose execution has been issued and returned *nulla bona* to seek equitable aid by way of a creditors' bill. Canaday v. Nuttall, 37 N. C. (2 Ired. Eq.) 265.

But, the fact that the sheriff is directed by the creditor's attorney to return the execution unsatisfied before the time for returning it has fully expired does not matter if the officer has made a personal demand on the defendant in the writ to turn out money or property to satisfy it, which demand is refused, and the sheriff is unable to find any property of the debtor. Illinois Malleable Iron Co. v. Graham, 55 Ill. App. 266; Pecos Irrig. & Improv. Co. v. Olson, 63 Ill. App. 313. To the same effect is Howe v. Babcock, 72 Ill. App. 68.

5. Demand before return.

A demand on a debtor for the payment of the execution is not necessary before making a return thereon, where the sheriff returns the execution "no property found," on his own responsibility, and not at the instance of the creditor or his attorney. Thompson v. Marsh, 61 Ill. App. 269.

But, in Metz v. McAvoy Brewing Co., 98 Ill. App. 584, it was said that it is a grave question whether the remedy at law is exhausted without a demand having been made of a defendant who is shown to be a resident of the county where the execution issues, where the defendant has the right, under the statute, to turn out his real estate before his personalty is taken.

In Reinhardt v. Kennedy, 106 Ill. App. 96, however, it was held that a creditors' bill may be filed upon the return of an execution *nulla bona*, although it does not appear that any demand was made upon the defendant, and the return was made by the officer upon the day the execution was received by him.

e. Necessity of issuing new execution.

In Storms v. Ruggles, Clarke, Ch. 148, where more than five years had elapsed since the rendition of the judgment and the return of the execution, it was held that a creditors' bill could not be maintained until another attempt had been made to collect the judgment by the issuance of a new exe-

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cution. The court said that, "in this country, a man who was a bankrupt five years ago may, owing to the mutations of property, be a rich man to-day; and, as the law does not favor an accumulation of costs in legal proceedings, it would seem to be right that, after a judgment has stood for a period of three years or more, the plaintiff should try again with an execution to collect it before he incurs the costs of filing a bill in this court. I do not mean to say that there may not be exceptions to this rule, but, if there is anything in the circumstances of a particular case, after so much delay, to render it necessary to file a bill without issuing a new execution, it should be stated in the bill."

So, a delay of nine years without taking out a new execution was held fatal. Gould v. Tryon, Walk. Ch. (Mich.) 353.

In Park v. Moore, 3 Edw. Ch. 234, a motion for a receiver made in a pending creditors' bill was denied where the bill showed that a writ of fieri facias had not been issued in three years, and that the debtor had porperty subject to execution, the court saying that all the creditor had to do was to issue another writ and to levy.

But, in Clark v. Davis, Harr. Ch. (Mich.) 227, it was held that the issue of a new execution after the return of one *nulla bona* would not affect the right of the execution creditor to base a creditors' bill on an original execution and its return *nulla bona*.

Under a statute providing that a party suing out an execution may file a bill, etc., one who purchases a judgment upon which execution has been returned unsatisfied cannot file a creditors' bill founded thereon, in his own name, unless he shall have caused an execution to be issued upon such judgment after his purchase. Fitch v. Baldwin, Clarke, Ch. 106.

In Wakeman v. Russel, 1 Edw. Ch. 509, the court expressed the strongest doubt whether an assignee of a judgment upon which execution had been returned unsatisfied could maintain a creditors' bill without the issuance of a new execution, under a statute providing that the party suing out the execution should file the bill. The court said that where three years had elapsed since execution was issued by the original parties, and the assignee had taken out no fresh process, he had not exhausted his legal remedies.

But, in Gleason v. Gage, 7 Paige, 121, it was held that, where the bill was filed by the assignee of a judgment, it was not necessary to take out a second execution, the court saying that the vice chancellor in the last-mentioned case misapprehended the spirit and intent of the statutory provision upon the subject of creditors' bills. The object of the revisers and of the legislature was not to establish as a technical rule that the execution should have been taken out by the same individual who filed the bill, but it was to establish and declare the great principle that the creditor, after the remedy against the tangible property of the debtor had been exhausted by the return of an execution unsatisfied, might come into equity for the purpose of obtaining a discovery and payment out of the property of the debtor which could not otherwise be reached. There was no good reason for requiring him to go through the mere formality of taking out a new execution and having it returned unsatisfied when the ink was scarcely dry upon a similar return made by the sheriff upon the execution which had been issued at the instance of the party from whom he purchased the judgment.

In Strange v. Longley, 3 Barb. Ch. 650, it was also held that the fact that, after an execution has been issued and returned *nulla bona*, the judgment was assigned, would not render it necessary for the assignee thereof to cause another execution to be issued and returned *nulla bona* before he could file a creditors' bill.

And, in Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968, although the question was not properly raised, the court said that it was of the opinion that it was not necessary for the assignee of a judgment to issue a new execution before the filing of a creditors' bill. To the same effect is Rankin v. Rothschild, 78 Mich. 10, 43 N. W. 1077.

Where an execution on a judgment in an action on a promissory note is satisfied by an indorser, who takes an assignment of the judgment, an indorsement of the sheriff on the execution, that it is satisfied out of the property of the indorser, but returned *nulla bona* as to the other defendants, is not sufficient to authorize a creditors' bill by the indorser against the other defendants, another execution and its return unsatisfied being necessary for that purpose. Bostwick v. Scott, 40 Hun, 212.

Where, under a statute, legal remedies must be exhausted before the maintenance of a bill to reach real estate alleged to be held in trust for the debtor, and it appears by the allegations of the bill that whether execution was issued within seven years after the rendition of the judgment is wholly conjectural, and it is certain that no execution was issued after the judgment was revived on scire facias, the bill cannot be maintained. Crawford v. Cook, 55 Ill. App. 351.

In Gilmore v. Miami Exporting Co. 2 Ohio, 294, a proceeding under § 59 of the chancery law to charge debts due from certain defendants to the debtor to the payment of a creditor's claim, a demurrer on the ground that the bill did not charge that execution had been issued and returned nothing to be found was overruled without opinion. In this case, upon one judgment no execution had been sued out, upon the other execution had issued, was returned *nulla bona*, and levied upon real estate, which, upon a vendi., had been sold for a very small sum. No new fi. fa. had been taken.

f. Pursuit of joint debtors.

It has generally been held that, before a creditor may proceed against the property

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of one joint debtor, he must exhaust his legal remedy against all the others. It would seem that the rule as to joint debtors ought to be the same as it is in the case of several debtors; that is, that where the property sought to be reached is subject to levy, the remedy at law need not be exhausted; but that, when the creditor pursues property not subject to levy, the remedy at law as against all the other debtors should be exhausted.

A creditor cannot set aside a fraudulent conveyance of the property of one of the debtors until he has pursued his legal remedy against the others. Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088.

One who brings a joint action to set aside a fraudulent conveyance of real estate by one of the debtors must show that all the debtors are insolvent. Geiser Mfg. Co. v. Lee, 33 Ind. App. 338, 66 N. E. 701; Riddick v. Parr, 111 Iowa, 733, 82 N. W. 1002.

A bill in equity to subject the assets of an absent debtor to the payment of the creditor's claim cannot be maintained where he has a perfect remedy at common law against the joint debtor. Lupton v. Lupton, 3 Cal. 120.

Where the judgment in a court of a justice of the peace is against two defendants, and the bill in equity is against but one, and there is no allegation that the other has no real estate, the bill cannot be maintained. Wilson v. Dale, 5 Ind. 163.

In Kyle v. Frost, 29 Ind. 382, it was held that a suit to subject real estate held by the wife of one of the judgment debtors could not be maintained, where the return did not show that the other defendants were insolvent, or give any reason why judgment could not be made out of them by the ordinary process of execution, except that one of them had no property in the county.

On a general creditors' bill it was held, in Howard v. Sheldon, 11 Paige, 558, that the creditor's remedies against all the joint debtors must be first exhausted and an execution issued and returned unsatisfied as to all of them before he would be entitled to the aid of equity.

In Voorhees v. Howard, 4 Abb. App. Dec. 503, the court said that it was always necessary, both before and after the adoption of the Revised Statutes, that the bill should show affirmatively that an honest attempt had been made to collect the debt by the issuing and return of an execution against the judgment debtor; and that, where there were several defendants jointly liable thereon, that such effort had been made and such remedy exhausted against all the judgment debtors before jurisdiction would be entertained in chancery.

Where there are two or more joint debtors, the remedy at law must be exhausted as to all before a statute requiring a bona fide attempt to collect the debt can be said to have been complied with. Field v. Hunt, 22 How. Pr. 329, 13 Abb. Pr. 320. The court said that, if there was any excuse for not proceeding to final execution against one or more of the joint debtors, as that he was out of the jurisdiction of the court, a bankrupt, a surety, or the like, the facts relied upon should be stated in the complaint in the equitable action.

But, in Hiler v. Hetterick, 5 Daly, 33, a judgment and return of execution unsatisfied as against one of two joint debtors was held a sufficient foundation for a creditors' bill to reach real estate purchased by the debtor, and conveyed to a third person in fraud of creditors.

Where a statute requires execution to be issued to the county in which the judgment is rendered, or to the county of the residence of the debtor against whom equitable proceedings are directed to reach equitable assets, the fact that there are several defendants, and that an execution has been directed to the county of the residence of some of them, does not obviate the necessity of compliance with the statute as to the defendant against whom it is purposed to institute proceedings, since, the remedy being statutory, the statute must be strictly pursued. Proctor v. Bell, 97 Ky. 98, 30 S. W. 15.

Where there are several defendants who are jointly liable for the payment of the plaintiff's debts, he should exhaust his legal remedy by executions against the property of all before he applies to equity for relief, except where, perhaps, one of the defendants is a mere surety, although a statute provides that whenever an execution against the property of the defendant shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery, etc., since the statute means that the plaintiff in the judgment shall have made a bona fide attempt to collect his debt by execution against the property of the defendant. Child v. Brace, 4 Paige, 309.

On the other hand, it was held, in Dawson v. First Nat. Bank, 228 Ill. 577, 81 N. E. 1128, that it is not a condition precedent to an action to set aside a conveyance of real estate as fraudulent that the creditor satisfy his claim by means of executions against the property of a cojudgment debtor.

Under the Kentucky act of 1796, permitting a creditor to proceed in equity to reach choses in action of an absent debtor, it was held that the creditor was not obliged to exhaust his remedy at law against a resident debtor before going into equity after the absentee's property. The court said, "We will not clog the operations of the statute by fabricating conditions which may render the remedy altogether useless." Curd v. Letcher, 3 J. J. Marsh. 443.

The levy of an execution on the land of one joint debtor is sufficient to give equity jurisdiction to remove fraudulent encumbrances placed by the debtor upon the land levied upon, and a complainant need not show the insolvency of the other debtors, or the exhaustion of his remedies at law as to them. Hodge v. Gray, 110 Mich. 654, 68 N. W. 979. The court said that the rule which obtains in respect to judgment cred-

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itors' bills does not obtain in bills in aid of execution.

Where the statute makes conveyances of property with intent to hinder, delay, or defraud creditors "clearly and utterly void" as against the creditors affected thereby, the fact that one seeking to set aside such a conveyance fails to show the insolvency of two of the defendants in the original judgment will not stand in the way of his action. Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351. The court said that the right of the judgment creditor to levy his execution upon the property so conveyed, and to proceed at law to subject it to sale for the satisfaction of his debt, could not be denied, without any reference to the question whether the debtor possessed other property, or whether there were other defendants having property liable to the same judgment. In other words, it was not necessary, in order to justify the levy of an execution upon the property fraudulently conveyed, that the plaintiff should show or that the fact should exist, that neither the party who had made such conveyances, nor his codefendants in the judgment, had other property upon which a levy could be made.

Where, as between the judgment debtors and the plaintiff, each is bound to pay the whole debt, it is no ground for complaint that the creditor may see fit to collect the debt out of the property of one, and not out of that of the other. Davelaar v. Blue Mound Invest. Co. 110 Wis. 470, 86 N. W. 185.

Where the return of the sheriff shows that there are no partnership assets, and it is also shown that there are certain lands belonging to one of the members of the firm which ought to be subjected to the payment of the judgment, but which, in fraud of complainant's rights, are so situated that they cannot be sold, a bill in equity to ascertain the true state of the title may be filed, although the complainant has not first, by scire facias, given the above-mentioned defendant an opportunity to show cause why his property should not be made liable to pay the judgment. Ticonic Bank v. Harvey, 16 Iowa, 141.

But the allegation that the judgment was recovered upon the debts of the defendant against whom alone execution issued and was returned unsatisfied is insufficient to bring the case within the exception to the rule requiring the legal remedy to be exhausted as to all of the joint debtors made, as pointed out in Baker v. Potts, 73 App. Div. 29, 76 N. Y. Supp. 406 (infra, h), in the case where debtors were not liable in equal degree, or in the case of principal and surety. Egan v. Hagan, 119 App. Div. 189, 104 N. Y. Supp. 247.

In Burne v. Kunzman (N. J. Ch.) 19 Atl. 667, it was held that where the judgment was against two persons, and the complainants had made a levy on some property of one of them, and, for aught that appeared, the property covered by the levy might be sufficient to pay complainants' debt, a bill could not be maintained to set aside a mortgage and sale as fraudulent.

g. Several claims; exhaustion of remedy as to one.

Where there are several creditors and the remedy at law has been exhausted as to one, or where one creditor has several claims, and has exhausted his remedy as to one, is that a sufficient exhaustion of the remedy as to others to permit them to come in under the equity action, or to permit the other claim to be disposed of in the equitable action? Certainly, if one creditor establishes that the debtor has no property subject to levy, it would be a misconception of the reason for the rule as to the exhaustion of the remedy at law to require the other creditors to issue executions, and have them returned unsatisfied. The same may be said of requiring a creditor to exhaust his remedy as to two claims. But, as to requiring the claim to be reduced to judgment at law, another situation is presented. Has the debtor the right to have the question of indebtedness tried by jury? If he has, then the fact that one creditor has reduced his claim to judgment and exhausted his remedy, or that one claim has been reduced to judgment and the remedy exhausted as to that, would be no excuse for not reducing other claims to judgment before the equitable action. If the debtor has not the right to have the indebtedness determined at law, then, even a general creditor might come into equity, where the remedy at law had been exhausted by another creditor. To require other creditors to exhaust their remedy at law where one creditor had done so would be a useless formality; but to require them to obtain judgment at law would not be a mere formality, if there is any virtue in the right of trial by jury. It has, however, been held that where one claim has been reduced to judgment and the remedy at law exhausted, even a judgment is not a condition precedent to equitable relief on another claim.

In Carp v. Chipley, 73 Mo. App. 22, it was held that where the fact that the remedy at law was unavailing was established by the return of the execution *nulla bona* on the judgment of one creditor, other creditors should be allowed to intervene in a creditors' action, although their claims had not been reduced to judgment. The court said that, under such circumstances, the other creditors should not be turned away and required to sue at law in order to make proof of a fact already in evidence.

Where the claims of general creditors were consolidated with that of a judgment creditor who had established a clear right to equitable relief by having execution on his judgment returned unsatisfied, it was held that the claims of the general creditors in the action would not be postponed until they had obtained judgments and had executions returned unsatisfied. Haskell v. Wynne, 3 Ky. L. Rep. 54.

Where an action to subject the interest

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of a debtor in the assets of a partnership to the payment of a debt is based upon two claims, one of which is reduced to judgment, upon which execution has been returned *nulla bona*, the fact that the second claim is on an overdue note will not stand in the way of the bill as to the latter claim. A. G. Edwards & Son Brokerage Co. v. Rosenheim, 74 Mo. App. 621. The court said that the proof which a court of equity required that a suit at law would be inadequate was the production of a judgment on the debt sought to be enforced, and a return of *nulla bona* to an execution issued thereon. When these facts were made to appear in one count in the petition, it would seem to be a vain and useless thing to send liquidated claims contained in other counts to a court of law, to be there reduced to judgments, before they could be considered in an equitable proceeding of this character. A court of equity would not require such a useless ceremony before entertaining jurisdiction.

An allegation in a bill seeking the aid of equity to reach equitable assets of the debtor, that he is insolvent and has no property subject to execution, and that executions on other judgments against the debtor had been issued and thereafter returned *nulla bona*, presents sufficient excuse for a creditor not first causing an execution to issue and be returned *nulla bona*. Tabb v. Williams, 57 N. C. (4 Jones, Eq.) 352.

Where a creditors' bill is filed by a judgment creditor in behalf of himself and all other creditors, it is not necessary that all, or any, of the other creditors, in whose behalf the action is brought, should be judgment creditors. State v. Foot, 27 S. C. 340, 3 S. E. 546. The reason for the rule was said to be that, if any one of the creditors is in a position to institute the action, he has the right to do so; and, if the action results in making equitable assets, then all the others, even simple contract creditors, are entitled to share therein, and hence the action may be brought for their benefit, even though they might not be in a position to enable them to institute the action on their own behalf. "If the person named as the plaintiff is a judgment creditor, and has exhausted his legal remedies, then he may maintain an action to set aside a fraudulent deed whereby property has been placed beyond the reach of his execution, and when such deed is set aside the other creditors, as a matter of equity, are entitled to share in the proceeds of the property thus subjected to the payment of debts, and hence the action may be instituted by the judgment creditor on his own behalf as well as on behalf of the other creditors, who, though not entitled to bring such an action, are, nevertheless, equitably entitled to share in its fruits."

In Enright v. Grant, 5 Utah, 334, 15 Pac. 268, it was held that showing a return of execution upon the judgment of one of the plaintiffs was sufficient proof that the debtor had no other property upon which execution could be levied to authorize other creditors to reach equitable assets of the debtor, in view of the allegation that the plaintiffs knew of no property upon which execution could be levied, and that judgment must remain wholly unsatisfied unless they could resort to equity.

But, in M'Kinley v. Combs, 1 T. B. Mon. 105, it was held that a creditor whose claim is of a purely legal character, and therefore cognizable in a court of law, must, in order to place himself in an attitude to take advantage of a deed on the ground of its being fraudulent, pursue it at law, and recover judgment and issue execution thereon; and when such a claim is combined with one merged in a judgment upon which execution has been issued and duly returned *nulla bona*, the bill as to such demand must be dismissed.

And, in Bardstown & G. River Turnp. Road Co. v. Caldwell, 8 B. Mon. 36, it was held that a return *nulla bona* on another judgment in favor of other sureties was not sufficient under a statute which gives jurisdiction upon a return of an execution upon the judgment sought to be enforced.

h. Exhaustion as to surety, principal, indorser.

It is not necessary that the creditor should have exhausted his rights and remedies against an indorser of a note upon which the claim is founded before proceeding in equity to set aside a fraudulent transfer of the property of the principal debtor. Ramsey v. Voorhees, 38 N. J. Eq. 282.

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The last-mentioned case was followed in Harvey v. State, 123 Ind. 260, 24 N. E. 239.

It does not lie with the principal debtor or his fraudulent grantee to object to a creditors' bill to reach property he has fraudulently transferred, on the ground that his creditor has not first exhausted his legal remedies as against his surety. It would be an unnecessary burden on a judgment debtor who is a surety to compel his land to be sacrificed, at the instance of the prin-

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Where the original decree awarded execution in the first instance against the separate property of the principal debtor, it was held unnecessary that the complainant should have exhausted his remedy against the surety also before proceeding by a creditors' bill against the principal debtor alone. Speiglemyer v. Crawford, 6 Paige, 254.

Where the action is to reach real estate of the surety, it is unnecessary for the creditor first to exhaust his legal remedies against the sureties and the principal. State Bank v. Belk, 68 Neb. 517, 94 N. W. 617. In this class of cases the prevailing doctrine was said to be that it is not necessary to allege that an execution has been returned unsatisfied, nor that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditors' lien from being efficiently enforced upon the property. As to the creditor, the conveyance was void and he had a right to have himself placed in the same position as if it had not been made. The fact that other property had been retained by the debtor might be evidence that the conveyance was not fraudulent, but, if the grantee's title was tainted with fraud, he had no right to say that all other means to satisfy the debt should be exhausted before he should be disturbed.

f. Exhaustion of remedy as to debtor and third person.

In Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, it was held that, with respect to the rule requiring the return of execution *nulla bona* before the granting of equitable relief to the creditor, no distinction was to be made between a case in which the bill complained against the principal debtor and some third person, and a bill which complained against the principal debtor alone. The court said that the distinction did not appear to have been before taken. Many of the cases where a return of *nulla bona* was required were against debtors alone. There was more reason for an application of the rule to the debtor than to parties associated in a bill with him. It was especially for his protection that the rule existed. It was his business that the creditors' bill usually wound up. The forms of creditors' bills in the books were of both descriptions, and the rule was the same.

g. Proceedings on inferior court judgments.

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A creditors' bill based on a return *nulla bona* on an execution issued by a justice of the peace on a judgment rendered before him does not sufficiently show insolvency of the debtor, or that he did not have enough property subject to execution to pay his debts when the action was commenced. As such an execution is not leviable upon real estate, the power of the officer having custody of the same is exhausted when he fails to find personal property upon which to levy. Stuckwisch v. Holmes, 29 Ind. App. 512, 64 N. E. 894.

A judgment of a justice of the peace will not support a creditors' bill to reach real estate fraudulently conveyed, especially where the land sought to be subjected lies in another county from that in which the judgment was obtained. State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62.

The return of "no property" on an execution issued on a judgment of a justice of the peace is not sufficient to entitle a judgment creditor to the aid of equity to subject to the payment of his judgment lands of the debtor to which he had the legal title, since he could have reached such lands by execution from circuit court. Weatherford v. Myers, 2 Dur. 91.

Under the Kentucky statutes, § 6, act of 1821, and the general execution law of 1828, a return of the execution on a judgment of a justice of the peace of over £5 was sufficient to authorize equitable relief against the debtor's real estate. Newdigate v. Jacobs, 9 Dana, 18.

The remedy must be exhausted as to real estate as well as personal property before a creditors' bill can be filed. Therefore a bill cannot be founded on a justice-of-the-peace judgment, the execution having been directed against personal property only. To complete the remedy the complainant must docket his judgment in the county clerk's office and take out executions there so as to reach the real as well as the personal property of the defendant, if he has any in the county. Dix v. Briggs, 9 Paige, 595. To the same effect, Henderson v. Brooks, 3 Thomp. & C. 445; Crippen v. Hudson, 13 N. Y. 161.

A creditors' bill to reach real estate cannot be founded upon a return *nulla bona* of an execution on an attachment judgment of a justice of the peace without personal service of process, where the statute does not authorize such attachment to be served upon the real estate of the defendant, and does not authorize the execution issued in a suit commenced by attachment where the defendant was not personally served with process and does not appear therein, or levy upon the goods and chattels of the defendant generally, and does not make the filing of the transcript of such judgment in the county clerk's office a lien upon the real estate of the defendant, and authorize the county clerk to issue execution against such real estate founded upon the filing of the transcript, and where the statute also pro-

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vides that such judgments shall be only prima facie evidence of the indebtedness in any suit that may be brought thereon, and may be repelled by the defendant, and also provides that he shall not be barred from any set-off, since the remedy of the owner of such judgments is to bring new suits thereon, and, after he obtains new and general judgments in these suits, to exhaust his remedy against real as well as the personal estate of the defendant on such new judgments. Corey v. Cornelius, 1 Barb. Ch. 571.

A creditors' bill to reach real estate cannot be maintained in the Iowa district court on a judgment in the superior court, since, a judgment of that court not being a lien upon real estate, the creditor has no lien, and is not in a position to perfect one and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent transfer, and since he has not exhausted his remedy at law by filing a transcript with the clerk of the district court so as to make the judgment a lien upon real estate. Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056.

Under a statute providing that judgments in the city superior court may be made liens upon real estate in the county in which the city is located, by filing transcripts of the same in the district court, where a transcript of a judgment of a superior court of one county was not filed in the district court of that county, but was filed in another county in which the real estate of the debtor was situated, it was held that this did not create a lien on the property, and therefore would not support a creditors' bill. Drahos v. Kopesky, 132 Iowa, 497, 109 N. W. 1021.

A judgment of a city superior court, a transcript of which is indorsed as filed and signed by the clerk, is not a sufficient basis for a creditors' bill. Green v. Forney, 134 Iowa, 316, 111 N. W. 976.

An execution and the return of "no property" from a quarterly court is not sufficient to give a court of equity jurisdiction to set aside a fraudulent conveyance. Grover v. Smith, 5 Ky. L. Rep. 250.

Upon the issuance of an execution from a quarterly court merely, and a return thereon of *nulla bona*, the creditor cannot resort to a proceeding *in rem* to subject to sale the real estate of his debtor. He must first exhaust his legal remedies. Mansfield v. Wilkinson, 16 Ky. L. Rep. 276, 27 S. W. 808.

Issuing an execution on the judgment of a quarterly court, and a return *nulla bona* thereon, will not entitle a creditor to seek the aid of equity to subject the debtor's real estate to the payment of his debts. An allegation that no transcript of the judgment had been lodged with the clerk of the circuit court, and no execution sued out thereon, for the reason that the debtor had no other real estate than that sought to be sold in the equitable proceeding, does not meet the requirement that the remedy at law must be exhausted before a creditor can successfully apply to equity. Mansfield v. Wilkinson, supra. Such a judgment, however, is sufficient where it is sought only to make it the basis for reaching equitable assets of the debtor. Jones v. Jeffress, 11 Bush, 636.

In Clements v. Waters, 90 Ky. 96, 13 S W. 96, the court said that, as land cannot be levied upon under an execution from a quarterly or justices' court, the statute authorizing the filing of a transcript in the circuit court of the proceedings in those courts showing a return of "no property," and the issual then of an execution by the clerk of the circuit court, was a proper one. It saved the costs and trouble of a second suit. A creditor was not allowed therefore to resort to an equitable action upon his judgment to reach the land of his debtor until he had failed to make his debt by suing out execution from the circuit court in the manner provided by the statute.

Under a statute providing that land cannot be levied on or sold under an execution from a quarterly court, if the creditor's judgment is in a quarterly court, he must, after an execution issued upon it has been returned "no property," obtain a transcript of the proceedings, file them in the clerk's office of the circuit court, and have an execution issued therefrom as provided by § 723 of the Code, and returned "no property;" a return of a quarterly-court execution *nulla bona* is not sufficient to authorize the creditor to set aside the conveyance of real estate. Behan v. Warfield, 90 Ky. 151, 13 S. W. 439.

An execution issued upon a judgment rendered in an inferior court, which cannot be levied upon real estate, is not sufficient to entitle a creditor to equitable aid to subject real estate of the debtor to the satisfaction of the judgment. It is necessary first to have such judgment transferred to the circuit court, and execution issued from that court, under the Kentucky Code. Alexander v. Mullins, 16 Ky. L. Rep. 31.

In Leggett v. Hopkins, 7 Paige, 149, it was held to be sufficient if the execution was issued in the county wherein the judgment was rendered, where the jurisdiction of the court of record in which the suit was brought did not extend beyond that county. It was held to be unnecessary for the complainant to bring another suit upon the judgment in the county where the property of the defendants was situated, or where they resided before he was authorized to proceed against them in equity.

V. Exceptions to general rules; excuses for noncompliance.

a. Where claim is admitted or allowed.

If the debtor is in default so that a judgment may be entered up against him, or if the debt is admitted or duly allowed against the debtor's estate by his representatives, it would seem that the reason for the rule requiring judgment as a condition precedent to equitable relief fails, and that under such

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circumstances the judgment may be dispensed, unless an exhaustion of the remedy at law is also required, which of course would necessitate judgment before an execution could be issued.

Where property of the debtor has been attached and the debtor has defaulted, a bill in equity may be maintained to set aside a fraudulent conveyance of real estate. Dodge v. Griswold, 8 N. H. 425. The court said that the default was an admission of record that the creditor had a just claim against the debtor in that suit. And upon this admission, the creditor had at least prima facie a right to enter up judgment against the debtor, sue out execution, and extend the same upon the lands attached. The creditor had then, at the time of filing his bill, prima facie a present subsisting title, and right to have the attached land applied in satisfaction of the debt demanded in the attachment suit. This seemed to the court equivalent to the lien created by judgment at law.

A creditor need not reduce his claim to judgment before proceeding in equity to subject real estate fraudulently conveyed to the payment of the demand, where there is no dispute as to the claim, and where the debtor died notoriously insolvent. Nieters v. Brockman, 11 Mo. App. 600.

The rule that the debtor has a right to have the amount of his debt determined in a court of law is satisfied without proceeding at law to judgment, where the debt is acknowledged by the debtor. D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780.

In Burnham, M. & Co. v. Smith, 82 Mo. App. 35, the principle was enunciated that, if a claim is undisputed, and the assets sought to be reached to be applied in payment thereof are not subject to execution or garnishment, and the debtor is insolvent, equity will take jurisdiction although the creditor's claim is not reduced to judgment. It is, however, recognized that there may be cases where the debt is disputed, and where there are issues of fact in respect thereto, which the debtor is entitled to have submitted to a jury. A court of equity would refuse in that event to further entertain jurisdiction of the cause. The question is discussed on principles applicable to creditors' bills, and the doctrine announced is sound in that aspect of the case. It should also be noted, however, that the action, described as being "in the nature of a creditors' bill," was for an accounting of a trustee in deeds of trust. This would seem therefore to be a case of which equity could take original jurisdiction, and that it was therefore one in which the remedy at law is not required to be exhausted. See infra, VI.

Although a creditor assailing a deed of assignment is not a judgment creditor, yet, where his claim is recognized in the deed and the amount of the debt is also recognized therein, equity has jurisdiction since there is no necessity of judgment to fix that amount. Cohen v. Morris, 70 Ga. 313.

Where the creditor's debt is conceded, judgment and execution are not conditions precedent to relief against insolvent partners of a dissolved partnership, by way of injunction and receivership to protect the partnership assets. Dillon v. Horn, 5 How. Pr. 35.

Where a partnership is, by the acts of the copartners, terminated, and the partners and partnership are insolvent, and all their assets, firm and personal, are covered by mortgages, and are being disposed of by sale, and scattered beyond the reach of their creditors, irrevocably, and the claims of the complainant creditors are expressly admitted, both in mortgages and in the pleadings in the case, and such creditors are made defendants to a petition by one of the mortgagees to marshal the assets, and for distribution of the funds covered by the mortgage,—such facts are sufficient to authorize an exception to the general rule that, before equitable aid can be sought by a creditor, a judgment is necessary; and such creditors have a proper standing in such proceeding, by a cross petition in the nature of a creditors' bill, to impeach the validity of these mortgages, which stand in the way of their just participation in the assets of the copartnership. Taylor v. Riggs, 8 Kan. App. 323, 57 Pac. 44.

Where the bill was to enjoin proceedings to sell on execution on the alleged fraudulent judgment, and the debt and insolvency of the defendant, as well as every other material allegation of the bill, except that of fraud, were confessed by the answer, it was said by the court, in Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519, that it would be requiring the plaintiffs to do a vain act if they should be compelled to await their judgment at law, and a return of execution, when it was acknowledged that the only effect would be a return of *nulla bona*, and that the property which they had attached in the meantime would have passed in the hands of a bona fide purchaser under color of a judicial sale, and be lost to them forever. Fraud is one of the primary subjects of equity jurisdiction, and it is not to be supposed that a court of chancery would refuse to entertain jurisdiction in a case like the one at bar, where the sole issue is one of fraud and where, by such refusal, the fraud complained of would be most successfully consummated.

"An action in the nature of a creditors' bill is properly based on an order of a probate court, upon the settlement of an administrator's accounts, to the administrator for the payment of money." Warner v. York, 25 Ohio C. C. 310.

Presentation, allowance, and approval of claims in an insolvency court is the equivalent of a judgment for the purpose of enforcing the creditor's rights against fraudulent or void acts of the insolvent. Ruggles v. Cannedy, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, 59 Pac. 827.

In Plume & A. Mfg. Co. v. Baldwin, 87 Fed. 785, it was said that a judgment in a court of law is not always indispensable to the bringing of a creditors' bill, and it

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was held that it should not be required where the claim upon which the equitable action was based is verified and allowed in insolvency proceedings following an assignment by the debtor.

Where an assignee of a debtor adjusted the creditor's claim, ascertained and allowed the amount due, and gave him a certificate therefor, which adjudication, under the statute, was as final as if rendered by a court, it was held to furnish a sufficient establishment of the claim to support a bill to set aside a fraudulent conveyance of real estate. Roan v. Winn, 93 Mo. 503, 4 S. W. 736.

But, if the filing with the assignee under an assignment, of a claim to which no exceptions are filed within the time allowed by statute for the same, can be said to constitute an adjudication of the same, this cannot avail a complainant who files his bill before the expiration of that time, since the adjudication cannot be said to become effectual until the expiration of the time for filing exceptions. Austin v. Bruner, 169 Ill. 178, 48 N. E. 449.

And the requirement that a claim be reduced to judgment is not satisfied by the allowance of a creditor's claim against the estate of the debtor under a void assignment, since this leaves him in the position of a general creditor. McCoy v. Connecticut F. Ins. Co. 87 Mo. App. 73.

A mere finding that the creditors have a valid claim against the congregation of an unincorporated church, which they are entitled to recover from it, is not a sufficient basis for a proceeding in aid of execution. Males v. Murray, 7 Ohio N. P. 614.

An award of arbitrators is no sufficient basis for a bill to set aside a fraudulent conveyance of the debtor's property. Duberry v. Clifton, Cooke (Tenn.) 328.

But, in Sanborn v. Maxwell, 18 App. D. C. 245, it was held that a judgment is not necessary to the enforcement of an equitable lien where the complainant's demand has been liquidated by an award under an arbitration agreement, since the award is as conclusive of the demand, both in respect to its validity and amount, as a judgment of a court of competent jurisdiction would be.

For allowance of claims against a decedent's estate, see infra, V., g, 2.

b. Where compliance with rules would be a mere matter of form.

The impossibility, impracticability, or futility of exhausting the remedy at law has been held to be a sufficient excuse for not doing so. When a statute, however, in positive terms directs the return of execution *nulla bona*, it has been held that that condition cannot be dispensed with.

In Dahlman v. Jacobs, 5 McCrary, 230, 16 Fed. 614, the fact that a debtor was a married woman, and that she had encumbered her property in favor of one creditor to the prejudice of others, was held to be sufficient to entitle a creditor at large to the aid of equity to compel an equal division of her property, since, under the Missouri statutes, the creditor cannot proceed at law to reduce his claim to judgment.

In Guaranty Title & T. Co. v. Pearlman, 144 Fed. 550, while recognizing that ordinarily, before a creditor may take steps to avoid the disposition by a debtor of his property as fraudulent, a judgment and execution against the property alleged to have been fraudulently disposed of are conditions precedent, it is held that, where such a course is not practicable, as where a statute makes sales of stocks of goods in bulk void at the instance of creditors, and requires proceedings to be begun within ninety days after the sale, which period of time is so limited as to render it impossible in the ordinary course of affairs for a creditor first to reduce his claim to judgment before seeking equitable aid given by this statute, equity will lend its aid to enforce the provisions of the statute in behalf of a creditor at large who has not reduced his claim to judgment.

In National Tradesmen's Bank v. Wetmore, 124 N. Y. 248, 26 N. E. 548, it was held that the fact that there had been neither execution nor judgment upon the creditor's debt could not stand in the way of an action to set aside an alleged fraudulent conveyance of real estate, where the creditor had begun action against the debtor in a sister state, and the debtor had died during the pendency of the suit, and where the creditor sought to revive the execution against the administrator, and the court ordered the action to abate on the ground of the debtor's insolvency, since the case presented was one in which the plaintiff could recover upon his claim, no judgment entitling him to have an execution issued and returned. The court said that the general rule requiring judgment, execution, etc., before complainant is entitled to relief in equity, is not so unrelenting as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of the court of law, there to take the preliminary steps, and produce what ordinarily might be treated as the condition precedent to the application for equitable relief.

But, in Clinton v. South Shore Natural Gas & Fuel Co. 61 Misc. 339, 113 N. Y. Supp. 289, it was said that it is a general principle of law and equity that a creditors' bill cannot be maintained until a judgment has been issued and been returned unsatisfied, and that it has become the settled rule of New York not to dispense with these preliminaries although it might be made to appear by evidence that no benefit could result to creditors from them.

And the opinion of a creditor that an execution or an attachment would be unavailing was held not to dispense with the necessity of exhausting legal remedies before seeking relief in equity. Kraemer v. Williams, 115 N. Y. Supp. 721.

In Mixon v. Dunklin, 48 Ala. 455, it was held that, where the statute requires an execution to be unsatisfied before the main-

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terance of a bill to subject the real estate to the payment of the creditor's claim, the complainant is not excused from compliance therewith because of the fact that, by reason of certain military orders, he could not have execution at law on his judgment.

So, insanity of the judgment debtor will not authorize the maintenance of a creditors' bill before judgment, where a statute provides that an action by equitable proceedings to subject property must be after judgment. Faivre v. Gillman, 84 Iowa, 573, 51 N. W. 46.

That the return of an execution would be a mere matter of form will not relieve a creditor from having it returned, where the statute in express terms requires its return unsatisfied preliminary to equitable relief. McElwain v. Willis, 9 Wend. 548.

In Thompson v. Caton, 3 Wash. Terr. 31, 13 Pac. 185, it was held that a court of equity will not interfere in aid of a creditor without a judgment, merely on the ground that he cannot collect his debt by the ordinary process of law.

In Cleveland v. Chambliss, 64 Ga. 352, the fact that a creditor of an insolvent estate was under an injunction not to sue his claim was said to afford a sufficient ground for not obtaining a judgment before resorting to equity, especially where the amount of the creditor's claim was established by a decree of the court in the suit in which the injunction was granted, which was brought before the court, in the case involving a creditors' bill, by way of amendment to the bill, and where the estate of the debtor was insolvent, and where the objection was raised on the merits, and not on demurrer.

That inability to sue because of a restraining order may be a sufficient ground for equitable jurisdiction over a creditors' bill by a creditor at large was recognized in Brown v. Barker, 68 App. Div. 592, 74 N. Y. Supp. 43; but relief was denied in this case because of an insufficient showing as to the validity of the order, and that it was against the consent of plaintiff. While recognizing that such circumstances might afford a basis of equitable jurisdiction, the right of the defendant to have his indebtedness determined in an ordinary action at law, wherein he could enjoy his constitutional right of a jury trial, unless such course was clearly impossible to plaintiff, was declared. It was further said that the courts are not inclined to extend the cases in which a plaintiff will be excused from pursuing the ordinary course of obtaining a judgment.

In Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004, the court said that after all the judgment and fruitless execution are only evidence that the creditor's legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of a resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity require a meaningless form, *Bona sed impossibilia non cogit lex.* When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process, and whenever a creditor has a trust in his favor, or a lien upon the property for the debt due him, he may go into equity without exhausting legal process or remedies.

In Williams v. Kemper, 99 Minn. 301, 109 N. W. 242, it was said that, in exceptional cases where it is impossible to obtain a personal judgment and the return of execution *nulla bona*, the rule seems to be that an allegation that the debtor is insolvent, or a nonresident and has no property within the state, is sufficient without alleging the recovery of a judgment and the return of execution unsatisfied.

An assignment by an insolvent debtor of all his property to an assignee, in fee for certain creditors, is sufficient to entitle a general creditor to the aid of equity to set same aside as fraudulent, since a judgment at law would create no lien upon the equitable assets. To issue execution in such a case would plainly be only an idle ceremony. Talley v. Curtain, 4 C. C. A. 177, 8 U. S. App. 347, 54 Fed. 43, rehearing denied in 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. 4.

It is unnecessary for a judgment creditor of a railroad company to sue out an execution before coming into equity to ask for the appointment of a receiver to operate the road, where, according to the facts and admissions of the parties, the suing out of an execution would have been an idle ceremony. Sage v. Memphis & L. R. Co. 125 U. S. 361, 31 L. ed. 694, 8 Sup. Ct. Rep. 887.

A judgment creditor who sues out a ca. sa. to secure satisfaction of a judgment, by virtue of which a debtor is committed to jail, from which he thereafter escapes without paying the debt, need not thereafter attempt to enforce the judgment by the issuance of an execution thereon, and its return *nulla bona*, before seeking the aid of equity to set aside a fraudulent conveyance by the debtor of his personal property. Poague v. Boyce, 6 J. J. Marsh. 70.

In Consolidated Tank Line Co. v. Kansas City Varnish Co. 45 Fed. 7, it was held that it was not necessary to the maintenance of a creditors' bill to set aside a deed of trust made by a corporation preferring certain creditors, that the complainant should be a judgment creditor, and have secured a return of *nulla bona* on executions, where the debtor's estate was a mere equitable one, which could not be reached by any proceeding at law.

A dormant judgment is no objection to equitable aid to reach equitable assets, especially where it appears that it would be futile to issue execution. Brown v. Long, 36 N. C. (1 Ired. Eq.) 190, 36 Am. Dec. 43.

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c. Where law and equity are administered by same court.

In some states it is held that, where law and equity are administered in one tribunal, the rules governing the old practice as to conditions precedent do not obtain.

In Connecticut a bill by a creditor to enforce the payment of a debt out of the property of a debtor, where the circumstances were such as to impede or render impossible the collection of the debt by the ordinary process of execution, was sustained without the formality of a judgment, on the ground that law and equity were administered by the same tribunal, and that therefore a judgment could be rendered in the very action in which the equitable relief was asked. Vail v. Hammond, 60 Conn. 374, 25 Am. St. Rep. 330, 22 Atl. 954; Huntington v. Jones, 72 Conn. 45, 43 Atl. 564.

Before the passage of the Georgia uniform procedure act of 1887, Civil Code, § 4937, a creditor without a lien, under ordinary conditions, could not first maintain a bill to set aside a fraudulent conveyance of his debtor. The act of 1887, however, said the court in Booth v. Mohr, 122 Ga. 333, 50 S. E. 173, made a great innovation in the law, and "now a suitor in the same action may join legal and equitable causes and obtain appropriate relief. Creditors in one suit may proceed for judgment on their debts, and to set aside fraudulent conveyances made by their common debtor."

In De Lacy v. Hurst, 83 Ga. 223, 9 S. E. 1052, it was held that the rule requiring the creditor, before invoking equitable aid, to reduce his claim to judgment, and have execution returned *nulla bona*, has been abolished in Georgia. The court said that the act conferred upon superior courts jurisdiction to hear and determine all causes of action, whether legal or equitable, or both. If the plaintiff has a purely legal action, he can bring it in that court; if he has a purely equitable action, he must bring it in that court; if he has an action both legal and equitable, he must bring it in that court. The court under the circumstances conceived no reason for compelling a plaintiff to apply first to the superior court, and obtain a judgment, and have an execution issued and returned *nulla bona*, and then apply to the same court to aid him in enforcing the judgment, which that court had previously granted. There being now but one court, the court of equity being abolished, the reason for the rule falls, and therefore the rule falls.

The last-mentioned case (83 Ga. 229) was approved in Vaughn v. Georgia Co-op. Loan Co. 98 Ga. 288, 25 S. E. 441. To the same effect, Kruger v. Walker, 111 Ga. 383, 36 S. E. 794.

It is held in North Carolina that the Code provisions by which the powers of both law and chancery courts are committed to a single tribunal render it unnecessary for a creditor first to obtain judgment before seeking equitable aid to reach property fraudulently conveyed by the debtor, but that full relief may be had in a single action. Dawson Bank v. Harris, 84 N. C. 206. The court asked why a plaintiff should be compelled to sue for and recover his debt, and then to bring a new action to enforce payment out of his debtor's property in the very court that ordered the judgment? Why should not full relief be had in one action when the same court is to be called on to afford it in the second? The policy of the new practice, and one of its best features, is to furnish a complete and final remedy for an aggrieved party in a single court, and without needless delay or expense.

So, under the new practice the issuance of an execution and return *nulla bona* are not conditions precedent to an action to follow the debtor's funds in certain lands, and to have the same sold for the satisfaction of the demands of creditors. Mebane v. Layton, 86 N. C. 571.

In Miller v. Hughes, 33 S. C. 530, 12 S. E. 419, to the contention that the claim of the plaintiffs, being a plain legal demand, should first be established by a judgment at law before the aid of equity could be invoked, the court replied that whatever embarrassment this might have offered under the former system of judicature, when law and equity were administered by different tribunals, it could not be felt now under the present system, especially after the Code had provided that both legal and equitable causes of action might be united in the same complaint. The court did not see, therefore, why the plaintiffs might not demand judgment for the amount alleged to be due them on the law side of the court, and, in the same action, ask relief on the equity side from the fraud which they alleged would render their action fruitless.

Under the blended system of law and equity administered in the Texas courts, a simple contract creditor may maintain a suit to avoid a fraudulent conveyance by his debtor. Shirley v. Waco Tap R. Co. 78 Tex. 131, 10 S. W. 543.

In Ward v. McKenzie, 33 Tex. 317, 7 Am. Rep. 261, it was held that a nonresident creditor who had obtained a judgment in a sister state could subject the property of a nonresident debtor in the hands of a fraudulent grantee to the payment of his claim, by a single action instituted by attachment, in which equitable aid to set aside a fraudulent conveyance was asked. The court said that the attachment put the specific property in custody of the law, under the control of the court, by the diligence of the creditor; that then, having jurisdiction of the subject, like all courts of equity, it had full power to grant the relief sought. It was urged in this case that equitable relief could not be granted before judgment. As to the effect of the judgment, the court said that the levy operated as a lien, and would hold the property until judgment and until execution could issue, and, if it were in a forum which dispensed both law and equity in the same

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suit, every obstacle and obstruction to the satisfaction of the judgment, to the full extent of the property attached, could be removed out of the way.

A creditor at large may in one action reduce his demand to judgment, and invoke equitable aid to set aside a fraudulent conveyance by the debtor of real estate. Waddell v. Williams, 37 Tex. 351.

But, in Marion Deposit Bank v. McWilliams, 2 Ohio Dec. Reprint, 142, it was held that, since it is a condition precedent to an action in the nature of a creditors' bill, that the creditor shall have reduced his claim to judgment, an action under the Code to recover judgment, joined with one in the nature of a creditors' bill, is demurrable for misjoinder.

In Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, it was held that the rule requiring the return of an execution *nulla bona* applies as well to the "enlarged" jurisdiction of chancery as to its limited jurisdiction, since no chancery jurisdiction, however enlarged, takes upon itself the collection of legal debts before the legal remedies are exhausted.

The actual return of an execution unsatisfied was essential to the maintenance of such a creditors' bill both before and after the enactment of the Revised Statutes of New York, and the place of such an averment could not be supplied by an allegation of the total want of property; and the union of legal and equitable jurisdiction in the supreme court furnishes no reason for departing from the well-established rule. Crippen v. Hudson, 13 N. Y. 161.

d. Where debtor is a nonresident, or is absent.

The fact that a debtor is a nonresident of the state, or has absconded, has generally been held a sufficient ground for relaxing the rule as to conditions precedent to equitable relief.

Where a debtor is a nonresident, so that a personal judgment cannot be obtained against him, this fact creates an exception to the rule requiring a judgment, the issuance of an execution, and a return thereof *nulla bona*, before seeking equitable aid. A bill may therefore be maintained, under such circumstances, to set aside a fraudulent conveyance of real estate by such debtor to a nonresident, without first reducing the claim upon which the bill is based to judgment. First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043, 1 A. & E. Ann. Cas. 626.

In Livingston v. Swofford Bros. Dry Goods Co. 12 Colo. App. 320, 56 Pac. 351, it was held that judgment and execution are unnecessary prerequisites to equitable relief against the estate of an absconding, insolvent debtor where it is evident that such steps would be fruitless and would involve needless expense. The court said that such steps were unnecessary to prove the claims of plaintiffs because the indebtedness to them had been admitted, and besides it appeared that the defendants were fraudulently wasting the estate so that it would have been probably entirely dissipated before even those creditors who had instituted suit, and procured service upon the debtor before he had absconded, could have secured final judgment and issuance of an execution. Those creditors who had not secured service before the debtor had absconded would be remediless. The validity of the claims of such creditors, upon which suit had been instituted against the debtor, had been, so far as he was concerned, as fully established and proven by the entry of his default as if final judgment had been entered. To all intents and purposes, therefore, the object of the rule requiring judgment first to be had before a creditors' bill could be maintained had been attained as to them. Issuance of execution and return of *nulla bona* could not have accomplished nor shown anything further than was done by the allegation of the bill and by proofs, to entitle the creditors to the aid which they sought in a court of equity.

In Kipper v. Glancey, 2 Blackf. 356, it was held that where a debtor absents himself from the state, but leaves real estate to which he is entitled in equity, his creditors may maintain a bill to reach the property before judgment, on the theory that a debtor, by absconding from the state, prevents a proceeding against him at law, and that his creditors should therefore be permitted to apply to a court of chancery to the same extent as though a judgment had been previously obtained, or the debtor was deceased; that where the only property left is of an equitable nature, not subject to levy, creditors may unite in a bill in chancery to liquidate their claims and to effect their common object of establishing the liability of the property.

The rule requiring judgment and execution to be secured by the creditor before resorting to equity does not apply as to a nonresident debtor, against whom it is impossible to obtain personal judgment. Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476.

The nonresidence of the debtor will render it unnecessary for a creditor to first obtain judgment before applying to equity to set aside a fraudulent conveyance by such debtor of his real estate in Iowa. Commercial Exch. Bank v. Applegate, 91 Iowa, 411, 59 N. W. 268.

Where the creditor is unable to obtain judgment because of the nonresidence of the debtor, he may obtain equitable relief against his debtor without judgment if his claim is of such a character as would have enabled him to obtain a judgment. Anderson v. Bradford, 5 J. J. Marsh. 69.

Where, on account of the absence of the debtor from the country, the creditor is unable to establish his demand at law, he will not be required to do so as a condition precedent to equitable relief, and the fact that the debtor returns after the bill is exhibited against him cannot affect the

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power of the court to decide the contest. Scott v. M'Millen, 1 Litt. (Ky.) 302, 13 Am. Dec. 239.

In Earle v. Grove, 92 Mich. 285, 52 N. W. 615, the insolvency of a nonresident debtor against whom a judgment had been rendered in the state of his domicil, and execution issued thereon and returned *nulla bona*, and the fact that the fund sought to be reached to satisfy the debt was within the jurisdiction of the court where the bill was filed, and that there was no way in law in which to reach such fund, were said to satisfy the general requirement of equity that a creditors' bill be preceded by a judgment and the issue and return *nulla bona* of an execution thereon.

In Overmire v. Haworth, 48 Minn. 372, 31 Am. St. Rep. 660, 51 N. W. 121, while the rule laid down in earlier cases was that a statutory trust existing in favor of creditors, where property is purchased by the debtor and transferred to a third person, cannot be enforced until the legal remedy is exhausted, it was held that it did not apply where the debtor was a nonresident. The court said that it was not required to consider or determine whether the nonresidence of the debtor and the nonexistence of a legal remedy in the forum was always to be deemed a sufficient reason for invoking the aid of equity. It was sufficient to say that such a case was deemed to justify the enforcement, in favor of the resident creditor, of the specific trust resulting under the statute from the fraudulent conduct of a nonresident debtor in procuring property purchased by him over which the jurisdiction of the court extended, to be conveyed to a voluntary grantee for the purpose of keeping it beyond the reach of his creditors.

In Rule v. Omega Stove & Grate Co. 64 Minn. 326, 67 N. W. 60, it was said that the reason for the rule that a mere contract creditor who has not obtained a judgment or specific lien on the property sought to be charged has no standing to enforce a creditors' bill fails where legal process against the principal debtor in the state of the forum is impossible, and that hence a creditors' bill to reach property conveyed in fraud of creditors or equitable assets will lie in favor of a simple contract creditor against an absconding or nonresident debtor.

In Rule v. Omega Stove & Grate Co. supra, the court said that the general rule is that a creditor bringing an action to enforce a stockholder's subscription must first obtain judgment against the corporation; but that, where the principal debtor is a nonresident foreign corporation and it is impossible to obtain such a judgment, the rule does not apply.

As to an absconding debtor, it was held, in Pendleton v. Perkins, 49 Mo. 565, that, since no personal judgment can be obtained against him, and there being no statutory proceeding by which the only property he has in the state (money due from a municipality, not subject to garnishment) can be reached, a creditors' bill will lie, in the first instance and from the necessity of the case, to subject to the payment of the debt such moneys. The court said that it had considered the question as devested of the element of fraud further than it adhered to all cases where the debtor possessed a fund from which he could satisfy his creditors, but absconded without having done so.

In Lackland v. Smith, 5 Mo. App. 153, it was said that the rule that, where the demand is merely legal and the resort is to equity to set aside a fraudulent conveyance, complainant must obtain a judgment at law before filing his bill, does not apply where the debtor has removed from the state so that no judgment can be had against him. But in this case the creditor had recovered judgment in a suit by attachment and had proceeded in that suit as far as he could.

But, in Dodd v. Levy, 10 Mo. App. 123, it was held that a creditor must reduce his claim which is purely legal to judgment at law before he can maintain an action to reach the real estate of the debtor, although the latter is a nonresident. The remedy was said to be by attachment.

A general creditor may maintain an action to reach the funds of an insolvent nonresident corporation, not subject to execution and in the hands of an assignee, subject to disposal on the order of the court. Webb v. Midway Lumber Co. 68 Mo. App. 546. The court said that where the debtor was a nonresident or had absconded so that a personal judgment could not be had, and he had no property which could be reached by the ordinary or statutory process, a creditors' bill would lie without the necessity of first reducing the demand to judgment and issuing execution. In such a case judgment and execution returned *nulla bona* would be useless.

The doctrine that proceedings in the nature of a creditors' bill can be maintained only by judgment creditors cannot be held strictly to apply to nonresident defendants who have made fraudulent conveyances of property in the state where the equitable action was brought, otherwise their general creditors would be without legal remedy. In such cases the plaintiff, having obtained his attachment and a special judgment thereon, can enforce his lien by action in the nature of a creditors' bill. Kennard v. Hollenbeck, 17 Neb. 362, 22 N. W. 771.

In Patchen v. Rofkar, 12 App. Div. 475, 42 N. Y. Supp. 35, a creditor at large whose debtor had made an assignment for the benefit of creditors was allowed, under the inherent powers of a court of equity, to recover judgment against the debtor for the amount of his demand, to have the assignment set aside as fraudulent, and to have adjudged to him a lien upon the assigned property for the amount of his indebtedness, and also to enjoin the defendants from disposing of the property pending the action for the appointment of a receiver. The right to equitable relief was based on the ground that the debtor was a nonresident of the state, and that plaintiff could not secure judgment for the amount of his in

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debtedness for that reason, and also that, as all his property had been assigned, no constructive service could be obtained by a levy on his property. The court said that the rule that, before a creditor can ask the intervention of a court of equity to set aside a conveyance, he must reduce his claim to judgment against his debtor and procure an execution thereon to be issued and returned unsatisfied, is not so unrelenting as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law there to take the preliminary steps, and produce what ordinarily must be treated as a condition precedent to the application for equitable relief. The court adhered to this decision in Patchen v. Rofkar, 52 App. Div. 367, 65 N. Y. Supp. 122.

Where, owing to the nonresidence of the defendant debtors, and to their lack of property other than the estate sought to be reached in equity, the plaintiffs are without a remedy at law, and cannot comply with the usual conditions precedent to the commencement of a suit in equity to reach equitable assets not liable to be levied on by execution, failure to recover judgment and return an execution unsatisfied is not fatal to a creditors' bill. Bateman v. Hunt, 46 Misc. 346, 94 N. Y. Supp. 861.

In Merchants' Nat. Bank v. Paine, 13 R. I. 592, the right of creditors at large to seek the aid of equity by a creditors' bill against an absconding debtor who left no legal assets subject to attachment, so that judgment could not be obtained against him by attachment proceedings, is upheld. On this subject it is said: "If it were true that the only reason for the rule is the exhaustion of legal remedies, we should not hesitate at all to assert the jurisdiction, for very clearly where no legal remedy exists, none can be exhausted, and the reason for the rule would cease, and with the reason the rule itself. *Cessante ratione legis, cessat ipsa lex.* There is, however, another reason for the rule, namely, that a court of law is the proper tribunal not only to afford a remedy for legal claims, but also to adjudicate them. It seems to be well settled, however, that a creditor may proceed in equity without first getting judgment at law if his debtor be dead. And if he can so proceed if his debtor be dead, there can be no insuperable reason against his so proceeding while his debtor is alive."

But, where the allegation is that the debtor has transferred property in fraud of creditors, the property can be attached, and therefore an equitable action to reach it cannot be maintained. First Nat. Bank v. Randall, 20 R. I. 319, 78 Am. St. Rep. 867, 38 Atl. 1055.

In Farrar v. Haselden, 9 Rich. Eq. 331, it was said that where a debtor is absent from the state, having property within the state which cannot be reached by process of law, it has been the practice to grant relief in equity as against such property to the creditors of such absent debtor. In such case a creditor may have taken no steps to recover or establish his demand at law because the law afforded no process by which he could make his debtor a party in the court.

In Peay v. Morrison, 10 Gratt. 149, it was held that where the debtor was a nonresident, a bill was maintainable to set aside a fraudulent deed of his property, although the creditor had not obtained judgment on his claim.

But, in other cases the courts have refused to relax the rule. In Reese v. Bradford, 13 Ala. 837, in the absence of statute, a court of equity cannot take cognizance of a mere legal demand, and enforce the collection of it against property liable to execution at law, on the ground of the absence or nonresidence of the defendant. To the same effect is Smith v. Moore, 35 Ala. 76.

The fact that a debtor is a nonresident will not, in the absence of statute, relieve a simple contract creditor, such as a surety who discharges a judgment against his principal and himself, from exhausting his remedy at law before securing the aid of a court of equity to reach real estate alleged to have been fraudulently transferred by his principal. Sanders v. Watson, 14 Ala. 198. The court said that according to the general rule on the subject, if the matter was cognizable in equity, but the defendant was not within the jurisdiction of the court, no suit could be entertained or relief afforded. To remedy this defect various statutes have been passed in the several states of the Union, and also in England; and it was by virtue of these statutes that courts of equity proceeded against absent defendants who were necessary parties to the bill, even where the subject-matter was of a purely equitable nature. And, if a court of equity must look to statute aid to enable it to proceed against an absent defendant when the subject-matter is properly within the jurisdiction of a court of equity, it would follow that the mere absence of a defendant from the jurisdiction could not enable a court of equity to take jurisdiction of a matter of purely legal cognizance, as the collection of a simple contract debt.

The general rule that, before a creditor can obtain equitable relief against his debtor, he must have reduced his claim to judgment, will not be relaxed merely because the debtor has left the state so that process cannot be served upon him, where by the statute the creditor may attach the property and in such an action reduce his claim to judgment. Greenway v. Thomas, 14 Ill. 272.

A creditor cannot first proceed in equity to reach property of a debtor who has left the state, where the creditor might have proceeded by attachment against the debtor's property which he alleges to have been fraudulently conveyed, obtained his judgment, and then gone into equity to remove the conveyance out of the way of his execution, or to subject the property to sale in satisfaction of his judgment. Dewey v. Eckert, 62 Ill. 218.

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The nonresidence of a debtor is no excuse for a creditor not first exhausting all available legal remedies, including suit in the state of his residence, before seeking to subject the debtor's property in the hands of and claimed by a third person, to the payment of his claim, in a proceeding in equity, where the insolvency of the debtor is not alleged. Ballou v. Jones, 13 Hun, 629.

A creditors' bill by a creditor without judgment or lien cannot be supported upon the ground that the debtor resides in another state. Smith v. Moore, 35 Ala. 76.

e. Where property is situate beyond jurisdiction.

As a condition to equitable relief, it is not necessary that a judgment creditor should exhaust his legal remedies as to lands of the debtor located in another state. O'Brien v. Stambach, 101 Iowa, 40, 63 Am. St. Rep. 368, 69 N. W. 1133.

In order to be entitled to equitable aid to reach property fraudulently conveyed, a creditor need not search beyond the jurisdiction of the court wherein the judgment was rendered for unencumbered property of the debtor, out of which to collect his judgment. Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

f. Effect of insolvency; lack of property subject to execution.

There is a distinction made in some of the cases, as to the necessity of judgment, between impossibility of obtaining judgment and uselessness of obtaining judgment, the courts holding that equitable aid may be afforded a general creditor where it would be impossible for him to obtain judgment; but that it would not be extended to him where his only excuse for not having obtained judgment is that the debtor is insolvent, and that it would be useless to obtain judgment. It is said that insolvency may be an excuse for not issuing execution, but not for not obtaining judgment.

But there is a serious objection to allowing the insolvency of the debtor to excuse the exhaustion of the remedy at law, and that is that a debtor may be unable to meet his obligations, and still be possessed of enough tangible property to satisfy the creditor's claim. The fact that the debtor has no property subject to levy might well excuse the issuance of execution; but the mere fact that the debtor is insolvent ought not to obviate the necessity of pursuing property subject to levy before resorting to property not subject to levy. An insolvent debtor has really more reason for not being subject to the burden of the equitable proceeding to reach his choses and equitable assets when his legal assets are open to the creditor, than has the solvent debtor. It is not a question of insolvency at all, for the debtor might have no property subject to levy and still be possessed of property enough not subject to levy to render him solvent. In that case, the fact that he was solvent would not stand in the way of an equitable action to reach his equitable assets. If, however, by insolvency is meant that the debtor has no property subject to levy, then the exception to the rule, which excuses issuance and return of execution, is proper.

In Bruker v. Kelsey, 72 Ind. 51, it was held that an allegation that the judgment debtor had no other property subject to execution, sufficient to pay his debts, or any part thereof, was a sufficient averment of insolvency.

It might well have been held, as already stated, that the allegation that the debtor has no property subject to execution was a better allegation than the allegation of insolvency, since it shows sufficient reason for not requiring issuance and return of execution, while the allegation of insolvency does not.

However, in Armstrong v. Keifer, 39 Ind. 225, an allegation of insolvency was held equivalent to a statement that the debtor has no property subject to execution. This, as pointed out, is a mistake.

The admission by the defendants that the debtor died insolvent is sufficient to satisfy the rule requiring a deficiency of legal assets to appear before equity will aid a creditor at large to reach property of the deceased debtor. Battle v. Reid, 68 Ala. 149.

The fact that creditors have not reduced their debts to judgment is no objection to the maintenance of a creditors' bill to reach property held under a trust deed, where the debtor is wholly insolvent except as he has interest under such deed. Kempton v. Hallowell, 24 Ga. 52, 71 Am. Dec. 112.

In Springfield Grocery Co. v. Thomas, 3 Ind. Terr. 330, 58 S. W. 557, it was held that a creditor whose debtor has made conveyances in trust for his creditors, including the creditor in question, may, without judgment, proceed in equity to set aside the deed, and for the appointment of a receiver.

Failure to issue execution on a judgment is of no consequence where it appears that the debtor is insolvent. Fleischner v. First Nat. Bank, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345.

In Taylor v. Dunlap Stone & Lime Co. 38 Kan. 547, 16 Pac. 751, it was said that the objection made, that it was not averred that execution had been returned unsatisfied, was not of much force in the face of the allegation that the debtors were wholly insolvent, and that, unless the plaintiff could levy upon and sell the real estate sought to be reached, he would be wholly without remedy, and would lose his entire claim.

In Austin v. Morris, 23 S. C. 393, the court said, *obiter*, that there was no law requiring a return of *nulla bona* against the debtor as an indispensable prerequisite to seeking equitable relief, but that it had been adopted by the courts as the most satisfactory manner of proving that which was indispensable to such relief, that is, the fact

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that the party had no adequate remedy at law, that the debtor was insolvent, and, outside of the property in controversy, had not the means from which payment might be made. This was the very purpose for requiring judgment and a return *nulla bona*. If that was shown by other proof or admissions of the party, the court could never see why judgment should be insisted on as an indispensable prerequisite. Why insist upon that evidence if there was other perfectly satisfactory evidence of the fact in question, especially if the circumstances were such that the delay in getting judgment might be fatal to the relief sought.

So, failure to take out a fi. fa., or to have it returned *nulla bona*, was held not to be fatal to equitable relief where a ca. sa. was issued,—the latter being considered the better test of whether the debtor was possessed of other property than that which he had conveyed away than a fi. fa. would have been. Pettus v. Smith, 4 Rich. Eq. 200.

The doctrine that the issuance of an execution and its return *nulla bona* are excused by the insolvency of the debtor is also stated in Stahlman v. Watson (Tenn. Ch. App.) 39 S. W. 1055.

There must be either an allegation of insolvency, or an allegation of the issuance of an execution and return of *nulla bona*, which implies insolvency. McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53; Bruker v. Kelsey, 72 Ind. 51.

The issuing of an execution and a return *nulla bona* thereon are considered sufficient evidence of the insolvency of the judgment debtor and that the judgment creditor is remediless at law; but they are not the only evidence of that fact. A bill in equity to set aside or postpone a conveyance of real property on which the plaintiff's judgment is, as against his debtor, a lien, without an execution, may be maintained on proof of the unsatisfied judgment and fraudulent conveyance, and the insolvency of the debtor, which may be proven by a return *nulla bona* on an execution, or by any other competent evidence. Failure to issue execution is not therefore necessarily fatal to the bill. The Holladay Case, 27 Fed. 830.

The averment that the debtor was wholly insolvent is sufficient without the usual further averment that he has and had no property subject to execution, etc. Lammert v. Stockings, 27 Ind. App. 619, 61 N. E. 945.

In Alford v. Baker, 53 Ind. 279, an allegation that the debtors had no property subject to execution was held to be a sufficient allegation of insolvency, and therefore showed a sufficient reason for seeking to reach and subject certain property to execution, alleged to have been fraudulently conveyed by the debtors.

In Postlewait v. Howes, 3 Iowa, 365, the court said that, if the creditor could charge in his bill, and prove on the hearing, that the debtor was in fact insolvent, and that an execution, if issued, must necessarily be returned unsatisfied, it saw no reason for requiring him to go through the fruitless form of exhausting his legal remedy by return of execution, "no property found." Under such circumstances there was no legal remedy to exhaust, for he showed that he had none. It was true that such return of *nulla bona* might in legal contemplation be the most satisfactory method of establishing the facts of insolvency, but practically it would be scarcely more conclusive or convincing to the mind of the chancellor than if proved by other means or in other ways. Yet doubtless the current of authorities held such return to be necessary.

In O'Brien v. Stambach, 101 Iowa, 40, 63 Am. St. Rep. 368, 69 N. W. 1133, it was held that neither law nor equity required the doing of entirely useless things, and that, in suits to subject lands to the payment of judgments where it was shown that the judgment debtor was insolvent, the creditor was not compelled to incur the expense and delay incident to the issuance and return of an execution *nulla bona* as a condition precedent to the right to maintain his suit.

So, it was held that the fact that no execution was issued on plaintiff's judgment would not stand in the way of an action to reach real estate, where the insolvency of the judgment debtor was otherwise shown. Gordon v. Worthley, 48 Iowa, 429.

In an action to reach real property of the judgment debtor, it is unnecessary to show a return of the execution *nulla bona*. It is sufficient if the plaintiff otherwise shows his inability to collect the judgment by execution. In this case the question was whether the report of the referee showed that there was sufficient property to satisfy the judgment other than that sought to be reached in the equitable action, and it was held that it did not. The action was therefore held maintainable. Miller v. Dayton, 47 Iowa, 312.

Where it appears that the debtor has no property subject to execution, execution and return *nulla bona* are not essential prerequisites to equitable relief to reach property fraudulently disposed of and concealed by the debtor. Ryan v. Spieth, 18 Mont. 45, 44 Pac. 403.

A bill to set aside a fraudulent chattel mortgage, which alleges only issuance of execution from the county court and the return of *nulla bona* is sufficient to support a creditor's action, where it alleges that the goods taken under the assailed mortgage constituted all the property, and that they were the sole means of the debtor for the payment of his debts, and that the property had been sold and disposed of before the commencement of the action, since it shows that, when the suit was begun, there was nothing to attach or levy upon. Chamberlain Bkg. House v. Turner-Frazer Mercantile Co. 66 Neb. 48, 92 N. W. 172.

In Payne v. Sheldon, 63 Barb. 169, it was held that an execution was not required where the relief sought was against the real estate of the debtor, who had no other property out of which the judgment could be satisfied. The court said that the lien on the land and the right to sell it on exe-

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cution in payment of the judgment were the basis of the right to have the fraudulent sale or encumbrance removed. The fact that the debtor had no other property proved conclusively that there was a necessity for relief. The issuing of execution did not change the situation in the least, or benefit either party. If an execution in such a case were issued and returned *nulla bona*, then it is admitted that the court might do all that was asked for in the case at bar—set aside the fraudulent transaction; and, the impediment being removed, another execution might issue and the property be sold thereon. The fact that the return *nulla bona* might entitle the creditor to initiate proceedings in the nature of a creditors' bill, and have a receiver and sale by him, did not change the position any; for he might, if he so elected, pursue his remedy by process of execution and sell the property thereon after the debtor's title was established by a removal of the fraudulent conveyance. Thus it was proved that the return *nulla bona* was only evidence of the necessity of securing aid from a court with equity powers.

To entitle the plaintiff in a judgment to file a creditors' bill upon the return of an execution unsatisfied, which has been issued against the personal estate merely, there should be at least a distinct averment in the bill that the defendant had not, either at the time of the issuing of such execution or at the time of the filing of the bill, any real estate or chattels real which could have been reached and sold upon execution, if the judgment had been entered and docketed in the county clerk's office and an execution issued thereon against both real and personal property of the defendant. Coe v. Whitbeck, 11 Paige, 42.

But a demurrer to the complaint is not such an admission of insolvency as obviates the necessity of a return *nulla bona* in an action to reach equitable assets. Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350.

In Mehler v. Cornwell, 3 App. D. C. 92, it was said *obiter* that, where there was no question as to the insolvency of the debtor, and that he had no property out of which the creditor's judgment could be satisfied, there was no imperative necessity for the issuance of an execution.

Where a debtor is insolvent, and his only assets are interests in his deceased father's estate, an injunction will issue to the administrator of the estate, to prevent the payment to him as heir, and subject such funds to the payment of the claim of the creditor, although the creditor, who has instituted suit at law on his claim, has not secured a judgment. Lawson v. Virgin, 21 Ga. 356. The court said: "The rule is not that equity will not interpose to assist a judgment at law until an execution has been issued and a return of *nulla bona* had thereon. It is broader than this. The legal remedies must be exhausted or pursued to every available extent." The court also said that the statute authorized a resort to equity whenever there was no adequate remedy at law, and that none was suggested in this case.

In Chamberlin v. Jones, 114 Ind. 458, 16 N. E. 178, the court said that as a general rule equity will not interfere to aid a creditor until he has exhausted all his remedies at law; but, when the creditor shows that his debtor has no property subject to execution, or that it has been fraudulently conveyed or placed beyond the reach of legal process, so that he has no available remedy at law, a court of equity will not require the observance of mere useless formalities.

Where the pleadings and the evidence show that the judgment debtor had no property which could have been levied upon under the execution, a creditor's equitable action will not be defeated because no executions were issued on the judgment, since the law will not require parties to incur expense and delay when no benefit arises therefrom to anyone concerned in the matter. Smalley v. Mass, 72 Iowa, 171, 33 N. W. 619.

In Harrison v. Battle, 16 N. C. (1 Dev. Eq.) 541, an action to reach a debtor's equity of redemption in personal property under a deed of trust, the want of a return *nulla bona* on the creditor's execution was held supplied where the deed conveyed the whole of the debtor's property.

Where the debtor was once taken in execution, and obtained his discharge as an insolvent, and admitted, when a bill to reach equitable assets was filed, that he had nothing tangible, nor any effects but the equitable assets sought for, it was held unnecessary to revive the judgment, which had become dormant, and to issue another execution. Brown v. Long, 36 N. C. (1 Ired. Eq.) 190, 36 Am. Dec. 43.

A creditors' bill which expressly alleges that the debtors did not have the legal title to any property whatever, and that the only interest which they owned, which could be made liable to the satisfaction of the judgment upon which the creditors' bill was based, was one which could be reached only in a court of equity, shows sufficient facts to avoid the rule requiring the issuance of an execution and its return *nulla bona* as a condition precedent to equitable relief. Rountree v. McKay, 59 N. C. (6 Jones, Eq.) 87.

In Turner v. Adams, 46 Mo. 95, it was held that the issuance and return of an execution *nulla bona* were not necessary conditions to be performed before seeking the aid of equity to set aside a fraudulent execution sale of real estate, where the bill also made it appear that the debtor was insolvent and the issuance of an execution would necessarily be of no practical utility.

In Luthy v. Woods, 1 Mo. App. 167, it was held that the insolvency of the debtor, together with the fact that the fund sought to be reached was not subject to garnishment, and could not be reached at law, was

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sufficient to support a bill for equitable aid, although the claim had not been reduced to judgment, on the theory that it would be useless for a creditor to proceed at law. The court said that it all came back to the inquiry, Had the plaintiff any remedy at law? There might be a possibility of such remedy. If it had any existence he must resort to it. He might defer his application to the court of equity until he had proved rigorously that at law he was remediless. Ordinarily this was demonstrated by the practical exhaustion of all legal remedies without result, by obtaining judgment, issuing execution, and a return of *nulla bona*. These things, however, were only evidence of the fruitlessness of a resort to legal process. If the futility of such a resort could be otherwise shown, the court did not perceive how the plaintiff could be confined to the more formal, expensive, and tedious demonstration.

But, on a subsequent appeal of the same case, 6 Mo. App. 67, in which the decision was held *res judicata* on this question as to the plaintiff, Hayden, J., said that there was no original ground of jurisdiction in the case, and that the plaintiff should have obtained a judgment at law.

A creditor whose debtor is insolvent and whose funds or credits in the hands of a corporation are not subject to garnishment may, in one proceeding, reduce his demand to judgment, and obtain a decree from the court of equity against the corporation, subjecting such fund to the payment of the judgment. Beal v. McVicker, 3 Mo. App. 592.

But, in Kent v. Curtis, 4 Mo. App. 121, where the action was to subject certain real estate, purchased and improved by the debtor and conveyed to his wife, it was held that the fact that the judgment against him would be fruitless would not release the creditor from first reducing his claim to judgment before securing equitable aid. Hayden, Judge, in the leading opinion, after referring to the necessity of judgment, said, among other things, that it was no answer to say that the debtor was insolvent. That did not touch the question. Insolvency might be a good excuse for not issuing execution, for that might be a useless act. But to obtain a judgment at law would not be useless. It would settle the legal right; would ascertain the fact with the ascertainment of which equity had nothing to do. It would secure the right of trial by jury in cases not of equity jurisdiction. It would prevent courts of equity from becoming the forum for the trial of suits for unliquidated damages and of actions for torts; for, if the jurisdiction of equity was not to depend on the nature of the demand, or the question whether legal remedies had first been exhausted, why, in any case where final process at law was inadequate to subject the property to the payment of debts, might not a creditor with a claim of damages, however arising, sue first in chancery? It was an error to suppose that the object of obtaining a judgment was merely to establish a lien. The judgment ascertained and established the right, and marked the line between the common-law and equity jurisdiction. Without it plaintiff had no standing in a court of equity. The essential distinction between law and equity could not be broken down until constitutional changes had been made. Lewis, P. J., and Bakewell, J., in separate opinions, while concurring in the result, took occasion to say that they did not consider that the cases of Luthy v. Woods and Beal v. McVicker, supra, were thereby overruled,—saying, in substance, in some cases where the claim was to be satisfied out of the fund accessible only by the aid of chancery, application might be made to the court in the first instance, before judgment.

The issuance of an execution and its return *nulla bona* will not be required of a creditor by a court of equity before assisting him to collect his judgment by subjecting to its payment equitable assets of the debtor not subject to execution, where it is made to appear that the issuance of an execution and its return *nulla bona* would necessarily be of no utility, and that the debtor is insolvent. Paddock-Hawley Iron Co. v. McDonald, 61 Mo. App. 559.

In Mebane v. Layton, 86 N. C. 571, it was urged that an action to reach equitable assets of the debtor could not be maintained because it was not averred that the defendant had no other property or effects sufficient to satisfy the plaintiff's debts, an allegation of insolvency being insufficient to support the action. But the court said that, if a few active creditors in the case had sued for their own benefit only, a simple allegation of insolvency of the debtor would have been deemed insufficient to support their action; for, though thus insolvent, he might still have possessed tangible property, liable to be taken under execution, sufficient to satisfy their demands, and thus rendered a resort to a court of equity quite unnecessary. But suing as they did for the benefit of every creditor alike, an allegation of absolute insolvency, as existing at the date of the attempted perversion of his property and as still continuing, must suffice, as it was apparent that the fund perverted must be needed to satisfy all the demands against the debtor. And, as his interest in the property sought to be reached was purely an equitable one, no other court was competent to give the needed relief.

On the contrary it has been held that mere insolvency does not dispense with the necessity for obtaining judgment before resorting to equity. Ginn v. Brown, 14 R. I. 524.

The fact that the defendants are insolvent does not excuse failure to return an execution before filing a creditors' bill. Beardsley Scythe Co. v. Foster, 34 How. Pr. 97.

The mere insolvency of the debtor is not a sufficient reason for a creditor not first resorting to the ordinary legal remedies before seeking the aid of equity to enforce

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his claim. Beardsley Scythe Co. v. Foster, 36 N. Y. 561.

On a creditors' bill to reach the property of a deceased debtor, where no execution had been issued on a judgment which formed the basis of the bill, relief was denied in Lawson v. Grubb, 44 Ga. 466, as the only reason presented for not causing an execution to be issued was the insolvency of the debtor, and this was held not to be sufficient.

That the debtor has made an assignment and is insolvent, and that to obtain judgment would therefore be a useless formality, was held, in Austin v. Bruner, 169 Ill. 178, 48 N. E. 449, not to be a sufficient ground to permit a creditor to proceed in equity to set aside an alleged fraudulent conveyance before obtaining judgment on his claim.

An allegation that the debtor had no property subject to execution will not take the place of a statutory requirement that an execution be issued and returned unsatisfied before the maintenance of a creditors' bill. Albright v. Herzog, 12 Ill. App. 557.

In Wickliffes v. Lyon, 5 J. J. Marsh. 84, it was said that the fact that the real property sought to be reached in equity was all that the debtor had, so that it would be useless to sue at law and recover judgment, would not authorize a court to lend equitable aid before judgment. As to the uselessness of proceeding at law, the court declared that the same might be said as to most cases of fraudulent conveyances, because the property conveyed in fraud of creditors was usually all that the grantor had which could be reached by execution.

In Stone v. Westcott, 18 R. I. 517, 28 Atl. 662, it was held that the rule requiring the issuance of an execution and a return unsatisfied before a creditor can maintain a bill to reach equitable assets is not excused by an allegation that the debtor has no property or estate on which the execution could be levied.

In the absence of a return *nulla bona*, an averment that the debtor has no property subject to execution at law is not sufficient, as the only evidence admissible to show that the creditor is without remedy at law is the return *nulla bona* by the proper officer. Shea v. Dulin, 3 McArth. 339.

A creditor at large, before judgment and execution thereon, and its return *nulla bona*, is not entitled to injunction restraining a debtor from disposing of a county warrant for money due to him from the county, although it is alleged that such warrant constitutes the debtor's entire property. Crowell v. Horacek, 12 Neb. 622, 12 N. W. 99.

In Taylor v. Gillean, 23 Tex. 508, it was held that the mere allegation in a creditors' bill of the insolvency of the debtor was not a sufficient ground for equitable jurisdiction, since this fact might be true and yet the debtor have tangible property, real and personal, subject to execution, in reference to which the creditor should have exhausted his legal remedy before seeking the aid of equity.

This question was discussed in Barrick v. Gifford, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259, an action to enforce statutory liability of stockholders arising after the corporation property has been exhausted. The question was whether the rule that the liability of stockholders could be resorted to only after the assets of the company had been exhausted could be dispensed with while the company was insolvent in the sense that the company was indebted in a sum greater than its assets. It was held that the insolvency in this sense would not be sufficient to dispense with this prerequisite. The court said that such a rule would be not only uncertain, but deceptive to the creditor. The right to commence the action would be a matter of speculation. It could not be determined before bringing the action and taking an account whether the company was indebted in a sum greater than its assets would pay or not. A rule of certainty applicable to such cases should be adopted. A true rule, and that which was usually adopted while the company had property and continued to do business, was to require the creditor first to obtain a judgment against the corporation and cause an execution to be issued, and, if it was returned "not levied for want of goods," then the creditor had the right to commence suit against the stockholders upon their individual liability.

Upon this point, see also Randolph v. Daly, 16 N. J. Eq. 313, supra, V., d. 2.

g. Effect of debtor's death.

1. In general.

An exception to the general rules in relation to conditions precedent to equitable relief on behalf of creditors is made when the legal remedies are obstructed by the laws relating to the administration of decedents' estates.

Thus, in O'Brien v. Coulter, 2 Blackf. 421, it is said an exception to the general rule that, to reach the equitable interest of the debtor in real estate by a suit in chancery, the creditor should first obtain a judgment at law, and to reach personal property, both a judgment and execution, is made in a case of a deceased debtor.

But, in Tate v. Liggat, 2 Leigh, 91, the court said that the right of a creditor to resort originally to a court of equity, against his debtor's property in the hands of his heirs or personal representatives, was not an exception to the rule, for in those cases there was no longer anyone personally responsible to the creditor, or anyone who had a right to dispose of the property at pleasure. The creditor had a right to satisfaction out of the specific property in the hands of the heir or executor, who was liable only in respect to such property, which, though not strictly a lien, was so far in the nature of one that the creditor could follow the property in the hands of a fraudulent alienee of the debtor, or of his heir, or executor.

In Pennsylvania, by statute, creditors at large become lien creditors upon the death of their debtor. This lien is held to give

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them a standing in a court of equity for relief against fraudulent conveyances of real estate made by the debtor in his lifetime. Fowler's Appeal, 87 Pa. 449.

Chancery will not subject the personal assets of an estate to the payment of a creditor's claim unless there has been not only a judgment against his debtor, but an execution with a return of *nulla bona*. Morgan v. Crabb, 3 Port. (Ala.) 470.

Where a fund is accessible only to the court of chancery and cannot be reached at law, and where the debtor is dead, creditors may resort to chancery in the first instance without first having recovered a judgment at law. Steere v. Hoagland, 39 Ill. 264.

But, in Houston v. Maddux, 179 Ill. 377, 53 N. E. 599, it was held that a creditor cannot maintain a bill to reach a trust fund belonging to a deceased insolvent debtor where his claim has not been allowed against the estate. The court said that the Steere Case, supra, was substantially overruled in Scripps v. King, 103 Ill. 469, in which it was said that, when a claim is against an insolvent estate, the creditor must have it properly allowed against the estate before he can remove a fraudulent conveyance to reach the property to subject it to his demand.

The rule requiring a return of execution *nulla bona* has no fair or legitimate application when the proceeding is against the estate of a decedent. Postlewait v. Howes, 3 Iowa, 365.

The fact that the debtor is deceased forms no legal excuse for failure to issue the execution. Lichtenberg v. Herdtfelder, 33 Hun, 57, affirmed in 103 N. Y. 302, 8 N. E. 526.

A statute which authorizes an action in equity against heir or devisee, to subject any property "descended or devised," does not apply to property held by a conveyance. Anderson v. Avery, 6 Ky. L. Rep. 363.

If the debtor is dead, the creditor may proceed in equity without first obtaining judgment. Tharp v. Feltz, 6 B. Mon. 6.

A creditor who has not reduced his claim to judgment, or presented it to the executrix of the estate of the deceased debtor, under the statute, is not in a position to assert such a conveyance of the debtor as fraudulent. Rutherford v. Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

In Nill v. Phelps, 20 Misc. 488, 46 N. Y. Supp. 662, it was said that, independent of a statute expressly providing that it was necessary for the creditor of a deceased, insolvent debtor, suing for the benefit of himself and other creditors interested in the estate, to obtain judgment in order to set aside certain transfers as fraudulent, such a step was unnecessary to the maintenance of such an action.

A bill to charge the real estate of a deceased debtor may be maintained by a simple contract creditor. Birely v. Staley, 5 Gill & J. 442, 25 Am. Dec. 303.

The doctrine that a creditor at large may maintain a bill in equity to reach real estate fraudulently conveyed by his debtor, since deceased, was also enunciated and applied in Shell v. Boyd, 32 S. C. 359, 11 S. E. 205.

It is unnecessary to issue execution on an insolvent, deceased debtor's estate before proceeding in equity to subject real estate entered by the debtor with his own funds in the name of his infant child, where a statute provides that execution cannot issue on a judgment against an administrator and requires that it must be paid in the due course of administration as all other claims against the estate. McDowell v. Cochran, 11 Ill. 31.

Where no administration was granted upon the estate of a deceased debtor for more than a year after his death, a return of *nulla bona* on the creditor's common-law judgment was held, in Treadway v. Turner, 10 Ky. L. Rep. 949, 10 S. W. 816, not to be a necessary condition precedent to invoking the aid of equity by a creditor at large to reach real estate fraudulently conveyed by the debtor in his lifetime, since there was no one against whom execution could issue.

A creditor who has obtained a judgment against the administratrix of a deceased debtor, and whose execution has been returned *nulla bona*, may proceed in equity against the debtor to set aside a fraudulent conveyance of real estate made by the debtor, although the judgment being against the administratrix was not a lien upon the land. Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169. The court said that, if the creditor had established his claim by judgment and exhausted all the means in his power at law to obtain satisfaction of his debt without success, he was entitled to the aid of a court of equity, according to the circumstances of the case, in such mode as would enable him to enjoy his legal right.

Because creditors of a deceased debtor did not, in his lifetime, obtain judgment against him, a court of equity would not refuse aid to subject real estate fraudulently conveyed to the payment of debts, if the creditors have exhausted their remedies against the estate. Haston v. Castner, 29 N. J. Eq. 536.

A creditor may file a bill to reach real estate alleged to have been fraudulently conveyed by his deceased debtor, without waiting for the disposal of his exceptions to the accounting of the administratrix of the debtor's estate, where the account shows that the assets amount to less that the judgment. The court said that, if the administratrix, who was friendly with the estate and interested in holding the lands, could not discover any other personal estate, it would be quite inconsistent for the court to say that the judgment creditor must further try to make discovery. Foster v. Knowles, 42 N. J. Eq. 226, 7 Atl. 290.

The fact that the complainant has not exhausted his remedy against a person against whom his judgment was recovered will not stand in the way of his proceeding in equity to reach real estate of a decedent liable for the debt, since the lien which the statute gives against the lands of which his

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debtor died seised is sufficient to enable him to maintain the action. Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

A representative of a deceased debtor to whom real estate of the debtor was conveyed in fraud of creditors may be sued by a creditor at large, when the estate is insolvent, to obtain satisfaction out of such real property. Spicer v. Ayers, 2 Thomp. & C. 626.

The mistake of the clerk of a court in not indexing a judgment so as to make it a lien upon the debtor's land, and the debtor having since died, so that no execution could then be issued on the judgment, was said to be sufficient ground for a court of equity to make it an exception to the general rule requiring the issuance of an execution and its return *nulla bona* before filing a creditors' bill to reach the equitable interests of the debtor in certain real estate, since this rule was not so universal in its application as to deny to a party the interposition of the equity powers of the court when the situation was such as to render impossible the aid of a court of law there to take the preliminary steps to produce what ordinarily might be treated as a condition precedent to the application for equitable relief. LeFevre v. Phillips, 81 Hun, 232, 30 N. Y. Supp. 709.

A simple contract creditor may invoke the aid of equity to set aside a fraudulent conveyance of real estate made by the debtor, in his lifetime, before the debt became due, where the creditor could not have proceeded to judgment against the debtor in his lifetime because the debt was not due and where an action against the administrator would have been of no avail, where proceedings in behalf of the administrator to sell the real estate fraudulently conveyed by the intestate in his lifetime would be unavailing, and where an action against the heirs would have been nugatory. Loomis v. Tifft, 16 Barb. 541.

In Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. 13, an action was brought by a judgment creditor against a grantee of the debtor to set aside a conveyance of real estate on the ground of fraud. The court said it was of course a necessary condition of a right to invoke the aid of equity in such a case, that the creditor should first have exhausted the remedy at law by the issue and return of an execution unsatisfied in whole or in part. The question in the case was whether the remedy was exhausted where the execution was issued after the death of the debtor, and it was held that it was not, the issuance of the execution being expressly forbidden by statute.

In Alexander v. Mullins, 16 Ky. L. Rep. 31, it was held that where the defendant in a judgment dies and execution is issued upon the judgment before there has been a revivor, a return of "no property" upon such an execution gives the plaintiff no right to maintain an action to subject land belonging to the defendant to the payment of the creditor's claim.

Although ordinarily an execution must issue on a judgment and be returned unsatisfied before resorting to a court of equity to reach real estate in which the judgment debtor has not such an interest as might be sold on execution, yet, in proceedings against intestate estates which are insolvent, a resort to equity may be had in Illinois without this preliminary, since the statutes of that state do not permit an execution to be issued upon a judgment, against an administrator. Bay v. Cook, 31 Ill. 336.

Under the Illinois statute of wills and judgments and executions an execution cannot issue against the administrator so as to reach personal assets, and in such cases it is held that resort may be had to equity without the necessity of suing out executions. Steere v. Hoagland, 39 Ill. 264.

Under the statutes the judgment is to be paid in due course of administration, as all other claims against the estate. The estate being insolvent, the complainant cannot obtain payment in the latter mode. His only remedy therefore is to proceed in equity against the land, and to that, on showing of the allowance of the claim against the estate, he is clearly entitled. Eads v. Mason, 16 Ill. App. 545.

In Winslow v. Leland, 128 Ill. 304, 21 N. E. 588, the court said that remedies which might have been pursued in the lifetime of the debtor were extinguished by his death, and that a new class of legal rights and remedies were created. His personal estate was no longer liable to be seized upon execution, but creditors were given the right, upon exhibiting and establishing their claims in the county court, to share in the distribution of his personal estate. Not only was it true that, when a debtor died, the law gave legal remedies against his representatives, but the rule was imperative that, to entitle a creditor to share in the distribution of his estate, these remedies must be pursued. A creditor of a deceased person must have exhibited and proved his claim in the county court before he could be entitled to payment, and in this respect judgment creditors, except so far as their judgments were liens on real estate, and simple contract creditors, stood upon the same footing.

In Gardner v. Gardner, 17 R. I. 751, 24 Atl. 785, it was held that, while it is a general rule that a creditor must first obtain a judgment at law, and have execution issued thereon and returned unsatisfied, before resorting to equity for the purpose of reaching equitable assets for the payment of his claim, the rule is not without its exceptions; and one of these is that, if the debtor is dead, the creditors may proceed in equity to reach his equitable assets without first placing their claims in judgment. In this case the bill was filed in aid of an action at law against the administratrix of an insolvent estate.

Where it is sought to reach the equitable interests of a deceased judgment debtor in certain property, a scire facias to revive the judgment is not necessary in order to en-

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title the judgment creditor to the aid of equity. Ferguson v. Crowson, 25 Miss. 430.

Where the debtor is dead, it is not necessary for the creditor to recover judgment and exhaust his remedy at law before proceeding to set aside a fraudulent assignment of the debtor. Winn v. Barnett, 31 Miss. 653. The court said that, when an estate has been declared insolvent, the debt must be established by the probate court if not already reduced to judgment; and this action of the probate court, so far as the mere establishment of the debt was concerned, was as much a judgment as if rendered by the circuit court, and other proceedings of the probate court would show either how much had been, or could at most be, paid on the debt. Such proceedings as to the balance of the claim would be treated as *nulla bona* as to the balance due on the execution at law. The same facts were virtually established, to wit, that no other means or property was in the hands of the administrator with which to satisfy such balance.

Where the action is to reach property fraudulently assigned by the administrator of a deceased debtor, in fraud of the latter's creditors, it may be maintained although execution has not been issued and returned unsatisfied. Everingham v. Vanderbilt, 12 Hun, 75.

But, in Phelps v. Jackson, 27 Ark. 585, the court said that, while it might not require a person seeking in equity to set aside a fraudulent contract made by the administrator with the heirs of an estate, to aver in his bill that process had been regularly issued and returned *nulla bona*, it could see no reason why he should not have obtained a judgment on his claims. The reason and propriety of this was obvious. It was altogether premature on his part to ask the chancellor to set aside a contract until this was done. Until his claim was so adjudicated, even admitting the transfer of the property, or the use of the assets to have been fraudulent, he had no right to complain of wrong done him. He might never obtain a judgment upon his claim. He might never be a creditor of the estate.

And in Screven v. Bostick, 2 M'Cord, Eq. 410, 16 Am. Dec. 664, it was said that, before a suit to set aside an alleged marriage settlement could be maintained by sureties of a deceased executor, who had committed a devastavit, a suit at law must first have been maintained to establish a demand, and, in this case, there was no administration of the estate of the deceased executor.

And in Anderson v. Avery, 6 Ky. L. Rep. 363, it was held that the general rule that an action in equity to set aside a conveyance as fraudulent cannot be maintained until there is a judgment at law and a return of "no property" applies as well when the debtor is dead as when he is living,—the legal remedy being as ample against the estate in the hands of the personal representative as against the estate of the living debtor.

In an action by the creditors of a partnership against the administrator of a deceased partner, to enforce payment of a partnership debt out of his estate, it is not necessary that the claims shall have been reduced to judgment against the surviving partner Claflin v. Ambrose, 37 Fla. 78, 19 So. 628. The court said that no action at law would lie; hence the principle that a creditor must exhaust his remedies at law before he can successfully invoke the aid of equity did not apply. Courts of equity had exclusive jurisdiction in cases of this character, and the creditor of a partnership could sue the administrator of a deceased partner in equity, at his option, without first suing the surviving partner at law.

It is not necessary that the creditor shall have first exhausted his remedy against a surviving partner on a partnership liability before proceeding against the executors of a deceased partner, where it appears that the surviving partner is insolvent. Van Riper v. Poppenhausen, 43 N. Y. 68.

In Duval v. Trent, 6 Munf. 29, it was held that, because the creditor had obtained judgments against the executors of a surety for the debtor, he was not thereby compelled to follow up those judgments before he could file his bill in equity for an account of the personal estate of the principal and surety to satisfy the debt; a judgment in favor of a creditor against the executors of a surety for the debtor was held to be sufficient to entitle the creditor to the aid of equity to reach the deceased surety's property.

In Stahl v. Stahl, 2 Lans. 60, it was held that an action to reach assets of a deceased joint judgment debtor could be maintained against his representative without the issuance and return of an execution against the surviving debtor, where the insolvency of the latter was averred.

A complainant does not make out a case which will authorize a court of chancery to take upon itself the administration of the estate of a deceased person where the remedy at law has not been exhausted, where he alleges that the conduct of the administrator has been negligent and fraudulent, but no reason is assigned why the ordinary powers of a county court are not adequate to the protection of all of the complainant's rights, and it is not shown that the interposition of that court has been asked for, or that the alleged misconduct of its administrator has been in any way brought to its attention. Winslow v. Leland, 128 Ill. 304, 21 N. E. 588.

The mere fact that a creditor has exhausted his legal remedies against his debtor while alive will not furnish a reasonable ground for proceeding by creditors' bill to reach personal estate while the administration is in progress, especially where no fraud is charged against the estate, and the only scope of the bill is to seek a remedy against the fraud or failure of duty of the administrator himself, and to reach property which the administrator is entitled to, but which he has failed to get into his

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possession. The creditor must exhibit and prove his claim in the county court before he is entitled to payment.

Where the only proof of a debt is a judgment against an administrator of the deceased debtor, such judgment will not sustain a creditors' bill to reach assets of the debtor in the hands of his donees. The only effect of such a judgment is to bind the administrator to the amount of the assets of the deceased debtor coming into his hands, since he cannot be considered as having represented the donees. Bridges v. Moye, 45 N. C. (Busbee, Eq.) 170.

Failure of a creditor to bring his action at law, or to take any proceedings for the recovery of his demand against the debtor or his estate, was held in Willetts v. Vandenburgh, 34 Barb. 424, fatal to the maintenance of an action against the heirs' assignee to compel the latter to account for the assigned property and for other equitable relief.

A creditors' bill against a representative of a deceased debtor, to enforce a judgment, cannot be maintained during the pendency of actions scire facias to revive a judgment and of debt on the same judgment, to each of which the statute of limitations has been interposed. Mann v. MacDonald, 3 App. D. C. 456.

Creditors of the estate of a decedent are not, under the Tennessee statutes, required to proceed against the property of the estate before asserting their rights against a fraudulent grantee. Armstrong v. Croft, 3 Lea, 191.

In Tennessee, in order to subject a legacy in the hands of executors, which is equitable personalty, to the payment of the debt, the bill in chancery must show, first, a judgment, execution, and a *nulla bona;* or second, one of the grounds on which an original attachment in chancery may issue, prescribed by the statute law; or third, a conveyance or device made, as to the property sought to be subjected, to hinder and defraud creditors. The last two mentioned conditions precedent are based upon statutory provisions with reference thereto. Harrison v. Hallum, 5 Coldw. 525.

A creditor of a deceased debtor may maintain an action against the executor and grantee, to set aside a fraudulent conveyance of his debtor's property, without previously obtaining judgment. In Tennessee, general creditors are permitted by statute to maintain bills to set aside fraudulent conveyances. See Spencer v. Armstrong, 12 Heisk. 707.

2. Allowance of claim against estate.

Under the Arkansas statute, a creditor cannot proceed to set aside encumbrances upon the estate of a deceased debtor, and subject the property to the payment of his debts, until he has presented his claim to the administrator and had it allowed and classified. Williamson v. Furbush, 31 Ark. 539.

Where the administrator of the estate of a debtor has allowed a creditor's claim, and the probate court has allowed and classified it, and ordered and adjudged that the same stand as a claim against the estate, it is not a necessary prerequisite to equitable relief that execution be issued upon it. The court said that, if an execution upon a judgment obtained in the circuit court could not be enforced against an estate, it could see no reason why it would be necessary for a creditor to proceed to obtain an execution in the probate court after he had had his claim allowed and classified. Wright v. Campbell, 27 Ark. 637.

Where the judgment creditor has probated his claim and had the same allowed against the estate of a deceased debtor, he may maintain a bill in chancery to set aside a conveyance of land, and subject the same to the payment of his claim. Chambers v. Sallie, 29 Ark. 407.

Under a statute providing that "personal property shall in all cases be subject to execution on a judgment against the purchaser for the purchase price thereof; and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser for value, without notice of the existence of such prior claim, for the purchase money," a vendor cannot come into equity to have a lien declared and enforced as to property sold a deceased vendee until he has had his claim allowed against the estate. Woolfolk v. Kemper, 31 Mo. App. 421.

Any creditor is entitled to maintain an action to set aside a fraudulent conveyance, but he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment. Ohm v. Superior Court, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244.

That creditors of a deceased debtor have not exhausted their remedy at law by execution is not an objection to equitable aid to reach property fraudulently transferred. Creditors of a deceased person who have had their general judgments allowed by the probate court against his estate, which is insolvent, need do nothing further to lay the foundation for equitable relief against the fraudulent grantee. Lyons v. Murray, 95 Mo. 23, 6 Am. St. Rep. 17, 8 S. W. 170.

A creditor at large may set aside a fraudulent conveyance of a deceased debtor's lands where his claim was, by statute, made a lien thereon, and where the claim has been presented according to statutory regulation, to the administrator under oath, and part of it has been paid by him, so that it was as conclusively established in a legal mode as though its validity had been passed upon by a court. Haston v. Castner, 31 N. J. Eq. 697.

Filing a claim by a creditor against the estate of a deceased debtor is a sufficient exhaustion of legal remedies to entitle a creditor to the aid of equity to enforce his debt out of assets of the estate. First Nat. Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092. It was urged in this case that a creditor at large could not reach the prop-

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erty of his debtor fraudulently assigned, but that only such creditors as had judgments and execution could reach the personal property of the debtor. But the court said that, upon the death of the debtor, the right of his creditors who had filed their claims against the estate, to pursue such property, was enlarged. Such creditors could file a bill to follow real estate which the deceased debtor had fraudulently assigned, by virtue of the lien given by the statute upon the lands of the deceased, to pay his debts.

In Harvey v. McDonnell, 113 N. Y. 526, 21 N. E. 695, it was held that the rule that a creditor at large or a simple contract creditor must sue at law to establish his debt, and then exhaust, by such proceedings as the law allowed, the real estate on which the judgment is a lien, and the personal property liable to execution, before seeking equitable aid to set aside transfers of real and personal property, did not apply where a creditor at large was a claimant against the estate of his deceased debtor, and his claim had been allowed, and the representatives of the decedent had exhausted the property of the estate, both real and personal, which had come to their hands, by applying it on the debts of the intestate, among which was plaintiff's claim, but not wholly satisfying such debts, and the creditor pointed to other property held by the administratrix, which it was claimed was fraudulently conveyed to her by the debtor in his lifetime, since it was apparent that the administratrix had an adverse interest to the creditors of the estate. It was said that such circumstances require an exception to the general rule stated, that the creditor stands in the place of a trustee, and it is immaterial that he is not a judgment creditor; that the relation he sustains to the estate entitles him to payment in common, and in just proportion with other creditors.

But, where there is neither allowance of claims or judgment, a creditor is not in position to come into equity to discover and apply the property of a deceased debtor to the payment of his claim. Mesmer v. Jenkins, 61 Cal. 151. The court said that perhaps an allowance of the claims by the administrator might be treated as the equivalent of a judgment upon it, for the purpose of enabling the creditors to maintain a creditors' bill, if there were no other obstacles in the way of their maintaining it.

A simple contract creditor, such as a surety, who has neither obtained judgment against a debtor in the latter's lifetime, nor has had his claim allowed against the estate, cannot maintain a bill in equity to set aside a conveyance of real estate made by the debtor for the purpose of defrauding creditors. Mugge v. Ewing, 54 Ill. 236.

But, it is not an obstacle to equitable relief against the fraud of a deceased debtor, that the creditor has not issued execution on his judgment, or has not presented a claim upon the judgment against the personal representative of the debtor, since deceased, where the debt is admitted by the personal representative and the deficit of assets in his hands appears. Merchants' & M. Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272.

Since the law will not permit a creditor of an estate, on recovering judgment against the administrator, or on having his claim allowed in probate court, to sue out an execution thereon, proof of the allowance of the claim and the insolvency of the estate will be regarded as an exhaustion of the creditor's legal remedies, and will entitle him to equitable aid. White v. Russell, 79 Ill. 155.

h. Actions against corporations.

1. Effect of insolvency.

There should be no difference between a corporation and a natural person so far as the effect of insolvency on the general rule as to conditions precedent to equitable relief is concerned, except so far as the corporation property may be regarded as a trust fund. The cases on that point will be found, infra, VI., e, 1.

A creditors' bill against a corporation, merely showing that the complainant was a contract creditor, does not allege grounds for equitable interference even if it appears that the company is insolvent. Nesbit v. North Georgia Electric Co. 156 Fed. 979.

Where a party claiming an indebtedness from a corporation by open account, having no specific lien therefor by contract or otherwise, files a bill in equity to collect his debt, which the corporation disputes, the only pretext for maintaining a bill being that the company is hopelessly insolvent and is wasting its assets,—statements not satisfactorily sustained by the evidence,—the case is not one of which the court has jurisdiction. Marble City Land & Furnace Co. v. Golden, 110 Ala. 376, 17 So. 935.

In Suydam v. North Western Ins. Co. 51 Pa. 394, it was held that a bill by a judgment creditor to reach funds of an insolvent corporation in the hands of a third person must show the issuance of an execution and its return *nulla bona*. It was held in this case that the insolvency of the corporation was not enough to warrant equitable relief. The court said it was quite possible that a judgment debtor might be insolvent, and yet an execution against him result in enforcing the payment of a single debt in judgment. The ordinary meaning of the term "insolvency" was the state of a person who had not property sufficient for the full payment of his debts. Under the English bankrupt law, a trader was in insolvent circumstances who was not in a condition to pay his debts in the usual and ordinary course of trade and business, and such was the common understanding of the term "insolvent." A general averment of insolvency might therefore be made truthfully against a corporation defendant while a judgment creditor complainant had a speedy and adequate remedy at law for the collection of the debt. Hence it had become an established rule that, when a judgment creditor sought

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the aid of a court of equity to enforce the payment of his debt, he must aver that a fi. fa. had been issued, and that it had been returned unproductive.

In Bickford v. McComb, 88 Fed. 428, it was said that a judgment creditor who sought to reach assets of an insolvent corporation in the hands of a creditor or stockholder must show the issuance of an execution against the corporation, and its return *nulla bona*, where the corporation was not made a party to the suit, in the absence of a statute permitting such an action without requiring the exhaustion of legal remedies.

The fact that a corporation, the maker of certain bonds, is insolvent, and the fact that another corporation which has guaranteed the bonds has been dissolved on the ground of its insolvency, will not render it unnecessary for the bondholder of the former corporation to exhaust his remedy at law before coming into equity to set aside a foreclosure sale of the guarantor's property, on the ground of fraud, since the plaintiff's claim is equitable only, and creditors at large are not favored in equity, and are not encouraged in their attempts to reach property and assets of their debtors, and subject the same to the payment of their demands, until they have exhausted all legal remedies by judgment and execution against the debtors themselves and their property. Herring v. New York, L. E. & W. R. Co. 63 How. Pr. 497.

In Streight v. Junk, 8 C. C. A. 137, 16 U. S. App. 608, 59 Fed. 321, the court said that it was well settled when a complainant instituted a suit to subject the assets of an insolvent corporation to the payment of debts due to him and other creditors in whose behalf he sued, he must be a judgment creditor. He must have reduced his claim to a judgment, and have exhausted his remedy at law as a creditor, before he could resort to the equitable remedies of the creditors' bill to reach equitable assets in the debtor's hands.

That an insolvent corporation has fraudulently conveyed its property in contravention of the statute is not a sufficient ground for equitable interposition in favor of a creditor at large, to enforce the payment of his demand, the insolvency not affecting the rule that, until a creditor has obtained a judgment at law for his demand against the debtor and the return of the execution unsatisfied, an action in equity will not lie to reach assets and apply them to the payment of a money demand arising upon the contract. Adee v. Bigler, 81 N. Y. 349.

But, in Blair v. Illinois Steel Co. 159 Ill. 350, 31 L.R.A. 269, 42 N. E. 895, it was held that, where the debtor is an insolvent corporation in the hands of a receiver, the issuance of an execution and its return *nulla bona* will not be required of a creditor before he will be allowed equitable relief.

In Comstock-Castle Stove Co. v. Baldwin, 169 Ill. 636, 48 N. E. 723, it was held that a judgment creditor could intervene in receivership proceedings for the winding up of an insolvent corporation, without first having an execution issued on his judgment and a return thereon of *nulla bona*, the original bill being filed not simply to enforce complainant's judgment upon which execution had been returned unsatisfied, but others as well, and it appearing that the court had made an order not only that the intervening creditor be admitted as a defendant, but also all other creditors of the company having an interest in the suit be so admitted.

And in Blanc v. Paymaster Min. Co. 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765, it was held that, if the debtor corporation is insolvent and a new corporation is organized by the officers of the stockholders of the old company, for the purpose of taking and holding its property and as part of a scheme to defraud and cheat the plaintiff and other stockholders of the old company, and a transfer of the property is made without consideration in pursuance of this scheme,—resort may be had to equity to reach such property and satisfy the indebtedness on a promissory note, although no valid judgment has been obtained by the plaintiff. The court said that, upon this state of facts, a court of equity would regard the defendant corporation as a mere continuation of the former corporation under a different name, and would hold it liable for the indebtedness of the old company, at least to the extent of the value of the property which it received from it without consideration and under the circumstances stated. Nominally the two corporations might be different, but as viewed in equity they were the same, and the plaintiff was not prevented from asserting such identity in fact.

Where the creditor does not sue in behalf of himself and other claimants to have the assets of an insolvent insurance company distributed among the creditors *pro rata*, and there is no lien or trust in his favor, he does not bring himself within the rule that such relief is sometimes granted by a court of equity out of the property of an insolvent or defunct corporation without requiring the demand first to be reduced to judgment. McCoy v. Connecticut F. Ins. Co. 87 Mo. App. 73.

In Patterson v. Lynde, 112 Ill. 196, it was said that undoubtedly creditors under proper circumstances were not compelled to wait for the winding up of insolvent corporations before proceeding to subject unpaid stock subscriptions to the payment of their claims, but to do so they must first recover a judgment at law in the courts of the state, and have such execution returned unsatisfied.

In Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909, the rule was recognized that it was essential to a cause of action in equity by creditors to administer the property of an insolvent corporation for their benefit by statutory regulation and otherwise that it be alleged that all legal remedies for the collection of the moving creditor's claim have been exhausted by the establishment thereof at law, the issuance of an execution thereon in a good-faith attempt to collect

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the same, and a return of such execution unsatisfied.

Of course, one not a judgment creditor of a corporation, who has no lien on its property, and does not allege the insolvency of the corporation, is not entitled to the aid of equity to set aside a transfer of a portion of its property by the corporation. Berford v. New York Iron Mine, 24 Jones & S. 236, 21 N. Y. S. R. 439, 4 N. Y. Supp. 836.

As to the effect of insolvency in working dissolution of corporation, see Ready v. Smith, 170 Mo. 163, 70 S. W. 484, next subdivision.

2. *Effect of dissolution or abandonment.*

Where, because of the dissolution of a corporation, no action at law can be maintained against it by creditors at large, they may resort to equity by way of a creditors' bill without first having obtained a judgment. Pullman v. Stebbins, 51 Fed. 10. The court said that, if a creditors' bill could be maintained for the purpose of discovering the assets of an absconding, absent, or deceased debtor, without first having obtained judgment *a fortiori*, it ought to be maintained when a corporation has been dissolved or become insolvent, except where it had property which it had conveyed away before its dissolution, in fraud of its creditors.

But the mere insolvency of a corporation will not *ipso facto* work a dissolution so as to relieve a creditor from pursuing the ordinary legal remedies before going into equity to set aside a fraudulent conveyance. Ready v. Smith, 170 Mo. 163, 70 S. W. 484.

An action cannot be maintained as a creditor's suit, to reach the funds of a corporation paid out to stockholders before its dissolution, where there has been no valid judgment and execution against the corporation or its successors, or where the creditor's remedies have not first been exhausted against the property remaining in the hands of the corporation, or received by its trustees on its dissolution. Sturges v. Vanderbilt, 73 N. Y. 384.

The fact that an insolvent corporation which was the guarantor of bonds no longer exists, and that the corporation which was the maker of the bonds is insolvent, will not authorize a bondholder who is only a creditor at large to come into a court of equity for the purpose of setting aside an alleged fraudulent sale of the dissolved corporation's property, on the ground of fraud, where the corporation was not dissolved until three years after defaults in the payment of interest on the bonds. Herring v. New York, L. E. & W. R. Co. 63 How. Pr. 497.

Where it appears that a corporation proceeded against is insolvent, has ceased to do business, and has been abandoned by its officers and directors, and has no one to administer its affairs or realize on its assets and apply the same to the satisfaction of its debts, a simple contract creditor who has not reduced his claim to judgment and who has no lien may sue the corporation in equity, have a receiver appointed, take charge of its assets, and have them administered and applied to the payment of his debts. Nunnally v. Strauss, 94 Va. 255, 26 S. E. 580.

But, in Walser v. Seligman, 21 Blatchf. 130, 13 Fed. 415, it was held that the practical dissolution of an insolvent nonresident corporation is not a sufficient ground for failure to exhaust legal remedies before coming into an equity court, since it cannot be doubted that a corporation is capable of being sued until it is formally dissolved. The court said: "It will not be seriously contended that the futility of the proceeding will justify a relaxation of the strict rule requiring the creditor to exhaust his legal remedy. It does not follow, because a corporation is so far *in nubibus* that it need not be made a party to an action, that a creditor will be excused from pursuing it at law before resorting to a creditors' bill. If a creditors' bill can be maintained in this jurisdiction whenever it appears that the debtor has no leviable property, and, like this corporation, is moribund, it can be also when the debtor is shown to be beyond the reach of the process by the court. It would, doubtless, be convenient for creditors in many instances if they were permitted to maintain a creditors' bill upon such a theory, but, in the absence of legislation or any satisfactory precedent, the right to do so cannot be recognized."

b. *Actions against partners.*

1. *In general.*

In Reyburn v. Mitchell, 106 Mo. 365, 27 Am. St. Rep. 350, 16 S. W. 592, the court said that the general rule that, before a creditor could call upon a court of equity to interfere in his behalf in the collection of his debt, he must show that he has a demand certain, ascertained by having been reduced to a judgment at law, and that he had exhausted all his legal remedies, applied to claims which were purely legal, and for the satisfaction of which the creditor had no lien or equitable claim upon the specific property; while the creditors of a partnership, strictly speaking, have no lien on the assets of the firm simply as creditors, they have the equitable right, however, to have the proceeds appropriated to the payment of their debts in preference to the creditors of the individual partners. This right can be determined and enforced only in equity. Equity, therefore, having primary jurisdiction of the subject-matter, its aid may be invoked also to remove obstructions from the title of the partnership to its property, so as to adjust the equities between the parties, and subject the property accordingly.

It was, however, held, in Blackwell v. Rankin, 7 N. J. Eq. 153, that a quasi lien of the creditors of a partnership on its property, as against creditors of individual members of the partnership, gives a court of equity jurisdiction for the purpose of protecting creditors of the partnership.

But, in Young v. Frier, 9 N. J. Eq. 465,

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it was held that the fact that the execution creditor was seizing upon partnership property to pay an individual debt could not give a general creditor a standing in equity to set aside judgments and restrain sales under execution, on the ground that the judgments were fraudulent. Blackwell v. Rankin, supra, was expressly overruled. The court said: "A great deal was said on the argument about the quasi lien of the creditors of a partnership on its property as against creditors of individual members of the partnership, and, in the case of Blackwell, the chancellor says, it is this quasi lien which gives this court jurisdiction for the purpose of protecting the creditors of the partnership. But, is any lien which such creditors may have against creditors of individual members of the partnership, any more sacred, or better entitled to the protection of the court, than the lien or claim, or whatever you may please to call it, which any creditor has on the property of his debtor, as against a wrongdoer?"

A partnership creditor, before judgment, has no such quasi lien on the partnership property as to entitle him to the aid of the court in protecting and enforcing his claim, either against the individual partners or against a creditor of a partner. Mittnight v. Smith, 17 N. J. Eq. 259, 88 Am. Dec. 233.

In Lawton v. Levy, 2 Edw. Ch. 197, it was said that there might be cases in which a bill could be sustained by simple contract creditors at large against their debtors and thus, if the parties concerned in a partnership had dissolved and had made a disposition of the property which was illegal and fraudulent as to creditors of the partnership, the court would sustain a bill filed by the latter, even though they might be only simple contract creditors, and cause the partnership property to be applied for partnership purposes according to law and equity. But it was held that, in the case at bar, as there was no distinct allegation of a dissolution of the partnership, or of a direct misapplication or diversion of partnership property, a bill to set aside a trust of a deed of assignment as fraudulent could not be maintained.

An action to impound assets of a partnership, pending resort by creditors to involuntary proceedings in bankruptcy, falls within the rule that a judgment must be procured, execution issued and returned unsatisfied, before equity can be resorted to for the purpose of reaching assets fraudulently conveyed. Ideal Clothing Co. v. Hazle, 126 Mich. 262, 85 N. W. 735.

To enable a creditor to interfere adversely in the administration of partnership assets, he must in the first place acquire an equitable lien by exhausting his legal remedy, or in some other way. A creditor at large has no standing in court on such a question. Crippen v. Hudson, 13 N. Y. 161.

A simple contract creditor of a partnership cannot recover of a creditor of the firm moneys obtained by the latter in fraud and violation of a compromise agreement. Viall v. Dater, 13 N. Y. Week. Dig. 54.

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Creditors at large of a partnership cannot come into equity for the purpose of controlling the disposition of partnership property, since, to authorize any person to demand the aid of an equity court in directing the application of the partnership property, he must have a lien, either legal or equitable, upon it, or must be in a situation to assert such a lien. Greenwood v. Brodhead, 8 Barb. 595.

An action to set aside assignments, pledges, and conveyances of partnership assets by the surviving partner, as fraudulent, cannot be maintained by a creditor who has not reduced his claim to judgment. Fairbanks, M. & Co. v. Welshans, 55 Neb. 362, 75 N. W. 865.

A bill cannot be maintained as a bill for the administration of the assets of an insolvent firm, by creditors who have not obtained a judgment. Gore v. Kramer, 117 Ill. 176, 7 N. E. 504. The court said that, to enable complainants to maintain a bill of this character, they must in the first place acquire an equitable lien by exhausting their legal remedy, or in some other way. A creditor at large has no standing in court upon such a question.

A nominal partner of a dissolved partnership cannot come into equity for the purpose of having the property of a new and different partnership, which took over the effects of the old firm, applied to the payment of claims due him, alleged to have grown out of previous liabilities of the old firm, without having first established any legal claim against the new firm. Stone v. Manning, 3 Ill. 530, 35 Am. Dec. 119.

2. Failure to exhaust remedy as to all the partners.

An execution and return *nulla bona* as to all of several defendants is a sufficient exhaustion of legal remedies to sustain a creditors' bill to set aside an assignment of partnership property, although the judgment on which the execution was issued was not in form entered against all the partners, it appearing, however, on the face of the judgment roll, that it was founded upon a joint obligation, and should have been entered in form against all. Produce Bank v. Morton, 67 N. Y. 199.

Where an action is brought on a partnership debt after one of the partners has in good faith transferred his interests in the partnership property to the other partner, and process is not served upon the surviving partner, an action in equity cannot be maintained on this judgment to set aside a transfer of the partnership property by the surviving partner to another person, since the partnership assets are then the individual property of the surviving partner, and as to him the remedy at law is not exhausted. Field v. Chapman, 15 Abb. Pr. 443.

In Tuthill v. Goss, 69 N. Y. S. R. 454, 35 N. Y. Supp. 136, it was held that a bill in equity by a creditor of a partnership, to set aside a fraudulent conveyance of individual

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property by one of the partners, since deceased, need not show the exhaustion by him of his legal remedies as to the surviving partner as a condition precedent to equitable aid to reach property fraudulently conveyed by the deceased debtor, since the judgment upon which the suit was founded created a joint and several obligation against each defendant.

The issuance of an execution against a partnership, and its return *nulla bona* as to one of the partners, is a sufficient exhaustion of legal remedies as to such partner, to entitle a creditor to sustain a bill in equity to reach real estate fraudulently purchased by such partner in the name of a third person. Bates v. Cobb, 29 S. C. 395, 13 Am. St. Rep. 742, 7 S. E. 743.

Where judgment was taken on a partnership note indorsed by a third person, against one of the partners, and execution was duly issued on this judgment, it was held not necessary to the maintenance of an action to set aside an alleged fraudulent transfer of his real estate, that the legal remedy against the other parties to the note be exhausted, since the partner against whom the judgment was taken was individually liable on the note, and judgment could be taken against him alone. Clarkson v. Dunning, 22 N. Y. S. R. 73, 4 N. Y. Supp. 430.

In King v. Baer, 31 Misc. 308, 64 N. Y. Supp. 228, service of process in a suit against a partnership, upon one of the partners, wherein judgment was taken against both partners and execution was issued upon such judgment directed against both partners, and returned *nulla bona* as to both, was held sufficient to authorize a creditors' bill, the object of which was to set aside a fraudulent assignment by the partnership.

j. Actions by sureties; promissory notes.

As a surety has a right to sue in chancery for money which he has paid for his principal, he may, when looking exclusively to a court of equity and filing a bill for a decree for his money, add a prayer for an auxiliary decree for removing obstructions fraudulently interposed to defeat or embarrass the remedial action of the court. Waller v. Todd, 3 Dana, 503, 28 Am. Dec. 94.

It is not an objection to equitable relief against the principal debtor, in favor of a surety who has paid a judgment on the original debt, that the surety has procured no judgment against his principal, since a surety, upon paying the debt of the principal, has a clear right to be substituted in the place of the creditor as to all securities held by the latter, and to have the same benefit he would have had therein. Dunphy v. Gorman, 29 Ill. App. 132.

In Clark v. First Nat. Bank, 57 Mo. App. 277, it is held that a surety, when he has paid the debt of his principal, may invoke in equity the doctrine of subrogation, the right to do so not being dependent upon whether he has recovered judgment against his principal and issued thereon execution which has been returned *nulla bona*.

On the other hand, in Peeples v. Tatum, 36 N. C. (1 Ired. Eq.) 414, it was held that a surety who has paid a debt of the principal obligor on a bond should establish his claim by judgment before proceeding in equity to reach property transferred by his principal.

The general doctrine that a creditor must first exhaust his legal remedies before he can sustain a creditors' bill applies to the surety of a partnership, who pays a debt of the partnership. McConnel v. Dickson, 43 Ill. 99.

A surety who pays a judgment rendered against himself and his debtor stands in the position of a simple contract creditor, with reference to the enforcement of his claim in equity. Mugge v. Ewing, 54 Ill. 236.

A surety who has paid a judgment against his deceased principal, but who has never obtained judgment against the principal in his lifetime, nor had his claim allowed against his estate, is not in position to ask the aid of equity to set aside a transfer of property made by the principal. Ibid.

In Stump v. Rogers, 1 Ohio, 533, it was held that a security might ask a court of chancery to aid in subjecting the estate of the principal to the payment of the debt without first advancing or paying the money, as he must do before he could sue an action at law.

But, in Ellis v. Southwestern Land Co. 108 Wis. 315, 81 Am. St. Rep. 909, 84 N. W. 417, it was said that the statement of the case in the syllabus showed that the action was brought by a surety to set aside an alleged fraudulent conveyance, but there was no discussion of the right in the opinion, and the decision tested by the syllabus was of little weight. In the Ellis Case it was held that a surety who has not paid the debt of his principal cannot maintain an action in equity to set aside a fraudulent conveyance by the latter, since he is in no better position than that of the creditor. The court said that the true principle seemed to be that a surety paying the debt of his principal was subrogated to the rights of his creditor. Until such payment he had no right enforceable against third parties. He might compel his principal to exonerate him from liability by applying the property to payment of the debt. But, when the principal had put his property beyond his power to use it for that purpose, the surety must be content to follow it along the same lines that a creditor might follow it.

The holder of a note who is entitled to subrogation to the rights of indorsers, who are secured by a trust deed given by the maker, may maintain an action for an accounting, although he has not obtained judgment at law, where the debt is acknowledged. D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780.

k. Miscellaneous grounds for noncompliance with general rules.

That a creditor has acquired an equity by obtaining a judgment and issuing execu-

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tion, etc., subsequent to the filing of his bill, is of no avail. Edgar v. Clevenger, 3 N. J. Eq. 258.

Where property has been fraudulently conveyed, a subsequent deed by the debtor to creditors will not authorize a bill in equity to reach such property, since the creditors thereby get nothing more than the debtor's interest in the property, the fraudulent deed being good as between the parties. A creditor, in order to reach property which has been conveyed by a fraudulent deed, void as to him, must "take hold" of the property by getting a judgment, and having it seized under execution. Until that is done, the debt is merely personal, and gives no lien upon the property. Grimsley v. Hooker, 56 N. C. (3 Jones, Eq.) 4, 67 Am. Dec. 227.

It does not operate to modify the doctrine that judgment must be obtained, that an action at law is pending which may result in a judgment and execution in favor of the creditor. Post v. Roach, 26 Fla. 442, 7 So. 854. In this case the action was pending when the bill was filed, but, before the suit at bar was determined, there was a judgment in favor of the creditor for the amount claimed, and an execution issued which was returned unsatisfied.

In Carr v. Parker, 10 Mo. App. 364, it was held that, when a judgment creditor is unable to maintain the lien obtained by the levy of an execution on personalty owned by the debtor, but claimed by a third person, because unable to give the bond required in such a case by statute, he has done all toward exhausting his legal remedies that equity will require before giving relief.

A supplemental bill setting forth the issue of an alias execution after suit brought, and its return unsatisfied, will not give the court jurisdiction of a creditors' bill. Grenell v. Ferry, 110 Mich. 262, 68 N. W. 144.

Where property of the debtor transferred to another has been levied on under execution, at the instance of the creditor, and has afterwards been replevied by the transferee, the creditor must pursue his replevin action to the end; he cannot, upon the taking of the property on a replevin bond, maintain an action to set aside the transfer as fraudulent. Rodgers, S. & Co. v. Kinsey, 8 Ohio Dec. Reprint, 308.

In Brown v. M'Donald, 1 Hill, Eq. 297, it was held that the general rule in equity that a creditor, to entitle himself to relief, must not only have recovered a judgment at law, but must show also that he has proceeded at law to the extent necessary to give him a complete title, applies only to cases where the court is called on to aid a creditor with his legal remedy. It has no application where the court is called on to aid a creditor in giving effect to its own judgment.

VI. Necessity of exhausting remedy at law where equity jurisdiction is original.

a. In general; special equities.

In discussing the question of whether a creditor must pursue his remedy at law before coming into equity for relief, where the jurisdiction of equity is original, the only cases taken are those in which the point was made that the creditor should first resort to law. Conditions precedent to equitable relief, in the sense that the term is used in this note, that is, the legal steps necessary to be taken before equitable relief can be had, do not exist in this class of cases. Here the creditor goes into equity at once, on the theory that the remedy at law is not adequate.

In McKeldin v. Gouldy, 91 Tenn. 677, 20 S. W. 231, the court said that the original jurisdiction of courts of equity to aid a creditor holding a legal demand was limited to those cases in which there was some element of fraud affecting the remedy at law as to assets subject to execution but for the interposition of fraud, and to those cases where there was some element of trust peculiarly entitling the creditor to subject a specific asset to the satisfaction of his demand; but, where neither trust nor fraud appeared, such courts had no jurisdiction to aid such a creditor, even though he had exhausted his remedy at law.

An exception to the general rule that, to reach the equitable interests of the debtor in real estate by a suit in chancery, the creditor should first obtain a judgment at law, and to reach personal property, both a judgment and execution, is made where the claim is to be satisfied out of a fund accessible only by the aid of a court of chancery. O'Brien v. Coulter, 2 Blackf. 421.

In Russell v. Clark, 7 Cranch, 87, 3 L. ed. 278, Chief Justice Marshall said: "If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

In Kent v. Curtis, 4 Mo. App. 121, it was said that the *dictum* of Chief Justice Marshall in the last-mentioned case referred to cases where the legal remedy was not open to the creditor; otherwise the *dictum* did not seem to be supported by the adjudged cases. It was not easy to see how a distinction could be made on the ground that there was a fund accessible only by the aid of the court of chancery. Equity did not regard the mere form which property might happen to take; and, whether the property was real estate or money, it might with equal propriety be said that there was a fund accessible only by the aid of a court of chancery. The cases where property of the debtor had been attached were expressly put upon the ground that the creditor had acquired a lien, and this fact gave jurisdiction.

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In Mifflin County Nat. Bank v. Fourth Street Nat. Bank, 22 Pa. Co. Ct. 495, it was held that, where there is no adequate remedy at law, or a trust exists in favor of a creditor and relief can be available only in a court of equity, the court will not require a creditor at large to obtain an empty judgment and fruitless execution before entertaining a bill to reach such funds. This was an action to reach a bank deposit which the assignee of the debtor refused to pursue. It was urged that the action could not be maintained because the plaintiffs were not judgment creditors.

But, in Ladd v. Judson, 174 Ill. 344, 66 Am. St. Rep. 267, 51 N. E. 838, it was held that the mere fact that the assets of a debtor, out of which satisfaction is sought, can be reached only through a court of equity, will not give that court jurisdiction in the absence of a judgment at law. The court said that, if a case could arise in which relief might be sought in equity in the first instance, it must appear that the complainant's demand was of such an equitable character that it could be established only in a court of equity; otherwise the right of the defendant to a trial by jury upon a legal claim would be taken away, and the reason for the rule destroyed.

A bill for contribution against the distributee of an insolvent corporation, to compel him to refund, for the benefit of a creditor who has not received his share of the insolvent assets, whatsoever part may belong to him as surplus over and above that which the said distributee ought to have received upon the equitable distribution of the assets, may be maintained although the complainant has not issued execution on his judgment and had same returned *nulla bona*. Bickford v. McComb, 88 Fed. 428.

In Moore v. Baker, 34 Fed. 1, in sustaining the right of a surety to maintain a bill in equity against a cosurety, to compel contribution and to set aside certain conveyances of real estate alleged to have been fraudulent, and subject the property to the payment of the judgment sought, it was said that, as the complainant could properly file his bill on the equity side of the court to enforce contribution by his cosurety, to this extent the case was one as to which a court of equity had undoubted jurisdiction and could be rightfully brought in that court in the first instance. Under such circumstances, it was said that, as original relief in equity might be rightfully sought by the complainant to compel a cosurety to pay his contributive share, as an incident to such relief, or supplementary to it, and in order to satisfy a demand properly enforceable in equity in the first instance by averments of the cosurety's insolvency, aid might also be had to reach property which it was alleged the cosurety had caused to be fraudulently conveyed. That "to hold that he cannot, for the reason that he must first exhaust his legal remedy against Baker [the cosurety], is in effect to deny to the complainant the right in the first instance to bring his suit in a court of equity, to compel Baker, as a cosurety, to pay his contributive share of the indebtedness of all the sureties to the city. If the complainant, without having brought a suit at law against Baker, has the right to institute an original proceeding in a court of equity to enforce the payment by Baker of his alleged contributive share of the liability which all the sureties have incurred, then it must follow that he has the right in the same proceeding, upon alleging and showing that he cannot otherwise collect his demand against his cosurety, to pursue the property of that cosurety which it is alleged has been fraudulently conveyed to a third party, who is made a defendant in the suit. That part of the relief sought which relates to the application of certain property to the satisfaction of the complainant's demand, because of the alleged insolvency of Baker, may be said to be incidental to the principal recovery prayed in the bill; and, as a court of equity has jurisdiction to grant the principal relief asked, without reference to the fact that a court of law may have concurrent jurisdiction, it may proceed, upon suitable allegations made, to dispose of the whole controversy."

But, in Jewett v. Maytham, 59 Misc. 56, 109 N. Y. Supp. 1000, it was held that a member of a Lloyd's insurance company, who pays a judgment against himself and other joint debtors, acquires only a right of contribution, and, until the amount has been determined by judgment in his favor, and execution has been issued and returned unsatisfied on such judgment, he is in no position to maintain an action in the nature of a creditors' bill, to set aside an alleged fraudulent conveyance of the property of one of the joint debtors from whom contribution is had.

A bill against a railroad construction company, which charges a violation of trusts, and dissipation and concealment of assets, and conspiracy, confederation, and fraud on the part of its officers and stockholders for the purpose of despoiling the company of its assets and leaving its creditors without redress, which allegations are not denied, may be maintained by general creditors. Merchants' Nat. Bank v. Chattanooga Constr. Co. 53 Fed. 314.

Indebtedness for goods sold and delivered amounts to no such equitable element as will allow a resort to equity by the creditor before obtaining judgment. Detroit Copper & B. Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751.

In Joseph v. McGill, 52 Iowa, 127, 2 N. W. 1007, it was held that a creditor was entitled to an injunction to prevent the disposition of real estate of the debtor in the hands of a fraudulent grantee, pending the determination of an attachment suit. This was put upon the ground that, since the attachment would not prevent a fraudulent grantee from disposing of the property to an innocent purchaser for value, and as this was about to be done, to refuse the relief asked might amount to a denial of justice to the plaintiff.

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In Cotes v. Bennett, 183 Ill. 82, 55 N. E. 661, affirming 84 Ill. App. 33, it was said that, conceding that the mortgagee's claim against a vendee of the mortgagor, who assumes the debt, is equitable in its nature, it is not enforceable independently in a court of equity, by a bill to set aside a fraudulent conveyance. The right of the mortgagee to recover on the contract was held to be by a proper action at law.

In Oakley v. Pound, 14 N. J. Eq. 178, it was held that equity would restrain a married woman from disposing of her property at the suit of a creditor before judgment, where she had created an equitable lien upon her separate estate by charging it with her debts. The court said that, if the bill could be maintained upon the ground that the indebtedness was an equitable charge upon her separate estate, it seemed clear that equity would protect such equitable lien by injunction.

In Brittain v. Quiet, 54 N. C. (1 Jones, Eq.) 328, 62 Am. Dec. 202, the plaintiff, a surety for the defendant, paid the debt, and afterwards the defendant obtained a judgment for a larger amount against the plaintiff on another claim, and had execution issued. In the meantime the defendant had removed from the state, leaving no property therein. The prayer of the plaintiff was to enjoin the defendant from collecting any more of his judgment than the difference between the amount of the judgment and the amount of the plaintiff's claim against the defendant on account of the payment of the suretyship debt. The objection was that the plaintiff had no judgment at law to prove his debt. The court said that the rule as to the exhaustion of the remedy at law was confined to creditors who were seeking the aid of equity in the collection of their debts, having no other ground for coming into equity than the fact that they were not able to enforce collection at law. Under these circumstances the court of equity would not give relief until the debt was established by a judgment, and in most cases not until the fact that collection could not be enforced at law was established by having an execution returned *nulla bona*. The rule was not a general one, but applied only to particular cases. In the case at bar, the very ground of the plaintiff's equity was that in the meantime the defendant had removed to another state, leaving no property behind him, so that the plaintiff had no remedy against his person or property unless he were allowed in equity to retain of the fund which he owed the defendant the amount that the defendant owed him, so as to consider the difference between the two sums as the amount actually due. To require him to take a judgment at law before he could come into equity would be in effect to deny the equity.

b. Fraud.

Inability to obtain relief at law, fraud, and collusion between a deceased debtor and his wife, who holds title to the debtor's property and who is at the same time administratrix of the deceased, are facts sufficient to give an equity court jurisdiction at the instance of the creditor at large to reach real estate fraudulently conveyed by the debtor to his wife through a third person. Spicer v. Ayers, 2 Thomp. & C. 626.

An order of a court of equity requiring a defendant to pay certain alimony, and, as a security for the payment of the same, that he execute a real estate mortgage to the complainant upon certain real estate, will be enforced in a court of equity, by that court inquiring into and setting aside a fraudulent conveyance of such real estate made by the debtor for the purpose of escaping a compliance with the order of the court, although the plaintiff has no judgment or lien against the premises sought to be reached, where the plaintiff is remediless at law. Kamp v. Kamp, 46 How. Pr. 143. The court said that jurisdiction of courts of equity to grant relief in cases of fraud and trusts was not abolished by the statute which instituted a creditors' bill upon a judgment and execution returned unsatisfied.

A creditor who has released an original note in reliance upon renewal notes that were forgeries as to a surety, but binding upon the principal, is entitled to seek the aid of equity to relieve him from the fraud and forgeries by which he was induced to surrender his prior claim. The claim, therefore, being of equitable cognizance, he has the right to combine with his prayer for judgment a further prayer to subject property fraudulently conveyed by his debtor to the payment of his debt, although he has not obtained a return of "no property found." McMakin v. Stratton, 82 Ky. 226.

Where the bill is not what is termed "a creditors' bill," but is one which seeks to charge the defendants in the original proceeding as members of a fraudulent association or copartnership, the complainant is not required to conform to the rules applicable to creditors' bills. Wheeler v. Clinton Canal Bank, Harr. Ch. (Mich.) 449.

The distinction between a creditor's suit to enforce a legal demand and one to enforce an equitable demand was drawn in Wiltshire v. Marfleet, 1 Edw. Ch. 654, wherein the right of creditors to file a bill in equity to subject property of the debtor alleged to have been fraudulently conveyed to the payment of their demands, which were for goods sold, before such demands were reduced to judgment, was denied. It was sought, in this case, to sustain the jurisdiction of the court by alleging that the debtor purchased goods with the fraudulent intention of not paying for them. On this subject the court said that, if the creditors' bill had shown the fraud in the purchase of goods, and that no valid sale had taken place,—in fact, had considered the goods as still being the property of the complainants,—it might have been enough to entitle the complainants to relief, by way of injunction in restraining the disposition of the

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goods as their goods, or the proceeds thereof, but that, because the bill was not framed on this theory, but on the theory of a sale induced by fraud, it was demurrable because the remedy at law had not been exhausted when it was filed. Enough appeared to entitle the complainants to relief as owners, but not as creditors.

A judgment is not necessary to entitle general creditors to the aid of equity to reach property fraudulently transferred, where a fraudulent conspiracy exists between the debtor and his grantee to defraud the debtor's grantors, and the property conveyed (stock of goods) is being rapidly disposed of by the grantee, since these are special circumstances which render the general rule inapplicable. Albany & R. Iron & Steel Co. v. Southern Agri. Works, 76 Ga. 135, 2 Am. St. Rep. 26.

Where a creditors' bill shows that the debtor had fraudulently procured property from the plaintiff, with the intention not to pay for it, and that the vendee and nominal possessor thereof knew of this, in equity the property will still be regarded as the property of the original owner, and he will not be required to obtain judgment before receiving equitable aid to restrain the disposition of the goods. Cohen v. Meyers, 42 Ga. 46.

But, in Johnson v. Farnum, 56 Ga. 144, on a creditors' bill to have a lien declared on personalty for the purchase price thereof, on the ground that such goods were fraudulently purchased by the debtor, relief was denied, the court applying the doctrine that creditors at large, without a lien or judgment, are not entitled to the aid of equity to interfere by injunction or receiver, with the debtor's property, whether in his possession or in the possession of his assignee. The court said that the seller of goods undoubtedly has a right to rescind for fraud; but he must at least claim the right, if not exercise it, before a court of equity would treat the sale as rescinded or subject to rescission.

Where the claim is based upon a debt owed for goods sold a partnership, the claim does not contain an equitable element such as will take the case out of the general rule requiring that the remedy at law be first exhausted before resort can be had to equity. Dormueil v. Ward, 108 Ill. 216. The court said that there was no claim that the debt itself had any equitable element in it that was not found in any other just debt. All the equitable features of the case consisted of the fraudulent acts of the debtors in their efforts to defeat the collection of the creditor's claim. These were not sufficient to give a court of equity jurisdiction.

In Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440, the court recognized the rule that, before a creditor could come into a court of equity to subject the equitable estate of his debtor to the payment of his demand, he must have pursued his legal remedy to every available extent without being able to obtain satisfaction, and said that, "for the most obvious reasons, why ask the aid of chancery to enforce legal process while there are legal assets liable to seizure and sale?" The court then continued: "But this is not the case made by this bill; it is filed to set aside fraudulent conveyances made for the express purpose of defeating the collection of complainant's debt, and to annul a sale in which the property of the debtor was sacrificed by the improper use of these covinous instruments. The bill makes a clear case of actual fraud, and a strong case." The court therefore was held to have jurisdiction in remedying the fraud.

The last-mentioned case was followed in Lathrop v. McBurney, 71 Ga. 815.

In Hart v. Hart, 52 Ga. 376, it was held that a creditors' bill to set aside a voluntary conveyance by the debtor alleged to have been made for the purpose of defrauding his creditors, and to restrain by injunction the sale of the property held by the debtor under such voluntary conveyance, cannot be supported upon a demand not reduced to judgment, by the allegation of fraud, when the fraud alleged is the execution of such conveyance without notice to creditors.

And in Detroit Copper & B. Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751, it was held that a bill in equity will not lie for the purpose of procuring relief against fraud at the suit of a creditor who has never reduced his demand to judgment.

c. *Trusts in general.*

Where the object of a bill is the enforcement of a trust, the case falls within the original equity jurisdiction, and therefore the exhaustion of the remedy at law is unnecessary.

In Miller v. Davidson, 8 Ill. 518, 44 Am. Dec. 715, after referring to the rule which requires a creditor seeking to reach equitable assets to have his execution returned unsatisfied, and the rule which allows him to come into equity to remove obstructions in the way of his execution, which does not require the return of execution *nulla bona*, the court said that there were some peculiar cases in which a party seeking a satisfaction of his debt directly might come into chancery in the first instance without obtaining a judgment. The court had jurisdiction of the subject-matter in all cases of trust, and it was abundantly competent itself to inquire whether the party claiming to be a *cestui que trust* was so or not.

In Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 52 L. ed. 1044, it was said that, whenever a creditor has a trust in his favor, he may go into equity without exhausting legal process or remedies.

A judgment is not necessary to enable a creditor to maintain a bill in equity to reach security in his favor in the hands of a trustee. Wyman v. Wallace, 201 U. S. 230, 242, 50 L. ed. 738, 741, 26 Sup. Ct. Rep. 495.

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Where the aid of chancery is sought to reach real estate of a debtor by virtue of a charge of his debts, by his will, upon such estate, there is no necessity to exhaust the remedies at law, or to allege the facts which exonerate that proceeding, since this is an inherent and original case of a trust, which it is the peculiar province of chancery to enforce. Darrington v. Borland, 3 Port. (Ala.) 9.

A fund specifically appropriated by the debtor for the payment of certain bills and promissory notes is a trust fund, which may be reached under the original jurisdiction of a court of equity without the exhaustion of legal remedies on the bills. Toulmin v. Hamilton, 7 Ala. 362.

The directors of a banking corporation are, in the management of its affairs, trustees for its creditors and stockholders, and are bound to administer its affairs according to the terms of its charter, and in good faith. If they fail in either respect, they are liable to the party in interest who is injured thereby for a breach of trust, and they may be required to account to him in a court of chancery, although such creditor has no judgment, and has not in other respects exhausted his legal remedy. Bank of St. Marys v. St. John, 25 Ala. 566.

The doctrine that a party seeking the aid of equity to subject equitable assets to the payment of a lawful demand must first exhaust his legal remedy by judgment, execution, and return *nulla bona*, was also held, in Prewett v. Land, 36 Miss. 495, not to be applicable to equitable demands such as the enforcement of a trust, where the creditor is without legal remedy, and must therefore resort to a court of equity in the first instance.

And in Chautauque County Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442, this distinction is also drawn, the court saying that, as to creditors' bills, strictly so-called, a condition precedent to relief is that the remedy of the creditor be exhausted at law, that is, an execution must be returned unsatisfied, but that the common-law powers of the court in reference to fraudulent trusts and conveyances are not touched by the provisions of the statute relating to creditors' bills. "Fraud and trust were familiar heads of equity jurisdiction, independent of the statute. The creditor invoking the aid of the court must establish his title to its interposition by alleging a lien, or quasi lien, upon the real or personal property which was the subject of the trust; and he would then be entitled to relief, notwithstanding he had a remedy at law by levy and sale upon execution."

A judgment creditor may, on general equitable principles, maintain an action to subject the equitable effects of his debtor before execution, where the case is so connected with trusts and equities, and involves such a variety of interests, that a plain and adequate remedy cannot be had at law. Piatt v. St. Clair, 6 Ohio, 227.

While it is true as a general proposition that a creditor at large, or before judgment, cannot proceed by creditors' bill to reach assets, even if there is nothing liable to attachment or execution at law, yet to this rule there are exceptions. Thus, if the creditor is entitled to payment out of a specific trust fund, a petition in the nature of a creditors' bill may be maintained without judgment. So, if a creditor's claim is a lien or charge upon the income of a debtor railroad company, or if the corporation is a trustee of that fund for his benefit, he may, without judgment, enforce the lien or trust, and it matters not whether it was created, or exists, without his privity or with it. Darst v. Pittsburgh, Ft. W. & C. R. Co. 3 Ohio Dec. Reprint, 199.

Creditors of a *cestui que trust* who have not recovered judgment against him cannot, although the claim be for necessities, maintain an action in equity to reach the trust property. Armstrong v. Pitts, 13 Gratt. 235.

In Kent v. Curtis, 4 Mo. App. 121, it was said that, if the primary purpose of the bill presented in itself a cause of equity cognizance, the case was obviously not within the rule requiring judgment. Thus, where, by the direction of the debtor, the property had been conveyed in trust, for the general benefit of his creditors, to one of the defendants, and the bill was filed for all the creditors, to establish the trust, these facts constituted the ground of jurisdiction.

In Fink v. Patterson, 21 Fed. 602, where an insolvent firm, in violation of a compromise agreement with its creditors, was paying many of its debts in full, it was held that a general creditor might have a receiver appointed to administer the assets of the firm for the benefit of all the creditors, on the ground that the assets, under the compromise agreement, formed a trust fund for the benefit of the creditors.

In Early Times Distillery Co. v. Zeiger, 9 N. M. 31, 49 Pac. 723, under a statute making transfers of property of an insolvent debtor, made with intent to prefer certain creditors, operative as an assignment for the benefit of all of his creditors, it was held that such a trust arises as will authorize a creditor without judgment to resort to a court of equity in the first instance for relief under the statute.

The last-mentioned case was followed in Grunsfeld Bros. v. Brownell, 12 N. M. 192, 76 Pac. 310.

It is unnecessary that a creditor have execution returned *nulla bona* before proceeding in equity to enforce the satisfaction of a judgment out of a trust fund created by an assignment, since a court of equity is able to inquire for itself whether one claiming to be a *cestui que trust* is so or not, and, if it establishes that the person holding the property is trustee for the creditors, then a complainant, if he is one of them, thus shows himself to be a *cestui que trust*, and establishes his right to invoke the aid of a court of equity to prevent the trustee from abusing the trust. Beach v. Bestor, 45 Ill. 341.

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A bill by a partnership creditor, where the partnership has made an assignment for the benefit of creditors, will be sustained against the assignee therein and his assigns, for the enforcement of the trust created by the assignment, and an accounting, although such creditor has not reduced his claim to judgment. Brockett v. Lewis, 144 Mich. 560, 108 N. W. 429. The court pointed out that this was not a creditors' bill, but an application by the *cestui que trust* to compel a proper application of the trust property. The case therefore comes under the trust jurisdiction of equity.

Equity will assume jurisdiction in behalf of an unpreferred creditor named in a deed of assignment, to restrain the trustee from improperly using and wasting the trust property, since the creditor is a *cestui que trust*, and equity has jurisdiction of this class of trusts, as of all others. Cohen v. Morris, 70 Ga. 313.

In Baker v. Bartol, 6 Cal. 483, it was said that a simple contract creditor could enforce a trust in his favor, created by an assignment by the debtor, by asking for a distribution. There was no more necessity for his being a judgment creditor in such a case than there was in the case of a foreclosure of a mortgage.

Upon the refusal of an assignee for the benefit of creditors, to maintain an action to set aside judgments as constituting an unlawful preference under an assignment statute, a creditor, for the benefit of himself and other creditors, may maintain an action to set the judgments aside in order to secure the property for the benefit of the assignee to be distributed according to the terms of the assignment, although the plaintiffs are not judgment creditors, and have no lien on the property seized under executions issued on the judgments. Spelman v. Freedman, 54 Hun, 409, 7 N. Y. Supp. 698, affirmed in 130 N. Y. 421, 29 N. E. 765.

Where creditors, by a general assignment for the benefit of all creditors, are thereby invested with a lien on the property assigned, they have the right to invoke the aid of equity for the purpose of removing an obstacle in the way of the execution of the trust for their benefit, without first exhausting their legal remedies. Holt v. Bancroft, 30 Ala. 193.

But, where creditors have not obtained judgment, or, as required by statute, presented their claims to the assignee under an assignment for the benefit of creditors, they are not entitled to attack, in aid of the assignment, a fraudulent conveyance of the assignor. Kalmus v. Ballin, 52 N. J. Eq. 290, 46 Am. St. Rep. 520, 28 Atl. 791. The court said that the assignee became a trustee for the benefit of creditors, and entitled to attack fraudulent transfers of property in the interest of creditors and to the extent necessary to satisfy their claims. But that obviously he owed a duty in this regard only to the creditors with whom the trust relation was established. He was no doubt a trustee for all the creditors who might, within the prescribed time and in the required mode, present their claims, which thus became prima facie ascertained and fixed. But, until a creditor presented his claim, he was a stranger to the assignee, and could not impose on him the burden of a trust in his favor. When a creditor presented his claim, the trust relation with the assignee came into existence. The assignee owed to such a creditor a duty to attack, on proper request, fraudulent transfers of property necessary to satisfy such claims. Upon the neglect or refusal of the assignee to comply with such a request, such a creditor acquired a status to act in the assignee's stead.

d. Statutory trusts.

When property is purchased by the debtor and conveyed to a third person, an interesting question arises with reference to conditions precedent to equitable relief, under statutes making an equitable trust result in favor of creditors under such circumstances. Does this trust invest the chancery court with original jurisdiction to reach this property? Or is this merely to be regarded as an equitable asset of the debtor which can be got at only after the creditor has obtained judgment and exhausted his remedy at law? The courts have usually taken the latter view, but the former is more in accord with the decisions upholding the original jurisdiction of courts of equity to enforce nonstatutory trusts in favor of the *cestui que trust*.

It is not necessary for a foreign judgment creditor to sue over in the courts of New York a judgment against a debtor, and, after recovery, to cause execution to be issued and returned unsatisfied in a suit to enforce a statutory trust in favor of creditors against the grantee of lands purchased with the debtor's moneys and conveyed to his wife by the vendor, and afterwards transferred by her to the defendant with full knowledge of the facts, since, under the New York statute, the common-law rule as to the resulting trust in favor of the party paying the consideration, and of those claiming in his right, has been annihilated by the statute of uses and trusts, which vests the absolute title as between the original parties in the nominal grantee, but declares a new and independent resulting trust in favor of the general creditors of the party paying the consideration in every case where the conveyance is fraudulently made to another with his assent. Porter, J., said that one of the most familiar of the inherent powers of the courts of chancery is that of granting equitable relief in cases of fraud by enforcing rights springing from mere trusts, whether created by will, by deed, or by operation of law. It is a jurisdiction entirely independent of that exercised under a special authority of the statute to grant ancillary relief to judgment creditors in aid of the remedies at law. The right of the party who invokes the exercise of this anterior and general jurisdiction depends upon his establishing the

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relation of trustee and *cestui que trust*. The right of the judgment creditor to the ancillary relief of a court of equity depends upon his compliance with the statutory condition which requires him first to exhaust his legal remedy. In one case the party has no remedy at law; in the other, he has none in equity until his remedies at law are exhausted. McCartney v. Bostwick, 32 N. Y. 53.

Under Revised Statutes of New York, 2 Rev. Stat. 173, 174, §§ 38, 39, a judgment creditor may file a bill in chancery against a judgment debtor, or any other person, to compel the discovery of any property or thing in action belonging to the judgment debtor, or of any property, money, or thing in action due or held in trust for him, whether the same might or might not have been originally taken on execution. Under this statute it was held that a judgment creditor could maintain a bill to reach property of the debtor, title to which had been taken by a third person, notwithstanding the judgment never was a legal lien on the land, and notwithstanding the fact that more than ten years had elapsed since it was received. Scoville v. Shed, 36 Hun, 165. This is, of course, on the theory of an action to reach property not subject to levy, and assumes the exhaustion of the remedy at law.

And in Estes v. Wilcox, 67 N. Y. 264, following Allyn v. Thurston, 53 N. Y. 622, a creditor at large was denied the right to maintain a creditors' bill to enforce a resulting trust in lands purchased and paid for by his debtor, since deceased, and by his direction conveyed to another person. The death and insolvency of the debtor, in and of itself, was held not to be a sufficient ground for equitable interposition, since the creditor had the right to prosecute his demand to judgment against the personal representatives of the deceased debtor; and while such a demand would not be conclusive against the debtor's heirs or grantees, the court said it would conclude the creditor as to the amount of his debt.

It is not essential to equitable jurisdiction that a judgment creditor, in order to invoke the aid of equity to reach specific real estate purchased by the debtor and fraudulently conveyed to a third person, must cause an execution to issue to the county of its situs, since the action is one *in personam* against the grantee, to enforce a statutory trust declared to result in such cases. (See Stat. 1898, §§ 2077, 2078.) State Bank v. Bienfang, 133 Wis. 431, 113 N. W. 726.

In Alabama, a creditor without judgment is entitled to equitable aid to reach real estate purchased by a debtor, title to which was taken in a third person. McAnally v. O'Neal, 56 Ala. 299.

On the other hand, it was held in Griffin v. Nitcher, 57 Me. 270, that there must be a return *nulla bona* to lay the foundation for a suit in equity to reach real estate paid for by the debtor and fraudulently conveyed to his wife.

In Corey v. Greene, 51 Me. 114, it was said: "If the debtor at any time has had the legal title to the estate, and, after the debt was contracted, conveyed it for the purpose of defrauding his creditors, such deed is void, in contemplation of law, and the creditor may still levy his execution upon it, and then establish the fraud by proceedings in equity. In such a case a levy is necessary; and, without it, a court of equity will make no inquiry into the question of fraud. . . . But, in cases where the debtor has never had the legal estate, but has paid the purchase money and caused the land to be conveyed by the grantor to a third person, whether the deed be regarded as valid or invalid, he has never had any title that could be seized on execution. A levy in such case is therefore unnecessary. A return of *nulla bona* is all that is required to lay the foundation for a suit in equity." Followed in Des Brisay v. Hogan, 53 Me. 554, as to real estate purchased by the debtor in the name of his wife. Levy held unnecessary.

But, in Gray v. Chase, 57 Me. 558, it is held that where a statute provides that property purchased by a husband and conveyed to his wife may be taken for the existing debts of a husband as if it were his property, and the courts hold that, where the husband never held the legal title, the property must be reached by process in equity, the fact that the husband has other property which may be reached by another process of the court does not make it necessary for the creditor to pursue such property before resorting to equity under the statute.

Under a statute providing that, when a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by another, a trust shall result in favor of creditors of the latter, a creditor cannot, before his claim has been reduced to judgment, proceed in equity to reach property so transferred. State Bank v. Chatten, 59 Kan. 303, 52 Pac. 893.

A creditor's right to the aid of equity to reach property of such a character that it cannot be taken on execution at law depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction; and the best, if not the only, evidence of this, is the actual return of an execution unsatisfied. In this respect there is a distinction between a bill seeking to reach land which the debtor once had legal title to, and a bill seeking to reach land to which the debtor never had the legal title, he having fraudulently purchased it in the name of a third person. In the former case, a levy of the execution upon the land is sufficient; and, in the latter, the execution must be returned *nulla bona*. Robinson v. Springfield Co. 21 Fla. 203.

Where the object of a creditors' bill is to reach and subject to the payment of a judgment real estate which the judgment debtor has bought and paid for, having title

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thereto taken in the name of a third person, a judgment creditor must have exhausted his remedy at law by suing out execution and having a return of *nulla bona* made thereon by the proper officer; since, as to such property, the legal title thereto never vested in the judgment debtor, and a judgment against him would not, therefore, be a lien thereon. Neubert v. Massman, 37 Fla. 91, 19 So. 625.

An attachment levied on lands bought by the debtor and conveyed to a third person in fraud of creditors will not support a creditors' bill, since such levy, followed by judgment, is not a sufficient basis for a bill to reach such property. Trask v. Green, 9 Mich. 358.

A levy on real estate which the debtor has purchased and caused to be conveyed to a third person in fraud of creditors is not a sufficient basis for a bill to subject it to the payment of a creditors' bill, under a statute providing that no trust shall result in favor of the debtor, but that a trust shall result in favor of the creditors of the debtor. Such a trust can be reached only after the return of the execution unsatisfied. Maynard v. Hoskins, 9 Mich. 485.

In Moffatt v. Tuttle, 35 Minn. 301, 28 N. W. 509, a bill to enforce a statutory trust in favor of creditors as to real estate paid for by the debtor and transferred to a third person, it was held that the exhaustion of the legal remedies was a condition precedent to the action, on the ground that the interest secured to the creditors by this statute was an equitable one.

In Holdrege v. Gwynne, 18 N. J. Eq. 26, it was held that a court of equity would not enjoin the disposition of property purchased by a deceased insolvent debtor in his wife's name, at the suit of a creditor who had no judgment or other claim that would be a lien on the property if the title were in the debtor.

Where real estate is purchased by the debtor and conveyed to a third person, in fraud of the debtor's creditors, a levy is not a necessary basis for equitable interference, since the legal title is never in the judgment debtor. Fairbairn v. Middlemiss, 47 Mich. 372, 11 N. W. 203.

In Arbuckle Bros. Coffee Co. v. Werner, 77 Tex. 43, 13 S. W. 963, it was also held that a lien is not necessary in order that a judgment creditor be entitled to the aid of equity to reach real estate fraudulently purchased by his debtor in the name of a third person.

Where a judgment creditor has filed a transcript of the judgment docket with the county clerk, thus creating a lien, he may maintain an action to subject property to the levy of execution upon his judgment where his complaint alleges that certain real estate was purchased with the money of the judgment debtor, and was held in trust for him, and that the conveyance was made by agreement with the holders of the property, for the purpose of hindering and delaying and embarrassing him in the collection of his judgment, without first exhausting his legal remedies, and without alleging a return *nulla bona* of an execution, or alleging insolvency of the judgment debtor. Stephens v. Parvin, 33 Colo. 60, 78 Pac. 688.

In Alabama, a general assignment in favor of creditors invests them with a lien which enables them, or any one of them, for himself and all others who may join in bearing the burdens of the suit, who choose to come in and prove their debts upon a reference to the master, to file a bill in chancery to compel an execution of the trust thus created for their benefit. Crawford v. Kirksey, 50 Ala. 590.

e. Trust-fund theory.

1. As to corporations.

An effort has been made in the case of debtor corporations to dispense with the usual conditions precedent to equitable aid to creditors on the theory that a corporation's property is a trust fund for the benefit of creditors. The attempt to get into chancery on this theory has, however, generally been unsuccessful.

The fact that a corporation's property is a trust fund for the payment of its debts, and that, whenever it has been wrongfully and fraudulently conveyed, creditors may reach and have it applied to the payment of their debts, will not authorize a creditor at large to come into equity to set aside an alleged fraudulent foreclosure sale, for the purpose of reaching equitable assets. Herring v. New York, L. E. & W. R. Co. 63 How. Pr. 497.

An insolvent corporation's property purchased at an alleged fraudulent foreclosure sale, and transferred to a new corporation, is not so peculiarly a trust fund in the hands of the new corporation, for the benefit of creditors of the insolvent corporation, afterwards dissolved, as to render it unnecessary for a creditor at large to exhaust his legal remedies before coming into equity to set aside a sale. Ibid.

The assets of a corporation do not constitute a trust fund of so sacred a nature that general creditors may set aside any disposition of such assets to secure an antecedent indebtedness in favor of one or more of its officers, where made while the corporation is still a going concern, though financially embarrassed. Childs v. N. B. Carlstein Co. 76 Fed. 86.

Mere corporate insolvency neither forces on creditors any lien on the corporate assets, nor renders such assets a subject of a trust in favor of creditors so as to authorize equitable aid to a general creditor. Whatever trust may exist is "rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Jones v. Mutual Fidelity Co. 123 Fed. 506.

The capital stock and assets of a corporation do not constitute such a trust fund for the benefit of creditors as will give the

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latter a specific lien or direct trust in such assets, so as to authorize a simple contract creditor of the corporation to go into equity without exhausting his legal remedies. Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127.

In McKee v. City Garbage Co. 140 Mich. 497, 103 N. W. 906, it was held that the fact that the debtor is a corporation, is insolvent, and is in no expectation of continuing business, will not relieve a creditor from establishing his claim at law by judgment before proceeding in equity to compel a reconveyance of transferred assets of the corporation, and the distribution of the same among the creditors and other persons entitled thereto. The court said that the principle underlying the exceptional cases in which this condition has been dispensed with is that, when a corporation becomes insolvent and unable to carry on its business, each creditor is entitled to his *pro rata* share of its assets; that the creditor, under such circumstances, has an equitable lien on the assets. That principle has been deliberately repudiated in Michigan.

In Atlas Nat. Bank v. John Moran Packing Co. 138 Mo. 59, 39 S. W. 71, it was said that the same steps necessary to be pursued by a creditor in order to reach property conveyed or disposed of by his debtor with intent to defraud his creditors must be pursued by a creditor of a corporation; and that, before a creditor can maintain a creditors' bill against a corporation, he must show that he has exhausted all remedies at law. It was therefore held that a creditor was not entitled to equitable aid to reach property of a corporation which it was charged with having fraudulently conveyed before his demand became due, and before any steps had been taken to exercise the ordinary legal remedies afforded by law. The action was prosecuted upon the theory that a direct trust or lien attaches to the property of a corporation in favor of its creditors, and that a simple-contract creditor of such corporation may maintain an action in equity with respect to the administration of such assets if the corporation is insolvent, although its debt or demand may not have been due at the time of the institution of the suit.

The mere fact that the debtor is a corporation does not affect the rule requiring a creditor first to reduce his claim to judgment before seeking equitable aid to set aside the disposition by the debtor of his property, as made with the intent to defraud his creditors. Ready v. Smith, 170 Mo. 163, 70 S. W. 484.

The fact that a corporation is not managing its property as wisely and successfully as it might does not make it a case for equitable interference on behalf of creditors who have neither judgment nor liens save attachment liens. Dodge v. Pyrolusite Manganese Co. 69 Ga. 665.

But, in Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 234, it was held that an ordinary contract creditor of an insolvent corporation may maintain a suit in equity to compel the proper distribution of corporate assets, and that, if it should be made to appear that there was danger of the property being wasted or improperly disposed of, the plaintiff would be entitled to a restraining order by giving the necessary bond, and, if necessary, to have a receiver appointed to take possession and dispose of the property under the orders of the court. This decision rests upon the ground that the assets of an insolvent corporation are a trust fund for the benefit of creditors. The court said that the primary object of the bill was the enforcement of a trust and the protection of trust property, and that such matters had always been held to be subjects of exclusive equity jurisdiction.

In Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365, the court said, *obiter*, that, ordinarily, a creditor must put his demand in a judgment against the debtor, and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and the court was not prepared to say that a creditor of a dissolved corporation might not, under certain circumstances, claim to be exempt from its operation. If it could, however, it would be upon the ground that the assets of the corporation constitute a trust fund which would be administered by a court of equity in the absence of a trustee, the principle being that equity will not permit a trust to fail for want of a trustee.

Where the prime object sought by the bill is to have the court take charge of the assets of an insolvent and dissolved corporation, and distribute them ratably among its creditors, and the action is brought by certain named creditors, not only in their own behalf, but as well for all other creditors who might see proper to come into the litigation, a court of equity will take hold of the assets and settle the respective rights of all claimants, and distribute the same according to equity and good conscience, regardless of whether the creditors' claims may have been reduced to judgment, since the assets of the insolvent corporation have become a trust fund for the benefit of all creditors alike. White v. University Land Co. 49 Mo. App. 450.

2. *As to ordinary partnerships.*

The creditor of a partnership cannot, before judgment, maintain an action to set aside as fraudulent a conveyance of the partnership assets by the surviving partner, on the theory that the assets of the partnership are held in trust for all the creditors by the surviving partner or his transferee. Fairbanks, M. & Co. v. Welshans, 55 Neb. 362, 75 N. W. 865.

In Batchelder v. Atlheimer, 10 Mo. App. 181, it was said that the funds of an ordinary partnership are, it is true, trust funds in a certain sense, but not in such a sense as to give any control over them to a court of equity until it is properly appealed to; that this appeal to equity can-

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not be made by a creditor unless he has first exhausted his legal remedy and at least obtained a judgment.

As to creditors' quasi lien on partnership property, see supra, V., i, 1.

3. As to special partnerships.

In Whitcomb v. Fowle, 7 Abb. N. C. 295, a creditors' bill by a general creditor to restrain an insolvent limited partnership from wasting its assets was entertained on the theory that the partnership assets are a special fund for the payment of debts ratably except those due to the special partner.

Where a statute constitutes the effects of a limited partnership a special fund for the benefit of all creditors, which fund, in the case of insolvency, is to be distributed among such creditors ratably, in proportion to the amount of their respective debts, it is not necessary that a creditor of such insolvent limited partnership should be compelled to proceed to judgment and execution at law, the necessary effect of which might be to give him a preference over other creditors, before he could be permitted to file a bill in equity to prevent the partnership funds from being wasted by the insolvent partner, and to obtain the payment of a ratable proportion of his debt out of the fund. Innes v. Lansing, 7 Paige, 583. The court said that if the insolvent partner neglected to place the partnership effects in the hands of a proper and responsible trustee, to be distributed without delay among all the creditors of the firm, other than the special partner, ratably, in proportion to the amount of their several debts, either due or to become due, any creditor might file a bill in equity in behalf of himself and the other creditors of the firm, and might have a receiver appointed to protect the trust fund, and to distribute it among the several creditors who might come in and prove their debts under the decree to be obtained on such a bill.

In Batchelder v. Atlheimer, 10 Mo. App. 181, it was held that, under the Missouri statute relating to limited partnerships, providing that, if the partnership becomes insolvent, no special partner shall be paid as creditor of the firm, or receive the benefit of any lien in his favor, as such, until the other creditors of the firm are satisfied; and that no sale or change of the effects of the firm, or of any member of the firm, made for the purpose of giving a preference or priority to one over another of his or its creditors, shall be valid against the creditors if made when he or the firm is insolvent or in contemplation of insolvency,—the assets of such an insolvent partnership were trust funds, and that a bill for a *pro rata* distribution thereof could be maintained by a general creditor. The court said that the enforcement of pure trusts is undoubtedly one of the original and inherent powers of courts of equity. Where, by direction of the debtor, the property has been conveyed in trust for the general benefit of his creditors to one of the debtors, and the bill is filed for all the creditors, to establish the trust, such facts constitute the grounds of jurisdiction.

When a limited partnership becomes insolvent, its assets are a special fund for the payment of its debts ratably, except those due to the special partner, and any creditor, although he has not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver. Whitcomb v. Fowle, 56 How. Pr. 365.

f. Estates of deceased debtors.

1. In general.

Where it is held that relief is granted against the estates of deceased debtors under the original powers of a court of equity, it would appear to be unnecessary first to establish the claim at law.

In Lehman v. Meyer, 67 Ala. 396, after referring to the classes of cases mentioned above, in which equity would come to the aid of the creditor in collecting his claim, it was said that there is another class of cases dependent upon the jurisdiction of the court over the administration and marshaling of the estates of deceased persons, in which the court is accustomed to intervene for the relief of creditors, though judgments at law have not been obtained and legal remedies have not been exhausted, if a necessity exists; and the necessity exists when there is a deficiency of other assets for the payment of debts. This class of cases embraces fraudulent alienations made by the debtor in his life, and depends upon a jurisdiction of the court distinct and independent of that to which the creditor of a living man can resort.

A bill by a creditor of a deceased debtor against the administrator and a party who was fraudulently holding all the property of the deceased which, in equity, should be applied to the payment of the debt, the bill praying that the debt might be paid out of this fund, was held to come under the original jurisdiction of equity, and not under its ancillary jurisdiction to aid the creditor in executing a legal process, and therefore it was not required that the creditor should have obtained a lien at law upon the specific property sought for, if that were legal property, upon which an execution could be levied; or, if it were equitable assets, not liable to levy by execution, that the creditor must have exhausted his legal remedy by a return of *nulla bona* on his execution, and must also be in a condition to proceed at once at law to enforce his right if the obstacle could be removed. Hagan v. Walker, 14 How. 29, 14 L. ed. 312.

In Alabama, courts of equity, by virtue of their original powers, have jurisdiction over estates of decedents, to direct and control executors and administrators, and protect the rights of creditors generally. Because of this jurisdiction, a creditor without a lien may resort to equity to reach

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real and personal property standing in the name of a trustee, for the wife and children of the debtor, which was fraudulently transferred by the debtor, the estate being insolvent, the jurisdiction resting upon the double ground of the fiduciary relation of the administrators, and the inadequacy of the powers of the orphans' court to afford the necessary relief. Pharis v. Leachman, 20 Ala. 662.

A bill to enforce a claim against property alleged to have been fraudulently conveyed by an intestate, and which is in the possession of a person who cannot administer it as the rightful representative, being bound by the fraud of his intestate, may be maintained, although the creditor has not exhausted his legal remedies or obtained a lien. Watts v. Gayle, 20 Ala. 817.

Creditors of a deceased debtor may maintain an action in chancery to have the real estate of the deceased sold to pay their claims, although they have not established the amount of their claim by judgment at law, since the administration of the assets of a deceased person is a well-established rule in equity, based upon its duty to enforce trusts. Offutt v. King, 1 MacArth. 312.

It is not necessary to the maintenance of a bill to set aside a fraudulent conveyance made by a deceased debtor that judgment be first obtained. The bill is not an application for the exercise of an auxiliary jurisdiction of the court, but is a part of its original jurisdiction. Dunn v. Murt, 4 Mackey, 289.

That the legislature has furnished a creditor an ample remedy at law by authorizing writs of foreign attachment to issue against nonresident heirs and devisees will not prevent him from proceeding in equity against the representative of a deceased debtor, since, in such case, courts of equity have concurrent jurisdiction with courts of law, and the creditor may elect into which court he will go. Martin v. Densford, 3 Blackf. 295.

In Whitney v. Kimball, 4 Ind. 546, 58 Am. Dec. 638, it was settled that where the original debtor is dead, a judgment at law need not be obtained before going into chancery for the collection of the debt, and that this jurisdiction rests on the ground that executors, administrators, and heirs are, or may be, trustees for creditors, and hence are liable to be called to account in chancery. And if, in a given case, a remedy exists at law also, the two jurisdictions are, in such a case, concurrent. It was said that chancery in the case of decedent's estate having jurisdiction in the first instance, and independent of all incidental circumstances, for the collection of the debt, the question of solvency or insolvency can have no influence with the court in the determination of the cause.

An administrator *de bonis non* who obtains a judgment against his predecessor for wrongfully converting the assets of the estate may go into equity to enforce such judgment without showing that there are unpaid claims against the estate. He is not required to show that there are no other assets sufficient to pay the claims of creditors. Duffy v. State, 115 Ind. 351, 17 N. E. 615.

A creditor at large of a deceased debtor may sue the personal representative in equity for an account of assets to be applied in payment of his debt, without first obtaining a judgment thereon. The decree, however, whether the action be brought by one creditor or more, is for the benefit of all the creditors. Beverly v. Rhodes, 86 Va. 415, 10 S. E. 572. The court said that the jurisdiction of a court of equity in such cases is said by some of the authorities to be founded upon the necessity of taking accounts or compelling a discovery of assets, and because there is no adequate remedy at law. By others it is put upon the ground of a trust in the personal representative, which it is the duty of a court of equity to enforce. But, whatever may be the correct explanation, the jurisdiction is not only well established, but it is, in Virginia, practically exclusive.

A judgment creditor of a deceased debtor whose administratrix refuses to bring suit may file a creditors' bill to set aside fraudulent mortgages. Munn v. Marsh, 38 N. J. Eq. 410.

One who has a claim for contribution from the estate of a deceased debtor may come into equity to establish it, and to set aside a fraudulent conveyance in the way of it, although the claim is not in judgment. Shurts v. Howell, 30 N. J. Eq. 418.

2. Exhaustion of personal assets.

Personal assets are, however, usually the primary fund for the payment of a deceased debtor's debts, and therefore must be first exhausted before the equitable remedy is available.

A creditor at large who has no lien, and who has not exhausted his legal remedies, cannot obtain satisfaction out of real estate fraudulently conveyed by the deceased debtor unless there is a deficiency of legal assets to satisfy the demand. State Bank v. Ellis, 30 Ala. 478.

Bills by simple-contract creditors to reach property fraudulently conveyed by a deceased debtor may be maintained where there is a deficiency of legal assets. Halfman v. Ellison, 51 Ala. 543; Jenkins v. Lockard, 66 Ala. 377; Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756; Battle v. Reid, 68 Ala. 149; Sharp v. Sharp, 76 Ala. 312; Merchants' Nat. Bank v. McGee, 108 Ala. 304, 19 So. 356.

In a bill to reach property of a deceased debtor, paid for by him, the title being taken in the name of a third person, the averment that the estate is insolvent, or that there is a deficiency of legal assets to satisfy plaintiff's demand, is essential to give the bill equity. Bush v. Coleman, 121 Ala. 548, 25 So. 569.

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A creditor of a deceased debtor, upon showing a deficiency of assets in the hands of a domiciliary administrator, may maintain a bill to set aside alleged fraudulent conveyances without exhausting the assets of the debtor in another state, in which the creditor is also prosecuting his claim against the estate. Fellows v. Lewis, 65 Ala. 343, 39 Am. Rep. 1.

A bill to set aside fraudulent conveyances of a deceased debtor cannot be maintained where no execution has been issued on the judgment, although the estate has been declared insolvent by the orphans' court, where the bill shows that the intestate, at the time of his death, was possessed of "divers valuable negro slaves which never came to possession of said administrators, or either of them, and were not in any manner applied in payment of the debts of said intestate." Quarles v. Grigsby, 31 Ala. 172.

A creditor of a deceased debtor, without obtaining judgment and exhausting his legal remedies, may come into equity to subject to his demand property fraudulently conveyed by the debtor while in life, if there is a deficiency of legal assets. Werborn v. Kahn, 93 Ala. 201, 9 So. 729. The court said that the equity of bills of this class rests on the principle that, when the legal assets are insufficient, and the administrator, because bound by the fraud of his intestate, cannot administer the property subject to the claims of creditors, a court of chancery only can grant full and proper relief. Such bills depend upon the original and primary jurisdiction of courts of equity in matters of administration and marshaling the assets of the estate for the enforcement of the claims of creditors,—a jurisdiction distinct and independent of that to which creditors of a living debtor, whose claims are not connected with an administration, can resort.

In Scott v. Ware, 64 Ala. 174, however, it was said that before a creditor can obtain the assistance of a court of equity to subject lands descended or devised to the satisfaction of his demand, he must have established his debt by a judgment at law and exhausted his legal remedies, and there must be an averment and proof of the want of personal assets, and the insolvency of the personal representative and the sureties on his bond, if any he has.

The exhaustion of legal remedies against the personal estate of a deceased debtor was also held to be essential, in Allen v. Vestal, 60 Ind. 245, before a creditor is entitled to equitable aid to reach the real estate of the debtor, fraudulently conveyed.

Before the real estate of a deceased debtor can be appropriated to the payment of debts, the deficiency of the personal estate left by the decedent must be alleged and proved. Without such allegation, a court of equity has no jurisdiction. Macgill v. Hyatt, 80 Md. 253, 30 Atl. 710.

Where it appears that a deceased debtor left an estate of which the personalty is of sufficient amount to pay the debt of complainant, a bill in equity to set aside a fraudulent conveyance of real estate, made by the debtor in his lifetime, will not lie, since the personal property of the deceased debtor is a primary fund for the payment of his debts. Rutherford v. Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

In Wisconsin, by statute (Rev. Stat. § 3835), where a creditor has just reason to apprehend that the estate of his deceased debtor does not contain sufficient personal assets for the payment of the debts of the decedent, he is permitted to file a bill in equity in behalf of all creditors, to reach and subject to the payment of their claims any real estate, or interest therein, or any other assets of the decedent not included in the inventory, which ought to be subjected to such debts. Allen v. McRae, 91 Wis. 226, 64 N. W. 889.

On showing that a debtor has deceased, equity will aid a creditor to subject the real estate of such debtor to the payment of his debt, where there are no personal assets. Richardson v. Penicks, 1 App. D. C. 261.

VII. Effect of special statutes.

In addition to statutes already mentioned as bearing upon the various questions discussed in the foregoing subdivisions of this note, other special statutes affecting the general rules as to conditions precedent to equitable relief are here grouped, so far as they have come before the courts for interpretation.

Where the statute confers the right upon creditors to enforce their claims in equity, no prior judgment or resort to legal remedies is demanded to establish their interest. Re H. G. Andrae Co. 117 Fed. 561.

Under a statute authorizing an action to subject any property of a judgment debtor belonging to the defendant, or interest therein, to the satisfaction of a judgment, it is not necessary that the judgment debtor be shown to be insolvent. McKee v. Murphy, 138 Iowa, 322, 113 N. W. 499.

Under the Iowa statutes, Code, §§ 3150–3154, which are really declaratory of the common law, the remedy at law must be exhausted before proceeding to equitable relief. Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056.

In Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, it was held that a statute allowing an equitable remedy to be pursued by a "judgment creditor" did not dispense with the requirement that execution should be returned *nulla bona* as a condition precedent thereto.

A creditor at large who, by attachment, obtains a specific lien on real estate conveyed by the debtor, and which conveyance he seeks in equity to set aside as fraudulent, cannot, on being defeated on the merits, and the validity of the conveyance sustained, sustain his bill to reach notes held by the debtor, given in payment of such real estate, without complying with statutory conditions in respect thereto. Evans v. Virgin, 69 Wis. 148, 33 N. W. 585.

Under a provision of a statute that where

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during the litigation, it shall appear that the defendant is doing, or threatens to do or procure or suffer some act to be done, in violation of plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act, it was held that it could not appear that his rights were in danger of being violated until they were established by a judgment. Brooks v. Stone, 19 How. Pr. 395.

The doctrine was stated in Lant v. Manley, 21 C. C. A. 457, 43 U. S. App. 623, 75 Fed. 627, that a bill in equity in aid of an attachment and execution on a debtor's equitable interests in real estate, fraudulently conveyed, would be sustained under statutes permitting attachments and executions to be levied on such interests.

A statute permitting a creditor to have equitable relief before his debt is due does not apply to a case where the transfer of the debtor's property is not fraudulent. United States Bank v. Huth, 4 B. Mon. 423.

Under a statute authorizing a judgment creditor to resort to the chancery side of the court to reach property or money in the hands of third persons, when the defendant has not real or personal property sufficient to satisfy the judgment, which can be taken in execution, a bill is not maintainable if the creditor has an execution levied on real property not yet disposed of, the proceeds of which cannot, at the time of the suit, be known, and it is in proof that there is other property not levied upon. Hubble v. Perrin, 3 Ohio, 288.

A North Carolina statute providing that creditors attempted to be defrauded by their debtor, as provided therein, may proceed in equity without obtaining judgment at law, was held, in Carr v. Fearington, 63 N. C. 560, to put a creditor filing his bill in the same situation that he would have been in had he obtained his judgment, and issued his execution, and had it levied on the property fraudulently conveyed; in other words, to give him a lien, on the filing of the bill, on the property sought to be subjected.

Under § 6343, Revised Statutes of Ohio, creditors whose debtors have made a disposition of all their property may maintain a bill in equity to have such disposition of the property declared an assignment by the debtor for the benefit of the debtor's creditors generally, although their respective claims have not been reduced to judgment. Brinkerhoff v. Smith, 57 Ohio St. 610, 49 N. E. 1025.

Section 1907a of the Kentucky statutes, which became operative June 16, 1896, expressly repealed so much of § 439 of the Civil Code as required a return of *nulla bona* upon the execution before a judgment creditor could institute an equitable action to subject the property of his debtor to the satisfaction of his judgment. The statute provides that "hereafter in this commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred, or mortgaged, to file in a court having jurisdiction of the subject-matter a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action, and alleging such fraud, or the facts constituting it, and describing such property, and, when done, a *lis pendens* shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought upon a return of *nulla bona*, as has heretofore been required. All laws or parts of laws in conflict herewith are hereby repealed." Locheim v. Eversole, 24 Ky. L. Rep. 1031, 70 S. W. 661.

In Tippenhauer v. Newport Roller Mill Co. 32 Ky. L. Rep. 209, 104 S. W. 440, it was held that, under statutes providing that before conveyances should be set aside in an action in equity, the creditor must have a return of no property found upon an execution in his favor against the debtor, the return is not made a condition precedent to the vesting of jurisdiction in a court of equity over the matter. It was said: "The court of equity had jurisdiction over the subject-matter. It likewise had jurisdiction of the parties. It was competent for it to adjudge such relief as to it appeared equitable in the premises. It ought to have been controlled in the character of its judgment by the rule of law governing the practice in such matters. But that it did not observe the rule of practice did not devest the court of jurisdiction. The judgment was not void on that account."

Under a statute providing that, after a judgment, an action may be brought to subject the debtor's property to the satisfaction thereof, and that a lien shall be created on the property of the judgment debtor in the hands of any defendant or under his control, from the time of the service of notice and copy of the petition upon such defendant, an equitable action to reach property of the debtor held under a void bill of sale may be maintained although the creditor had no lien or interest in the property in question at the time. Falker v. Linehan, 88 Iowa, 641, 55 N. W. 503. To the same effect is Hirsch v. Israel, 106 Iowa, 498, 76 N. W. 811.

Under a statute providing that the expense of a family shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors thereof, and, in relation thereto, they may be sued jointly or severally, a creditor is not entitled to come at once into a court of equity to enjoin the disposition of the debtor's property before exhausting his remedy at law. Harrison v. Hill, 37 Ill. App. 30.

In Reubens v. Joel, 13 N. Y. 488, it was said that the Code, §§ 219, 220, had so far altered the rule requiring a creditor to exhaust his legal remedy before seeking equitable aid as to allow the creditor an injunction at the time of the commencing of

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the action to obtain judgment on his demand, or at any time thereafter, in three classes of cases: First, where it appeared by the complaint that the creditor was entitled to the relief demanded, and such relief, or any part thereof, consisted in restraining the commission or continuance of some act, and the commission or continuance of which, during the litigation, would produce injury to him; second, where, during the litigation, the defendant does, or threatens, or is about to do, or procures some act to be done in violation of the creditor's right respecting the subject of the action, and tending to render the judgment ineffectual; third, where, during the pendency of the action, the defendant threatens or is about to dispose of his property with intent to defraud his creditors. It was, however, held that this provision did not cover an action by a simple-contract creditor against the debtor and the fraudulent assignee, to restrain the latter from disposing of the assigned property, and have the assignment declared void and his debt paid, since the fraud in that case was not threatened, but consummated. To sustain such an action, the court said that the plaintiff must be a judgment creditor of the fraudulent assignor.

Fraudulent conveyances generally.

The Alabama Code, Revised Code, § 3446, Code of 1879, § 3886, so enlarges the original jurisdiction of courts of equity that a creditor without a lien may file a bill to discover or to subject to the payment of his debt property which has been fraudulently transferred or attempted to be fraudulently conveyed by his debtor. Reynolds v. Welch, 47 Ala. 200; Todd v. Neal, 49 Ala. 266; Crawford v. Kirksey, 50 Ala. 590; McAnally v. O'Neal, 56 Ala. 299; Lide v. Parker, 60 Ala. 165; Evans v. Welch, 63 Ala. 250; Lehman v. Meyer, 67 Ala. 396; Bromberg v. Heyer, 69 Ala. 22; Weis v. Goetter, 72 Ala. 259; Harris v. Moore, 72 Ala. 507; Zelnicker v. Brigham, 74 Ala. 598; Mathews v. Mobile Mut. Ins. Co. 75 Ala. 85; Jones v. Massey, 79 Ala. 370; Carter Bros. v. Coleman, 82 Ala. 177, 2 So. 354; Southern R. Constr. & Land Co. v. McKenzie, 85 Ala. 548, 5 So. 322; Miller v. Lehman, D. & Co. 87 Ala. 517, 6 So. 361; Jones v. Smith, 92 Ala. 455, 9 So. 179; Wooten v. Steele, 109 Ala. 563, 55 Am. St. Rep. 947, 19 So. 972; Alabama Iron & Steel Co. v. McKeever, 112 Ala. 134, 20 So. 84; Steiner Land & Lumber Co. v. King, 118 Ala. 546, 24 So. 35; Freeman v. Pullen, 119 Ala. 235, 24 So. 57; Rice v. Eiseman Bros. 122 Ala. 343, 25 So. 214; Little v. Sterne, 125 Ala. 609, 27 So. 972; Hall v. Alabama Terminal & Improv. Co. 143 Ala. 464, 2 L.R.A.(N.S.) 130, 39 So. 285, 5 A. & E. Ann. Cas. 363.

By virtue of this statute, simple-contract creditors, who have not reduced their demands to judgments at law, may maintain a creditors' bill to reach personal property subject to levy and sale under execution at law, upon allegations that it has been transferred by the debtors with intent to hinder, delay, and defraud them. Lehman v. Meyer, supra. In this case, as to this statute, the court said: "The intention of the legislature was to draw simple-contract creditors, or creditors at large,—creditors who had not reduced their demands to judgments at law,—within the jurisdiction of courts of equity, originally exercised for the assistance and relief of judgment creditors only. In other words, when the debtor, by a fraudulent transfer or conveyance, had offended the rights of all creditors, whether judgment creditors or creditors at large, that all should have in equity the same right to invoke its removal. It may be supposed the term 'creditor without a lien,' employed in the statute, is rather indefinite, and was intended as an expression that the creditor at large should resort to equity only when, if he had a lien, he could invoke the aid of the court for its enforcement. But the real meaning of the statute is, that a simple-contract creditor, or a creditor at large, not having a lien by operation of law, shall have an equal right with a creditor having such lien, through the aid of a court of equity, to reach property subject to the payment of debts, which has been fraudulently transferred."

This statute is not confined to cases where mere discovery is necessary. Zelnicker v. Brigham, supra.

It confers on simple-contract creditors remedies formerly accorded only to creditors with liens. Bromberg v. Heyer, supra.

A creditors' bill filed by virtue of this statute gives to the creditor a sufficient lien upon the property to which it relates, to authorize the appointment of a receiver to take charge of the property. Weis v. Goetter, supra.

A statute authorizing a simple-contract creditor to subject property fraudulently conveyed, or attempted to be fraudulently conveyed, by the debtor, changes the rule requiring him to show a deficiency of legal assets, and authorizes him to proceed without regard to the existence of such assets. McClarin v. Anderson, 109 Ala. 571, 19 So. 982.

A bill of discovery under the Alabama Code of 1896, § 819, need not show that complainants had obtained a judgment at law upon which execution was issued and returned unsatisfied, or that complainants were creditors with a lien or judgment. McKissack v. Voorhees, 119 Ala. 101, 24 So. 523.

Section 818 of the Alabama Code, providing that a creditor without a lien may file a bill in chancery to discover or to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by his debtor, authorizes a simple-contract creditor without a lien to file a bill to discover or subject to the payment of his debt any property which has been fraudulently conveyed by

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during the litigation, it shall appear that the defendant is doing, or threatens to do or procure or suffer some act to be done, in violation of plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act, it was held that it could not appear that his rights were in danger of being violated until they were established by a judgment. Brooks v. Stone, 19 How. Pr. 395.

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Under § 6343, Revised Statutes of Ohio, creditors whose debtors have made a disposition of all their property may maintain a bill in equity to have such disposition of the property declared an assignment by the debtor for the benefit of the debtor's creditors generally, although their respective claims have not been reduced to judgment. Brinkerhoff v. Smith, 57 Ohio St. 610, 49 N. E. 1025.

Section 1907a of the Kentucky statutes, which became operative June 16, 1896, expressly repealed so much of § 439 of the Civil Code as required a return of *nulla bona* upon the execution before a judgment creditor could institute an equitable action to subject the property of his debtor to the satisfaction of his judgment. The statute provides that "hereafter in this commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred, or mortgaged, to file in a court having jurisdiction of the subject-matter a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action, and alleging such fraud, or the facts constituting it, and describing such property, and, when done, a *lis pendens* shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought upon a return of *nulla bona*, as has heretofore been required. All laws or parts of laws in conflict herewith are hereby repealed." Locheim v. Eversole, 24 Ky. L. Rep. 1031, 70 S. W. 661.

In Tippenhauer v. Newport Roller Mill Co. 32 Ky. L. Rep. 209, 104 S. W. 440, it was held that, under statutes providing that before conveyances should be set aside in an action in equity, the creditor must have a return of no property found upon an execution in his favor against the debtor, the return is not made a condition precedent to the vesting of jurisdiction in a court of equity over the matter. It was said: "The court of equity had jurisdiction over the subject-matter. It likewise had jurisdiction of the parties. It was competent for it to adjudge such relief as to it appeared equitable in the premises. It ought to have been controlled in the character of its judgment by the rule of law governing the practice in such matters. But that it did not observe the rule of practice did not devest the court of jurisdiction. The judgment was not void on that account."

Under a statute providing that, after a judgment, an action may be brought to subject the debtor's property to the satisfaction thereof, and that a lien shall be created on the property of the judgment debtor in the hands of any defendant or under his control, from the time of the service of notice and copy of the petition upon such defendant, an equitable action to reach property of the debtor held under a void bill of sale may be maintained although the creditor had no lien or interest in the property in question at the time. Falker v. Linehan, 88 Iowa, 641, 55 N. W. 503. To the same effect is Hirsch v. Israel, 106 Iowa, 498, 76 N. W. 811.

Under a statute providing that the expense of a family shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors thereof, and, in relation thereto, they may be sued jointly or severally, a creditor is not entitled to come at once into a court of equity to enjoin the disposition of the debtor's property before exhausting his remedy at law. Harrison v. Hill, 37 Ill. App. 30.

In Reubens v. Joel, 13 N. Y. 488, it was said that the Code, §§ 219, 220, had so far altered the rule requiring a creditor to exhaust his legal remedy before seeking equitable aid as to allow the creditor an injunction at the time of the commencing of

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the action to obtain judgment on his demand, or at any time thereafter, in three classes of cases: First, where it appeared by the complaint that the creditor was entitled to the relief demanded, and such relief, or any part thereof, consisted in restraining the commission or continuance of some act, and the commission or continuance of which, during the litigation, would produce injury to him; second, where, during the litigation, the defendant does, or threatens, or is about to do, or procures some act to be done in violation of the creditor's right respecting the subject of the action, and tending to render the judgment ineffectual; third, where, during the pendency of the action, the defendant threatens or is about to dispose of his property with intent to defraud his creditors. It was, however, held that this provision did not cover an action by a simple-contract creditor against the debtor and the fraudulent assignee, to restrain the latter from disposing of the assigned property, and have the assignment declared void and his debt paid, since the fraud in that case was not threatened, but consummated. To sustain such an action, the court said that the plaintiff must be a judgment creditor of the fraudulent assignor.

Fraudulent conveyances generally.

The Alabama Code, Revised Code, § 3446, Code of 1879, § 3886, so enlarges the original jurisdiction of courts of equity that a creditor without a lien may file a bill to discover or to subject to the payment of his debt property which has been fraudulently transferred or attempted to be fraudulently conveyed by his debtor. Reynolds v. Welch, 47 Ala. 200; Todd v. Neal, 49 Ala. 266; Crawford v. Kirksey, 50 Ala. 590; McAnally v. O'Neal, 56 Ala. 299; Lide v. Parker, 60 Ala. 165; Evans v. Welch, 63 Ala. 250; Lehman v. Meyer, 67 Ala. 396; Bromberg v. Heyer, 69 Ala. 22; Weis v. Goetter, 72 Ala. 259; Harris v. Moore, 72 Ala. 507; Zelnicker v. Brigham, 74 Ala. 598; Mathews v. Mobile Mut. Ins. Co. 75 Ala. 85; Jones v. Massey, 79 Ala. 370; Carter Bros. v. Coleman, 82 Ala. 177, 2 So. 354; Southern R. Constr. & Land Co. v. McKenzie, 85 Ala. 548, 5 So. 322; Miller v. Lehman, D. & Co. 87 Ala. 517, 6 So. 361; Jones v. Smith, 92 Ala. 455, 9 So. 179; Wooten v. Steele, 109 Ala. 563, 55 Am. St. Rep. 947, 19 So. 972; Alabama Iron & Steel Co. v. McKeever, 112 Ala. 134, 20 So. 84; Steiner Land & Lumber Co. v. King, 118 Ala. 546, 24 So. 35; Freeman v. Pullen, 119 Ala. 235, 24 So. 57; Rice v. Eiseman Bros. 122 Ala. 343, 25 So. 214; Little v. Sterne, 125 Ala. 609, 27 So. 972; Hall v. Alabama Terminal & Improv. Co. 143 Ala. 464, 2 L.R.A.(N.S.) 130, 39 So. 285, 5 A. & E. Ann. Cas. 363.

By virtue of this statute, simple-contract creditors, who have not reduced their demands to judgments at law, may maintain a creditors' bill to reach personal property subject to levy and sale under execution at law, upon allegations that it has been transferred by the debtors with intent to hinder, delay, and defraud them. Lehman v. Meyer, supra. In this case, as to this statute, the court said: "The intention of the legislature was to draw simple-contract creditors, or creditors at large,—creditors who had not reduced their demands to judgments at law,—within the jurisdiction of courts of equity, originally exercised for the assistance and relief of judgment creditors only. In other words, when the debtor, by a fraudulent transfer or conveyance, had offended the rights of all creditors, whether judgment creditors or creditors at large, that all should have in equity the same right to invoke its removal. It may be supposed the term 'creditor without a lien,' employed in the statute, is rather indefinite, and was intended as an expression that the creditor at large should resort to equity only when, if he had a lien, he could invoke the aid of the court for its enforcement. But the real meaning of the statute is, that a simple-contract creditor, or a creditor at large, not having a lien by operation of law, shall have an equal right with a creditor having such lien, through the aid of a court of equity, to reach property subject to the payment of debts, which has been fraudulently transferred."

This statute is not confined to cases where mere discovery is necessary. Zelnicker v. Brigham, supra.

It confers on simple-contract creditors remedies formerly accorded only to creditors with liens. Bromberg v. Heyer, supra.

A creditors' bill filed by virtue of this statute gives to the creditor a sufficient lien upon the property to which it relates, to authorize the appointment of a receiver to take charge of the property. Weis v. Goetter, supra.

A statute authorizing a simple-contract creditor to subject property fraudulently conveyed, or attempted to be fraudulently conveyed, by the debtor, changes the rule requiring him to show a deficiency of legal assets, and authorizes him to proceed without regard to the existence of such assets. McClarin v. Anderson, 109 Ala. 571, 19 So. 982.

A bill of discovery under the Alabama Code of 1896, § 819, need not show that complainants had obtained a judgment at law upon which execution was issued and returned unsatisfied, or that complainants were creditors with a lien or judgment. McKissack v. Voorhees, 119 Ala. 101, 24 So. 523.

Section 818 of the Alabama Code, providing that a creditor without a lien may file a bill in chancery to discover or to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by his debtor, authorizes a simple-contract creditor without a lien to file a bill to discover or subject to the payment of his debt any property which has been fraudulently conveyed by

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his debtor, without first exhausting his legal remedies and the return of *nulla bona*, whether the debtor be living or dead. Freeman v. Pullen, supra.

Creditors at large are entitled to proceed in equity under Code 1896, § 818, and have set aside a fraudulent conveyance of real estate made by the debtor, without reference to the sufficiency of legal assets belonging to the debtor's estate. Wood v. Potts, 140 Ala. 425, 37 So. 253.

But, under this statute, a simple-contract creditor cannot enjoin a fraudulent attachment suit instituted by another creditor. Builders & Painters' Supply Co. v. First Nat. Bank, 123 Ala. 203, 26 So. 311.

Under a statute providing "that, in suits to set aside fraudulent conveyances and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but, in such cases, insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief," it is necessary to show insolvency of all of the joint debtors before resort can be had to equity. Euclid Ave. Nat. Bank v. Judkins, 66 Ark. 486, 51 S. W. 632.

In a creditors' suit for equitable garnishment, this statute dispenses with the necessity of previous judgment, and the plaintiff lays the foundation for his suit when he alleges that the debtor is insolvent and that no relief can be obtained at law. Riggin v. Hillard, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402.

The statute of 1887, dispensing with the necessity of obtaining judgment before commencing a suit to set aside a fraudulent conveyance, and providing that "insolvency may be proved by any other method," does not authorize such an action in the absence of proof of the debtor's insolvency. Davis v. Arkansas F. Ins. Co. 63 Ark. 412, 39 S. W. 258.

It is not the rule under the Code of Indiana that only creditors who have obtained judgments are entitled to invoke the aid of courts of equity against fraudulent conveyances. Phelps v. Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

The 2d section of the act of 1835, chap. 380, declares: "That, in a proceeding in equity to vacate a conveyance or other act as fraudulent against creditors, it shall not be necessary for the creditor plaintiff in the cause to obtain a judgment on his demand in order to the relief sought in the case, either in his or her own behalf, or in behalf of any other creditor who shall claim to participate in the benefit of the decree." Wylie v. Basil, 4 Md. Ch. 327.

Anterior to the act of 1835, chap. 380, with some exceptions, it was the rule that a creditor who had not obtained a lien on the debtor's property could not proceed to vacate and set aside deeds to the debtor's property in the absence of a lien upon it by judgment or otherwise. Since that act, however, the necessity of a lien as preliminary to the equitable relief has been obviated. Richards v. Swan, 7 Gill, 366. To the same effect is Christopher v. Christopher, 64 Md. 583, 3 Atl. 296.

Under the act of 1835, chap. 380, a judgment is not a condition precedent to an action by a partnership creditor to set aside a fraudulent conveyance by the partners, disposing of the partnership effects among themselves. Sanderson v. Stockdale, 11 Md. 563.

But the act of 1835, chap. 380, has no application to a case in which the thing complained of has not been executed. Therefore, one who is merely a creditor at large cannot enjoin the debtor from conveying the property sought to be reached, and have a trustee appointed to sell the land for the payment of the debt and for general relief. Balls v. Balls, 69 Md. 388, 16 Atl. 18.

The statute removes the disability of nonjudgment creditors to sue in a court of equity to subject the debtor's property to the payment of the debt, but leaves the law in all other cases wholly unaffected. Morton v. Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

Under this statute now incorporated in § 46, art. 16, Code Public General Laws, an allegation as to the alleged debt is sufficient if it sets out that defendant became indebted to the plaintiff for a certain amount on a certain day, "which indebtedness, with interest thereon, still remained unpaid and unsatisfied." Sinclair v. Auxiliary Realty Co. 99 Md. 223, 57 Atl. 664.

The Massachusetts statutes (Gen. Stat. chap. 113, § 2) do not authorize a creditor without a judgment to seek the aid of equity to interfere by injunction with real estate fraudulently conveyed by the debtor, which is subject to attachment. Under such circumstances, a creditor cannot entitle himself to a bill in equity by omitting to make an attachment. Taylor v. Robinson, 7 Allen, 253.

Under Massachusetts Gen. Stat. chap. 113, § 2, clause 11, the remedy may be pursued by a creditor who has not exhausted his remedy at law either by suing out an execution, or even reducing his claim to judgment. Barry v. Abbot, 100 Mass. 396.

The last-mentioned case was followed in Tucker v. McDonald, 105 Mass. 423.

In Crompton v. Anthony, 13 Allen, 33, it was held that a bill in equity to reach property alleged to be held in trust for the debtor, and property alleged to have been fraudulently conveyed for the purpose of concealing it from creditors, and to prevent the same from being taken on legal process, to the knowledge of the grantees, could be maintained under the Massachusetts statutes without first establishing the claim by a judgment at law. The court said that the proceeding was intended to be in the nature of an equitable process by which a single creditor might, in one and the same suit, establish his claim against the debtor, and also compel the appropria-

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tion of property in the hands of third persons to the payment of his debt.

In Mississippi it is provided in substance that chancery courts shall have jurisdiction of bills by creditors to set aside fraudulent conveyances who have not obtained judgments at law, or, having judgments, have not had executions thereon returned unsatisfied. In Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305, the object of this statute was said to be to remove the necessity of a creditor resorting first to a court at law to recover judgment, and then going into equity to secure satisfaction.

Under this statute, it is not a necessary prerequisite to equitable relief that a creditor show the insolvency of the debtor, or that he has exhausted his legal remedies. Citizens' Bank v. Buddig, 65 Miss. 284, 4 So. 94. The court said that the view that insolvency is a condition precedent to such an action is sustained by a number of decisions from Indiana, where the supreme court, confounding the distinction between a voluntary conveyance by a husband to his wife, a father to his child, and the like, the validity or invalidity of which is determinable by the circumstances of the donor at the time of the gift, and a conveyance made to hinder, delay, and defraud creditors, had held that a creditor attacking a conveyance as made for the purpose of defrauding must aver and prove the insolvency of the debtor when the conveyance was made, and that it continued to the time of instituting the suit; and had displayed remarkable consistency and persistence in this erroneous view, against the sentiment of the courts, as indicated by the multitude of cases in which it had been questioned.

A creditor at large may resort to equity to have vacated a collusive attachment levied upon the debtor's property, although he may have a remedy at law, where a statute provides that "[chancery] courts shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and may subject the property to the satisfaction of the demands of such creditors as if complainant had a judgment and execution thereon returned no property found." McBride v. State Revenue Agent, 70 Miss. 116, 12 So. 699.

In Jones v. Jones, 79 Miss. 261, 30 So. 651, it was held that a statute giving equity jurisdiction over suits of creditors without judgment or execution returned unsatisfied, to set aside fraudulent conveyances, did not cover suits for unliquidated damages arising out of a tort before there had been any judgment at law ascertaining the damages, the defendant being within the jurisdiction of the court.

A personal judgment against a debtor is not a condition precedent to equitable aid under a statute providing that any person aggrieved thereby may file a petition to set aside a fraudulent conveyance as though it had been brought on a return of *nulla bona* as theretofore required. Smith v. Curd, 24 Ky. L. Rep. 1960, 72 S. W. 744.

In Ohio, by § 458 of the Code, which is a reprint of § 16 of the act directing the mode of proceeding in chancery, the right of a judgment creditor to seek the aid of equity to satisfy a judgment out of property fraudulently conveyed depends upon the fact of no property in the judgment debtor, and not upon the return upon an execution. Therefore, this fact may be established by the return of an execution *nulla bona*, or any other competent proof. Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

Since the act of 1851-2, Code, § 4288, the remedy to reach the proceeds of property fraudulently conveyed is as ample without judgment and return of *nulla bona* as it was before with such judgment and return. McCrasly v. Hasslock, 4 Baxt. 1.

By the statute of Tennessee, a creditor before judgment may file a bill to set aside a fraudulent conveyance and subject the property to the payment of his debt. (Act 1852, § 365, which is Code, §§ 4288 et seq.) Fay v. Jones, 1 Head, 442; Croone v. Bivens, 2 Head. 339; Epperson v. Robertson, 91 Tenn. 407, 19 S. W. 230.

In August v. Seeskind, 6 Coldw. 166, the court said that the proper construction of these sections of the Code (§§ 4288-4290) was that the court had the same power and jurisdiction in all respects to set aside fraudulent conveyances and other fraudulent devices in the cases therein mentioned, and to subject the property, by sale or otherwise, to the payment of debts, as if the creditor had judgment, or judgment and execution, or judgment, execution, and a *nulla bona* return. It was also held that, although attachment might be issued to impound the debtor's property when it might appear to be necessary, the issuance of the attachment was not a condition precedent to equitable jurisdiction.

By § 4291 of the Tennessee Code, the same power and jurisdiction are conferred upon the court in all respects to set aside fraudulent conveyances and other devices, as if the creditor had obtained judgment, and execution thereon had been returned unsatisfied. And, within the meaning of the statute, the surety, before payment of the debt, is a creditor in such a sense that he may bring his principal and the creditor into a court of equity and obtain exoneration out of the property, real or personal, fraudulently conveyed by the former, or its proceeds in the hands of anyone who is not a bona fide purchaser without notice. Greene v. Starnes, 1 Heisk. 582.

Any creditor, without first having recovered judgment at law, may, under the Tennessee statute, file a bill to set aside fraudulent conveyances or devices. Act 1852, chap. 365. Armstrong v. Croft, 3 Lea, 191.

The jurisdiction of a court of chancery,

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under a statute allowing a creditor to come into equity for the purpose of setting aside a fraudulent conveyance of property by his debtor, without first obtaining a judgment at law, does not depend upon an attachment, which need not be resorted to except to impound the property. Nailer v. Young, 7 Lea, 735.

In Shapira v. Paletz (Tenn. Ch. App.) 59 S. W. 774, it was held that, although a surety, at the time of the filing of the bill to reach property fraudulently conveyed by his principal, may not have taken judgment in his behalf, yet, if he has paid the debt of the principal, that is immaterial, since it is not necessary that a surety should be a judgment creditor. The fact that he is a creditor is sufficient to enable him to maintain a bill in equity to subject property fraudulently conveyed to the payment of his debt.

In Virginia, under chapter 179, Code of 1860, it is held to be proper for a creditor, without having sued out an execution at law, to impeach, by a bill in equity, conveyances by the debtor upon the ground of fraud, actual or constructive. Russell v. Randolph, 26 Gratt. 705.

Section 2 of chapter 175 of the Code of Virginia allows bills to set aside deeds to be brought by creditors who have not obtained a judgment or decree, and have not established specific liens. Fink v. Patterson, 21 Fed. 602.

A West Virginia statute expressly provides that a creditor shall not be required to sue and obtain a judgment at law before proceeding in equity to set aside a fraudulent conveyance, and to subject the estate conveyed to payment of his debt. He may, in the first instance, proceed in equity upon a mere legal demand, and obtain all the relief against such estate that he could have obtained if he had first recovered a judgment at law. Code, chap. 133, § 2. Tuft v. Pickering, 28 W. Va. 330.

The statute as to maintaining an action without judgment applies to the state as a creditor. State v. Bowen, 38 W. Va. 91, 18 S. E. 375.

And the fact that the state has obtained a judgment against its debtor does not place it in a worse position than it would be under the statute as a simple creditor. Ibid.

Under § 2, chap. 133, of the West Virginia Code, a creditor, before obtaining judgment, may maintain a suit to avoid a fraudulent transfer of or charge upon the estate of his debtor. Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874; Witz v. Lockridge, 39 W. Va. 463, 19 S. E. 876; First Nat. Bank v. Prager, 50 W. Va. 660, 41 S. E. 363.

The statute of fraudulent conveyances gives the creditor the absolute right to assail the conveyance that removes his debtor's property from his pursuit, and the creditor is not compelled to seek other property of his debtor first. Hoffman v. Fleming, 43 W. Va. 762, 28 S. E. 790.

This was held to be an enabling statute in 23 L.R.A. (N.S.) Frye v. Miley, 54 W. Va. 324, 46 S. E. 135, doing away with the rule which prevented relief under certain conditions only to the extent of the right given by statute; namely, to sue in equity to annul a fraudulent conveyance before reducing the claim to judgment. This was held not to mean that an action could be brought in such a case before the maturity of the debt.

Under the fraudulent conveyance statute of West Virginia, any creditor at large of the fraudulent debtor, without respect to the form or character of the debt, may maintain a suit to set aside a conveyance as fraudulent as to him, even though the claim be an unliquidated one, founded upon no certainty as to the amount of the damages claimed. Carr v. Davis (W. Va.) 20 L.R.A. (N.S.) 58, 63 S. E. 326.

Under this statute, a surety on a bail bond may sue in equity a surety on a bond of indemnity, and also to set aside a fraudulent conveyance of real estate made by such surety, although he had not paid the recognizance, where, however, the execution has been issued against him to collect it. Ibid.

But a simple-contract creditor, having failed to establish fraud, and having no lien on an equity of redemption sought to be subjected to the claim, is not entitled to subject it to sale. Johnson v. Riley, 41 W. Va. 140, 23 S. E. 698.

The rule that a creditor who has acquired a lien upon the real or personal property of his debtor by issuing and levying an execution upon the property owned by him may maintain an action in equity to set aside and avoid the claims of third persons to such property when the complaint alleges and shows that such other claims are fraudulent and void, as against the plaintiff's right, exists independent of statute, and is not taken away by a statute providing such a remedy. Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169.

Fraudulent assignments.

Where there has been an assignment for the benefit of the creditors, and a statute provides that, "in case there shall be any fraud in the matter of said assignment . . . any person interested therein may file his bill in the circuit court in chancery," etc., it was held that it was not necessary to obtain an order of the court requiring the assignee to institute the proceedings before a creditor could maintain a bill to set aside a chattel mortgage alleged to have been given by the mortgagor with the connivance of the assignee, in anticipation of the assignment, to secure the mortgagee a preference. Burnham v. Haskins, 72 Mich. 235, 40 N. W. 327.

In McCarthy v. Hancock, 9 N. Y. Leg. Obs. 98, it was said that, until a judgment has been obtained and execution issued and returned *nulla bona*, a creditor is in no position to assail the validity of an assignment by his debtor for the benefit of his creditors, or to reach choses in action of

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the debtor. This was a statutory regulation.

It is provided by statute in South Carolina, § 2016, chap. 72, General Statutes, that a simple-contract creditor, or any creditor who has no judgment, may assail, on the equity side of the court, a fraudulent assignment for the benefit of creditors without first reducing his claim to judgment. Austin v. Morris, 23 S. C. 393. In this case a mortgage, made for the purpose of giving preferences to certain persons, was held to be within the terms of the statute.

This section dispenses with the necessity of a judgment and the exhausting of legal remedies before a creditor may seek equitable aid for himself and other creditors, to set aside an assignment for creditors; hence, a bill may be maintained, whether it is to attack a formal deed of assignment, or such conveyance by a debtor of all his property as in law amounts to, or will be construed as, an assignment. Meinhard Bros. v. Strickland, 29 S. C. 491, 7 S. E. 838.

The statute is not confined to cases in which the assignment is assailed upon the ground that it provides for preferences among creditors, but permits the assignment to be attacked on any ground whatsoever. Regenstein v. Pearlstein, 30 S. C. 192, 8 S. E. 850.

Insolvent corporations or traders.

In Arkansas it is provided by statute that "any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up the affairs of such corporations, and, upon such application, the court shall take charge of all the assets of such corporation, and distribute them equally among the creditors, after paying the wages and salaries due laborers and employees." Kirby's Digest, §§ 949, 950; Bradshaw v. Bank of Little Rock, 76 Ark. 501, 89 S. W. 316.

The Arkansas statutes (Sandels' & H. Dig. §§ 1425–1428) which permit a simple-contract creditor to reach the property of an insolvent corporation authorize a suit for that property in a Federal court by a creditor who has not reduced his claim to judgment. Darragh v. H. Wetter Mfg. Co. 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 7.

In Comer v. Coates, 69 Ga. 491, a statute (act of 1881) providing that, "in case any corporation, not municipal, or trader or firm of traders, shall fail to pay, at maturity, any one or more matured debts, payment of which has been demanded of such debtor, and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditors' bill to which one or more of the creditors who have matured debts unpaid shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such trader, firm of traders, or corporation,"—was held to apply to existing traders, and not to those who had ceased to be such at the time the action was brought.

If the defendants have sold out their entire interest in their business and have ceased to do business, but no action is brought against them, the right to proceed under the above-mentioned act does not exist. Blanchard v. Vansyckle, 70 Ga. 278.

The act does not apply where the insolvent debtor partnership has been dissolved before the bill is filed. Scott v. Jones, 74 Ga. 762; Kimbrell v. Walters's Sons, 86 Ga. 99, 12 S. E. 305; Stillwell v. Savannah Grocery Co. 88 Ga. 100, 13 S. E. 963.

Unsecured creditors of an insolvent debtor, each of whose claims given upon account is partly due and partly not due, may proceed under the insolvent traders' act, Code, §§ 3149 et seq., to reach the debtor's assets. Rice v. Dodd, 94 Ga. 414, 20 S. E. 339.

But the vendee of land is not a trader as to the vendor, within the meaning of the act, although the vendee is engaged in a general merchandise business. Ball v. Lastinger, 71 Ga. 678.

In Minnesota the district court is not empowered to sequestrate the assets, and appoint a receiver of a corporation other than a banking or insurance corporation, on the bringing of an action in equity by mere contract creditors whose claims have not been reduced to judgment. A mere contract creditor who has not prosecuted his claim to judgment and execution, nor in any other manner acquired a lien on his debtor's property, cannot interfere with the possession or control of the same through sequestration proceedings, nor can he, if the debtor be a corporation, sue the stockholders, under the Minnesota statutes, §§ 9, 17, chap. 76 (Gen. Stat. 1894, §§ 5897, 5905). Klee v. E. H. Steele Co. 60 Minn. 355, 62 N. W. 399.

A Missouri statute regulating insurance companies of the town mutual class requires claims of policy holders to be reduced to judgment when not voluntarily paid, before proceeding to realize out of the company's assets, and, if the company is insolvent, the assets are required to be divided among the creditors according to their respective rights. McCoy v. Connecticut F. Ins. Co. 87 Mo. App. 73.

Conveyances in contemplation of insolvency.

A judgment and execution are also, by statute of Kentucky, no longer creditors' bill precedents to the maintenance by a creditor of a creditors' bill, the object and purpose of which is to have a conveyance made by the debtor in contemplation of insolvency subjected to the payment of the general creditors of the debtor. Griffith v. Cox, 79 Ky. 562.

A statute providing that transfers of property in contemplation of insolvency, without designing to prefer certain creditors, shall inure to the benefit of all of the creditors, and providing that all such transfers as are decreed void inure to the benefit of all creditors generally, and are subject to

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the control of a court of equity upon a bill filed by any person interested, authorizes a bill without the necessity of first establishing the claim at law. Early Times Distillery Co. v. Zeiger, 9 N. M. 31, 49 Pac. 723. To the same effect, Grunsfeld Bros. v. Brownell, 12 N. M. 192, 76 Pac. 310.

Discovery of assets.

Section 819 of the Code of 1896 provides that a judgment creditor or a creditor without a lien or judgment may file a bill for the discovery of assets. Etheridge Bros. v. Swann-Abrams Hat Co. 147 Ala. 535, 41 So. 465.

Under a statute providing that a creditor may file a bill against his debtor for the discovery of assets owned by the debtor, and for the application of such assets to the creditor's claim, it is not necessary that a creditors' bill should show any fraudulent conveyance or attempt fraudulently to convey property, it being sufficient if it avers the insufficiency of visible assets subject to legal process, and the existence of assets which are concealed and hidden. Pollak v. Billing, 131 Ala. 519, 32 So. 639.

The 49th section of the Illinois chancery act provides that a creditor having an execution returned, "no property found," or unsatisfied in part, may file a bill to discover property belonging to the defendant, and, on such discovery, may apply the same to the satisfaction of the judgment at law. Scripps v. King, 103 Ill. 469.

A New Jersey statute, act of 1845, gives a judgment creditor the right, upon the return of an execution unsatisfied, to file a bill in chancery for a discovery of property or money due to the debtor, or held in trust for him, and to prevent the transfer of such property, or the payment of the money, and to have the same appropriated to the payment of the judgment. Green v. Tantum, 19 N. J. Eq. 105, affirmed in 21 N. J. Eq. 364.

Equitable interests and assets.

A statute declaring that the powers of chancery courts extend "to subject an equitable title or claim of real estate to the payment of debts" does not authorize a bill to subject an equity of redemption owned by the debtor to the payment of a judgment, where the judgment creditor has not exhausted his legal remedies. Turrentine v. Koopman, 124 Ala. 211, 27 So. 522. The court said that the declaratory provisions referred to were doubtless intended to settle the question, which appeared to have been originally in doubt in England and in some courts of this country, as to whether equity can aid a creditor in the collection of a judgment at law by subjecting equitable assets where the legal remedy is unavailing for want of legal assets. The statute declared the power in general terms, but contemplated its exercise conformably to the usual principle which denies relief in equity when there is an adequate remedy at law.

The section of the Indiana Revised Statutes of 1843, p. 456, authorizing the sale of an equitable interest in real estate on a decree in chancery after an unavailing execution at law, relates to an execution from the circuit court. Wilson v. Dale, 5 Ind. 163.

Under a statute providing that "when a judgment debtor has no personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he may have in real estate . . . [etc.], shall be subject to the payment of such judgment by action . . ." it was held that the plaintiff must be governed entirely by the statute, and that it was necessary to allege that the judgment debtor had no personal or real property subject to levy on execution, or an allegation equivalent thereto. Moyer v. Riggs, 8 Kan. App. 234, 55 Pac. 494.

Under § 16 of the Code, directing the mode of proceeding in chancery, which provides that where judgments at law or decrees in chancery have been obtained against any person, and the debtor has not personal or real estate subject to levy or execution, sufficient to satisfy the judgment or decree, but has an equitable interest in real estate, the same may be subjected in chancery to the payment of said judgment or decree. The creditor, if his claim was in judgment when he filed his bill, and there is not sufficient property of such a character as can be sold on execution, may maintain a bill in equity to subject the equitable interests of his debtor to the payment of his judgment. This provision is held clearly to regulate the rights of creditors in Ohio, and to render necessary a judgment in order to invoke the aid of chancery. Clark v. Strong, 16 Ohio, 317.

Under a statute providing that, when a judgment debtor has not sufficient property to satisfy the judgment, an action may be maintained to reach the equitable assets, the court, in Lee v. Harback, 2 Ohio Dec. Reprint, 361, said that the moment it was shown, or admitted by the plaintiff, that there was sufficient personal or real property liable to execution to satisfy the judgment, the court could then proceed no further at the instance of the judgment creditor, but the proceeding must be dismissed for want of jurisdiction if nothing further appeared to distinguish or establish it.

In Graham v. LaCrosse & M. R. Co. 10 Wis. 459, it was held that the enactment of the Code with reference to supplemental proceedings abolished the right of a party to maintain an action in the nature of the old creditors' bill at common law. After that decision, the legislature provided that a creditors' bill might be maintained in cases where an execution had been issued upon a judgment and returned unsatisfied in whole or in part. Laws 1860, chap. 303; Rev. Stat. 1878. § 3029. Under this statute no action to reach general assets of a debtor which cannot be seized upon the execution can be maintained until execution has been issued and returned unsatisfied, in whole or

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in part. Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169.

Property not open to execution or attachment.

Under a clause of a statute (Mass. Gen. Stat. chap. 113, § 2) which confers upon the court jurisdiction of "bills by creditors to reach and apply in payment of a debt any property, right, title, or interest, legal or equitable, of a debtor within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor," a judgment rendered against a corporation where process was served upon it after its dissolution is nugatory and void, and will not support a creditors' bill. Thornton v. Marginal Freight R. Co. 123 Mass. 32.

In Maine, by statute, jurisdiction is conferred upon equity to aid a creditor at large to reach and apply in payment of a debt due to him any property, right, title, or interest, legal or equitable, of his debtor residing there, or found in that state, which cannot be attached on a writ, or taken on execution in an action at law against such debtor, and which is not exempt by law from attachment and seizure. Construing this statute in Donnell v. Portland & O. R. Co. 73 Me. 567, the intent thereof was said to be to enable a single creditor alone, without first fruitlessly exhausting all legal remedies, or reducing his claim to judgment, by the one proceeding, in the nature of an equitable trustee process, to establish the validity and amount of his claim against his debtor, and compel the appropriation of the debtor's property, of whatever kind, in the hands of some third person, to the payment of his debt.

The debt need not be reduced to a judgment in order to maintain a bill in equity under the statutes which give a remedy in equity to reach and apply in payment of a debt property of the debtor which cannot be attached or taken on execution at law. Sandford v. Wright, 164 Mass. 85, 41 N. E. 120.

But the fact that a trust company owns promissory notes given to it for loans and United States bonds, and has no property which can be come at to be attached or taken on execution at law, will not entitle a creditor under the statute (Gen. Stat. chap. 113, § 2) to enjoin it from alienating its assets. The court said that the proceeding under this statute was to be regarded in the nature of an equitable trustee process, and as distinguished from a creditors' bill. Phœnix Ins. Co. v. Abbott, 127 Mass. 558.

And, in proceedings by a wife living apart from her husband, against the latter, to reach property which cannot be attached or taken at law, before equity will lend her its aid to reach such property, she must have secured a judgment from the probate court, under Pub. Stat. chap. 147, § 33, that she is living apart from her husband for justifiable cause, and is entitled to be supported by him, and a decree must have been entered in her behalf for a definite sum of money, fixing her status as a creditor of her husband. Willard v. Briggs, 161 Mass. 58, 36 N. E. 687.

A statute providing that, in all cases where personal service of process cannot be made at law, and when no original attachment at law will lie, and no judgment at law can be obtained, and also in cases where the demand is purely of an equitable nature, a court of chancery may subject legal and equitable interests in every species of stock and other property, with certain exceptions, and also in real estate, provided that, in case of a legal demand, the amount due shall be ascertained by the verdict of a jury, summoned in the same manner as for other trials of issues of fact before a court of chancery,—does not authorize an action by a nonresident creditor against a nonresident debtor and his fraudulent grantee, to subject the property transferred to the payment of the debt, where no judgment has been obtained at law, where the demand is of a legal character, and no personal service of process has been had in the equitable action. Gasget v. Scott, 9 Yerg. 244.

Foreign attachment.

Under the Kentucky statute, a general creditor who has obtained an attachment on the land of a nonresident debtor thereby acquires a right to subject the property to the payment of his claim, where the conveyance was made to cheat, hinder, and delay creditors, or, as to existing liabilities, was made without valuable consideration. Little v. Ragan Bros. 83 Ky. 321.

Upon a bill to subject land of a nonresident to the payment of a debt, it was required, under the Kentucky statute of 1827, 1 Stat. Law, 98, to be shown that the debtor owned no personal property, or not enough to pay and discharge a debt in the state, to the knowledge of the complainant. Calk v. Chiles, 9 Dana, 265.

In Kelso v. Blackburn, 3 Leigh, 299, the court said that the proceeding by foreign attachment against absentees was an innovation upon the common law; a proceeding *in rem*, founded on the necessity of the case, lest there should be an absolute failure of justice; and, like all *ex parte* proceedings, it was liable to great abuse unless carefully watched and strictly confined to the ground covered by the law. It was not under their general jurisdiction that courts of equity took cognizance of these cases, but under particular statutes; and these, it would be found, have marked out with special care the extent and described the manner of the proceeding.

An action in the nature of a creditors' bill cannot be based on a judgment for money only against a nonresident debtor, where jurisdiction was obtained only by attachment, where, by statute, such a judgment can be enforced only against the attached property. Capital City Bank v. Parent, 134 N. Y. 527, 18 L.R.A. 240, 31 N. E. 976.

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Enforcement of judgment lien.

Under a Virginia statute providing that "the lien of a judgment may always be enforced in a court of equity. If it appear to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment" [Code of 1873, chap. 182, § 9], a creditor may go into equity to enforce his lien against his debtor's real estate, before exhausting his remedy at law against his debtor's personal property. The remedy in equity against the real estate is the only remedy in that state against such property, since the elegit was abolished. Acts 1871–2, chap. 373, p. 469. This remedy is not dependent upon the inadequacy of the legal remedy to satisfy the judgment out of the personal estate, or the insufficiency of such estate for that purpose, but may always be resorted to, whether there be or not personal estate of the debtor sufficient to satisfy the judgment. The court said that if the creditor resorted to the real estate first, and the debtor had personal property which he preferred should be applied to the payment of the judgment, he certainly could make the application himself more speedily and at much less expense than an officer at law could under an execution, and thus relieve his real estate to the extent of the value of the personal estate so applied. If he failed or refused to make the application, it was his own fault. Price v. Thrash, 30 Gratt. 515. To the same effect, Barr v. White, 30 Gratt. 531.

In Virginia, by statute, a judgment creditor may resort to a court of equity, if he so elects, to enforce the lien of his judgment against the real estate of his debtor, without first proceeding by execution at law to subject the personal estate, or assigning any reason for not doing so. The remedy in equity against the real estate is not dependent upon the inadequacy of the legal remedy to satisfy the judgment out of the personal estate, or the insufficiency of such estate for that purpose, but it may always be resorted to without reference to whether there is sufficient personal estate of the debtor to satisfy the judgment. Stovall v. Border Grange Bank, 78 Va. 188. To the same effect, Moore v. Bruce, 85 Va. 139, 7 S. E. 195.

The 8th section of chapter 139 of the West Virginia Code gives to courts of equity jurisdiction and authority to enforce judgment liens at any time. Pecks v. Chambers, 8 W. Va. 210. The court said that the exercise of that jurisdiction was not made dependent upon the fact as to whether the amount of the judgment might, or could be made by any other proceeding,—for instance, by a writ of fieri facias. A court of equity might, under the provisions of that section, sell lands of a judgment debtor to pay his judgment debts, whether the rents and profits of the lands of the debtor would pay the debt in five years or not. This was not the case prior to the adoption of the Code of 1868. The policy and effect of the legislation in relation to the enforcement of judgment liens seemed to be to do away with the restraints and restrictions in relation to the sale of realty for the payment of debts, which formerly existed, and to give the judgment creditor access to the lands of his debtor without unnecessary delay for the satisfaction of his just demands through the aid and instrumentality of courts of equity, should the creditor choose to invoke the aid of such courts before exhausting legal remedies to which he might resort. Whether this policy was wise or judicious was not for that court to determine.

The 8th section of chapter 139 of the Code of West Virginia of 1868 confers upon courts of equity jurisdiction and authority to enforce judgment liens against the lands of the judgment debtor, at any time, without reference to whether the judgment debtor has personal property or estate out of which the judgment might be made by a process of execution or not. Marling v. Robrecht, 13 W. Va. 440.

Under Code 1891, chap. 139, § 7, a bill to enforce a judgment lien must show the return of a fi. fa., indorsed "no property found," or that an execution issued on the judgment within two years from its date. Under a prior statute, such a suit could be maintained previous to execution. Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102.

Deceased debtors.

In Lilienthal v. Drucklieb, 34 C. C. A. 657, 92 Fed. 753, the existence of a legal representative of a deceased debtor, or his refusal to act, was held not to be a condition precedent to an equitable action in the nature of a creditors' bill, under a statute which enables a creditor of a deceased insolvent debtor, in behalf of himself and other creditors, to bring an equitable action in the nature of a creditors' bill without the necessity of previous judgment, and the issuance of an execution, and its return unsatisfied.

Under a statute providing the following remedies for creditors of deceased persons: "(1) An action at law against the personal representative . . . (2) A separate bill in chancery to compel payment of his individual debt out of the funds in the hands of the personal representative, and discover the funds or estate liable to the payment thereof . . . (3) A bill in behalf of himself and other creditors to ascertain and distribute both the real and personal estate . . . (4) A bill against an heir or devisee because of assets by descent,"—to entitle a creditor to institute his suit under either of the last three heads enumerated, he must have either exhausted his remedy under the first, being the legal remedy, or show that such remedy would, for some reason, be unavailing, or that the personal representative had neglected his legal duties to such an extent as to justify the interposition of a court of equity. Hale v. White, 47 W. Va. 700, 35 S. E. 884.

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State acts; Federal courts.

An action to subject to the payment of a debt due complainants certain property owned by the debtor and other defendants cannot be maintained in the United States courts, in default of any proceeding at law to establish the validity of the amount of the debt, or to enforce its collection, although a statute of the state in which the action was brought permits it. Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712. The court said that the general proposition as to the enforcement in Federal courts of new equitable rights created by the states is undoubtedly correct, subject, however, to this qualification, that such enforcement do not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoined or enforced in the states by whose legislation it was created. The Constitution, in its 7th Amendment, declared that, in suits at common law, where the value in property shall exceed $20, the right of trial by jury shall be preserved. In the Federal courts this right cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at common law of a demand for equitable relief in aid of the legal action or during its pendency.

A simple-contract creditor having no express lien by mortgage, trust deed, or otherwise, cannot come into a United States court of equity to obtain seizure of the property of a debtor, and its application to the satisfaction of his claims, notwithstanding a state statute may authorize such a proceeding in the courts of the state. Harrison v. Farmers' Loan & T. Co. 36 C. C. A. 443, 94 Fed. 728.

But, in Jones v. Mutual Fidelity Co. 123 Fed. 506, it was held that a Delaware statute providing that, whenever a corporation becomes insolvent, any creditor or stockholder may obtain the appointment of a receiver, could be enforced in a Federal court by unsecured general creditors as well as by stockholders and judgment creditors, since this statute created a purely equitable right and remedy. The court said that there was a clear distinction between the exercise of equitable jurisdiction in aid of the legal remedy for the collection of a pecuniary legal demand, and the exercise of equitable jurisdiction in enforcing a purely equitable right by a purely equitable remedy created by a valid state statute, not in aid of any legal remedy, but wholly independent thereof, though the existence of such equitable right and remedy might presuppose and be dependent on the existence of such pecuniary legal demand. Failure to recognize this distinction had produced some confusion in the cases.

23 L.R.A.(N.S.)

Mechanics' liens.

Lien creditors, by virtue of laborers' liens, whose debtor does not reside in the state, and is insolvent, and who are in danger of being defeated in the collection of their claims by the entire loss by removal from the state of the only assets which their lien covers or can reach, are entitled to the aid of equity, by way of injunction and the appointment of a receiver, to preserve the property and prevent its removal from the state, without first reducing their claim to judgment. Orton v. Madden, 75 Ga. 83.

H. C. S.

CALIFORNIA SUPREME COURT.

WHITNEY ESTATE COMPANY, Appt.,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Respt.

(— Cal. —, 101 Pac. 911.)

Insurance — computing loss — statute.

1. The parties to a contract of rent insurance may stipulate for a method of ascertaining and computing the loss, notwithstanding the statute provides that the sole object of insurance is indemnity.

Same — rent — what covered.

2. The gross rentals, and not the amount less cost of janitor and other service to which the landlord is subject, are covered by a policy providing that the insurer shall be liable for the actual loss of rent based on rentals in force at the time of fire, and requiring the assured to carry insurance in an amount equal to the annual rents of the premises, in the absence of which the assured shall be held as a coinsurer in the amount of the deficiency.

(April 30, 1909.)

Case Note. — Rent insurance.

In Palatine Ins. Co. v. O'Brien 107 Md. 341, 16 L.R.A.(N.S.) 1055, 68 Atl. 484, it was held that delay in rebuilding a structure, the rents of which were insured, owing to a refusal of a permit by the municipal authorities, so that the rents were not reestablished as soon as they might otherwise have been, was within the provisions of a policy that the company would not be liable for loss caused by order of any civil authority.

In the preceding case it was also held that one whose rents were insured was presumed, in the absence of evidence to the contrary, to have discharged his obligation under the contract to take immediate possession of the premises for the purpose of rebuilding, and that he thus put an end to the obligation of the tenant to pay rent.

Both of these propositions were reaffirmed in Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 Atl. 775.

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APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in plaintiff's favor for a sum less than was demanded in an action brought to recover the amount alleged to be due on a policy of fire insurance. Reversed.

The facts are stated in the opinion.

Mr. **L. A. Redman**, for appellant:

The law recognizes the validity of contracts of fire insurance, whereby the insured might derive a profit from the happening of the event insured against; and where the bona fides of the transaction are not assailed, and neither fraud nor mistake is charged, the valuation agreed upon is conclusive upon the parties as to the amount which the insured is entitled to receive.

Michael v. Prussian Nat. Ins. Co. 171 N. Y. 25, 63 N. E. 810; May F. Ins. 4th ed. § 30; Alsop v. Commercial Ins. Co. 1 Sumn. 451, Fed. Cas. No. 262; Cooley, Briefs on Insurance, pp. 518, 3087; 1 Clement, F. Ins. p. 83; Civil Code, §§ 2594, 2595, 2757; 13 Am. & Eng. Enc. Law, 2d ed. p. 102.

Messrs. **Goodfellow & Eells**, for respondent:

The measure of damages is the amount of actual loss or damage that has been sustained by reason of the fire.

Lite v. Firemen's Ins. Co. 119 App. Div. 410, 104 N. Y. Supp. 434; Barry v. Farmers' Mut. Hail Ins. Asso. 110 Iowa, 433, 81 N. W. 601; McIlrath v. Farmers' Mut. Hail Ins. Asso. 114 Iowa, 244, 86 N. W. 310; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74; Queen Ins. Co. v. McCoin, 105 Ky. 806, 49 S. W. 800; Castellain v. Preston, L. R. 11 Q. B. Div. 380.

Mr. **T. C. Coogan** also for respondent.

Sloss, J., delivered the opinion of the court:

This is an action on a policy of fire insurance. The facts are undisputed, such of them as were put in issue by the pleadings having been found by the court upon the agreement of the parties.

The defendant, in June, 1905, issued to plaintiff a policy containing the following provisions bearing upon the question in dispute:

"Northern Assurance Company of London.

"In consideration of the stipulations herein named and of $66.20 premium does insure the Whitney Estate Co. for the term of one year from the 1st day of June, 1905, at noon, to the 1st day of June, 1906, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding $15,400, to the following described property while located and contained as described herein, and not elsewhere, to wit:

"15,400. On rents of the brick building known as the Starr King building, situate No. 117 to 125 on the south side of Geary street, between Grant avenue and Stockton street, San Francisco, California. . . .

"It is understood and agreed that, in case the above-named building or any part thereof shall be rendered untenantable by fire, this company shall be liable to the assured for the actual loss of rent ensuing therefrom, based upon the rentals in force from the rented portions of the premises at the time of fire, not exceeding the sum insured. Loss to be computed from the date of the fire for the time it would require to put the premises in tenantable condition, excluding from such time such portion thereof as may be consumed by a strike or by any other delay beyond the control of the assured.

"In the event of disagreement as to the time required to put the premises in tenantable condition, the same shall be ascertained by two competent and disinterested appraisers," etc.

"The assured stipulates and agrees to carry insurance on said rents in an amount equal to the annual rents of said premises, and it is understood and agreed that if, at the time of fire, the aggregate amount of insurance shall be less than the annual rentals at the time of the fire, the assured shall be held to be an insurer in the amount of such

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In the latter case it was held that, where the policy provided that the company should not be liable for loss of rents occasioned "by interruption of business, manufacturing processes, or otherwise," the insured was not entitled to recover for loss of rents during a delay in rebuilding caused by the obstruction of the streets by *débris* from a general conflagration.

In Hartford F. Ins. Co. v. Northern Trust Co. 127 Ill. App. 355, where it appeared that a building was insured against actual loss of rent in case it should be rendered untenantable by fire; that the lease of the building provided that, in case the premises were rendered untenantable by fire, the lessor, at his option, might terminate the lease or repair the premises within thirty days; that it was injured by fire, but by extraordinary diligence it was restored to its former condition, and the tenant put back into possession in twenty-nine days, during which he paid the rent as though no fire had occurred, —it was held that the contingency insured against never happened.

Lite v. Firemen's Ins. Co. 119 App. Div. 410, 104 N. Y. Supp. 434, sufficiently set out in WHITNEY ESTATE CO. v. NORTHERN ASSUR. CO., was affirmed on stipulation, and therefore without opinion, in 193 N. Y. 639, 86 N. E. 1127.

Four earlier cases upon this question are to be found in the note to Palatine Ins. Co. v. O'Brien, 16 L.R.A.(N.S.) 1055.

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deficiency, and in that capacity shall bear a proportionate share of the loss."

All of the foregoing, except the first paragraph quoted, is contained in a slip or "rider" attached to a policy in the form usually employed for fire insurance. One of the clauses found in the body of the policy, and relied on by respondent, declares that "wherever in this policy . . . the word 'loss' occurs it shall be deemed the equivalent of 'loss or damage.'" Many of the other provisions common to such usual or "standard" form are, in their nature, inapplicable to the subject-matter of this particular contract.

On April 18, 1906, the Starr King building was owned by the plaintiff, and on that day it was totally destroyed by fire. At the time of the fire of April, 1906, the total amount of insurance on rents carried by plaintiff, including and concurrent with that of the defendant, was $69,175, and the total amount of rents being collected by plaintiff from tenants occupying the rented portions of the building was a sum which, if paid for one year, would aggregate $68,298. For such rents the plaintiff was required to, and did, furnish to its tenants certain services, including the operation of an elevator, the supply of water and light, and the services of a janitor. The cost to the plaintiff of such service, if paid for one year, would aggregate $10,000. The time required to put the building in tenantable condition was agreed upon by the parties to be twelve and one-half months. The position of the plaintiff was that, on these facts, it was entitled to recover from the insurers the gross amount of the rents for one year, *viz.*, $68,298. The defendant contended, however, that the loss or damage sustained by plaintiff and recoverable by it was only the sum remaining after deducting from the gross annual rentals the $10,000, which, if there had been no fire, plaintiff would have been obliged to expend in furnishing the aforesaid services to tenants. The latter view was accepted by the trial court, which, after finding as a conclusion of law that plaintiff's loss or damage was $58,298, awarded judgment for $12,964.47, the proportion of such loss payable by defendant. From this judgment plaintiff appeals.

The question thus presented is, so far as we are able to learn, a novel one. Rent insurance is a comparatively recent development of underwriting, and cases dealing with its peculiar problems are few. In their briefs the learned counsel for the respective parties present various authorities, but none of the cases cited on either side can be said to be closely in point. They are valuable in so far as they illustrate general principles of insurance law, which must be looked to for the determination of the question before us. One of these principles—and the one upon which the respondent bases its position — is that a policy of insurance is a contract of indemnity. It is, as defined in Civil Code, § 2527, "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." Section 2551 provides that "the sole object of insurance is the indemnity of the insured. . . ." Policies "executed by way of gaming or wagering" are void. Civil Code, § 2558. "The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof." Accordingly it is universally held that (except in case of a valued policy) "the insured is entitled to recover under the policy only such loss as he has actually sustained, not exceeding the sum stipulated." 16 Am. & Eng. Enc. Law, 2d ed. p. 840.

The contention of the respondent is that the application of these rules requires the affirmance of the judgment. The "loss of rent" suffered by plaintiff was not, it is said, the gross amount of rents which it would have received, but only the surplus remaining after deducting the expense to which it would have been put in collecting such rents. This position would have much force if the subject of insurance consisted of such property that the loss occasioned by a fire could be accurately determined. But, in the case of rents of a building, it is not, in the nature of things, possible to determine, at any particular period, just what the income from rents for the ensuing year would be. It may be that a greater or a less part of the building may be occupied during the year than at its commencement; so with the matter of expense. The annual outlay for elevator service, wages of janitors, light and water, will depend upon a variety of contingencies which cannot be foretold. Furthermore, the fact that a building is rendered untenantable may cause a loss of rents to the owner in ways that are even more incapable of measurement. A building vacated by its tenants in consequence of fire may remain vacant, in whole or in part, long after it has been restored and is again ready for occupancy. In view of all these uncertainties, it is perfectly competent for the parties to a contract of rent insurance, without in any degree violating the principle that the insurance shall furnish only indemnity against loss, to stipulate for a method of ascertaining and computing such loss. We think the policy before us, fairly construed, does provide that the loss of rents shall be deemed to be the amount of rentals that would be collected by the in-

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sured during the period that may be required to restore the building to a tenantable condition, assuming that the rentals would have continued to be the same in amount as at the time of the fire. So construed, the policy, if not strictly a valued policy (Civil Code, § 2596), may be regarded as analogous to a valued policy in so far as it prescribes a method for determining, as between the parties, the amount of loss. The suggested meaning is the one indicated by the clauses of the policy quoted by us. The insurance company agrees to be liable for the "actual loss of rent ensuing" from the fire, and makes provision for the manner of determining the loss. It is to be based upon the rentals in force from the rented portions of the premises at the time of fire, and to be "computed from the date of the fire for the time it would require to put the premises in tenantable condition." No elements, except those of actual rentals at time of fire, and time required for repair, are mentioned. The first of these elements is easily ascertainable, and special provision is made for arbitration as to the second, in the event of disagreement. If it had been intended that any other item should enter into the computation, it seems reasonable to suppose that something would have been said regarding such other item. The view suggested is fortified by a consideration of the clause requiring the insured to carry insurance on said rents in an amount equal to the annual rents of the premises, under penalty of being held to be a coinsurer to the extent of the deficiency. If respondent's contention be correct, this clause would require, if the management of the building involved any expense whatever, the carrying of insurance to an amount greater than the loss which could possibly be sustained. It would impose upon the insured the obligation of insuring to the extent of his gross rents, although the liability of the insurers would be limited to the net rents. In this view the requirement would be unreasonable and burdensome. It is, however, a perfectly proper and legitimate condition if recovery, in the event of fire, is to go to the extent of the total rentals, without any deduction for expenses.

As we have said, no case directly in point has been called to our attention. Perhaps the one that affords the closest analogy to the one before us is Stevens v. Columbian Ins. Co. 3 Caines, 43, 2 Am. Dec. 247. There the charterer of a vessel had insured the freight under an open policy. There was a total loss *en route*, and it was held that the insured was entitled to recover the gross amount named in the policy, without any deduction for expenses of wages and provisions for the crew, which would have had to be borne by plaintiff if the vessel had completed her voyage. It is true that there are many distinctions between marine insurance and insurance against loss by fire, and that the rules governing the one cannot always be applied to the other. The doctrine of the Stevens Case is, in this state, expressly adopted by statute as the method of estimating the loss of freight under an open marine policy. Civil Code, § 2741. But, notwithstanding the differences arising from the nature of marine and fire insurance, each is a contract of indemnity, and much of the reasoning of the court in the case just mentioned has a direct bearing upon the one before us. "Although indemnity is the leading object of insurance, it is not always the criterion by which to ascertain the amount of the loss," says the court, and goes on to point out that "to adopt the net amount of freight as the rule would lead to much litigation and uncertainty respecting the deductions to be made. But to take the gross amount of freight as the rule of damages would be equal, simple, and easily ascertained." The last observation has particular force when applied to the facts of the case before us.

The respondent relies on Lite v. Firemen's Ins. Co. 119 App. Div. 410, 104 N. Y. Supp. 434. The policy there involved was one on "the profits of the lease" of certain buildings leased by plaintiff, and by him sublet to various tenants. In the course of the opinion it is said that plaintiff's recovery was to be "measured by the difference between the rentals which he is able to realize from the property, less the rent paid by him plus the expense of running and maintaining the building." The subject of insurance being the profits of the lease, it was obviously necessary, in estimating plaintiff's loss, to deduct from the rents received by him all expenses incurred. The case is not at all analogous to the present one, where the insurance is on rents. Barry v. Farmers' Mut. Hail Ins. Asso. 110 Iowa, 433, 81 N. W. 690, and McIlrath v. Farmers' Mut. Hail Ins. Asso. 114 Iowa, 244, 86 N. W. 310, are also cited by respondent. These were cases of insurance on growing crops, which were destroyed before maturity. In each case it was held that plaintiff could recover only the market value of the grain destroyed, after deducting what it would have cost to prepare it for market. This ruling has no bearing on the question before us. The insured was entitled to no more than the value of the property lost at the time of its destruction. The value of a growing crop is not the equivalent of the value which such crop would have at maturity, and the court was simply declaring a meth-

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od of ascertaining the value of the property at the time of destruction, and the consequent loss. See Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62; Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708; Teller v. Bay & River Dredging Co. 151 Cal. 209, 12 L.R.A.(N.S.) 267, 90 Pac. 942, 12 A. & E. Ann. Cas. 779.

Upon a consideration of the entire policy, we think it was intended to make the defendant liable for such amount of rent, at the rate paid for the portions rented at the time of the fire, as would have become payable to plaintiff during the period required to restore the premises to a tenantable condition, without deduction for any expenses connected with the renting.

The judgment is reversed, with directions to the Trial Court to enter judgment in accordance with the views herein expressed.

We concur: Angellotti, J.; Shaw, J.

Petition for rehearing denied May 27, 1909.

NORTH DAKOTA SUPREME COURT.

F. C. RISING et al., Respts.,
v.
GEORGE DICKINSON, Appt.

(— N. D. —, 121 N. W. 616.)

Public officer — registrar of deeds — negligence — liability.

1. Under §§ 2452, 2453, Rev. Codes 1905, it is made the duty of the registrar of deeds of each county to keep a numerical index in his office, in which shall be noted, opposite the description of each tract, the volume and page of each mortgage or other instrument affecting the title thereto. Held, that defendant's failure for over two months after a mortgage was duly recorded to note the same in such numerical index is negligence *per se*, rendering him liable to one who, in reliance on such index, purchases the property, and sustains damage as the necessary and proximate result of such official neglect.

Same — contributory negligence.

2. It is essential to a recovery for such negligence that plaintiff be free from contributory negligence, but it was not contributory negligence on plaintiff's part in failing to examine the grantor and grantee index wherein such mortgage was noted.

Same — nature of office — liability.

3. The registrar of deeds is a ministerial officer, and as such is liable at common law, in the absence of an express statute, to an action for damages caused by his failure or neglect to perform the duties of his office, or for their negligent or illegal performance.

Insolvency — evidence — sufficiency.

4. The action was tried on the theory, and it is in effect conceded, that it was essential to a recovery, however, that plaintiff should prove that one S., the mortgagor and the person from whom he purchased the premises, and who gave him a warranty deed containing a covenant against encumbrances, was insolvent, and hence unable to pay the mortgage indebtedness or to respond in damages for the breach of her covenant. Evidence examined, and held insufficient, for reasons stated in the opinion, to establish such fact.

(May 1, 1909.)

Case Note. — Liability of registrar of deeds for neglect, delay, or mistake in registering or indexing instrument affecting title to real property.

The duty of indexing deeds and mortgages is a ministerial one, and for neglect of such duty an action lies against the recording officer in favor of individuals who are injured thereby. Norton v. Kumpe, 121 Ala. 448, 25 So. 841.

In an action against a registrar of deeds and his bondsmen, State ex rel. Daniel v. Grizzard, 117 N. C. 105, 23 S. E. 93, held that the plaintiff was entitled to recover for the failure of the registrar to index a mortgage on certain property, which resulted in a loss to the plaintiff on his subsequently loaning money on the same property.

Where it is the official duty of a recording officer to keep a tract index, and he fails to perform that duty in respect to a mortgage upon a particular parcel of land, and thereafter a person purchases that tract, relying on the index that it is free from encumbrances, the damages which the purchaser suffers may be recovered in an action against the recording officer and his sureties. Johnson v. Brice, 102 Wis. 575, 78 N. W. 1086.

In Crews v. Taylor, 56 Tex. 461, the liability of a recording officer for neglect in failing to record a certain mortgage or enter it upon the file book was recognized, but a recovery was denied the plaintiff because it appeared that he had notice of the existence of the mortgage lien through a deed which was on record and which he examined.

In Hartwell v. Riley, 47 App. Div. 154, 62 N. Y. Supp. 317, a county clerk was held liable for his failure as recording officer to index properly a *lis pendens* filed for record in his office, where such failure resulted in loss to a subsequent mortgagee of the property against which the *lis pendens* was filed.

A mistake by a registrar of deeds in recording a mortgage to secure $1,000 as securing $100 was held, in State ex rel. Kivett v. Young, 106 N. C. 567, 10 S. E. 1019, to be such a failure in the faithful discharge of the registrar's duties as to warrant a recovery on his official bond.

State use of Cardin v. McClellan, 113 Tenn. 616, 85 S. W. 267, 3 A. & E. Ann. Cas.

Headnotes by FISK, J.
23 L.R.A.(N.S.)

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APPEAL by defendant from a judgment of the District Court for Benson County in plaintiff Rising's favor in an action brought to recover damages alleged to have been caused by defendant's alleged negligent failure properly to note a certain mortgage in the public records of which he was the registrar. Reversed.

The facts are stated in the opinion.

Messrs. **Lindstrom & Sinness** and **Burke & Middaugh** for appellant.

Messrs. **McClory & Barnett,** for respondents:

A recorder of deeds is a ministerial official, answerable in damages for nonfeasance, misfeasance, or malfeasance.

23 Am. & Eng. Enc. Law, 2d ed. p. 377; State v. Ruth, 9 S. D. 84, 68 N. W. 189; Johnson v. Brice, 102 Wis. 575, 78 N. W. 1086.

Fisk, J., delivered the opinion of the court:

Plaintiff Rising recovered a judgment in the court below against defendant for damages for the alleged negligence of the latter, who was registrar of deeds of Benson county, in failing and neglecting to note in the numerical index a certain mortgage filed and recorded in his office on September 20, 1901.

The facts necessary to a correct understanding of the law points involved are as follows: On September 20, 1901, one Julia Solvey, who was the owner of the real property described in the complaint, gave a mortgage thereon to the Advance Thresher Company. Such mortgage, as above stated, was filed in defendant's office on September 20th, and recorded in book 18 of mortgages at page 445, and thereafter entered in the grantor and grantee's index of mortgages, but the same was not noted on the numerical index of mortgages until after December 5th following. On the latter date plaintiff Rising purchased the premises covered by such mortgage from Julia Solvey, taking from her a warranty deed of the premises, with the usual covenant warranting the same to be free from all encumbrances, except a mortgage for $400 and one for $60 in favor of other parties. The proof shows that, prior to such purchase, the plaintiff Rising examined the reception book required to be kept by defendant as such registrar of deeds, covering entries for the period of about two months immediately prior thereto, and also the numerical index, and failed to find the mortgage to the Advance Thresher Company in either of such records, and he claims to have made such purchase without any notice of any kind of the existence of such last-named mortgage. Subsequently, and prior to the commencement of this action, the

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992, holds that a registrar of deeds and his bondsmen are liable in damages for the error of the registrar in recording a description of property, without question as to wilfulness, innocence, or inadvertence. Maxwell v. Stuart, infra, is distinguished as a decision under a statute requiring that the wrongful act be wilful. The statute in the McClellan Case contained no such qualification, and it was said that, "moreover, the failure of the registrar to copy the deed of the complainant correctly cannot be said to be an innocent mistake, as failure to do so cannot be accounted for upon any other hypothesis than incompetency or gross carelessness."

A parish recorder was held liable, in Baker v. Lee, 49 La. Ann. 874, 21 So. 588, for his omission to record an act of sale by a sheriff in a partition action, the omission resulting in enabling the purchasers at the sheriff's sale to create mortgages on the property which defeated a mortgage right reserved by the judgment in the partition suit.

In Reeder v. State, 98 Ind. 114, a county recorder was held liable to one injured by reason of a certain mortgage record not appearing on the general indexes in the recorder's office. It appeared that the mortgage was indexed in the volume in which it was recorded, but that conveyances were not put upon the general index until the particular volume was completed. This method of indexing was held not to comply with a statute making it the duty of the recorder to keep up the general indexes "as deeds and mortgages shall from time to time be recorded," and a judgment against the recorder and his sureties for the amount of the damages caused by the delay was affirmed.

In State ex rel. Lowry v. Davis, 96 Ind. 539, a county recorder was held liable on his official bond for an error in recording a certain deed, whereby a covenant on the part of the grantee to assume the payment of "five hundred dollars" was recorded to read "two hundred dollars," to the injury of the grantor in the deed in question.

In Hunter v. Windsor, 24 Vt. 327, upon a general demurrer, it was held that the defendant would be liable for the failure of its town clerk, whose duty it was to record transfers of property and index the same, to index a certain mortgage, with resulting damage to the plaintiff if he purchased the property in question relying on his examination of the index as showing no encumbrance.

Upon the same state of facts in an action against the town clerk and the towns themselves, it was held that there could be no recovery for the clerk's failure to index the mortgage in question, where it appeared that the plaintiff had made no examination of the records, and so could not have been misled on account of the absence of the mortgage from the index. Lyman v. Edgerton, 29 Vt. 305, 70 Am. Dec. 415.

Although no statute expressly required

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holder of the Advance Thresher Company mortgage foreclosed the same by action which resulted in a judgment decreeing that there was due thereon the sum of $492.30, and directing a sale of the premises to satisfy such sum. Plaintiff Rising appeared as an intervener in such foreclosure proceedings, but, failing in his defense, he thereafter was required to and did pay, to protect his title, the sum aforesaid, which is one of the items of damage claimed to have been suffered by him by reason of defendant's said negligence. At the conclusion of the trial both parties moved for a directed verdict, whereupon the learned trial court excused the jury, and thereafter findings of fact and conclusions of law were made and judgment ordered in favor of the plaintiff F. C. Rising and against the defendant for $492.30, with interest, together with the costs and disbursements of the action. A motion for a new trial was thereafter made and denied, and this appeal is both from the judgment and order aforesaid.

Among other things, appellant contends in effect that plaintiff was himself guilty of contributory negligence barring a recovery, because he neglected to make a proper and diligent search of the records, and that, if he had done so, he would have discovered the Advance Thresher Company mortgage. It is a conceded fact that this mortgage was duly noted both in the reception book and the grantor and grantee index, and that the same was recorded in mortgage book 18 on page 445, but was not noted in the numerical index, and that plaintiff Rising merely examined the reception book and the latter index. It is no doubt true that plaintiff, by searching a little farther back in the reception book, or by examining the grantor and grantee index, would have discovered such mortgage, but we think he was not bound at his peril to do so. The law required defendant to keep a numerical or tract index, in which should be noted opposite the description of each tract the volume and page where each mortgage or other instrument affecting the same is recorded, and the plaintiff had a right to assume that defendant had performed his duty in this regard. While it is true that such notation could not be made until after the instrument was recorded, or rather until its recordation is commenced, for the reason, as contended by appellant's counsel, that the officer, until such time, does not know the page upon which the record commences, still the undisputed evidence discloses that this mortgage was actually recorded over two months prior to the date plaintiff made the examination aforesaid, and we think it must be held as a matter of law that defendant was negligent in failing

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satisfactions of mortgages to be recorded in the mortgage record, or in any other particular record, yet the court said, in Mechanics' Bldg. Asso. v. Whitacre, 92 Ind. 547, that it must be held to be the intention of the law that such releases should be recorded in the mortgage record, and the recorder was held liable in this case for recording a release upon the record of the wrong mortgage, to the injury of one who relied on the entry.

For neglect of duty to index deeds and mortgages, a right of action lies for nominal damages, and also for such actual damages as proximately result from the wrong. Norton v. Kumpe, supra.

A recorder is not liable for more than nominal damages for a mistake in recording a conveyance so that a certain covenant reads "two hundred dollars" instead of "five hundred dollars," unless the plaintiff proves that he cannot collect the full amount from the party actually liable. State ex rel. Lowery v. Davis, 117 Ind. 307, 20 N. E. 159.

But a recovery may not be had upon the official bond of a recorder of deeds for failure to index a mortgage in a certain book, where there was more than one index for such purpose, and the statute only required the keeping of a complete index as a safe and sure reference to any deed, mortgage, or other instrument recorded, and the mortgage in question was properly entered in the book used for indexing all mortgages by themselves. Temple v. People, 6 Ill. App. 378.

In the absence of statutory provision requiring a recorder to enter in the index of mortgages the satisfaction of the mortgage or the date of the satisfaction, such an entry, if made, can only be regarded as the private memorandum of the recorder, and not as a record upon which anyone has the right to rely, or for a mistake in which the recorder is liable to the person injured. Mechanics' Bldg. Asso. v. Whitacre, supra.

In Maxwell v. Stuart, 99 Tenn. 409, 42 S. W. 34, under a statute which made any wilful violation of the requirements as to indexing deeds, mortgages, etc., a misdemeanor, and made the official and his sureties civilly liable for such violation, it was held that if a registrar of deeds, in a bona fide attempt to comply with the law, makes a mistake in indexing, which is simply one of judgment on his part and not a wilful neglect of duty, he and his sureties should not be held liable therefor. The court, however, qualified this holding by saying that it was not intended to hold that a registrar or clerk might be so negligent as not to prepare an index with reasonable care, and then escape liability because a wilful purpose to injure could not be proved; that if his negligence was gross and inexcusable, and with full knowledge that he was negligent in his duty, it would be presumed that his act was done wilfully.

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to note such instrument upon the numerical index within such time after the same was recorded. Wisconsin has a statute very similar to the statute of this state regarding the records, including indexes, to be kept by the registrar of deeds, and the case of Johnson v. Brice, 102 Wis. 575, 78 N. W. 1086, we think fully sustains us in these views. In that case the plaintiff relied solely upon the tract index, and it was there expressly held that plaintiff had a right to rely on such index, and his recovery was sustained upon the theory of defendant's negligence in failing to note a certain mortgage in such index. We think the statute requiring such numerical index to be kept clearly contemplates that immediately, or at least within a reasonable time after each instrument is recorded, it shall be noted on such index. The performance of such duty requires but a brief period of time, and we are agreed that, under the facts in the case at bar, defendant was unquestionably guilty of actionable negligence *per se* in failing to note this mortgage upon said index prior to December 5, 1901.

Appellant's counsel call attention to the fact that, in the Wisconsin case above cited, the action was based upon an express statute fixing liability; but it is clear that, in the absence of such a statute, there is a common-law liability on defendant's part to respond in damages to any person who has been injured as the proximate result of his negligent performance of official duty. The registrar of deeds is a ministerial officer, and as such is answerable in damages for nonfeasance, misfeasance, or malfeasance. As stated in 23 Am. & Eng. Enc. Law, 2d ed. p. 377: "He is liable in a civil action for a failure or refusal to perform the duties of his office, or for their negligent or illegal performance." See also the numerous cases cited therein. To the same effect, see Throop, Pub. Off. § 743; also, State v. Ruth, 9 S. D. 84, 68 N. W. 189, wherein it was held that "an officer who, without legal excuse, fails to perform a ministerial duty, is liable for the proximate results of his failure to any person to whom he owes performance of such duty." That such is the law seems to us too plain for serious debate, and we pass this point without further comment.

This brings us to a consideration of appellant's exceptions to certain findings of the trial court. It is asserted that finding No. 8, in so far as it finds that plaintiff Rising relied upon the numerical index, has no support in the evidence, and that finding No. 14, to the effect that Julia Solvey, the mortgagor and plaintiff's grantor, was insolvent, is likewise without support in the evidence. The case was tried upon the theory, and it is in effect conceded, that, if either of these contentions is correct, a reversal must follow, as both of such findings are essential to plaintiff's recovery. If plaintiff did not rely, in purchasing said property, upon the numerical index, or if he was not damaged in the eye of the law, because of the fact that Julia Solvey was solvent and able to respond in damages for the breach of the covenant in her deed against encumbrances other than those mentioned, or financially able to pay the note secured by such mortgage, then plaintiff has no cause of action against defendant, at least for anything other than nominal damages. We have examined the record carefully, and failed to find any evidence to the effect that plaintiff, in purchasing this land, relied wholly upon the numerical index with reference to existing encumbrances. It is true plaintiff testified that, before purchasing the land, he examined the numerical index, and also the reception book, and failed to find said mortgage noted upon either, and that he had no knowledge of the existence of such mortgage. For all that appears from the record, plaintiff may have relied as much or more upon the covenant in his grantor's deed as upon the numerical index in question. Conceding, however, that the evidence upon this issue was sufficient to go to the jury, and hence the finding of the court will not be disturbed, we are entirely clear that the evidence is wholly insufficient to sustain the finding that Julia Solvey was insolvent. The only testimony upon this point is that of the witness Stewart, who testified: "I am acquainted with Julia Solvey. I have known her ever since I have been in the county, till she left. She has gone to Canada. She is not a resident of this county or state at the present time, and has no property here. I have been acquainted for sometime with her business affairs, and have had collections against her. I think I returned them to the M. M. Osborne Company. I was not able to collect anything on them. From my knowledge as to the state of her financial affairs and these collections, I would state that Julia Solvey is at this time insolvent." The above testimony was given at the trial which commenced on November 22, 1906, whereas the transaction out of which plaintiff's cause of action arises took place in the early part of December, 1901, nearly five years prior thereto. How, then, can it be argued that the foregoing testimony in any manner tends to prove that Julia Solvey in December, 1901, and for a long time thereafter, was not perfectly solvent? But such testimony is wholly insufficient to prove her insolvency, for another reason. It purports to give the mere opinion and conclusion of the witness without stating any facts as a basis

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therefor, and hence is entitled to no probative weight. The fact that the witness had collections against her, and in favor of the M. M. Osborne Company, which he was unable to collect, tends to prove nothing. She may have declined payment of the same for perfectly valid reasons. He does not swear that these claims were reduced to judgment, and execution was issued and returned unsatisfied, nor does he state what knowledge, if any, he had relative to the assets and liabilities of Julia Solvey. For all that his testimony discloses, she may not have owed a dollar to anyone, and she may have owned property worth millions of dollars. Moreover, the testimony of this witness fails to state when Julia Solvey went to Canada or when she ceased to own property in Benson county or in North Dakota. It may be from anything that appears in his testimony, that she continued to reside and to own property here for several years after the plaintiff purchased said property, and after he acquired knowledge of the existence of such mortgage. As before stated, and for the reasons above stated, we are convinced that plaintiff signally failed to establish the fact of Julia Solvey's financial inability to respond in damages to plaintiff for the breach of her covenant aforesaid, and proof of such fact was essential to plaintiff's recovery. As to the proper method of proving insolvency, see Abbott, Trial Ev. 2d ed. 777–779.

Entertaining these views, it follows that the judgment and order appealed from must be reversed, and it is so ordered.

All concur except Morgan, Ch. J., not participating.

ILLINOIS SUPREME COURT.

JOHN J. COWDEN et al., Appts.,
v.
TRUSTEES OF SCHOOLS et al

(235 Ill. 604, 85 N. E. 924.)

Surety — correcting account.

Sureties of an officer who has succeeded himself cannot maintain a bill in equity, after his death, to correct his official reports so as to show that he did not in fact have on hand funds with which he charged himself at the time they became his sureties, and thereby relieve themselves from liability for a shortage in his accounts.

(October 26, 1908.)

APPEAL by complainants from a judgment of the Appellate Court, Third District, affirming a decree of the Circuit Court for McLean County in defendants' favor in a suit to correct the accounts of plaintiffs' principal and enjoin a suit on his official bond. Affirmed.

The facts are stated in the opinion.

Messrs. **Livingston & Bach** for appellants.

Mr. **Jacob P. Lindley** for appellees.

Vickers, J., delivered the opinion of the court:

Appellants, who were sureties on the official bond of R. S. McIntyre as township treasurer, filed a bill in the circuit court of McLean county for the purpose of correcting certain official reports made by the township treasurer on June 30, 1903, 1904, 1905, and 1906, and to enjoin a suit at law on the official bond until this cause is determined. The circuit court sustained a demurrer interposed by the trustees of schools to the

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Case Note. — Liability of sureties on bond of public officer for default of principal during prior term.

There can be no doubt of the general proposition of law that, in the absence of stipulations in the bond of a public officer making it retrospective, or of estoppel by reason of the principal's report or statement for the prior term, there can be no liability on the bond for default of the principal which occurred prior to the execution of the bond. Farrar v. United States, 5 Pet. 373, 8 L. ed. 159; United States v. Boyd, 15 Pet. 187, 10 L. ed. 706; United States v. Linn, 1 How. 104, 11 L. ed. 64; Jones v. United States, 7 How. 681, 12 L. ed. 870; Postmaster General v. Norvell, Gilpin, 106, Fed. Cas. No. 11,310; Myers v. United States, 1 McLean, 493, Fed. Cas. No. 9,996; United States v. Van Steinberg, 77 Fed. 860; Dumas v. Patterson, 9 Ala. 484; McPhillips v. McGrath, 117 Ala. 549, 23 So. 721; People v. Hammond, 109 Cal. 384, 42 Pac. 36; United States v. Dudley, 21 D. C. 337; Coons v. People, 76 Ill. 385; Stern v. People, 96 Ill. 475; Potter v. Board of Trustees, 11 Ill. App. 280; Bogardus v. People, 52 Ill. App. 179; Rogers v. State, 99 Ind. 218; Mahaska County v. Ingalls, 16 Iowa, 81; Bessinger v. Dickerson, 20 Iowa, 260; Thompson v. Dickerson, 22 Iowa, 360; Independent School Dist. v. McDonald, 39 Iowa, 564; Colyer v. Higgins, 1 Duv. 6, 85 Am. Dec. 601; Newman v. Metcalfe County Ct. 4 Bush, 67; Paducah v. Cully, 9 Bush, 323; Jones v. Gallatin County, 78 Ky. 491; Rochester v. Randall, 105 Mass. 295, 7 Am Rep. 519; Egremont v. Benjamin, 125 Mass. 15; Paw Paw Twp. v. Eggleston, 25 Mich. 36; State use of Pace v. McCormack, 50 Mo. 568; State ex rel. Douglas County v. Alsup, 91 Mo. 172, 4 S. W. 31; State ex rel. Chatham Nat. Bank v. Finn, 98 Mo. 532, 14 Am. St. Rep. 654, 11 S. W. 994; State ex rel. Knapp v. Finn, 23 Mo. App. 290; Missoula County v. McCormick, 4 Mont. 115, 5 Pac. 287; Warren County v. Wilson, 16 N. J. L.

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bill, and, appellants having elected to stand by their bill, the same was dismissed for want of equity. That decree has been affirmed by the appellate court for the third district. By their further appeal appellants bring the case to this court for review.

The facts averred in the bill show that McIntyre was appointed township treasurer in 1880 and every two years thereafter, and that he held the office continuously until December 5, 1906, when he died. The bond upon which appellants were sureties covered the term from September 25, 1903, until September 25, 1905. The bill alleges that by his report made June 30, 1903, the treasurer showed cash on hand $2,391.97, and notes, bonds, etc., on hand $4,840; and on June 30, 1904, the report showed cash on hand $2,166.97, notes $3,450, personal notes $665, and distributable funds $41.25. After the death of McIntyre the trustees of schools demanded $7,647.94 as the balance due from the administrator of McIntyre, who turned over only $1,210.93, leaving a balance unpaid of $6,437.01. Appellants charge in their bill that this balance was misappropriated by McIntyre prior to September 25, 1903, and claim that they should not be held liable for any defaults except for such as occurred during the term during which appellants were sureties on his bond.

The questions presented by this appeal have been determined by this court adverse-

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110; Patterson v. Freehold Twp. 38 N. J. L. 255; State v. Sooy, 30 N. J. L. 539; Hoboken v. Kamena, 41 N. J. L. 435; Bissell v. Saxton, 77 N. Y. 191; Board of Education v. Fonda, 77 N. Y. 350; Poole v. Cox, 31 N. C. (9 Ired. L.) 69, 49 Am. Dec. 410; State ex rel. Cofield v. McNeill, 74 N. C. 535; Cox v. Hill, 5 Lea, 146; State use of Marshall County v. Orr, 12 Lea, 725; State v. Polk, 14 Lea, 1; Gray v. State, 95 Tenn. 317, 32 S. W. 201.

There are some cases, however, which, while admitting that the general rule of law is as above stated, nevertheless, like COWDEN v. TRUSTEES OF SCHOOLS, avoid such rule by holding that, where an officer is re-elected and gives a new bond, his sureties are concluded by their principal's official report made at the conclusion of his former term, showing a balance on hand, so that, even if he had converted such balance before such bond was given, the sureties thereon are nevertheless liable.

Thus, in Baker v. Preston, Gilmer (Va.) 235, it was held that the books kept by a state treasurer who had been re-elected from year to year for several years were conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and the sureties on the bond given for his last year, so as to charge them with the balance shown on his books at the commencement of his last term as if such balance were actually on hand. But this conclusion was vigorously combatted by one of the judges in a dissenting opinion, and was criticized in Henrico Justices ex rel. Craddock v. Turner, 6 Leigh, 116, and in State v. Rhoades, 6 Nev. 352,—cases not otherwise in point in this note.

And, in Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987, 7 N. W. 155, it was held that the sureties upon the bond of a public officer were concluded by the reports and settlements made by him in compliance with statute; and that, if such reports and settlements showed a balance in the officer's hands at the time the bond was executed, the sureties thereon would be liable for the misappropriation of such money though it had actually occurred before the bond was executed. The court added, however, that this rule must be understood as not precluding the officer and his sureties from showing in a proper case that there were mistakes in his books and settlements.

Hence, under a statute governing the reports of certain public officers and requiring that the bonds of such officers when re-elected shall not be approved until they have produced and fully accounted for the funds and property that have come into their hands, it was held in Webster County v. Hutchinson, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534, that if a county treasurer, upon making his report to the supervisors, as required by law, did not produce the money with which he charged himself in such report, and the board of supervisors, regardless of such failure to produce such money, indorsed on his new bond that he had fully accounted for and produced all the funds with which he was chargeable as shown by his balance sheet, his sureties were not estopped, by the representation of the treasurer in such settlement, from showing in their own exoneration that the treasurer had in fact failed to produce the funds with which he was chargeable, and that the default of their principal actually occurred prior to such settlement and prior to the giving of the bond on which they were sureties.

So, in Independent School Dist. v. Hubbard, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 241, the case just cited was approved, though it was further held that if a settlement was made and all the funds and property with which the officer was charged were actually produced as required by law, such settlement, in the absence of fraud or mistake, was conclusive upon the sureties.

And the conclusion arrived at in COWDEN v. TRUSTEES OF SCHOOLS is supported by the following Illinois cases cited therein: Morley v. Metamora, 78 Ill. 394, 20 Am. Rep. 266; Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60; Cawley v. People, 95 Ill. 249; Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182; Fogarty v. Ream, 100 Ill. 366; Longan v. Taylor, 130 Ill. 412, 22 N. E. 745.

The great weight of authority, however, seems to be opposed to the rule laid down in

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ly to appellants' contention. In the case of Morley v. Metamora, 78 Ill. 394, 20 Am. Rep. 266, the same contention was made that is now presented by appellants. In that case, as in this, the officer was his own successor, and his sureties sought to escape liability on the ground here interposed. In that case it was said: "It is not made to appear very clearly that whatever default occurred took place in the first year the supervisor was in office; but, conceding that *fact*, we do not think it relieves the sureties *on* the bond upon which this action is brought from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. That report was approved, and we must presume it was true. . . . In contemplation of law the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it." That case has been reaffirmed in Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60, and in Longan v. Taylor, 130 Ill. 412, 22 N. E. 745. In the case last above cited the officer whose bond was in suit was a township school treasurer, and in that case it was held that the bondsmen of such officer were concluded by the reports made by their principal, and were estopped from showing that such reports were untrue.

Conceding the law to be as laid down in the foregoing cases, appellants contend that

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the COWDEN CASE. Thus, in Ohning v. Evansville, 66 Ind. 59, specifically overruling State ex rel. Vincennes Twp. v. Grammer, 29 Ind. 530, it was held that entries made by a city treasurer in his books, showing the amount of funds belonging to the city on hand at the conclusion of a preceding and the beginning of a new term, were not conclusive upon the sureties in the bond given by him at the commencement of his new term. And they were accordingly permitted to show that he had misappropriated such funds in his former term.

And, in Detroit v. Weber, 29 Mich. 24, it was held that the sureties upon the bond of a re-elected officer were not concluded by false entries in his books made to assist in forcing a balance at the close of a preceding term. Judge Campbell, however, dissented strongly from this conclusion.

So, in Van Sickel v. Buffalo County, 13 Neb. 103, 42 Am. Rep. 753, 13 N. W. 19, it was held that the surety on the bond of a re-elected treasurer was not estopped from showing the incorrectness of his principal's voluntary official report as to the amount of money in his hands at the commencement of his last term.

And, in Salazar v. Territory, 8 N. M. 1, 41 Pac. 531, it was held that the sureties upon the bond of a county treasurer, given at the beginning of his second term, were not estopped, by the report of the treasurer as to funds in his hands at the close of his first term,—which report was made during the second term, after the filing of the second bond, and was approved by the county commissioners,—from showing that the default occurred during his first term.

And this rule finds support, also, in Goodwine v. State, 81 Ind. 109; Bissell v. Saxton, 66 N. Y. 55; Kellum v. Clark, 97 N. Y. 590; and Vivian v. Otis, 24 Wis. 518, 1 Am. Rep. 199.

The conclusion reached in the COWDEN CASE would seem also to be opposed by the following cases, in which it was held that the reports or settlements of a public officer, showing funds in his hands at the time the bond was given, are only prima facie evidence against the sureties, and that, if they can show that such funds were in fact misappropriated by the officer before their bond was given, they are not liable therefor; United States v. Irving, 1 How. 250, 11 L. ed. 120; United States v. Boyd, 5 How. 29, 12 L. ed. 36; Bruce v. United States, 17 How. 437, 15 L. ed. 129; United States v. Stone, 106 U. S. 525, 27 L. ed. 163, 1 Sup. Ct. Rep. 287; United States v. Honsman, 17 C. C. A. 283, 44 U. S. App. 171, 70 Fed. 581; Townsend v. Everett, 4 Ala. 607; State v. Newton, 33 Ark. 276; Mann v. Yazoo City, 31 Miss. 574; State ex rel. Rutledge v. Holman, 93 Mo. App. 611, 67 S. W. 747; State ex rel. Scott v. Greer, 101 Mo. App. 669, 74 S. W. 881; Com. v. Reitzel, 9 Watts & S. 109; Anderson County v. Hays, 99 Tenn. 542, 42 S. W. 266.

In the following cases it was held that where an officer served for more than one term, and it was afterwards discovered that he was in default, it would be presumed, in the absence of evidence to the contrary, that this default took place during his last term, and that, accordingly, the sureties on his last official bond would be liable therefor: United States v. Earhart, 4 Sawy. 245, Fed. Cas. No. 15,018; Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833; Kagay v. Trustees of Schools, 68 Ill. 75; Pape v. People, 19 Ill. App. 24; Fox Dist. Twp. v. McCord, 54 Iowa, 346, 6 N. W. 536; Bernhard v. Wyandotte, 33 Kan. 465, 6 Pac. 617; Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; Clark v. Douglas, 58 Neb. 571, 79 N. W. 158; Kelly v. State, 25 Ohio St. 567; Vaughan v. Evans, 1 Hill, Eq. 414.

In the following cases it was held that, where an officer had served for more than one term, and the sureties on the last term were sued for his default, the burden of proof was upon them to show that the default occurred before their bond was given: Weakley v. Cherry Twp. 62 Kan. 867, 63 Pac. 433; Readfield v. Shaver, 50 Me. 36, 79 Am. Dec. 592; Pine County v. Willard, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 71; Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105; State v. Bobleter, 83 Minn. 479, 86 N. W. 461; Hetten v. Lane, 43 Tex. 279; Parsons v. Miller, 46 W. Va. 334, 32 S. E. 1017.

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a different rule should apply where sureties file a bill in equity for relief from the false and fraudulent reports made by the officer. This contention is fully met and determined adversely to appellants' view in the case of Fogarty v. Ream, 100 Ill. 366. That was a bill in equity filed by sureties for the purpose of being relieved from the payment of money where the default had occurred in the previous terms of the guardian. In disposing of that question this court, on page 377 of 100 Ill., said: "Had it appeared Lynch still had the trust funds on hand, or other funds with which to replace the same, when complainant became his surety on his official bond, his liability for any waste of such funds thereafter would not be contested. It is sought, however, to prove the guardian did not have in his possession or control the trust funds at the time complainant became his surety, but had previously wasted the same, and was then, and has ever since continued to be, insolvent. This the policy of the law will not permit him to do. It would open a wide door for frauds in such matters. Here the guardian elects to charge himself with the full amount of a claim in his favor for funds belonging to his ward. It is neither a false nor a fictitious claim. The money is absolutely due from the guardian to his ward, and neither the guardian nor his surety will be permitted to deny he has the money admitted to be in his hands. Any other rule would be a most unsafe one and would lead to results the law will not tolerate. No case exactly analogous with the one at bar has before arisen in this state, but the same principle has been applied to sureties of defaulting municipal officers. Morley v. Metamora, supra; Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182; Cawley v. People, 95 Ill. 249. . . . Roper v. Sangamon Lodge, supra."

Finding no error in this record, the judgment of the Appellate Court for the Third District is affirmed.

KANSAS SUPREME COURT.

A. M. HORNER, Plff. in Err.,
v.
THEODORE SCHINSTOCK.

(— Kan. —, 101 Pac. 996.)

Judgment — collateral attack — perjury.

A party against whom a judgment was obtained by the perjury of the adverse party committed in testifying on the trial of the action wherein the judgment was rendered cannot, while the judgment remains in force, maintain an action against such adverse party for damages alleged to have been suffered because of such perjury.

(May 8, 1909.)

ERROR to the District Court for Kingman County to review a judgment sustaining a demurrer to the complaint in an action brought to recover damages alleged to have been caused by the giving of testimony wilfully and corruptly false. Affirmed.

The facts are stated in the opinion.

Mr. C. W. Fairchild for plaintiff in error.

Messrs. George L. Hay and L. F. Walter, for defendant in error:

The action cannot be entertained while the former judgment remains free from action or proceedings impairing its original force.

Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469; Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140; Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; Peck v. Woodbridge, 3 Day, 30; Demerit v. Lyford, 27 N. H. 541; Lyford v. Demerritt, 32 N. H. 234; Cottle v. Cole, 20 Iowa, 481; Laithe v. Mc-

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Case Note. — Judgment in original action as bar to action by defeated party against the adverse party for perjury in procuring it.

This note is confined to cases in which an action was brought for damages against one by whose alleged perjured testimony upon a former trial a judgment was secured against the complainant in the second action. Cases involving merely the question whether an action for damages resulting from perjured testimony may be maintained have been excluded.

As to perjury as ground for relief against judgment, see exhaustive note to Graves v. Graves, 10 L.R.A.(N.S.) 216.

The distinction between the cases included in the earlier note and those discussed in the present note is that, while in the one case the plaintiff claims that the judgment is void because of the false testimony and seeks relief therefrom, in the cases under discussion in this note, the plaintiff admits that the judgment is valid, or at least enforceable against him, and he seeks to recover damages for the injuries caused him by such judgment.

The few reported cases upon this point are in harmony with HORNER v. SCHINSTOCK in holding that such an action will not lie while the former judgment stands. In addition to the several cases cited and quoted in that opinion, a few others may be noted.

Thus, in McCafferty v. O'Brien, 1 Cin. Sup. Ct. Rep. 64, it was held that an action of this character could not be maintained. The

Headnote by BENSON, J.
23 L.R.A.(N.S.)

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Donald, 7 Kan. 254, 12 Kan. 340; Bleakley v. Barclay, 75 Kan. 470, 10 L.R.A.(N.S.) 230, 89 Pac. 906.

Benson, J., delivered the opinion of the court:

The plaintiff alleged that in a former action between the same parties the defendant had given testimony which was wilfully and corruptly false, and had thereby obtained a judgment against the plaintiff, causing damages for which he prayed judgment. A demurrer to this petition was sustained, and of this ruling the plaintiff complains.

It was held in Laithe v. McDonald, 12 Kan. 340, that where a party had obtained a judgment by wilful and corrupt perjury committed in the absence of the other party, who had exercised due diligence, the judgment should be vacated in an action brought for that purpose under § 568 of the Civil Code, which provides that the district courts may vacate or modify their own judgments "for fraud practised by the successful party in obtaining the judgment or order." Gen. Stat. 1901, § 5054. The case just referred to is cited by the plaintiff as sustaining his contention, but it does not. That was a direct attack upon the judgment to set it aside. By this action the plaintiff treats the judgment as valid, and seeks to recover damages suffered from it. Such an action cannot be maintained. It is the judgment that causes the injury, and it is legally impossible that the losing party to a final adjudication should have an action against his successful adversary to recoup in damages for what he was thus adjudged to render. A judgment, unless set aside or reversed, marks the end of the controversy, and not a mere pause in the litigation. It is possible that a miscarriage of justice may occur through perjury in securing a judgment. It is also possible that damages, if they could be awarded in a new action, might be recovered through the perjury of the other party, and so each succeeding adjudication might be re-examined in a fresh action until the parties were exhausted. It will not do to open the door to such general mischief, in order to afford relief against the supposed hardships of a particular case. While decisions upon the precise situation are not numerous, they are persuasive.

In an action commenced in New York to recover damages because of a judgment obtained by the alleged perjury of the defendant on a trial between the same parties in Connecticut, it was said in the opinion of Justice Spencer, after stating the evils that would result from the precedent if recovery were permitted: "The old rule is the safest, that the parties must come prepared at the trial to vindicate themselves, and to detect the falsity of the testimony brought against them, if it be untrue; or they must take their chance of obtaining a new trial by showing that they were surprised, and that they have detected the imposition." Smith v. Lewis, 3 Johns. 157, 167, 168, 3 Am. Dec. 469. In a concurring opinion in the same case Chief Justice Kent observed: "It would be against public policy and convenience; it would be productive of endless litigation, and it would be contrary to established precedent —to allow the losing party to try the cause over again in a counter suit because he was not prepared to meet his adversary at the trial of the first suit. The general law of the land, and the rules of every superior court of competent jurisdiction, sufficiently provide against forcing a party to trial without giving him a due opportunity to prepare for his defense, and cases of surprise and injustice are generally redressed by the discretionary power of the courts in setting aside verdicts." In addition to the power to set aside verdicts upon motion, referred to in the foregoing quotation, our Code (Gen. Stat. 1901, § 5056) provides

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court said that this was not an action for a new trial, or for the equitable interference of the court to prevent injustice, but a suit for damages growing out of an alleged fraud committed by the defendant on the plaintiff; but, as the judgment rendered was a final judgment, it could not be collaterally impeached.

To the same effect was the decision in Bostwick v. Lewis, 2 Day, 447, which was an action by the plaintiff to recover damages from the defendant for suborning a witness in a prior action between the two parties.

And, in Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140, which was an action against a witness for false testimony upon a former trial, it was held that the action could not be maintained without virtually putting it in the power of every suitor to re-examine every suit in which he is cast, and to try the witnesses for perjury by instituting against them a civil suit.

So, in Eyres v. Sedgewicke, Cro. Jac. 601, which was an action of a similar character, the court said that there was no precedent for such an action, and that was reason enough why it should not be sustained.

So, also, in Damport v. Sympson, Cro. Eliz. 520, which was an action on the case against the defendant for falsely swearing in an action of trespass against himself, whereby the plaintiff recovered less damages than he would but for the alleged perjury, it was held that the action was not maintainable, and the court said, among other reasons, "If this might be suffered, every witness would be drawn in question."

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that a new action may be maintained for that purpose. The plaintiff was not, therefore, denied a remedy by due course of law, as he contends.

This question was presented in the supreme court of Maine in an early case. The plaintiff alleged that the defendant, in a former action against him, had recovered by means of false testimony, and sued for damages caused by the judgment obtained through such perjury. The court said: "But the judgment against the plaintiff, so long as it remains in force, must be considered as true and just. He cannot be permitted to aver the falsity of that judgment as the ground for the recovery of damages. It constitutes in itself a clear and unequivocal denial of his allegations. He says that, by the fraud and conspiracy of the defendants, he has lost the land, but the judgment imports that it was properly rendered in the ordinary course of judicial proceedings.... The plaintiff himself presents the judgment as the cause of his injury and the basis of his claim against all of the defendants. He does not seek to pass by it as *res inter alios acta*, but in substance admits it to be binding upon him, though he contends it was unjustly obtained, and alleges that his damages have been caused by it." Dunlap v. Glidden, 31 Me. 435, 437, 52 Am. Dec. 625. The same result was reached in Wisconsin, and was stated in a clear and forcible opinion by Whiton, J., wherein the principle was held applicable to the alleged perjury of a party in securing an adjudication by the officers of the Federal land district, whereby the plaintiff had lost a tract of land. A demurrer to the declaration was sustained, and, while the general proposition that damages caused through prejury were recoverable in a proper case was conceded, still it was held that the gist of that action was not the perjury, but the unjust recovery consequent upon it. It was said in the opinion: "The reason why the suit cannot be maintained is not that the false statement was made on oath, but because it was testimony taken in the course of a judicial investigation before a tribunal clothed with authority to decide the matters in controversy between the parties, and was taken in relation to the matter decided. Should the judgment recovered in this suit be permitted to stand, the case would present this anomaly; that, while the land which was the subject of controversy between the parties would belong to the plaintiff in error, the reason for the recovery against him in this suit would be the injustice of the order or decree of the officers of the United States, by which it was awarded to him." Abbott v. Bahr, 3 Pinney (Wis.) 193, 195. A like decision was made in New Hampshire. A trustee, in the process of foreign attachment, had been discharged upon his oath alleged to have been false. It was held that an action on the case for damages consequent upon the discharge so obtained would not lie. It was said: "It is quite manifest that in this action the plaintiff seeks to try again the same question that was tried and decided in the former suit between the same parties. This, on well-settled principles, he cannot be permitted to do." Lyford v. Demerritt, 32 N. H. 234, 237.

In a case recently decided in this court an effort was made in habeas corpus proceedings to retry an issue that had been determined between the same parties by the judgment of a court of competent jurisdiction in another state. Mr. Justice Porter said: "All courts are likely to be deceived by perjured testimony, and to permit a defeated party to go to another court, foreign or domestic, and procure a retrial of the same issues on the ground that the successful party had fraudulently procured the former judgment upon false testimony, would make litigation endless, and judgments as unsubstantial as the stuff that dreams are made of." Bleakley v. Barclay, 75 Kan. 462, 470, 10 L.R.A.(N.S.) 230, 89 Pac. 906. While the issue presented in this case is not the same, the principle stated is quite applicable. 1 Freeman, Judgm. § 289; 1 Black, Judgm. § 296; Pico v. Cohn, 25 Am. St. Rep. 159, note p. 165 (91 Cal. 129, 13 L.R.A. 336, 25 Pac. 970, 27 Pac. 537). The fact that the judgment was rendered in the same court where this action was commenced cannot affect the application of the rule. If maintainable here, it could be brought in any court having jurisdiction wherein the defendant might be summoned.

Section 2307 of the General Statutes of 1901, cited as authority for this action, prevents the merger of the civil rights in a criminal prosecution for a felony, but it does not create a remedy where none existed before the prosecution was instituted.

The judgment is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

JAMES HARGIS et al., Appts.,
v.
W. G. BEGLEY et al.

(— Ky. —, 112 S. W. 602.)

Bond — bail — departure from state — liability.

1. Sureties on the bond of one under indictment for felony do not act at their peril

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in permitting him to leave the state on a visit, so as to be absolutely liable in case he is prevented from returning in time for his trial, because of an unavoidable accident to his person.

Same — casualty — gun-shot wound.

2. An accidental gun-shot wound which prevents one under an indictment for crime, who has left the state on a visit, from returning in time for trial, is within the operation of a statute allowing relief to his sureties for unavoidable casualty or misfortune preventing the principal from appearing and defending.

Same — nonappearance — excuse.

3. Sureties on the bond of one who, being under indictment for crime, did not appear for trial, may excuse their failure to appear at the term of court at which the case was called, by showing that they relied on a printed court calender which did not show the term at which the case was called, and that they were ignorant of the change from the calender as printed.

(September 29, 1908.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Leslie County in defendants' favor in a suit to enjoin the enforcement of a bail bond. Reversed.

The facts are stated in the opinion.

Messrs. **Cleon K. Calvert and J. J. C. Bach** for appellants.

Messrs. **Ira Fields and James H. Jeffries** for appellees.

Case Note.—Liability of bail where principal fails to appear for no fault of his own.

It is a well-established proposition of law that the sureties in a recognizance will not be liable thereunder for the failure of the principal to appear if such failure was caused by no fault of the principal. In accordance with this rule, if the principal is dead when the day for his appearance in court arrives, his sureties will be excused from liability on his bail bond. Co. Litt. 206a; Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; Pynes v. State, 45 Ala. 52; Ringeman v. State, 136 Ala. 131, 34 So. 351; State v. Cone, 32 Ga. 663; Russell v. State, 45 Ga. 9; Mather v. People, 12 Ill. 9; Piercy v. People, 10 Ill. App. 219; Woolfolk v. State, 10 Ind. 532; Bonner v. Com. 27 Ky. L. Rep. 652, 85 S. W. 1196; State v. Crane, 17 N. J. L. 191; State v. McNeal, 18 N. J. L. 333; State v. Traphagen, 45 N. J. L. 134; People v. Manning, 8 Cow. 297, 18 Am. Dec. 451; People v. Wissig, 7 Daly, 23; People v. Perlstein, 28 N. Y. S. R. 171, 7 N. Y. Supp. 662; Granberry v. Pool, 14 N. C. (3 Dev. L.) 155; Bank of Mt. Pleasant v. Pollock, 1 Ohio, 35.

Upon the same principle the sureties will not be liable where the principal subsequently appears and shows that his nonappearance on the day set in the recognizance was caused by his sickness. Chase v. People, 2 Colo. 481; Russell v. State, supra; Hopkins v. Com. 5 Ky. L. Rep. 419; Baker v. State, 21 Tex. App. 359, 17 S. W. 256; Strey v. State (Tex. Crim. App.) 27 S. W. 137.

And it would be a good defense on the part of the sureties if their principal's failure to appear was caused by his being confined to his bed by reason of injuries arising from his being thrown from a horse (People v. Tubbs, 37 N. Y. 586); or from his being disabled by wounds (Com. v. Craig, 6 Rand. (Va.) 732).

And, in McArdle v. McDaniel, 75 Ga. 270, judgment upon a forfeited recognizance was vacated upon the motion of the principal after he had been tried and acquitted upon a later appearance, where he showed that his absence at the first term was caused by his own sickness, and at the second by the sickness of his wife.

But, in Com. v. Hart, 17 Pa. Co. Ct. 148, the court refused to remit a forfeiture of bail merely because the failure of the principal to appear was caused by his being summoned by telegram out of the state to attend a sick wife, where it appeared that the witnesses for the commonwealth left the state and remained away, making it impossible to try the principal, though he appeared at a subsequent term.

In Com. v. Fleming, 15 Ky. L. Rep. 491, the sureties upon a recognizance were discharged from liability where it appeared that their principal, prior to the forfeiture of his bond, was tried upon a charge of lunacy and duly adjudged a lunatic, and ordered to be sent to an asylum, and, while being conducted to the asylum in the custody of an officer appointed by the court, escaped, and was at large when the bond was forfeited.

On the other hand, in Adler v. State, 35 Ark. 517, 37 Am. Rep. 48, it was held to be no defense, in a prosecution upon a bail bond, for the sureties to show that, at the time the principal was required to appear, he was insane, and had been taken out of the state and confined in an insane asylum in another state to be treated for his insanity,—upon the ground that the sureties had no right to permit him to be sent out of the state.

So, in Ringeman v. State, supra, it was held that the sureties were not released from their liability by the fact that their principal was so ill of consumption that it became necessary for the preservation of his life, for him to go to another state; that, at the time the forfeiture was taken, he was still suffering from such malady, and that a return at that time could not have been made without serious detriment to his health, or without imminent danger to his life. The court went on to say that his illness, however severe and critical, was not such an act of God, in legal contemplation,

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Nunn, J., delivered the opinion of the court:

Prior to October, 1906, one Doug Hays was indicted in the Leslie circuit court, charged with a felony, and his bail fixed at $500. Appellants, James Hargis, Ed. Callahan, and S. B. Stidham, executed the usual bond for the appearance of Doug Hays at the October term of the Leslie circuit court to answer the charge. He failed to attend, and there was an order made forfeiting his bail bond, and another bench warrant issued, and his bail fixed at $1,000, and summons was awarded against his sureties, appellants. At the February term, 1907, of the court, appellants failed to answer, and a judgment was rendered against them for the amount of the bond. This action was instituted by appellants to enjoin the collection of this judgment.

As reasons why appellants should not be compelled to pay this judgment, they presented the following: That they and Doug Hays resided in Breathitt county, about 45 miles from Hyden, in Leslie county, the place where the judgment was rendered; that, shortly after the bail bond was executed, Doug Hays went to the state of Minnesota on a visit to his brother, who resided there; that while there Doug Hays and his brother went on a hunting trip, and Doug Hays accidentally shot and wounded himself, and it was impossible for him to appear at the Leslie circuit court in October in fulfilment of the bond; that, after he became able to travel, he returned to Breathitt county, and

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as would relieve his sureties from the obligation of his bond.

And, in Bonner v. Com. 27 Ky. L. Rep. 652, 85 S. W. 1196, it was held that the fact that the principal was confined with a serious illness in the hospital, physically incapacitating him from appearing in accordance with his recognizance, did not release his bail. To quote from the opinion: "The bail will be bound until the accused is able to appear, and his failure to appear and surrender himself in answer to the indictment is a breach of the recognizance."

So, in Markham v. State, 33 Tex. Crim. Rep. 91, 25 S. W. 127, it was held, under the statute regulating recognizances, that, in pleading sickness of the principal as a defense to a scire facias on a forfeited bail bond, it must be shown that his failure to appear at court arose from no fault on his part, and that sickness should not be deemed a cause sufficient to exonerate the principal and his sureties, unless such principal appear before final judgment on the bail bond in answer to the accusation against him, or show sufficient cause for not so appearing.

And, in State v. Edwards, 4 Humph. 226, it was held that the fact that a principal was sick constituted no reason for his nonappearance in obedience to his recognizance, which would excuse his bail from surrendering him at a subsequent term.

In Piercy v. People 10 Ill. App. 219, it was held that a violent sickness which prevented the principal from being in court was not such an act of God as would, under the Criminal Code, exonerate the sureties and entitle them to a discharge. Here, however, it appeared that the principal was out of the state.

In Smith v. State, 17 Ga. 462, in accordance with the general rule enunciated at the beginning of this note, a final judgment upon a scire facias on a bail bond was set aside where it appeared that the principal's counsel, understanding that he had an agreement with the solicitor general that certain other cases were to be called up before his clients, had dismissed the defendant from attendance, and, upon the case being called and the solicitor general denying such agreement, he asked for ten or fifteen minutes' time to send for the principal.

And, in Mason v. People, 17 Ill. App. 331, it was held that a forfeiture of a recognizance should be set aside where it appeared that the failure of the principal to appear was caused by his being informed by his attorneys that the venue was changed, and that he need not attend the court in that county any more, and he was in the county to which he understood the venue had been changed when he learned that the forfeiture had been asked for, and he immediately started for the county in which he had given bail.

The same conclusion was reached in Rawlings v. State, 38 Neb. 590, 57 N. W. 286, where it was shown that another case preceded the case of the principal, and he was informed by his attorney that his case would not be reached until the afternoon of the next day, and he did not appear until the afternoon of the next day, when, owing to the failure of the one whose case was before his to appear, he found that his case had been called sooner than he expected and his recognizance forfeited.

But, in People v. Haggerty, 5 Daly, 532, the court refused to vacate a judgment on a forfeited recognizance, where the nonappearance of the principal was caused by his reliance upon a verbal agreement of his counsel and the district attorney to postpone the trial of his case or give him notice,—upon the ground that such stipulation could be enforced only when in writing.

So, in Wray v. People, 70 Ill. 664, it was held that where the principal in a recognizance failed to appear at the time required, in consequence of being bound to appear at the same time in a court in another state, this would afford a good cause for setting aside a forfeiture of his recognizance, if he, in good faith, surrendered himself as soon as he could after being released from attendance in the other court and in a reasonable time after the forfeiture.

Upon the same principle, if the governor of the state in which the recognizance was given surrenders the principal upon the

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executed another bail bond for the $1,000. It is made to appear that they failed to attend the Leslie circuit court, which began on the first Monday in February, 1907, for the reason that they did not know that there was a February term of that court; that they believed that the term began on the third Monday in March, 1907; that they relied upon the Bradley & Gilbert Company court calender for the year 1907, which fixed the *term* for the Leslie circuit court on the *third* Mondays in March, June, and Novem*ber*; that they did not know of the change fixing the terms of the Leslie circuit court to begin in February, May, and October. They filed with their pleadings the court calender of Bradley & Gilbert Company for the year 1907, and it substantiates their claim. The lower court concluded that, notwithstanding these alleged facts, which were not disputed, appellants had no cause of action.

Appellees' counsel contends that appellants, the sureties of Doug Hays, acted at their peril when they permitted him to leave the state to visit his brother, and it was no defense to the action to recover the amount of the bond that Hays was accidentally shot, and thereby prevented from appearing at the October term of the Leslie circuit court, and refers to the cases of Starr v. Com. 7 Dana, 243, Alguire v. Com. 3 B. Mon. 349, and Withrow v. Com. 1 Bush, 17, and other cases of similar import as sustaining their position. These cases are unlike the case at bar. The case in 7 Dana, 243, was one

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requisition of the governor of another state, this will discharge the sureties. Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; Adler v. State, 35 Ark. 517, 37 Am. Rep. 48; People v. Moore, 4 N. Y. Crim. Rep. 205; State v. Allen, 2 Humph. 258; State v. Adams, 3 Head, 260.

So, the sureties will be discharged if the principal, having given bond to appear before a United States court in one district, is, with the consent of that court, removed for trial under an indictment in another district. Re Beavers, 131 Fed. 366.

And the fact that the principal was arrested and imprisoned by military authorities will excuse a surety in a recognizance for the appearance of his principal to answer to an indictment. Belding v. State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26; Com. v. Rowland, 4 Met. (Ky.) 225; and Com. v. Webster, 1 Bush, 616.

In Com. v. Terry, 2 Duv. 383, it was held to be a sufficient defense to a scire facias on a forfeited recognizance that, on the day fixed for his appearance, the principal was a soldier in the Federal Army, at a remote distance from the court, and was refused a furlough to enable him to attend in discharge of his recognizance, which he would have done had he not been thus prevented without his fault and against his will.

So, the enforced military or naval service of a principal will be a sufficient excuse for his nonappearance in accordance with his recognizance, to discharge his sureties. Alford v. Irwin, 34 Ga. 25; McCluskey v. Brock, 34 Ga. 206; and Robertson v. Patterson, 7 East, 405.

The authorities differ as to whether or not the voluntary enlistment of a principal in the Army or Navy, whereby he was unable to appear according to the terms of a recognizance into which he had entered, would discharge the sureties. In the following cases this was held to be no defense: Winninger v. State, 23 Ind. 228; State v. Scott, 20 Iowa, 63; Sayward v. Conant, 11 Mass. 146; Harrington v. Dennie, 13 Mass. 93; Lamphire v. State, 73 N. H. 463, 62 Atl. 786, 6 A. & E. Ann. Cas. 615.

Upon the same principle it was held, in Huggins v. People, 39 Ill. 241, that, if an arrested soldier was surrendered or abandoned by the military to civil authority, he could not, by giving bail and voluntarily placing himself under the military jurisdiction, insist that his bail was discharged by the principle of *vis major*.

But, in Gingrich v. People, 34 Ill. 448, it was held that the fact that the principal, without the knowledge or consent of his sureties, enlisted in the military service of the United States, and that since his enlistment he had been with his regiment in another state, under the military authority and rule, and was not at any time at liberty to surrender himself; and his sureties were unable to arrest, take, or surrender him in satisfaction of his recognizance,—showed ground for a continuance of the proceeding by scire facias upon the principal's forfeited recognizance, but presented no good defense.

In People v. Cushney, 44 Barb. 118; People v. Cook, 30 How. Pr. 110; and McFarland v. Wilbur, 35 Vt. 342, the fact that the principal had enlisted in the service of the United States, and had continued to be under the control of such service, was held to be a good defense on the part of his sureties.

Upon the same principle it was held, in Com. v. Overby, 80 Ky. 208, 44 Am. Rep. 471, overruling Com. v. House, 13 Bush, 679, that the bail would be exonerated where it appeared that, upon the day following the execution of the bond, the principal was arrested by an officer of the United States and carried before a United States commissioner, and by him held to appear and answer at the next term thereafter of the United States circuit court, upon the same charge for which he had been required to appear and answer in the state court, and, failing to give bail, he was committed to jail, where he remained until he was indicted, tried, and convicted in the United States court for the offense, and sentenced to confinement in the penitentiary of another state.

So, in Woods v. State, 51 Tex. Crim. Rep. 595, 103 S. W. 895, and Caldwell v. Com.

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where an infant was defendant in the indictment, and he failed to appear to answer it; and the sureties on the bail bond defended upon the ground that the infant's mother had taken him out of the state and kept him away until after the bond was forfeited. The court adjudged that the defense was insufficient. The case in 3 B. Mon. 349, was where the defendant had not appeared because he was imprisoned by the state authorities in Louisville, Kentucky. This fact was pleaded as a defense to the forfeiture of the bail bond, and was held insufficient, because it was defectively pleaded. The case in 1 Bush, 17, was one where one Catlin, who was charged with murder in Marion county, Kentucky, was arrested and gave bond, and then went to the state of Indiana, where he was arrested and imprisoned for the violation of the law in that state. While thus imprisoned in the state of Indiana, his bail bond was forfeited for his nonappearance in the Marion circuit court, and the court held that his enforced absence in the state of Indiana at the time the forfeiture proceeding was had was not a defense to the forfeiture. In the last two cases referred to the defendant was prevented from attending court in compliance with the bail bond on account of wrongful acts committed by them. They were imprisoned for committing other crimes. When the sureties executed bond in the first case referred to they knew that the infant was in the charge of his mother, and, when they permitted her to take him from the state, they took the risk of her permitting him to return, or of his returning of his own will in spite of her objections. If it had been made to appear in those cases that the defendants had been prevented from appearing in answer to their recognizance, not on account of any wrongful act or dereliction on their part, but on account of unavoidable

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14 Gratt. 698, it was held to be a good defense to a scire facias upon a forfeited bail bond that, at the time set for his appearance, the principal was held in custody in another county, and that he subsequently appeared and answered to the charge against him.

And, in People v. Bartlett, 3 Hill, 570, it was held to be a good answer to an action on a recognizance that, intermediate to the date of the recognizance and the term of court therein mentioned, the principal was arrested and committed to jail in another county, where he was kept in confinement until after the day of appearance, and until he was convicted and sentenced to state's prison, where he had ever since remained.

On the other hand, in the following cases, imprisonment in another county of the same state was held not to be such a defense as would exonerate the sureties from liability on their principal's bond, upon the ground that it was within the power of the sureties to compel the principal to be produced in court: Brown v. People, 26 Ill. 28; Mix v. People, 26 Ill. 32; State v. Merrihew, 47 Iowa, 112, 29 Am. Rep. 464; Alguire v. Com. 3 B. Mon. 349.

And, in United States v. French, 1 Gall. 1, Fed. Cas. No. 15,165, the United States circuit court refused to discharge bail whose principal was confined in jail under the process of the court of the state, upon the ground that there was no physical or legal impossibility of producing the defendant, though it added that the circumstances of the case might furnish reasons for a respite of the recognizance until the next term. This same question arose in United States v. Stricker, 12 Blatchf. 389, Fed. Cas. No. 16,410, upon a motion to remit a penalty in a forfeiture of a recognizance, which motion was denied upon the ground that the question could be determined on the trial of the action which had been brought upon the forfeited recognizance.

Imprisonment of the principal in another state will not, as a general rule, discharge the sureties, if he fails to appear at the day set in his bond (Hall v. Com. 20 Ky. L. Rep. 99, 45 S. W. 458; State v. Horn, 70 Mo. 466, 35 Am. Rep. 437); upon the ground, in the following cases, that the principal was prevented from appearing by reason of his own voluntary act, which rendered him amenable to the criminal laws of another jurisdiction (United States v. Van Fossen, 1 Dill. 406, Fed. Cas. No. 16,607; Yarbrough, v. Com. 89 Ky. 151, 25 Am. St. Rep. 522, 12 S. W. 143; King v. State, 18 Neb. 375, 25 N. W. 519); or upon the ground expressed in the following cases, that the sureties were to blame in permitting him to leave the state (Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; Cain v. State, 55 Ala. 170; Withrow v. Com. 1 Bush, 17; Devine v. State, 5 Sneed, 623).

In Granberry v. Pool, 14 N. C. (3 Dev. L.) 155, it was held that imprisonment of the principal for debt would not release his sureties from liability, since the latter could always arrest the former by paying the debt.

Of course, the imprisonment of the principal after the bond had been declared forfeited would be no excuse for his nonappearance. People v. Nooney, 73 Hun, 566, 26 N. Y. Supp. 313.

Attention should be called to State v. Berry, 34 Ga. 516, in which the master of a slave, who had entered into a recognizance for the latter's apearance, was held to be discharged from his obligation by the abolition of slavery.

In Starr v. Com. 7 Dana, 243, which is set forth in HARGIS v. BEGLEY, the decision proceeded upon the ground that the mother could legally exercise no control over the infant principal against the rights of the bail, in whose custody the law deems the principal to be placed.

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accident or sickness, over which they had no control, the results would have been different. See Com. v. Terry, 2 Duv. 383; Bonner v. Com. 27 Ky. L. Rep. 652, 85 S. W. 1196.

The second proposition presented by appellees' counsel is that the judgment was rendered in February, 1907, and this action was not instituted to set aside the judgment until the 31st day of May of that year, and that one court had passed between the date of the judgment and the institution of this action, and the court was without power to vacate or modify it, except upon the grounds set out in § 518 of the Civil Code of Practice, which it is claimed are not presented in this proceeding. This contention of appellees' counsel is correct, except the last proposition, to the effect that appellants present no grounds for vacating or modifying the judgment under § 518, Civ. Code Prac. The 7th subdivision of that section is as follows: "For unavoidable casualty or misfortune, preventing the party from appearing or defending." Casualty is that which happens without design or without being foreseen If Hays was "accidentally shot," it was without design on his part; and if he was prevented from appearing at the Leslie circuit court by reason thereof it would be the same as if he had become seriously ill, and was thereby prevented from attending court. If Hays had been at his home in Breathitt county, and had been sick, and thereby prevented from attending the Leslie circuit court, it would not be contended that his sureties could not have successfully defended for his not appearing; and there is no reason why that defense would not avail them if his sickness had occurred to him while on a visit to his brother. It is true appellants, in their pleading, did not use the words, "that Hays was prevented from attending the Leslie circuit court by reason of an unavoidable casualty or misfortune;" but the facts stated by them, if true, show these facts.

We are of the opinion that the lower court erred in sustaining a demurrer to appellants' pleadings. The judgment is reversed and remanded for trial; and, if appellants' contentions are found to be true, the court will set aside the judgment, and render judgment according to the justice of the case, as provided in § 98, Civil Code Prac., which is as follows: "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond."

23 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

J. T. MOREHEAD, Appt.,
v.
CITIZENS' DEPOSIT BANK.

(— Ky. —, 113 S. W. 501.)

Note — collateral — surety — release.

1. One who signs a note which is to be held as collateral for that of another, with the understanding that he is to sustain the relation of surety to the latter note, will be discharged from liability by the extension of time to the principal debtor, without his knowledge, by a holder with notice of the facts.

Same — renewal — consideration.

2. The acceptance of interest in advance is sufficient consideration for the renewal of a note, to release a surety who does not consent thereto.

Estoppel — surety — recognition of liability.

3. The filing by the father, who is surety on his son's note, of a claim against the latter's bankrupt estate for a sum due him, and the collection of a *pro rata* thereon, and its deposit by his attorney in the bank holding the son's note, to be applied thereon under the mistaken belief that the father was still liable on the note as surety, will not estop him from setting up his release by extension of time to the son on the paper.

(November 17, 1908.)

Case Note. — Effect of renewal of principal's obligation to release party to a note executed to the creditor as collateral.

This note, of course, excludes cases where the principal debtor pledges as collateral security notes owned by him.

It would seem that, when the court in the foregoing case found as a matter of fact that the maker of the collateral note was, by the express contract or distinct understanding of the parties, a surety upon the secured note, his liability was determined, as the rule that a surety is released by any arrangements made by the other parties without his knowledge or consent, which work to his prejudice, is apparently unquestioned. But, in the absence of such an understanding, which, of course, is a mere incident peculiar to this case, there remains an interesting question whether the maker of a note executed as a collateral security to another note is in the position of a surety, so as to be released by any extension of time on the secured note given without his knowledge or consent, or whether the note is to be considered merely as any other collateral and governed by the general, but by no means universal, rule that the renewal of a note secured by collateral security does not have the effect to release any of the collateral pledged to secure it.

Of course the ordinary manner of a person's

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APPEAL by defendant from a judgment of the Circuit Court for McLean County in plaintiff's favor in an action brought to enforce a liability on a promissory note held as collateral to that of a bankrupt. Reversed.

The facts are stated in the opinion.

Messrs. **William B. Noe** and **J. W. Boston** for appellant.

Messrs. **Ben D. Ringo** and **Joe H. Miller** for appellee.

Clay, C., delivered the opinion of the court:

J. W. Morehead, a son of appellant, was indebted to the Citizens' Deposit Bank in the sum of $750. The bank agreed that, if he would execute a note for this sum and secure the note by proper collateral, he could have further time within which to pay his debt. He then went to his father, J. T. Morehead, and brought him to the bank. There the president of the bank explained to him that it was necessary to have a surety for the note executed by his son, and appellant, after some hesitation, acquiesced in the arrangement. For the purpose of carrying out the arrangement, he executed a note payable one day after date for the sum of $750 to J. T. Morehead Company, the firm name under which J. W. Morehead was doing business. This note was then indorsed by J. W. Morehead for the firm, and delivered to the bank. The note of J. W. Morehead was not paid at maturity, but was renewed some three or four times thereafter, and the interest paid thereon. After all these renewals were made, and after the expiration of about two years and a half, the bank sued J. T. Morehead on the collateral note held by it. He defended on the ground that he was in effect a surety for his son, J. W. Morehead, on the original note of $750 executed by him to the bank; that after J. W. Morehead's note became due it was renewed three or four times, and the interest paid thereon; that this was done without his knowledge or consent; that such renewals operated to his prejudice, and served to release him from his liability as surety. The court rendered judgment for plaintiff below, and the defendant appeals.

The first question is: Did J. T. Morehead occupy the relation of surety on the note of J. W. Morehead? For the purpose of determining this question, we are not confined solely to the instrument executed, but may consider parol evidence. 1 Am. & Eng. Enc. Law, 2d ed. p. 343. According to the testimony of appellant, he signed the note as collateral security for the note executed by his son.

The president of the Citizens' Deposit Bank testified as follows:

J. W. Morehead at that time was indebted to the bank in the sum of $750, which amount was then due. I requested of him that said note or debt herein be paid or secured in some manner; if he desired to get any extension of time on it, it must be secured. Some time after I had informed him of that fact, he and his father came to the

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becoming a surety upon a note is to sign the secured note itself, and the execution of a distinct note for the purpose of securing a second note is somewhat unusual. While there are cases involving notes of such a character and the rights of the parties thereto, there appears to be no other reported case in which the effect of a renewal of the secured note to release the collateral note is expressly discussed, or the rules applicable to such facts stated.

In Jennison v. Sceets, 60 Ill. App. 607, where a note had been executed as collateral security to another note, and the time for the payment of the principal note had been extended, the court said that the jury should not have been inferentially instructed that the extension of the principal note operated as an extension of the collateral note; but the facts as given in the reported case are not sufficient to show whether or not the makers of the collateral note claimed to be released by such extension.

In Holland Trust Co. v. Waddell, 75 Hun, 104, 26 N. Y. Supp. 980, affirmed on opinion below in 151 N. Y. 666, 46 N. E. 1148, it was held that the plaintiff might maintain an action upon a certificate of deposit upon defendant's bank, which had been deposited with the plaintiff as collateral security for a promissory note of a third party, which had thereafter been renewed from time to time. This decision is based entirely upon the rule that the renewal of a note secured by collateral has not the effect to release such collateral. The court said: "The principle is too well settled to need the citation of authorities, that the renewing of notes from time to time in no way extinguishes the original debt; it is simply an extension of the time of payment and a change as to the evidence of the debt, and all collaterals pledged for the payment would remain as security notwithstanding the extension of the time of payment." There was a question in the case whether or not the plaintiff knew that the certificate of deposit had been issued merely as accommodation paper, but the court said that, even if the plaintiff did know that the certificate had been issued merely as accommodation paper, and that the payee had no account at the defendant's bank, the latter would still be liable thereon, under the facts as stated.

As to effect under negotiable-instruments law of extension of time to principal to release one who, on the face of the instrument, is primarily liable, but who is in fact surety, see case note to Vanderford v. Farmers' & M. Nat. Bank, 10 L.R.A.(N.S.) 129.

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bank,—it was not in my office,—and he proposed the execution of this note at that time by his father, J. T. Morehead, to be given as collateral security to be executed by his father, J. T. Morehead, to him, and which note he assigned to the bank as collateral security, at the same time executing his note with which this was filed as collateral security for $750, and he was given four months' time from that date by the execution of those notes.

Q. What conversation did you have with Mr. J. T. Morehead at that time about this transaction?

A. They came in, and it is a fact that, when the nature of the case was stated, that we required a surety for the execution of this note, Mr. J. T. Morehead did have some hesitancy in signing the note, and eventually he said he would sign it as it was his boy, and he wanted to help him out, and he was willing to do that much for him.

It is manifest from the foregoing that J. T. Morehead regarded himself in the light of a surety upon the $750 note of his son, and that the president of the bank regarded him in the same light, and accepted the collateral note with full knowledge of the relation which J. T. Morehead sustained to the note of his son. We think the rule is now well established that, as between himself and the party accommodated, the accommodation party is in effect a surety, and his right to recourse against the party accommodated is that of a surety against the principal debtor. As to other holders of the paper, his liability is in general that of a similar party (maker, acceptor, or indorser) who receives value, but he is so far a surety as to holders with notice of his accommodation character that he will be discharged by arrangements made to his prejudice with the principal debtor without his knowledge. 7 Cyc. Law & Proc. p. 725; Guild v. Butler, 127 Mass. 386; Price County Bank v. McKenzie, 91 Wis. 658, 65 N. W. 507. Applying this principle to the case under consideration, we find that the collateral note was simply an accommodation paper; that it was executed with the distinct understanding with the bank that J. T. Morehead was in effect a surety on the $750 note executed by his son to the bank. This arrangement was effected not only with the knowledge of the bank, but by agreement with it.

Counsel for appellee insist, however, that the rule is that the renewal of a note secured by collateral security does not have the effect to release any of the collateral pledged to secure it. There can be no doubt that this is the general doctrine, and is recognized by this court in Bank of America v. McNeil, 10 Bush, 54, and Koehler v. Hussey, 22 Ky. L. Rep. 317, 57 S. W. 251; but the facts of those cases bear no similarity to the case under consideration. The note in this case was not merely collateral deposited to secure the payment of a debt from J. W. Morehead to the bank, but was a note executed under and by virtue of an arrangement with the bank whereby it was agreed that J. T. Morehead was a surety upon the note of his son. We therefore conclude that he should be released under the same circumstances and conditions that any other surety should be released.

The record in this case shows that the original note was renewed some three or four times. The last renewal, which is filed with the petition in this case, is for the sum of only $750, with interest from the date of its maturity. This indicates not only that the interest on the note was paid, but that it was paid in advance. The acceptance of the interest thus paid was sufficient consideration for the renewal of the note. By accepting the new note under such circumstances, the bank put it out of its power to sue the principal debtor until the renewal note became due. This was true in the case of each of the renewals. Therefore, during each period of renewal, appellant could not have paid off the indebtedness of his son and taken steps to protect himself. We therefore conclude that he was prejudiced by the renewals made without his knowledge or consent, and that such action on the part of the bank released him from liability on the collateral note sued on in this action. Steger v. Jackson, 31 Ky. L. Rep. 434, 102 S. W. 329; Post v. Losey, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121; Perley v. Loney, 17 U. C. Q. B. 279; Alley v. Hopkins, 98 Ky. 668, 56 Am. St. Rep. 382, 34 S. W. 13. Especially should we hold this in view of the further fact that there is proof tending to show that J. W. Morehead was solvent at the time of the first renewal, and appellant might, if the bank had not made such renewal, take steps to protect himself.

But appellee insists that a note amounting to $1,000 was filed against the estate of J. W. Morehead, who was adjudged a bankrupt, in favor of appellant, and that a note of $200 was also filed in favor of his attorney, which notes were filed for the purpose of securing appellant in the payment of the collateral note of $750 sued on in this action; that such action was a recognition by appellant of his liability to appellee, and constitutes an act of estoppel. Appellant and his son both swear that the latter was indebted to the former in the sum of $1,200 to $1,400. Opposed to this testimony is that of certain statements made by the son to the effect that he owed his father nothing.

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There is also the circumstance that, when appellant's attorney collected appellant's *pro rata* on the notes filed in the bankruptcy proceedings, he went to the bank and deposited the proceeds with it, to be applied on the note of $750. A few minutes thereafter, however, he returned to the bank and agreed to pay the money on the note of $750 executed by appellant, provided the bank would release appellant from further liability thereon. He claims that he reconsidered his action because he realized the fact that, in paying the money absolutely in the first instance, he was acting without authority. We do not think these facts are sufficient to estop appellant from setting up the defense made to the note sued on. The preponderance of evidence is to the effect that the son did owe the father. Even if appellant's attorney, under the mistaken belief that he was still liable as surety, had offered to make a payment on the note, this fact alone would not estop him from defending on the ground that he had been released, when, as a matter of fact, he had been released. Brandt, Suretyship, § 160; Robinson v. Offutt, 7 T. B. Mon. 540.

Being of the opinion that the collateral note sued on is simply accommodation paper, that it was accepted by the bank with the full knowledge and understanding that appellant was a mere surety on the note executed by his son, that the bank, without the knowledge or consent of appellant and for a valuable consideration, renewed the son's note on three or four occasions, and that appellee has shown no facts which would estop appellant from setting up the defense relied on, we therefore conclude that appellant has been released from all liability.

The judgment is reversed, and cause remanded, with directions to dismiss the petition.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MAX FRISCH
v.
FRANK E. WELLS.

(200 Mass. 429, 86 N. E. 775.)

Election of remedies — contract — replevin.

A vendor who is to retain title until the purchase price is fully paid and a bill of sale given, and who, upon nonpayment of an instalment when due, brings suit against the vendee for the balance due, arresting and holding the body of the debtor until he releases himself by taking the statutory oath, is precluded from subsequently maintaining replevin for the property, although he failed to enter the writ in the first suit.

(January 5, 1909.)

REPORT by the Superior Court for Essex County for the opinion of the full bench of an action brought to recover possession of certain personal property. Judgment for defendant.

The case sufficiently appears in the opinion.

Mr. **Frederick E. Shaw**, for plaintiff:

There was no final or decisive election between inconsistent remedies.

Washburn v. Great Western Ins. Co. 114 Mass. 175; Lord v. Bigelow, 124 Mass. 185, Miller v. Hyde, 161 Mass. 472, 25 L.R.A. 42, 42 Am. St. Rep. 424, 37 N. E. 760.

If what was done was under or because of the mistaken idea that Krasner was about to leave the state, then there was not an election of remedies.

Butler v. Hildreth, 5 Met. 49; Washburn v. Great Western Ins. Co. supra; Connihan v. Thompson, 111 Mass. 270.

Messrs. **James H. Sisk, William E. Sisk, and Richard L. Sisk**, for defendant.

Braley, J., delivered the opinion of the court:

Under the contract, title to the replevied chattels was not to pass to the vendee until the purchase price had been fully paid and a bill of sale given. But, after having paid

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Case Note. — Bringing action for purchase price as waiver of right of vendor in conditional sale to recover property in specie.

The doctrine of FRISCH v. WELLS, while, as subsequently shown, opposed by some cases, seems to have the support of the weight of authority. It is supported by the following cases, which enunciate and apply the general principle that the seller of goods on conditional sale, upon default of the buyer in paying the purchase price, has two remedies open to him,—one, to assert his title to the goods and recover possession of them; the other, to treat the sale as an absolute one, and the title as having vested in the buyer, and bring an action to recover the purchase price. These remedies are inconsistent, and the pursuit of one precludes the other. The seller cannot, after having elected to treat the sale as absolute and the title as having vested in the buyer thereafter assert title to the property under the original retainer of title. Bell v. Old, 88 Ark. 99, 113 S. W. 1023; Butler v. Dodson, 78 Ark. 569, 94 S. W. 703; Parke & L. Co. v. White River Lumber Co. 101 Cal. 37, 35 Pac. 442; Crompton v. Beach, 62 Conn. 25, 18 L.R.A. 187, 36 Am. St. Rep. 323, 25 Atl. 446; Truax v. Parvis, 7 Houst. (Del.) 330, 32 Atl. 227; Smith v. Gilmore,

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a part by instalments, his failure to make other payments was a breach which entitled the vendor, who had not broken the contract, either to treat it as an agreement for goods sold and delivered, and to sue at once for the price, or in tort for conversion, or in replevin for their specific recovery. Bailey v. Hervey, 135 Mass. 172; Brown v. Magorty, 156 Mass. 209, 30 N. E. 1021; White v. Solomon, 164 Mass. 516, 518, 30 L.R.A. 537, 42 N. E. 104; Smith v. Aldrich, 180 Mass. 367, 369, 62 N. E. 381. If the first remedy was used, it rested upon the theory that after breach, at the election of the plaintiff, the title passed to the vendee, who received and retained the property. But, if the second remedy was resorted to, the remedial right rested upon the assumption that, as the bill of sale had not been given, the title still remained in the plaintiff. Brown v. Magorty, 156 Mass. 209, 211, 30 N. E. 1021. See Cooper v. Cooper, 147 Mass. 370, 373, 9 Am. St. Rep. 721, 17 N. E. 892. These remedial rights, although alternative, were therefore inconsistent, and, while the plaintiff had his choice of either, he could not resort to them all. Snow v. Alley, 156 Mass. 193, 195, 30 N. E. 691. Nor is the case of Miller v. Hyde, 161 Mass. 472, 25 L.R.A. 42, 42 Am. St. Rep. 424, 37 N. E. 760, on which the plaintiff relies, in conflict. A majority of the court there held that, without satisfaction, a judgment for the plaintiff, in an action of tort for conversion, did not vest in the defendant title to the chattels, and, as the remedies were consistent, replevin for

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7 App. D. C. 192 (filing claim in orphans' court against estate of deceased buyer); American Process Co. v. Florida White Pressed Brick Co. (Fla.) 47 So. 942 (filing claim in bankruptcy court against buyer, a bankrupt); Elwood State Bank v. Mock, 40 Ind. App. 685, 82 N. E. 1003; Gaar S. & Co. v. Fleshman, 38 Ind. App. 490, 77 N. E. 744, 78 N. E. 348; Smith v. Barber, 153 Ind. 322, 53 N. E. 1014; Button v. Trader, 75 Mich. 295, 42 N. W. 834; Bailey v. Hervey, 135 Mass. 172; Whitney v. Abbott, 191 Mass. 59, 77 N. E. 524; Alden v. W. J. Dyer & Bro. 92 Minn. 134, 99 N. W. 784; Keystone Mfg. Co. v. Cassellius, 74 Minn. 115, 76 N. W. 1028; Poirier Mfg. Co. v. Kitts (N. D.) 120 N. W. 558; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; D. M. Osborne & Co. v. Walther, 12 Okla. 20, 69 Pac. 953; Merchants' & P. Bank v. Thomas, 69 Tex. 237, 6 S. W. 565; Bensinger Self-Adding Cash Register Co. v. Cain, 4 Tex. App Civ. Cas. (Willson) 499, 18 S. W. 136; Parlin & O. Co. v. Moline Plow Co. (Tex. Civ. App.) 27 S. W. 1087.

But where the contract of sale provides that the title to the property sold is to remain in the seller until the purchase price, with interest thereon and any judgment rendered therefor, is paid in full, the seller, on default of the buyer, may prosecute to judgment an action for the purchase price, and title will not pass until such judgment is paid. Fuller v. Byrne, 102 Mich. 461, 60 N. W. 980.

A suit for the purchase price is not an election as to that portion of the property conditionally sold, the purchase price of which is not then due and payable. Bryant v. Kenyon, 123 Mich. 151, 81 N. W. 1093.

So suit by attachment levied on the property conditionally sold, prior to default by the purchaser, does not amount to an election to treat the sale as absolute and the title to have vested in the purchaser. Edgewood Distilling Co. v. Shannon, 60 Ark. 133, 29 S. W. 147.

In other jurisdictions it is held that bringing an action by the seller, and prosecuting it to judgment, do not waive the right to retake the property the title to which he retained in the original contract of sale, where the judgment remains unpaid. Thomason v. Lewis, 103 Ala. 426, 15 So. 830; E. E. Forbes Piano Co. v. Wilson, 144 Ala. 586, 39 So. 645, disapproving *dictum* to the contrary in Davis v. Millings, 141 Ala. 378, 37 So. 737; Vaughn v. Hopson, 10 Bush, 337; McPherson v. Acme Lumber Co. 70 Miss. 649, 12 So. 857; Campbell Printing Press & Mfg. Co. v. Rockaway Pub. Co. 56 N. J. L. 676, 44 Am. St. Rep. 410, 29 Atl. 681; Root v. Lord, 23 Vt. 568; Matthews v. Lucia, 55 Vt. 308.

Hickman v. Richburg, 122 Ala. 638, 26 So. 136, however, enunciated the doctrine that any unequivocal act on the part of the seller recognizing the title as being in the buyer would preclude the former from afterwards setting up title in himself, and when election between two inconsistent rights had been made it could not afterwards be revoked. This doctrine was held to apply to a seller of property on conditional sale who thereafter took steps to establish and enforce a materialman's lien on the property sold, although such attempt was ineffectual.

And see also Tanner & D. Engine Co. v. Hall, 89 Ala. 628, 7 So. 187, which holds that a title clause in a conditional-sale contract is waived by the seller causing attachment to be levied on the property conveyed, selling it thereunder, and becoming the purchaser.

In New York the rule is unsettled. In Orcutt v. Rickenbrodt, 42 App. Div. 238, 59 N. Y. Supp. 1008, it was held that the seller of personal property by a contract which provided that title was to remain in him until the purchase price had been paid, who took a note to represent the purchase price, could not assert title to the property after having brought an action on the note, although he thereafter discontinued it. The court said that this action was an election to pursue one of two inconsistent remedies, either of which was available to the seller at the time the election was made, and, having elected to resort to an action upon the note, he and all persons claiming under him were precluded from thereafter asserting

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the horse could be maintained against his vendee. It must be presumed, from the record, that, with knowledge of his legal right, and being in possession of the facts, the plaintiff chose to bring suit for the balance due, and to arrest and hold the body of the debtor until he was discharged upon taking the oath prescribed by Rev. Laws, chap. 168, § 40. The plaintiff failed to enter the writ. It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act, and makes the election binding. Butler v. Hildreth, 5 Met. 49; Connihan v. Thompson, 111 Mass. 272; Bailey v. Hervey, supra. The answer was a general denial, which put in issue, not only the plaintiff's right to possession, but his title to the property. D'Arcy v. Steuer, 179 Mass. 40, 41, 60 N. E. 405. And the plaintiff having once made an irrevocable election, the title was relinquished or waived, and the present action is absolutely barred. Bailey v. Hervey, supra; Whitney v. Abbott, 191 Mass. 59, 77 N. E. 524.

The rulings at the trial were correct, and by the terms of the report judgment is to be entered for the defendant, with damages in the sum of $1, and for a return of the goods. McNeal v. Leonard, 3 Allen, 268.

So ordered.

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any right, under the contract, to retake the property.

And Kirk v. Crystal, 118 App. Div. 32, 103 N. Y. Supp. 17, affirmed without opinion in 193 N. Y. 622, 86 N. E. 1126, held the seller of a heating plant on conditional sale could not assert title thereto after having filed a notice of a mechanics' lien against the interest of the buyer in the property in which the heating plant was installed. The court said the filing of this notice was the assertion of a claim irreconcilable and inconsistent with a claim of title.

In Taylor v. Esselstyn, 62 Misc. 633, 115 N. Y. Supp. 1105, the court said that, after all of the payments were due under a contract of conditional sale, the plaintiff could regard the contract as a cash sale upon the same reservation of title, and could thereupon have the election of disaffirming the sale and replevying the goods, or of enforcing the sale and suing for the price, and cited in support of this proposition, Kirk v. Crystal, supra. The question whether an election had been made, however, was not before the court.

And see National Cash Register Co. v. Ferguson, 25 Misc. 363, 55 N. Y. Supp. 592, which held that a suit for the purchase price of property sold on conditional sale is not an election which will thereafter preclude a claim to the title to such property, where, at the time of such suit, the seller was not advised as to all the facts.

This doctrine was also apparently recognized in Cooper v. Payne, 111 App. Div. 785, 97 N. Y. Supp. 863, affirmed without opinion in 190 N. Y. 512, 83 N. E. 1124, which held that a seller of personal property on conditional sale could not, after having seized and sold the property, claim that such seizure was unlawful because prior thereto he had elected to affirm the sale by suing the buyer on one of the purchase-price notes given in accordance with terms of the contract of sale. This decision, however, was not based on the theory that such an action was not an election, but rather on the theory that the seller was estopped, under the circumstances, from asserting it to have been an election.

But, in Brewer v. Ford, 54 Hun, 116, 7 N. Y. Supp. 244, a doctrine to the contrary was enunciated, although the action did not present the question as it was presented in the Orcutt Case. Here the question arose on the claim that the seller of property on conditional sale, bringing trover for the unlawful conversion of the property, after default had been made in the payment of notes given to represent the purchase price, must, in order to entitle himself to recover, surrender the notes for cancelation. This contention was denied on the theory that, when default was made in payment of the notes, "the plaintiff had the right to take possession of the property as against his vendee, for the purpose of preserving his security and enforcing his right to have the property devoted to the payment of his debt . . . he may retain the title to the property, and at the same time enforce the vendee's promise to pay the purchase price. . . . Such an action would not be inconsistent with the right of the vendor to retain the title and possession until the vendee performed his promise. If it should be held that an action for the purchase money under such an agreement was inconsistent with the title in him, it would be, in effect, declaring the contract nugatory as to the vendor." This case was again presented to this department of the appellate division after retrial had been had (59 Hun, 17, 12 N. Y. Supp. 619), and, while it was held that the doctrine, as enunciated when the case was previously before that court, was the law of that case and stood as *res judicata*, yet the soundness of the doctrine was questioned and disapproved, and it was said that the majority of the court as then constituted were against it. Upon appeal this latter decision was affirmed without opinion. 126 N. Y. 643, 27 N. E. 852.

In Ideal Cash Register Co. v. Zunino, 39 Misc. 311, 79 N. Y. Supp. 504, the Brewer Case, as reported in 54 Hun, was cited with approval as authority for the holding of the court that the seller of property under a contract containing a provision that the title should not pass until the purchase price, or any judgment for all or any part of the same, was paid in full, could retain

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the title to the property until the purchase price or any judgment for its payment was settled in full.

The Brewer Case, as reported in 54 Hun, was also cited in National Cash Register Co. v. Coleman, 85 Hun, 125, 32 N. Y. Supp. 593, in support of the holding that the recovery of a judgment, as long as it remained unsatisfied, did not affect the title of the seller in the property sold under a contract providing, in case of any default in the making of any payment, the vendor might take possession and remove the property, and the balance of the purchase price should at once become payable, together with the further provision that the title to the property should not pass until it was paid for.

And see American Box Mach. Co. v. Zentgraf, 45 App. Div. 522, 61 N. Y. Supp. 417, where a provision in a contract for the sale of personal property, that the delivery by the buyer of notes representing the purchase price should not be deemed a payment, or affect the vendor's title to the property, unless the notes were paid in full, was held to authorize the vendor to reduce the notes to judgment without the imputation of having made an election of remedies which would preclude him from thereafter asserting title to the property, unless it was paid. The court said that such a contract differed from that presented in the Orcutt Case, in that the note sued upon in that case was given subsequently to the execution of the contract, and not contemporaneously with and as part of it, under an express stipulation that retention of title in the purchaser should not be affected by giving the notes, unless they were paid.

While the foregoing case seems to distinguish between a conditional sale where the purchase price is not represented by notes, and such a sale where notes for the purchase price were given contemporaneously with the contract, this distinction is not, as a rule, recognized. The doctrine that suit for the purchase price, on default of payment, will amount to an election, so that title to the property purchased is thereby vested in the buyer, was applied to conditional sales where purchase-price notes were executed contemporaneously with the contract, in the following cases, although the point was not discussed: See Truax v. Parvis, 7 Houst. (Del.) 330, 32 Atl. 227; Merchants' & P. Bank v. Thomas, 69 Tex. 237, 6 S. W. 565; Bensinger Self-Adding Cash Register Co. v. Cain, 4 Tex. App. Civ. Cas. (Willson) 499, 18 S. W. 136; D. M. Osborne & Co. v. Walther, 12 Okla. 20, 69 Pac. 953.

In Durr v. Replogle, 167 Pa. 347, 31 Atl. 645, where a clause in a contract for the sale of personalty contained a provision that no title should vest in the bailee, except as lessee, until the full payment of the purchase price, or rent as it was termed, and the execution and delivery of a bill of sale, it was held that the seller could maintain an action on any unpaid instalments after their maturity, without in any way affecting his right to thereafter make claim to the property.

The foregoing case seems inconsistent with the doctrine of that court as enunciated in Seanor v. McLaughlin, 165 Pa. 150, 32 L.R.A. 467, 30 Atl. 717, to the effect that the seller of property by conditional sale, upon default in payment of the purchase price, had an election of remedies. He may take the property and treat the contract as ended, or he may treat the sale as absolute and the title in the purchaser, and sue for the purchase price; these remedies, however, are alternate, and not concurrent. The doctrine of the Seanor Case was reaffirmed by that court in Kelly Springfield Road Roller Co. v. Schlimme, 220 Pa. 413, 123 Am. St. Rep. 707, 69 Atl. 867, where a contract of sale containing a title-clause provision substantially similar to that in the Durr Case was held not to permit the seller to enforce notes for the purchase price, given contemporaneously with the contract of sale, and also claim title to the property. Quoting with approval from the Seanor Case, the court said: "Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative; they could not adopt both, unless it was plainly expressed in the contract, or a necessary implication from its terms."

MASSACHUSETTS SUPREME JUDICIAL COURT.

BENJAMIN F. WYETH
v.
CHARLES H. THOMAS et al.

(200 Mass. 474, 86 N. E. 925.)

Civil rights — undertaker.

1. Refusal to permit one to engage in the business of an undertaker, without good reason, violates his constitutional rights to life, liberty, and the pursuit of happiness.

Same — burial of dead.

2. Refusal to permit one to bury the dead body of his relative or friend, except under an unreasonable limitation, unconstitutionally interferes with his private rights.

Undertaker — regulation — police power — liability.

3. The police power does not justify the adoption of a rule requiring a knowledge of embalming as a condition to receiving a license as undertaker, by a board of regis-

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Case Note. — Constitutionality of restriction on business of undertaking.

A statute providing that a person not already engaged in the business of undertaking shall not engage therein unless he shall have been duly licensed as an embalmer, and shall have been employed as an assistant to a licensed undertaker for at least three years, is void, since it is not a valid exercise of the police power as promoting the health, comfort, safety, and welfare of society, and since its effect is

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tration in embalming which has power to adopt rules governing the care and disposition of human dead bodies and the business of embalming.

Legislature — delegated power — validity.

4. The legislature cannot delegate to a board authority to require a knowledge of embalming as a condition to receiving an undertaker's license.

(January 6, 1909.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of an application for writ of mandamus to compel the granting of an undertaker's license. Writ awarded.

The facts are stated in the opinion.

Mr. **Arthur P. Stone**, for petitioner:

The police power cannot be used as a cloak for matters which the parties interested believe to be beneficial, but in which the public health is really a secondary consideration.

People v. Beattie, 96 App. Div. 383, 89 N. Y. Supp. 193; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 A. & E. Ann. Cas. 927; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Re Sam Kee, 31 Fed. 680; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Thomas v. Hot Springs, 34 Ark. 553, 36 Am. Rep. 24; United States ex rel. Kerr v. Ross, 5 App. D. C. 241; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 116 N. W. 885; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 A. & E. Ann. Cas. 842; Austin v. Murray, 16 Pick. 121; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Com. v. Essex Co. 13 Gray, 239; Winthrop v. New England Chocolate Co. 180 Mass. 464, 62 N. E. 969.

Mr. **Gilbert A. A. Pevey**, for respondents:

In the exercise of police power for the prevention of injuries to the right of the public, and for the security of the public health or welfare, statutes may be passed prohibiting, unless under certain conditions, the prosecution of certain employments or the doing of certain things not illegal in themselves.

Com. v. Fahey, 5 Cush. 411; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 A. & E. Ann. Cas. 842; Com. v. Gilbert, 160 Mass. 157, 22 L.R.A.

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to create a monopoly, to build up a class, and to deny the right to contract. People v. Ringe, 125 App. Div. 592, 110 N. Y. Supp. 74.

And a provision in a section of a town by-law forbidding any person, without permission signed by a majority of the selectmen, to bring any dead body into the town, or to convey through the streets any dead body so brought in, is not authorized by a statute giving the selectmen authority to make regulations for the interment of the dead and for funerals; and the further provision of such section of the by-law forbidding persons without license from the selectmen to bury any dead body so brought into the town, on their own premises or elsewhere within the town, being a prohibition, and not a regulation, is void. So, the provision of another section, that no person shall act as undertaker within the town unless appointed and licensed by the selectmen, if intended more effectually to enforce the prohibition of the foregoing section, is void. Austin v. Murray, 16 Pick. 121.

But, under a statute empowering boards of health to make all regulations which they deem necessary concerning burial grounds and interments, and to establish penalties not exceeding $100 for their violation, a board of health may make a regulation forbidding any person except a cemetery superintendent, a duly appointed undertaker, or other person specially authorized, to move from any house or place within the city, to any place of burial, the body of any deceased person, and requiring undertakers to collect, and account for, burial fees, and to give a bond for the faithful performance of their duties, and fixing a penalty of not more than $20 for violation of the regulations; and such regulations are not unreasonable, and their validity is not affected by the fact that they may have been made with reference to a particular person; and the failure of an appointed undertaker to file a bond warrants the revocation of his appointment. Com. v. Goodrich, 13 Allen, 546.

And, under a statute giving officers of a borough power to prohibit the interment of deceased persons within the limits of the borough, and to make such other regulations as may be necessary for the health and cleanliness thereof, the authorities have power to pass an ordinance providing that permits shall be taken out for the burial of the dead; and such ordinance is not unreasonable, and is valid as to an undertaker who has obtained a burial permit from a city outside the borough, in which the death occurred. Yeadon v. White, 36 Pa. Super. Ct. 360.

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439, 35 N. E. 454; Burnham v. Webster, 5 Mass. 266; Nickerson v. Brackett, 10 Mass. 212; Com. v. Alger, 7 Cush. 99; Welch v. Swasey, 193 Mass. 373, 118 Am. St. Rep. 523, 79 N. E. 745; Salem v. Maynes, 123 Mass. 372; Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 478, 47 L.R.A. 314, 55 N. E. 77; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Com. v. Blackington, 24 Pick. 352; Decie v. Brown, 167 Mass. 290, 45 N. E. 765; Com. v. Roswell, 173 Mass. 119, 53 N. E. 132; Com. v. Hamilton Mfg. Co. 120 Mass. 383; Bancroft v. Cambridge, 126 Mass. 438; Com. v. Roberts, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522; Watertown v. Mayo, 109 Mass. 319, 12 Am. Rep. 694; Rideout v. Knox, 148 Mass. 372, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; Newton v. Joyce, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; Com. v. Hubley, 172 Mass. 58, 42 L.R.A. 403, 70 Am. St. Rep. 242, 51 N. E. 448; Com. v. Danziger, 176 Mass. 290, 57 N. E. 461; Com. v. Pear, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Parker v. Kaughman, 34 Ga. 136; Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 A. & E. Ann. Cas. 13; Allopathic State Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 So. 809; Dexter v. Blackden, 93 Me. 473, 45 Atl. 525; Mon Luck v. Sears, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; Com. v. Keary, 198 Pa. 500, 48 Atl. 472; State v. Sharpless, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; Kentucky Bd. of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730; State v. Evans, 130 Wis. 381, 110 N. W. 241; Iler v. Ross, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; State v. Wilcox, 64 Kan. 789, 68 Pac. 634.

The refusal to license was justified under the provisions of the Revised Laws.

Com. v. Goodrich, 13 Allen, 549; Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 N. E. 870.

The determination of the defendants as to whether or not the petitioner should receive a license as an undertaker, because he is not a registered embalmer, is within their judgment and discretion.

Rice v. Highway Comrs. 13 Pick. 225; Provident Sav. Life Assur. Soc. v. Cutting, 181 Mass. 261, 92 Am. St. Rep. 415, 63 N. E. 433.

Knowlton, Ch. J., delivered the opinion of the court:

This is a petition for a writ of mandamus to compel the respondents, the board of health of the city of Cambridge, to grant the petitioner a license as an undertaker. Among the facts agreed are the following:

"Second. That the petitioner, Benjamin F. Wyeth, is an inhabitant of Cambridge, is an undertaker by trade, and has been for forty-six years engaged in the trade of undertaking in various capacities, and has carried on for some years past the business of undertaking under the name of Benjamin F. Wyeth; that said undertaking business as conducted by the petitioner is a profitable one, and it is his support and the support of his family; that the petitioner is the sexton of the First Church in Cambridge, and the members in attendance at that church and other residents of Cambridge and the vicinity have been accustomed from time to time to engage him to perform such services as may be required in connection with the burial of the dead.

"Third. That the petitioner, Benjamin F. Wyeth, is a competent undertaker, and is well versed in the duties and practices of that trade or business, except in so far as he is ignorant of the processes of embalming.

"Fourth. That the petitioner, Benjamin F. Wyeth, does not hold himself out to the public as one skilled in the methods of embalming dead bodies, and has not, and never has had, and has not applied for, a certificate or license from the board of registration in embalming to enable him to engage in the business of embalming dead bodies.

"Fifth. That a large part of the petitioner's trade or business does not require a knowledge of embalming, and in many instances the petitioner is not required nor directed to embalm the bodies of the dead intrusted to his care.

"Sixth. That, in all cases in which the said Benjamin F. Wyeth has had occasion to have the bodies of the dead embalmed, he has, since January 1, 1906, procured the services of an embalmer duly registered by the board of registration in embalming, or he has intrusted the work to some servant or agent in his employ who was duly registered as aforesaid.

"Seventh. That the respondents to this petition or their predecessors in office had, up to and including the 1st day of May, 1907, always given to the said Benjamin F. Wyeth a license to act as undertaker upon his application therefor."

From other facts in the case, and from the respondents' answer, it appears that the only reason for refusing to grant the petitioner a license as an undertaker is that he is not licensed as an embalmer. He cannot obtain a license as an embalmer without making application under rule 2, § 1, adopted by the board of registration in embalming, and complying with the requirements

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of this section, which is as follows: "The applicant must have taken a regular course at a reputable school of embalming whose course of instruction is satisfactory to this board, and must have had not less than a year and a half of experience in active work with a practising embalmer." The question of law presented by the report of the single justice is whether the respondents' refusal to grant a license, solely for this reason, is legal.

Stat. 1905, chap. 473, p. 483, is "An Act to Establish a Board of Registration in Embalming." Under § 6 the board is to adopt rules and regulations "not inconsistent with the provisions of this act and the statutes of the commonwealth, governing the care and disposition of human dead bodies, and the business of embalming." Under the authority of this section the board has adopted rules and regulations whereby they assume to put the whole business of the management of funerals and the burial of the dead in the hands of persons holding a license as embalmers from this board. The first part of rule 9, § 2, is as follows: "No permits for removal, burial, or disinterment shall be issued by boards of health, city or town clerks, selectmen of a town, or any other persons authorized to issue burial permits, to any person or persons who have not been registered and received a certificate from the state board of registration in embalming." Under this rule no one can bury lawfully the dead body of a former member of his family, unless the permit for burial is obtained by a licensee of this board. No one can perform the ordinary duties of an undertaker without first having procured a license as an embalmer. No one can obtain a permit for the disinterment of a dead body for any cause, at any time, however long after the burial, unless he is a licensed embalmer. Surely the fitness of a person to receive a permit for the disinterment of a dead body cannot depend upon his knowledge or ignorance of the process of embalming. The question is presented whether there is any warrant under the Constitution and the laws for this interference with the liberties of the people.

The respondents, in their answer, rest their defense largely upon the action of the board of registration in embalming, and adopt as their own the views upon which this action presumably was founded.

The right to enjoy life, liberty, and the pursuit of happiness is secured to everyone under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the Constitution of the United States, which does not permit a state to deprive any person of life, liberty, or property without due process of law. The nature of this right has been stated and illustrated in many cases. Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 A. & E. Ann. Cas. 842; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Winthrop v. New England Chocolate Co. 180 Mass. 464, 62 N. E. 969; Austin v. Murray, 16 Pick. 121; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

There is no doubt that the refusal to permit one to engage in the business of an undertaker is a violation of this right, unless there is some good reason for the refusal; and the refusal to permit one to bury the dead body of his relative or friend, except under an unreasonable limitation, is also an interference with a private right that is not allowable under the Constitution of the commonwealth or the Constitution of the United States.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, the public safety, or the public morals, and, perhaps in a strict sense, in the interest of the public welfare, may be regulated by the state, and no other interference of the public to the detriment of an individual is permissible.

The burial of the dead has such relations to the public health that it well may be regulated by law. In possible aspects of it, its regulation may be made in the interest of the public morals. For the detection of crimes which result in death there well may be regulation in the interest of the public safety. In the exercise of the police power the legislature of this state has made elaborate provisions and strict regulations covering these subjects. Rev. Laws, chap. 78, §§ 37 to 44, inclusive; chapter 29, §§ 6-8, 10–12, 15. Of its power to exercise complete control of burials of the dead, so far as is necessary for the protection of the public health and the promotion of the public safety, there is no question.

No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity. Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker

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that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally it is not an essential part of the duties of an undertaker, and it has no relation to the public health.

The only particular in which the respondents have suggested, either in their answer or their argument, that performance of an undertaker's duties by a licensed embalmer would tend to promote the public health, is that an embalmer would be more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer. To use the language of the agreed statement of facts: "In the opinion of the respondent board of health, these rules for preserving and embalming human dead bodies have a tendency to and do increase, on the part of the undertaker, the knowledge of the nature of the disease from which the party deceased may have suffered, and which may have caused death." There is certainly a grave reason to doubt the correctness of this opinion. No evidence is furnished that, through his knowledge of the business of embalming, one can form an opinion which an ordinary undertaker of experience could not form of the cause of death of a person whose body is seen by him. But, if there may be some slight increase of knowledge from this source to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation. As was said in the opinion in Lochner v. New York, 198 U. S. 45, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 543, 3 A. & E. Ann. Cas. 1133: "The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person, and in his power to contract in relation to his own labor." From such a possibility no such benefit could come as to justify a requirement that all human bodies should be embalmed for the purpose of procuring such information in regard to the cause of death as can be acquired through the process of embalming, or a requirement that an embalmer should always be employed as undertaker for the chance of a valuable discovery from his observation, without his using the process of embalming. The law recognizes direct ways of ascertaining whether death was from a contagious disease, without employing an embalmer for that purpose. Rev. Laws, chap. 29, §§ 1–6, 10–12. These ways seem a thousandfold more important and reliable than any possible knowledge that an embalmer might have from his training in that business, beyond the knowledge of an undertaker of experience who was not an embalmer.

We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health, as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation, within the exercise of the police power by the state. If such a regulation had been made by an act of the legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York which provided, among other things, that no person should engage in the business of undertaking unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the appellate division of the supreme court of that state. People v. Ringe, 125 App. Div. 592, 110 N. Y. Supp. 74.

From another point of view the rules and regulations of the board of registration in embalming, relied on by the respondents as an important reason for their decision, are invalid. In Brodbine v. Revere, 182 Mass. 598–600, 66 N. E. 607, 608, is this language: "It is well established in this commonwealth and elsewnere that the legislature cannot delegate the general power to make laws, conferred upon it by a Constitution like that of Massachusetts." Then follow numerous citations from different states, with the words: "This doctrine is held by the courts almost unanimously." None of the cases referred to later in the opinion, in which there was a delegation of legislative authority for a local or special purpose, or in matters of administration, and none of the cases which have been decided since, and which are referred to in Com. v. Kingsbury, 199 Mass. 542, 127 Am. St. Rep. 513, 85 N. E. 848, go far enough to legalize a delegation of authority to change a general law for all people of the commonwealth, with no local or special reason for seeking the aid of an administrative board, as the rule about the issuing of permits, and some of the other rules of this board, purport to change the general laws

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on this subject for all the people in every city and town in the commonwealth. If the statute were construed to authorize the making of such rules, it would be held unconstitutional as assuming to delegate general legislative authority.

We decide that the refusal of the respondents to grant the petitioner a license as an undertaker, solely for the reason that he is not licensed as an embalmer, is unwarranted, improper, and illegal. According to the report upon this determination of the question of law, a writ of mandamus is to issue. The case being on the law side of the court, only questions of law could be reported to the full court, and, by the terms of the report, the question of discretion whether to grant the writ must be taken to have been decided in favor of the petitioner. The report is equivalent to a finding upon the answer and the facts agreed that the only reason for the respondents' refusal was that the petitioner was not licensed as an embalmer, and that, except for this, the respondents, in the exercise of their judgment and discretion, would have granted the license. Upon these facts nothing remains but to enter the order:

Peremptory writ of mandamus to issue.

MICHIGAN SUPREME COURT.

JACOB STUMPF
v.
LOUIS STORZ et al.

(156 Mich. 228, 120 N. W. 618.)

Tax — mortgage.

1. The taxation of mortgages and also of the real estate bound by them to its full value is not invalid as double taxation.

Same — deduction of debts.

2. The constitutional requirement of uniformity of taxation is not violated by a statute permitting the deduction of debts from credits in listing personal property for taxation.

(April 6, 1909.)

CERTIORARI to the Circuit Court for Oakland County to review a judgment denying a writ of mandamus to compel the striking of a certain personal-property assessment from the tax rolls. Affirmed.

The facts are stated in the opinion.

Mr. **Fred A. Baker**, for plaintiff in certiorari:

The taxation of real-estate mortgages, in addition to the taxation of the real estate at its full value, is duplicate taxation, and as such unconstitutional.

Falkner v. Hunt, 16 Cal. 167; People v. Whartenby, 38 Cal. 461; People v. Eddy, 43 Cal. 331, 13 Am. Rep. 143; Savings & L. Soc. v. Austin, 46 Cal. 415; People v. Hibernia Sav. & L. Soc. 51 Cal. 243, 21 Am. Rep. 704; Central P. R. Co. v. State Bd. of Equalization, 60 Cal. 35; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; Russell v. Croy, 164 Mo. 110, 63 S. W. 849; Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; London & S. F. Bank v. Bandmann, 120 Cal. 221, 65 Am. St. Rep. 179, 52 Pac. 583; Germania Trust Co. v. San Francisco, 128 Cal. 589, 61 Pac. 178; Standard Life & Acci. Ins. Co. v. Board of Assessors, 95 Mich. 466, 55 N. W. 112; Stroh v. Detroit, 131 Mich. 109, 90 N. W. 1029; Green v. Grant, 134 Mich. 462, 96 N. W. 583.

Allowing the owner of taxable property of any kind to deduct from its assessable value the amount of his indebtedness is a plain violation of the constitutional requirement of uniformity.

Detroit Citizens' Street R. Co. v. Detroit, 125 Mich. 694, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809; Exchange Bank v. Hines, 3 Ohio St. 1; Re Assessment & Collection of Taxes, 4 S. D. 6, 54 N. W. 818; State v. Duluth Gas & Water Co. 76 Minn. 96, 57 L.R.A. 63. 78 N. W. 1032; Henderson v. Com. 99 Ky. 623, 29 L.R.A. 73, 31 S. W.

Case Note. — Taxation of mortgage and real estate at full value as double taxation.

This note is confined to the question whether the taxation of a mortgage and of the real estate subject thereto at its full value in the same state is double taxation, and does not cover the question whether the taxation of the mortgage in one state, and the real estate in another, is double taxation. The note is confined strictly to the question indicated in the title, and does not include the more general and fundamental question whether the taxation of credits amounts to double taxation, irrespective of the fact whether or not they are secured by specific property.

As to taxation of property in different states as double taxation, generally, see case note to Judy v. Beckwith, 15 L.R.A.(N.S.) 142.

As to taxation of shares of stock and corporate assets as double taxation, see case note to East Livermore v. Livermore Falls Trust & Bkg. Co. 15 L.R.A.(N.S.) 952.

From the standpoint of logic and, perhaps, of sound principles of taxation, it would seem possible to demonstrate that the taxation of a mortgage, or the indebtedness represented thereby, to the mortgagee, and the taxation of the real estate at its full value, without deduction on account of the indebtedness secured by the mortgage, to the mortgagor, amounts to double taxation, and that the actual burden of both taxes will in most cases ultimately fall upon the mortgagor. And in some states the taxing statutes are framed in harmony with this view.

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486; Barnes v. Moragne, 145 Ala. 313, 41 So. 947.

Although the taxation of real-estate mortgages, in addition to taxing the land at its full value, is not, standing by itself, unconstitutional duplicate taxation, and although the deduction of debts from credits is not of itself so great a departure from uniformity as to make it unconstitutional, yet, when they operate in combination, the result is a violation of the uniformity clause of the state Constitution, and of the equality required by the 14th Amendment of the Constitution of the United States.

Standard Life & Acci. Ins. Co. v. Board of Assessors and Santa Clara County v. Southern P. R. Co. supra; Russell v. Croy, 164 Mo. 97, 63 S. W. 849; Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 95, 44 L.R.A. 679, 78 N. W. 1025; Stroh v. Detroit, supra; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; 1 Cooley, Taxn. 3d ed. 343; Thomas v. Snead, 99 Va. 616, 39 S. E. 586; Hamilton v. Wilson, 61 Kan. 517, 48 L.R.A. 238, 59 Pac. 1069; Brewer Brick Co. v. Brewer, 62 Me. 62, 16 Am Rep. 395; Gilman v. Sheboygan, 2 Black, 510, 17 L. ed. 305; Jones v. Memphis, 101 Tenn. 188, 47 S. W. 136; Marion & McP. R. Co. v. Champlin, 37 Kan. 682, 16 Pac. 222; Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395; State v. Elizabeth, 64 N. J. L. 502, 45 Atl. 795; Fox's Appeal, 112 Pa. 337, 4 Atl. 149; Fletcher v. Oliver, 25

Nevertheless, the great weight of authority holds, as a legal proposition, that the taxation of the mortgage to the mortgagee, and of the real estate at its full value to the mortgagor or owner, without deduction of the amount of the mortgage, does not constitute double taxation in an obnoxious constitutional sense. Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499; Ouachita County v. Rumpf, 43 Ark. 525; Lamar v. Palmer, 18 Fla. 147; People v. Rhodes, 15 Ill. 304 (*obiter*); People v. Worthington, 21 Ill. 171, 74 Am. Dec. 86; Griffin v. Board of Review, 184 Ill. 275, 56 N. E. 397; Augusta Bank v. Augusta, 36 Me. 255 (*obiter*); Appeal Tax Ct. v. Rice, 50 Md. 302; Baltimore v. Canton County, 63 Md. 218 (*obiter*); Allen v. Harford County, 74 Md. 294, 22 Atl. 398; Taggart v. Sanilac County, 71 Mich. 16, 38 N. W. 639; Detroit v. Board of Assessors (Detroit v. Rentz) 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787 (*obiter*); Marquette v. Michigan Iron & Land Co. 132 Mich. 130, 92 N. W. 934 (*obiter*); STUMPF v STORZ; St. Louis Mut. L. Ins. Co. v. Board of Assessors, 56 Mo. 515 (*obiter*); State v. Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703; Nashua Sav. Bank v. Nashua, 46 N. H. 389 (*obiter*); Morrison v. Manchester, 58 N. H. 538 (by implication); Drew v. Morrill, 62 N. H. 23; Boston, C. & M. R. Co. v. State, 62 N. H. 648; People ex rel. People's Trust Co. v. Feitner, 30 Misc. 216, 63 N. Y. Supp. 883, affirmed in 51 App. Div. 178, 64 N. Y. Supp. 539 (*obiter*); Paddell v. New York, 50 Misc. 422, 100 N. Y. Supp. 581, affirmed in 114 App. Div. 911, 100 N. Y. Supp. 1133, and 187 N. Y. 552, 80 N. E. 1114; Philadelphia Sav. Fund Soc. v. Yard, 9 Pa. 359; West Chester Gas Co. v. Chester County, 30 Pa. 232 (by implication); Judge v. Spencer, 15 Utah, 242, 48 Pac. 1097; 27 Am. & Eng. Enc. Law, 2d ed. p. 610.

Morrison v. Manchester, supra, holding that the entire value of mortgaged property, without deduction of the amount of the indebtedness secured thereon, may be assessed and taxed to the owner, apparently implies that such taxation does not amount to unconstitutional double taxation, even though the mortgagee is also taxed on the mortgage. The opinion, however, was devoted mainly to combating the contention that the only taxable property of the mortgagor is the equity of redemption; and in one of the briefs for the mortgagor it was stated that the proposition that there is a double taxation was not an essential part of the complainant's contention.

The case of McGregor v. Vanpel, 24 Iowa, 436, is probably also to be regarded as sustaining the proposition above state, though strictly the decision appears to be merely that the mortgagee cannot complain that he is doubly taxed.

In Taggart Sanilac County, supra, Morse, J., with whom Champlin and Long, JJ., concurred, said that he thought that the statute as it stood, taxing land to its full value and at the same time taxing a mortgage upon it at its full cash value, was open to the complaint of double taxation; but that double taxation was not necessarily unconstitutional, and was not unconstitutional in this instance.

The view taken by the courts which sustain this rule is fairly represented by the opinion in Judge v. Spencer, supra, where it is said in effect that the interests represented respectively by the ownership of the mortgage and the ownership of the land are entirely separate, and represent different values; that each should contribute a just share of the burdens of government, however difficult it may be in practice to have each owner do so in a state where rate of interest by contract is not limited; that while it undoubtedly frequently happens that the owner of the land mortgaged is not only compelled to pay the assessment on the land, but also, indirectly at least, by increased rate of interest on the money borrowed, to pay the tax on the mortgage, and in this way the burden which ought to be borne by the creditor is shifted to the debtor, this consideration does not render the taxing of the mortgage objectionable as double taxation, nor militate against the justness and legality of the tax, although it may render questionable the policy of the law.

This position, however, is opposed by the California cases. The history of the question in that state is of such interest as to

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Ark. 289; Saltonstall v. Board of Review, 132 Mich. 196, 93 N. W. 246; Re Opinion of Justices (Mass.) 84 N. E. 499.

Mr. **Frank L. Covert** for respondent board of review.

Messrs. **Beaumont, Smith, & Harris** for respondent Michigan Bankers' Association.

Montgomery, J., delivered the opinion of the court:

This is a petition for a mandamus requiring the board of review of the township of Royal Oak to reconvene and strike from the assessment roll of the township for 1908 a personal-property assessment against the relator of $9,000; that being the value placed by the board on certain mortgages upon real estate and land contracts held by the relator. The object of the petition is to test the constitutional validity of the provisions of the general tax law relative to the taxation of real-estate mortgages and other credits. The briefs of relator and respondent show that no effort has been spared to place before the court all the learning obtainable upon the subjects presented, and, if we omit to refer to and discuss all the authorities cited, it is not through any want of appreciation for their aid in the final solution of the questions, or because they have not had full attention by the court. To attempt to cite the authorities bearing upon each of the propositions contended for, and to discuss and distinguish the cases, would extend the opin-

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justify the statement of the cases in some detail.

In People v. McCreery, 34 Cal. 432, the action was to recover from the mortgagee a tax levied on the debt secured by the mortgage, and one of the defenses was that, inasmuch as the land covered by the mortgage was also taxed, it presented a case of double taxation. The court, however, held that if the facts presented a case of double taxation it was only the mortgagor, and not the mortgagee, whose property had been twice taxed, and the latter could not complain.

So, a statute which undertook to exempt from taxation solvent debts secured by mortgages upon real estate was held unconstitutional in People v. Eddy, 43 Cal. 331, 13 Am. Rep. 143.

In Lick v. Austin, 43 Cal. 590, it was the mortgagor who complained that his real estate had been taxed at its full value without deducting the amount of an existing mortgage thereon, which mortgage was a distinct subject of taxation under the statute. It was claimed that, if the land was taxed at its full value without deducting the mortgage, and if the mortgage debt was also taxed, this would be a double taxation of the same subject-matter. The court, however, held that it did not concern the mortgagor whether the mortgage debt was taxed in the hands of the mortgagee, and that he could not complain of double taxation, unless his own property was twice taxed.

As stated in the subsequent case of Savings & L. Soc. v. Austin, 46 Cal. 484, the combined effect of the decisions in the McCreery and the Lick Cases was that neither the mortgagor nor the mortgagee could resist a tax,—the one upon the land and the other upon the mortgage debt,—on the ground that there has been a double taxation of either.

In Savings & L. Soc. v. Austin, 46 Cal. 415, however, Crockett, J., after an elaborate discussion, came to the conclusion that, if a debt for money loaned and secured by mortgage be taxed, and the mortgaged property be also taxed, the same value and subject-matter has been twice taxed, and it presents a case of double taxation beyond the power of the legislature. This, however, was a mere *dictum*, as a decision on the point was unnecessary to a disposition of the case, and did not receive the assent of the majority of the court.

But, in People v. Hibernia Sav. & L. Soc. 51 Cal. 243, 21 Am. Rep. 704,—an action to recover taxes levied upon solvent credits owned by defendant and secured by mortgages on real estate in California, which real estate was assessed at its full value without deduction of the mortgage debt,—the majority of the court held that solvent credits, whether secured by mortgage on real estate or not, are not property, nor taxable as such, within the provision of the Constitution declaring that all "property" shall be taxed in proportion to its value; and this decision was largely based upon the position that the taxation of credits necessarily involves double taxation. People v. McCreery and People v. Eddy, supra, were expressly overruled. McKinstry, J., who spoke for the court, said that the view that credits were not property within the constitutional provision removed the objection previously resorted to, that the creditor could not complain if the debtor should pay a double tax. It should be noted that the court expressly refrained from passing on the question as to the power of the legislature to impose a tax in the nature of a license or excise tax in respect of such credits.

The last case was decided in 1876. By the Constitution adopted in 1879, express provision was made for taxing the interest of the mortgagee, in a manner, however, which avoided the objection of double taxation. The provision was that a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby; and that, except as to railroad and other quasi public corporations in case of debts so secured, the value of the property affected by such mortgage, etc., less the value of such securities, shall be assessed and taxed to the owner of the property, and the value of such securi

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ion beyond reasonable limits. We shall content ourselves with stating the result of our investigations, and with referring to such cases as we think should be considered controlling.

The sections of the Constitution bearing upon the subject are §§ 11 and 12 of article 14, which read as follows:

"Sec. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

"Sec. 12. All assessments hereafter authorized shall be on property at its cash value."

It is strenuously insisted that the taxation of mortgages upon real estate in addition to the taxation of the real estate itself at its full value is double taxation, and, as such, unconstitutional. It is conceded that the practice has been to tax credits as personal property ever since the organization of the state government in 1838, and it must also be conceded that the decisions of this court have recognized the constitutionality and validity of these statutes. In the case of Taggart v. Sanilac County, 71 Mich. 16, 38 N. W. 639, Mr. Justice Sherwood said: "Mortgages are nowhere excepted out of the taxable property. It was evidently the intention of the legislature, under our tax laws as they now are, to make personal property bear its just proportion of the burdens of taxation, and I find no constitutional objection to this be-

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ties shall be taxed and assessed to the owner thereof in the district in which the property affected thereby is situated.

Under this constitutional provision it was held in Germania Trust Co. v. San Francisco, 128 Cal. 589, 61 Pac. 178, that to assess and tax to the holder thereof the bonds of a railroad corporation secured by a mortgage upon its real property within the state, which was assessed at its full cash value, without deduction of the debts secured thereon, would amount to double taxation, which, in this instance at least, said the court, is made impossible since, by the terms of the Constitution, the secured obligation is, for the purposes of assessment and taxation, to be deemed and treated as an interest in the property affected. The court accordingly held that the provision of the political Code excepting bonds of railroad and other quasi public corporations from the definition of property liable to taxation was constitutional and valid. The doctrine of this case is followed and applied in Re Fair, 128 Cal. 607, 61 Pac. 184, and Re Pichoir, 128 Cal. 615, 61 Pac. 1130.

Cases like Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392, which hold that it is not double taxation to tax a mortgage and the debt secured thereby against the mortgagee as an interest in real property, the mortgagor being allowed to deduct the amount of the mortgage indebtedness from the assessment of his interest in the land, are not within the scope of this note. So, cases like State ex rel. Lewis v. Smith, 158 Ind. 543, 63 L.R.A. 116, 63 N. E. 25, 214, 64 N. E. 18, upholding statutes permitting the deduction of the mortgage indebtedness or a portion thereof from the value of the real estate for purposes of taxation, against objections based on constitutional provisions as to equality and uniformity, are beyond the scope of the note.

Broadly speaking, the argument of those who insist that the taxation of the mortgage, and real estate subject thereto at its full value, amounts to double taxation, is that the physical property is the only basis of assessable value, although the assessments may properly be divided so that the part of the value represented by the mortgage shall be assessed to the mortgagee, and the balance, or equity of redemption, to the mortgagor; that in general, if the mortgage as well as the full value of the land is assessed, the entire burden of the tax will ultimately fall upon the mortgagor, either directly by virtue of his stipulation to pay the mortgagee's tax, or indirectly by the necessity of paying a higher rate of interest than would otherwise be necessary. If this view of the practical operation of a law which subjects both the mortgage and the full value of the land to taxation is sound, —and in the absence, at least, of any statutory limitation of the rate of interest it undoubtedly accords with actual experience, —the absurd result is reached, under such a system, that a man who has but $1,000 to pay on a farm which he buys for $2,000, and is therefore obliged to give back a mortgage for $1,000, will bear the burden of a tax upon an assessed valuation of $3,000,— $2,000 on the land directly assessed to him, and $1,000 on the mortgage, which is nominally assessed to the mortgagee, but the tax on which, in this view, the mortgagor actually pays,—whereas if he had been actually worth $2,000, so that he could have paid for the farm in cash, he would only have been obliged to pay taxes on an assessed valuation of $2,000, the value of the farm. The unfortunate mortgagor, therefore, is not only obliged to bear the burden of a tax on the thousand dollars of value he owns and on the thousand dollars he owes, but is subjected to penalty, apparently for being in debt, by way of a tax on an additional thousand dollars which he neither owns nor owes. Instead, as might be expected, of paying but one half the amount that would have been necessary if he had been worth $2,000 instead of $1,000, he actually pays one third more. And it is to be observed that this result is not only not necessary, in order to protect the state against a loss of assessable values, but, upon the other hand, actually creates out of whole cloth, or paper rather, a new and increased

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ing done. . . . I know of no reason why property in real-estate mortgages cannot be assessed at its cash value as well as any other personal property. Such property is very largely dealt in by nearly all classes of business men, and the various kinds have a rated value according to the extent of the security and personal responsibility of the party whose obligation is secured, if any; and I know of no reason why the assessing officer may not as well ascertain that value as any other business man. . . . The claim that double taxation cannot be avoided under the act cannot be sustained. . . . In order to have double taxation, the same property must be taxed twice when it should be taxed but once. The law of 1887 creates no such injustice. When an indebtedness is secured by mortgage on real estate, and the mortgage becomes property more valuable and desirable than the land itself, there is not, nor can be, any good reason why the mortgage should not be taxed to assist in bearing the public burden, and any course of reasoning which would exempt the property in the mortgage, and make the land bear the burden of taxation which should be shared by the holder of the mortgage, would not only be unequal and unjust, but would, I think, be getting about as near double taxation as can be reached without having it pure and simple." Justice Champlin, concurring in this view, said: "I think it is competent for the legislature to assess and tax securities representing values. Whether it is the best plan to adopt, or whether it is expedient to do so, is not a judicial, but a political, question, resting solely with the legislature." The question was again before the court in Marquette v. Michigan Iron & Land Co. 132 Mich. 130, 92 N. W. 934, in which this same contention was made, that a tax on both the property contracted to

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Assuming again, for the sake of simplicity, that the thousand dollars with which the mortgage is discharged was a gift to the mortgagor, or represented new value created by him, so that there is no corresponding credit subject to taxation, it is apparent that, under a system which taxes both mortgage and property at full value, the execution of a mortgage increases the assessable value without adding any real value, and that its discharge diminishes the assessable value without destroying any real value. Upon the other hand, if the value of the property on which the mortgage is secured be regarded as the total assessable value, whether it be assessed wholly to the mortgagor, or in part to the mortgagor and in part to the mortgagee, the execution of the mortgage will not increase the assessable values nor its discharge diminish them.

Perhaps the time has passed when any advantage may be hoped from addressing any argument to the courts against the constitutionality of the taxation of both the mortgage and the property on which it is secured at full value, but, in view of the demonstrable correctness of the proposition that such taxation amounts to double taxation in fact, it would seem the argument might still appeal, with some force at least, to courts sitting in states where double taxation is specifically prohibited by the Constitution.

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But it is urged that in practice the mortgagor pays the tax both upon the real estate and upon the mortgage, and that, therefore, he is subjected to double taxation. The answer is that this may or may not be true, and that, whenever the mortgagor does pay the tax upon the mortgage, it is not because it is a burden imposed upon him by the state, but because of a contract that he has voluntarily entered into, and this contract is subject to restrictions imposed by the usury laws. See Green v. Grant, 134 Mich. 462, 96 N. W. 583. As bearing on the general question, see Paddell v. New York, 187 N. Y. 552, 80 N. E. 1114, s. c. 211 U. S. 446, 53 L. ed. 275, 29 Sup. Ct. Rep. 139.

It is next urged that the law permitting a creditor in listing his property for taxation to deduct the amount of any indebtedness owing by him is unconstitutional as being in violation of the constitutional requirement of uniformity; the claim being that the Constitution of Michigan does not make the net assets of persons or corporations the basis of taxation, but, on the contrary, provides that all general taxation must be on property according to its cash value; and it is urged with much force that the credits of which one is possessed constitute property, and that, this being so, it would be subject to taxation as property, and that any provision for deducting the indebtedness of the owner is in effect an exemption of so much of his property from taxation.

The case of Exchange Bank v. Hines, 3 Ohio St. 1, is relied upon to sustain this contention. The majority opinion of the court in that case did sustain the contention, and that opinion has been followed by the supreme court of South Dakota in the case Re Assessment & Collection of Taxes, 4 S. D. 6, 54 N. W. 818. The Constitution of Ohio of 1851 (art. 12, § 2) provided that "laws shall be passed, taxing, by a uniform rule, all moneys, credits," etc., and it was in construing this constitutional provision that the rule in Exchange Bank v. Hines was laid down. Soon after this decision, however, the legislature of Ohio enacted a statute which declared that the term "credit" meant the excess of the sum of all legal claims and demands over and above the sum of legal and bona fide debts owing by such person. In Hubbard v. Brush, 61 Ohio St. 252, 55 N. E. 829, the supreme court of Ohio said of this legislation that it had been acquiesced in for more than forty years, and that Exchange Bank v. Hines, in so far as it denied the right to deduct liabilities from claims and demands, has been ignored. The court said: "The word 'credits,' in the connection in which it is used in the Constitution, is not made at all clear by a resort to the lexicographers. It is apparent, however, that, if the framers of the Constitution had intended to specifically tax book accounts, promissory notes, and the like, it would have only required the addition of a few words, not at all incompatible with the brevity required in such instruments, to manifest that intention. The ease with which it could have been done gives to the omission a signification entitled to some consideration. . . . The difficulties, however, attending a deduction of liabilities from claims and demands, have not proved formidable since the practice was authorized by the legislature, and the practice itself has received general approbation. For these considerations, not to specify others, we are of opinion that the legislative declaration is in accord with the Constitution, and therefore hold that the corporation involved in this controversy rightfully, in listing its property for taxation, deducted its liabilities from its claims and demands." The result of this opinion was that the term "credits" as used in the Constitution might be held to mean the net credits. The same ruling was made by the supreme court of Nebraska in Lancaster County v. McDonald, 73 Neb. 453, 103 N. W. 78. In the case of Florer v. Sheridan, 137 Ind. 28, 23 L.R.A. 278, 36 N. E. 365, the conclusion was reached that the true value of the taxpayer's credits was the balance due after deducting the debts. The case upon this point is well reasoned, and we think states the correct rule. See also State v. Moffett, 64

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Minn. 292, 67 N. W. 68, and State v. Northern P. R. Co. 95 Minn. 43, 103 N. W. 731, and for a general discussion, Gray, Limitations of Taxing Power, §§ 1395 et seq. Since the adoption of the Constitution, and indeed before, every tax law in the state has authorized the deduction of debits from credits in listing personal property for taxation, and, while the court has never been directly called upon to pass upon this question, the propriety of such legislation has been recognized in First Nat. Bank v. St. Joseph, 46 Mich. 526, 9 N. W. 838, and Beecher v. Detroit, 110 Mich. 456, 68 N. W. 237.

It is urged that the fact that the practice of deducting debts from credits has so long continued should not deter the court from declaring the law unconstitutional, if convinced that it is beyond the legislative power. This statement of the duty of the court is undoubtedly correct. See Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 95, 44 L.R.A. 679, 78 N. W. 1025. But the fact that such statute has remained upon the statute books for over seventy years, and that the practice has continued from the formation of the state to the present time, does call upon the court to move with the utmost caution in asserting its invalidity. We are not convinced that the reasoning of the courts in the cases cited above from other jurisdictions is unsound, and are disposed to follow them. As to the further contentions of relator's counsel, the language of Judge Cooley [Taxation, vol. 1, 3d ed. p. 389] quoted with approval by this court in Detroit v. Board of Assessors (Detroit v. Rentz) 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787, is peculiarly appropriate: "Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and, if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions."

The order of the Circuit Court dismissing the petition is affirmed, with costs.

23 L.R.A.(N.S.)

OHIO SUPREME COURT.

EDWIN E. KELLOGG, Plff. in Err.,
v.
CINCINNATI TRACTION COMPANY et al.

(80 Ohio St. 331, 88 N. E. 882.)

Municipal corporation — overhead bridge — right to erect.

The owner of lots abutting on opposite sides of the street may, under a license or permit from the city council, revocable at its pleasure, construct an overhead bridge for the purpose of transporting freight over the street and relieving the street of a serious obstruction to, or interference with, traffic along the street; the bridge being so constructed that its supports will not be in the street, and so that it will not interfere with the light and air of adjoining abutting owners.

(May 18, 1909.)

Headnote by the COURT.

Case Note. — Right of municipality without express power to permit construction of an overhead bridge across a public street for private purpose.

It is not intended to include in this note the question whether a municipality has power to permit the erection of bridges across public streets for public purposes, or power to permit the erection of such bridges, either for public or private purpose, where the abutments or supports of the bridge or approaches thereto are built in and occupy a portion of the street.

But few cases have considered the question as herein raised. It is to be noted that, in KELLOGG v. CINCINNATI TRACTION CO., the bridge in question was constructed between buildings on opposite sides of the street, and its supports were not in the street, and hence neither the bridge nor its supports in any way impeded public travel. Moreover the permit of the municipality to construct the bridge was considered merely a license, revocable at pleasure. The general rule is that a municipality cannot, without express or implied power, permit any use of its streets that will seriously impair or interfere with the public use, even where the license or franchise is to use the street or streets for a public purpose, and the rule is even more rigidly enforced where the contemplated use is for a private purpose.

In the few cases that have considered the question under annotation, it was presented in form somewhat different from that presented in the KELLOGG CASE, and for that reason, although the power of a municipality to permit the erection of such a structure has been uniformly denied, the cases cannot fairly be said to conflict with the doctrine of the KELLOGG CASE. Indeed, in the KELLOGG CASE, the court expressly

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ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas dismissing a petition filed to enjoin the construction of a proposed bridge. Affirmed.

The facts are stated in the opinion.

Messrs. **Horstman & Horstman**, for plaintiff in error:

An ordinance permitting encroachment upon a street for a purely private purpose is void.

People ex rel. Faulkner v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785; Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89; Hibbard v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256; State v. Street & Waters Comrs. 65 N. J. L. 307, 47 Atl. 466; Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373; John Anisfield Co. v. Edward B. Grossman & Co. 98 Ill. App. 180; Costello v. State, 108 Ala. 45, 35 L.R.A. 303, 18 So. 820; Denver v. Girard, 21 Colo. 447, 42 Pac. 662; Platt v. Chicago, B. & Q. R. Co. 74 Iowa, 127, 37 N. W. 107; Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 482, 81 N. E. 983; Lake Shore & M. S. R. Co. v. Elyria, 69 Ohio St. 415, 69 N. E. 738; 2 Dill. Mun. Corp. 4th ed. § 660; Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262.

Mr. **Murray Seasongood**, for defendants in error street railroad companies:

The bridge is not a nuisance as it does not amount to an obstruction of the street.

Cincinnati v. Fleischer, 63 Ohio St. 229, 58 N. E. 568; Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274; Wolff v. District of Columbia, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 A. & E. Ann. Cas. 967; Iroquois Hotel Co. v. Columbus, 5 Ohio N. P. N. S. 357; Spencer v. Andrew, 82 Iowa, 14, 12 L.R.A. 115, 47 N. W. 1007; Cushing v. Boston, 128 Mass. 330, 35 Am. Rep. 383;

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pointed out that there was no complaint that the public would be inconvenienced or any property rights injured, and statements in the answer, to the effect that the bridge would promote the public convenience in the street, were admitted. It is on this ground that the power of a municipality to permit the erection of such a bridge was attacked in the cases hereinafter mentioned. Thus, in Field v. Barling, 149 Ill. 556, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850, the power of a municipality to permit the construction of a structure similar to that involved in the KELLOGG CASE was attacked by near-by property owners, who claimed that such a structure injured their property in that it deprived them of sunshine, light, air, and warmth which they had hitherto enjoyed, and cut off and obstructed their view. On these grounds the contention of such property owners was sustained, and the erection of the structure restrained.

On the same ground a similar structure or bridge was held, in Beecher v. Street & Water Comrs. 64 N. J. L. 475, 46 Atl. 166, affirmed in 65 N. J. L. 307, 47 Atl. 466, to be inconsistent with the purposes for which the city had control of the highways, and hence the municipal authorities had no power to pass an ordinance permitting the construction of such a bridge.

And it was also held in the foregoing case that owners of property located near such a bridge, whose light and view was thereby obstructed, had a sufficient interest to entitle them to maintain proceedings to question the validity of the action of the municipality in authorizing the construction of the bridge.

In reaching the same conclusion as to a very similar structure, in Tilly v. Mitchell & L. Co. 121 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969, the court said: "So long as it remains a street, it is reserved for public uses and for public uses alone, and the council has no power to devote any part of it to private uses, even though that part be merely a part of the space above the roadbed. . . . Common councils have no authority to turn a street into a tunnel, for the purpose of granting to private parties for private use the enjoyment of everything above the tunnel. The proposition needs no authority. The council holds the easement in the street for public use alone. is an attempt to exceed their powers, and The attempt to divert a part to private use hence, under principles already stated, can be controlled by the courts."

Townsend v. Epstein, 93 Md. 537, 52 L.R.A. 409, 86 Am. St. Rep. 441, 49 Atl. 629, also held that, while the mayor and city council of the city of Baltimore were invested with the title to and control over public streets, yet this power did not warrant a grant of the use of a street to promote a mere private purpose to serve a mere private interest, or to subordinate the right of one citizen in a street to the private interest and convenience of any other; hence, a permit to a private person to connect buildings on opposite sides of the street by a superstructure built so far above the street as not to interfere with traffic was invalid because beyond the powers of the corporation.

And, in Bybee v. State, 94 Ind. 447, 48 Am. Rep. 175, a similar structure was held to be within the rule that "the permanent and exclusive use and occupancy of any public street or highway by any person, by the erection or maintenance of any structure on, beneath, or above its surface, which wrongfully obstructs or may obstruct such street or highway, is a misdemeanor within the meaning of the statute, and is punishable as a public nuisance."

But a municipality is liable for the damages caused by its officers summarily tearing down such a structure over an alley, because by ordinance it had been declared a nuisance, when the obstruction thereby to light and travel was of a slight character. Frostburg v. Hitchins, 99 Md. 617, 59 Atl. 49.

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Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Offutt v. John Roth Packing Co. 11 Ohio C. C. N. S. 357.

Messrs. **Edward M. Ballard** and **Geoffrey Goldsmith**, for defendant in error city of Cincinnati:

The public has in a street the right of pedestrian and vehicular passage and to subsurface and to supersurface for pipes, tubes, conduits, and the like, and for trackage, trolleys, and the like, respectively, but no other rights.

Hamilton, G. & C. Traction Co. v. Parish, 67 Ohio St. 181, 60 L.R.A. 531, 65 N. E. 1011; Henry v. Cincinnati, 1 Ohio C. C. N. S. 289.

A bridge having no footing in the street, and finding support in buildings or lands abutting the street, and affording a clearance of 24 feet 3 inches, is not a nuisance.

Offutt v. John Roth Packing Co. 11 Ohio C. C. N. S. 357; Reese v. Cleveland, 5 Ohio N. P. N. S. 193; Henry v. Cincinnati, supra; Butler v. Cincinnati, 2 Ohio C. C. N. S. 376; Iroquois Hotel Co. v. Columbus, 5 Ohio N. P. N. S. 357.

Summers, J., delivered the opinion of the court:

The city of Cincinnati by ordinance granted permission to the Cincinnati Traction Company and the Cincinnati Street Railway Company to construct and maintain across Eastern avenue in the city, a bridge for the purpose of connecting the property of the companies upon the north side of the avenue with the property of the companies on the south side of said avenue, in order that coal might be carried from their elevator on the north side of the avenue to their power house on the south side of said avenue.

The plaintiff in error, Edwin E. Kellogg, filed a petition for an injunction against the city and the two companies. He avers that he is a taxpayer of the city, and brings the action on behalf of the city, and that he, in writing, duly requested the city solicitor to bring the action, and that he refused to do so. He avers that the city by ordinance granted permission to the companies to construct the bridge. He avers that Eastern avenue is one of the principal thoroughfares of the city, and that the companies threaten to erect and maintain the bridge, and he avers that the ordinance is invalid for the reason that the city did not have authority to make the grant, and that the erection of the bridge will result in the execution and performance of a contract made in behalf of the corporation contrary to law, and will be an abuse of the corporate power of the city.

The city answers, admitting the facts stated in the petition. It sets out a copy of the ordinance, and denies that it is a contract, or its enactment an abuse of the corporate power of the city.

The answer of the companies is as follows:

"The Cincinnati Traction Company and the Cincinnati Street Railway Company, defendants, admit that the city of Cincinnati is a municipal corporation, that these answering defendants are corporations, and that the plaintiff, Edwin E. Kellogg, is a taxpayer, and that he requested the city solicitor in writing, and the latter refused such request, as alleged. They further admit that the city of Cincinnati, on April 27, 1908, passed the ordinance the title to which is set forth in the petition; that it is their intent to construct and maintain a bridge for coal purposes across Eastern avenue from their property on the north side of said avenue to their property on the south side thereof, in accordance with the terms and provisions of said ordinance, except that the height of said bridge above the surface of Eastern avenue will be greater than the minimum height prescribed by the ordinance,—that is to say, the bridge proposed is to be about 10 feet in width, with a clear span across said avenue, and located so that the center line of the bridge on the north line of said avenue shall be about 151 feet west of the west line of St. Andrew street, measured along the north line of Eastern avenue, and that the center of said bridge at the south line of Eastern avenue is to be about the same distance west of the west line of St. Andrew street, measured along the south line of said Eastern avenue,—and said defendants deny each and every other allegation in said petition contained.

"The defendants further aver that the Cincinnati Street Railway Company owns the fee, and the Cincinnati Traction Company is the lessee of said owner, and has a leasehold estate in the properties located on the north side and the south side of said Eastern avenue and so to be connected by means of said proposed bridge, together with an elevator at the north end of the bridge for lifting coal from railroad cars to the level of the bridge; that the total frontage of the property so located on the north side of Eastern avenue is 227.61 feet; that the total frontage of said property located on the south side of Eastern avenue is 376.50 feet; that the bridge as authorized is designated to be, and will be, constructed and maintained along a line at right angles to the center line of Eastern avenue, and at the sole cost and expense of these defendant companies; that the distances on both sides of Eastern avenue between the eastern boundaries of the properties aforesaid of these defendants and the center of said proposed bridge are about 151 feet, as hereinbefore stated; that the distance be-

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tween the center of said bridge as proposed on the north side of Eastern avenue and the west boundary of the said property located on the same side of Eastern avenue is about 75 feet; that the distance between the bridge as proposed on the south side of Eastern avenue and the west boundary of the said property on the same side of the avenue is about 225 feet; that the plan of the proposed bridge has been completed, and the bottom line of the truss construction supporting the same is to be 28.83 feet above the rails of the street railway tracks located at that point in said Eastern avenue, and the bridge will be constructed and maintained with a clearance of that height throughout the width of said avenue; that said proposed bridge cannot, and will not, interfere in any respect whatever with the light and air of any property or structure of any owner or holder of property situated on either side of said avenue; that the said bridge is designed to be and will be constructed and maintained so that no part of the structure will rest in any portion of Eastern avenue, its supports being designed to be, and will be, placed wholly upon the property of these defendants; that the materials with which the bridge is to be constructed are of the most substantial, modern, and durable steel work, thoroughly fireproof in all parts, both as to supports and span, including also the floor, sides, and roof of the bridge and all its connections, and its construction will be of such a character, and the structure will be so inclosed, as absolutely to prevent any part of the structure itself, or anything carried thereon, from falling into the street; and the right is expressly reserved to the city council by the said ordinance to revoke the bridge grant at any time, and to require the defendant companies to remove the bridge upon thirty days' notice.

"These defendants further aver that they maintain, on the property located as aforesaid on the south side of Eastern avenue, one of the most important power stations they have or use in connection with their street railway system in Cincinnati; that it is necessary to place and maintain the bridge structure proposed in manner aforesaid, in order to secure by railroad, which is the only means of securing, sufficient supplies of the best obtainable smokeless coal, the north end of said proposed bridge being designed to connect with the Pennsylvania railroad, the only railroad in that vicinity, and the defendants being required by ordinance of Cincinnati to operate their power house without the emission of smoke for more than six minutes in any one hour; that the quantity of coal now consumed at said power house is between 35,000 and 40,000 tons per annum, and much of this coal should be stored and carried in large quantities so as to avoid interruptions to street car service through delays in railroad deliveries; that such storage is not now practicable, but would be after completion of the proposed bridge; that these defendants have found it necessary, and they propose, to enlarge this power plant so as there to generate the electrical energy required to meet the increasing demands of the street railway traffic of the city, and sufficient finally to enable the defendants to abandon some of their other power stations, and the quantities of coal that will be ultimately needed at the power station on Eastern avenue, to be supplied by means of this proposed bridge, will be about 250,000 tons per annum, and the prevention of, or any interference with, the construction and maintenance of this bridge as proposed, would work irreparable injury, both to these defendants and the public.

"The defendants further aver that the only means for transporting coal from the railroad aforesaid, or from any other railroad, to the said power station, is by teams; that the defendant traction company was authorized by ordinance of the city of Cincinnati passed March 28, 1904, to construct and maintain surface tracks across Eastern avenue at or about the site of the proposed bridge, for the purpose of transporting coal from the Pennsylvania tracks to the said power station, but subject, however, to a provision that there should be no obstruction to travel on Eastern avenue; that these defendants found that such a plan as that would be an obstruction to travel, and would be impracticable as well as dangerous; that the use of teams has been, and is now, an obstruction to travel, and is also attended by constant danger of collision with street cars, since the teaming has to be carried on at right angles to the line of travel in Eastern avenue; but that the plan proposed of supplying the coal by means of the bridge in question would not interfere with public travel of any kind, or with any street use whatever.

"The defendants further aver that it has been, and is, the usage and custom in the city of Cincinnati, through its council and controlling officials, to permit the construction, maintenance, and use of bridges of various kinds, including structures similar in character to the one involved herein, across and above the surfaces of streets and alleys, and that no interference with public traffic or street usage of any character has been experienced.

"Wherefore these defendants pray that both the temporary and perpetual injunc-

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tions prayed for be denied, and that they be dismissed hence with their costs."

General demurrers to the answers were filed and overruled, and the petition dismissed, and on error in the circuit court the judgment of the court of common pleas was affirmed. The question for determination is whether a city taxpayer may enjoin the construction, by an abutter, of a bridge over a street, from his property on one side of the street to his property on the other, under an ordinance granting him the right to do so.

It is provided by statute (§§ 1526–1566, Rev. Stat.) that "a proprietor of lots or grounds in a municipal corporation, who subdivides or lays the same out for sale, shall cause to be made an accurate map or plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons, or other public uses," and that, when such map has been properly acknowledged and approved by the council of the city, and recorded in the office of the recorder of the county, it shall be deemed a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended.

Judge Dillon says (Mun. Corp. § 664a) that "the later and better considered judgments hold that it is comparatively unimportant, as respects the relative rights of the abutting owner and the public in and over streets, whether the bare fee is in the one or the other. If the fee is in the public, the lawful rights of the adjoining owners are in their nature equitable easements; if the fee is in the abutter, his rights in and over the street are in their nature legal; but, in the absence of controlling legislative provision, the extent of such rights is, in either event, substantially, perhaps precisely, the same." And, in Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224, it is said: "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle, with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner, or in some third person." The decisions in this state are in accord with these statements of the law. Langley v. Gallipolis, 2 Ohio St. 108; Crawford v. Delaware, 7 Ohio St. 459; Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville, 14 Ohio St. 523; Scioto Valley R. Co. v. Lawrence, 38 Ohio St. 41, 43 Am. Rep. 419; Callen v. Columbus Edison Electric Light Co. 66 Ohio St. 166, 58 L.R.A. 782, 64 N. E. 141. If the fee is in the city, it is in trust for the purposes of a street, and, if it is in the abutter, it is subject to the easement of a street.

The estate that is vested in the city is measured by the uses and purposes for which the dedication is intended; the remainder remains in the dedicator and vests in the owners of the abutting property. Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341. The abutting owner's interest in the street is a property right, and he may make any use of the property that is subject to the easement of a street, or that is held in trust for a street, that does not impair its use for any purpose for which it may be used as a street. 2 Dill. Mun. Corp. §§ 656a, 656b, 723c. "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for the public use; and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places." Dillon, § 656. Accordingly, it is held that a franchise to construct a railway in a street, or to lay water, natural or artificial gas pipes, or heating pipes, or to construct telegraph or telephone or electric lighting poles and wires in the streets, or other franchises, may not be granted by a municipality, unless it is expressly authorized so to do by the legislature; and there are cases that hold that the municipality, in the absence of power delegated to it by the legislature, either expressly or impliedly, may not license or permit encroachments upon the street, or the use of the street for any private purpose, and that a delegation of such power is not to be implied from a general grant of power to supervise and control the streets. Elliott, Roads & Streets, §§ 651, 653, 740.

In People ex rel. Faulkner v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785, it is held: "An ordinance permitting the construction of a bay window extending into the street or any other encroachment thereon, for a purely private purpose or private use, is void." "The streets in their entirety are public streets, exclusive for public use, and no part of them can be de-

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voted exclusively to private persons or private use by virtue of municipal ordinances or otherwise." In Costello v. State, 108 Ala. 45, 35 L.R.A. 303, 18 So. 820, it is held that a fruit stand on the sidewalk is an unlawful osbtruction, and that the city could not authorize it by license. To the same effect is Denver v. Girard, 21 Colo. 447, 42 Pac. 662. In Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262, it is said: "The power of a city over its streets, and the right of the public to them, extends upward indefinitely for the purpose of their preservation, safe use, and enjoyment; and the duty of a city in this respect is commensurate with its power."

We concur in the view that a franchise can be granted only by the state, or by the municipality under power expressly granted; but there are many uses or encroachments upon the streets that are not, and never have been, regarded as nuisances, so long as they serve a useful purpose, and do not inconvenience the public, and which may be permitted or licensed under general powers such as those conferred by § 1536–131, Rev. Stat., which provides that, "in all municipal corporations, council shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the corporation, and shall cause the same to be kept open and in repair and free from nuisance."

In Elster v. Springfield, 49 Ohio St. 82, pages 96, 97, 30 N. E. 274, 277, a water pipe had been laid in a street, under a grant or license by the city, for the purpose of conveying water from a spring to a paper mill several squares distant. In the construction in the street of a large sewer by the city, more than twenty-one years after the pipe had been laid, the water pipe was destroyed, and the owner sued the city for damages. In the opinion it is said by Spear, J. (96): "The laying of sewers, like that of gas and water pipes beneath the soil, and the erection of lamps and hitching posts, etc., upon the surface, is a street use, sanctioned as such by their obvious purpose, and long-continued usage." And again he says (97): "As we have seen, the city as to its streets is a trustee for the use of the public. A trustee of property for the benefit of the public could not, any more than could a trustee of private property held for known specific and continuing uses, alien or encumber the property to the prejudice of the beneficiary; and a purchaser dealing with the trustee, in either case, would be bound to take notice, at his peril, of the limitation of the power. 2 Dill. Mun. Corp. § 671; Alton v. Illinois Transp. Co. 12 Ill. 60, 52 Am. Dec. 479. Hence it would follow that whatever grant may have been made by the town of Springfield to the Kills, to maintain water pipes in Center street, could have no greater operation than as a temporary license, subject to be revoked at the will of the town or city, as its necessities in the future uses of the street might require. It necessarily results from this that the enjoyment of the street beneath the surface for the laying of the pipes, and the flowing of the water through them, was a permissive use, and that no permanent right could be acquired by long continuance." And it is there held: "The use of the street by the plaintiff for his water pipes being allowed by license, there was no enjoyment adverse to the city. Nor had the city power by grant to give plaintiff any right in the street inconsistent with the future legitimate uses of the street by the city. Hence no right by prescription to maintain the pipes in the street would vest in the plaintiff, although he had enjoyed the use more than twenty-one years, and any damage accruing to plaintiff by removing the pipes, and thus interrupting the flow of water through them, would be *damnum absque injuria*." In Cincinnati v. Fleischer, 63 Ohio St. 229, 58 N. E. 568, it is held that the city is not liable for personal injuries sustained by a person in falling over a carriage block of the usual size, and occupying the usual position of such blocks, near the curb upon the street, merely because it permitted it to be in the street.

The immemorial practice has been for the abutter to maintain in the street shade trees, carriage blocks, hitching-posts, lamp-posts, areas, cellarways, coal cellars or holes, steps, stairways, fire escapes, porticos, bay windows, awnings, signs, and other conveniences, and to place his building flush with the street, so that the eaves project over the street and his window shutters open over the sidewalk. In a large city, where land is very valuable, it is not unreasonable that a property owner should wish to build flush with the street, and to place an areaway to the basement, and bay windows over the street, for they may add very materially to the enjoyment of his building, without inconveniencing the public; but if, in order to have them, he must set his building back from the street line, he will do without, for he cannot afford them at that cost, and so everything will be brought to a dead level, and beauty be sacrificed with convenience.

When a franchise is granted without limit as to time, and invested with the elements of a contract, it is usual for the grant to be made by the state, subject to the approval of the municipality; and, when the question is as to the power of the city to

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make such a grant, it should be held not to exist, unless expressly given or necessarily implied; but, when the use is not in the nature of a franchise, but is a use that is recognized as permissible by an abutter, the city may authorize it by a permit or a license, under the general power given it of care, supervision, and control. Such a permit or license is a mere regulation of the use. It contains none of the elements of a contract, and is revocable at the pleasure of the city. It is so held respecting a permit to an abutter to occupy a street with building materials, to be used in a building on the abutting lot, in Columbus v. Penrod, 73 Ohio St. 209, 3 L.R.A.(N.S.) 386, 112 Am. St. Rep. 716, 76 N. E. 826.

In Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590, where an abutting owner had contracted for the construction of an area, 6 by 20 feet, in a street in front of his building, with steps down the area leading into the basement, and where a person had fallen into the area, and brought suit for damages for his injuries, it was successfully contended by Morrison R. Waite, counsel for plaintiff in error, and afterwards Chief Justice of the Supreme Court of the United States, that the trial court had erred in charging the jury "that, as the defendant had shown no license or authority from the authorities of the city of Toledo or state of Ohio to make such an excavation in the street in front of his lot, such excavation was unlawful; and, being unlawful, the defendant Clark was liable for any damage which occurred, by reason thereof, to the plaintiff, when he (the plaintiff) was not himself in fault, although the work was done by Freeman under a contract with Clark entered into for that purpose."

The easement for a street extends as far below, and as high above, the surface of the ground as is necessary for street purposes, but if the abutter may for a useful purpose, and when the public is not inconvenienced, build an areaway in the street to the basement of his building, or place structures under the street, he may, subject to the same limitations, place structures above the street. There is no complaint here that the public will be inconvenienced, or any property rights injured, but the demurrer admits the statements of the answer to the effect that the bridge will promote the public convenience in the street. The rule that every encumbrance is unlawful, unless expressly authorized by the legislature, is certain and easy of application, but is not according to experience, and may result in a very great inconvenience to many and hardship to a few; and, so long as such permits or licenses are revocable at the pleasure of the city, whenever the public convenience requires, and inasmuch as a right to maintain them cannot be acquired by their use, however long continued, it is better to suffer a few contentions that may arise than to escape them at the expense of the convenience of so many.

Judgment affirmed.

Crew, Ch. J., and Spear, Davis, and Shauck, JJ., concur.

OREGON SUPREME COURT.

J. J. JENNINGS et al., Respts.,
v.
L. TRUMMER, Appt.

(— Or. —, 96 Pac. 874.)

Broker — introducing customer — commission.

1. A broker for the sale of property who notifies the owner of the fact that he has a customer, and gives his name, is entitled to the credit of bringing the parties together, although he does not actually introduce them to each other, which service is performed by another broker.

Same — two agents — right to commission.

2. A property owner who, with knowledge of the facts, deals with a customer of one broker through the agency of another, will be liable to the first for his commission.

Same — unfair dealing.

3. A property owner will be liable for the commission of a broker to whom he has given the right to sell the property, after receiving notice that he has a customer, if such owner afterwards induces another broker to effect the sale, by acquainting him with the facts.

Appeal — findings — conclusiveness.

4. The determination by the trial court on conflicting evidence, that a broker for the sale of property had secured a purchaser at a certain price before the owner interfered by a sale through another broker, is binding on the appellate court.

(July 28, 1908.)

Case Note. — Right to commissions where two or more real-estate brokers acting for the same person are instrumental in effecting a sale of property to a certain purchaser.

The earlier cases on this question are gathered in a subject note to Headley v. Savings Bank, 44 L.R.A. 337. The cases gathered here, therefore, are only those decided since that note.

The question as to which one of two or more real-estate brokers instrumental in effecting a sale of property to a certain

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APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiffs' favor in an action brought to recover commissions for the sale of real estate. Affirmed.

Statement by **Eakin, J.:**

This is an action to recover commissions for the sale of real estate. Plaintiffs allege that in December, 1904, the defendant employed them to find a purchaser for the furniture and good will of a rooming house in Portland, Oregon, for the price of $7,000 net to the defendant, for which they were to have for their commission such sum above $7,000 as they should be able to obtain; that on December 23, 1904, plaintiffs were negotiating a sale with Mrs. Lange as a prospective purchaser at the price of $7,750, which she was ready, able, and willing to pay therefor, and plaintiffs advised defendant of such prospective sale and gave him the name of the customer, and on December 24, 1904, while plaintiffs were so negotiating with Mrs. Lange, the defendant sold the property to her for a price in excess of $7,000; that the sale was procured through the efforts of plaintiffs; and they now ask judgment for $750, the amount of their commissions thereon. Defendant, by his answer, denies these allegations of the complaint, and alleges that plaintiffs did not procure Mrs. Lange as the purchaser, but that L. R. Cottrell, another real-estate broker, introduced her as the purchaser, to the defendant, at the price of $7,250. The cause was

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purchaser is entitled to the commissions seems to resolve itself into the further question which one of the brokers was the procuring cause of the sale. It will be seen, therefore, that the real difficulty involved in this question, and upon which the courts might not seem altogether harmonious, is to decide which one of the brokers was the procuring cause of the sale, all the courts being agreed that the broker who was the procuring cause of the sale is entitled to the commissions.

In **Votaw** v. McKeever, 76 Kan. 870, 92 Pac. 1120, the court states the law to be as follows: "Where two or more agents are employed to sell the same property, the one who makes the sale to have the commission, and a sale is brought about by the joint efforts of all the agents employed, then the agent who was the efficient, predominating, procuring cause of the sale is entitled to the commission. Who first called the attention of the purchaser to the property, or who finally closed the contract by receiving a part payment of the purchase price, or who was most diligent in showing the premises to the purchaser, are unimportant facts, except as they tend to support the controlling proposition. The true rule of law applicable to such a case was very clearly placed before the jury by the 10th instruction, which reads: 'Where two or more agents employed by the owner show or make an effort to sell the same property to the same person, and such person afterward buys the property, and the owner is liable for the payment of the commission, the rule of law is that that agent is entitled to the commission who is the proximate, efficient, and procuring cause of the sale.' This submits the controversy to the jury to decide from the evidence which agent was the proximate, predominating, and procuring cause of the sale. The jury should consider all of the evidence presented, and not confine its deliberations exclusively to the initiatory steps taken, nor to the final execution of the conveyance. If an agent, by his own exclusive effort, produces a purchaser, shows him the property, and, after considerable effort, prevails upon him to take the property, but delays the final act of closing the trade until the following day, and, while the negotiations thus stand in abeyance, another agent induces the purchaser to pay the purchase price and the owner to execute a conveyance, such agent should not be regarded as the efficient, proximate, and procuring cause of the sale. On the other hand, if the agent who produced the purchaser relaxed his efforts, and another, by efficient and persistent work with such purchaser, induced him to make the purchase, then he should be regarded as the one who made the sale."

In accordance with the above statements, where an owner of property places it for sale with two or more real-estate agents, or places it in the hands of a second agent after the relations with the first have terminated, if one makes a sale, though possibly on different terms, to a customer to whom others had first unsuccessfully tried to sell the same property, or with whom they had merely negotiated, not resulting directly in the purchase of the property, the owner, at least in the absence of any interference between the agents, is liable for commissions only to the agent who finally effected the sale.

Cases so holding are: Carper v. Sweet, 26 Colo. 547, 59 Pac. 45; Witherbee v. Walker, 42 Colo. 1, 93 Pac. 1118; Henkle v. Dunn, 97 Mo. App. 671, 71 S. W. 735; Gamble v. Grether, 108 Mo. App. 340, 83 S. W. 306; Johnson v. Lord, 35 App. Div. 325, 54 N. Y. Supp. 922; Sampson v. Ottinger, 93 App. Div. 226, 87 N. Y. Supp. 796; Cole v. Kosch, 116 App. Div. 715, 102 N. Y. Supp. 14; William P. Rae Co. v. Kane, 121 App. Div. 494, 106 N. Y. Supp. 47, reaffirmed after a new trial in 132 App. Div. 935, 116 N. Y. Supp. 739; Haines v. Barney, 33 Misc. 748, 67 N. Y. Supp. 164; Tyng v. Constable, 35 Misc. 283, 71 N. Y. Supp. 820; Kifer v. Yoder, 198 Pa. 308, 47 Atl. 974; Duval v. Moody, 24 Tex. Civ. App. 627, 60 S. W. 269; Land Mortg. Bank v. Hargis (Tex. Civ. App.) 70 S. W. 352; Frink v. Gilbert (Wash.) 101 Pac. 1088.

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tried by the court without the intervention of a jury, and the court found for the plaintiffs, and rendered judgment thereon, and defendant appeals.

Mr. C. M. Idleman for appellant.
Mr. Dan J. Malarkey for respondents.

Eakin, J., delivered the opinion of the court:

The denial of the defendant's motion for a judgment of nonsuit, interposed at the close of plaintiffs' testimony, is the only ground of error presented by the defendant in his brief. It is a general principle that, even if the evidence was insufficient to be submitted to a jury, yet the appellate court will not review the motion if such defect has been cured by subsequent testimony which is properly disclosed by the record. Bennett v. Northern Pacific Exp. Co. 12 Or. 49, 6 Pac. 160; Carney v. Duniway, 35 Or. 131, 57 Pac. 192, 58 Pac. 105; Elmendorf v. Golden, 37 Wash. 664, 80 Pac. 264. Therefore we are at liberty to examine the whole of the evidence which is contained in the bill of exceptions, in considering the error assigned.

Defendant's contention is that, as the property was listed with two agents, and that Cottrell actually brought Mrs. Lange and defendant together, and the sale was thus consummated, he was justified in dealing with Cottrell, and plaintiffs have no cause of action. On the 23d day of December, 1904, plaintiffs notified the defendant that they had secured Mrs. Lange as a

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And see 23 Am. & Eng. Enc. Law, p. 928.

In Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441,—a case not strictly in point here, since it did not involve real-estate brokers, and which was decided prior to the date of the former note,—it was said: "A broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that, after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors."

If the jury find that an agent did not procure the purchaser, and that he did not have the exclusive authority to sell, such agent cannot recover commissions where the sale is effected through another agent. Rothenburger v. Schoniger, 30 Ky. L. Rep. 1018, 99 S. W. 1150.

In Girardeau v. Gibson, 122 Ga. 313, 50 S. E. 91, where a real-estate agent procured a purchaser, but, before the completion of the sale, by agreement of all parties concerned, the transaction was considered at an end, it was held that, in the absence of fraud or collusion, such agent cannot recover commissions upon the property being subsequently placed in the hands of another agent and by him sold on practically the same terms to the same purchaser.

And the same is true where a real-estate broker after failing to effect a sale is discharged by the principal, and the land is afterward sold by another broker to a purchaser with whom the first broker had previously dealt. Leonard v. Eldridge, 184 Mass. 594, 69 N. E. 337, and Smith v. Kimball, 193 Mass. 582, 79 N. E. 800.

In Higgins v. Miller, 109 Ky. 209, 58 S. W. 580, it was held that when property has been listed for sale with a number of real-estate agents, the one who succeeds in bringing the seller and purchaser together, and induces them to enter into the contract, is the one who has earned the commissions; and an agent, although the first to introduce the parties, cannot recover if unsuccessful in his attempt at sale.

In De Zavala v. Royaliner, 84 N. Y. Supp. 969, reaffirmed after a new trial in 45 Misc. 430, 90 N. Y. Supp. 563, it was held that a broker was not entitled to commissions for the sale of a leasehold, where he merely brought the parties together, but did not cause them to agree upon terms, but which was effected some time later through another broker, upon a basis, however, different than that which was submitted by the first broker.

To the same effect is McNulty v. Rowe, 28 Misc. 523, 59 N. Y. Supp. 690, where a broker merely suggested a purchase to a certain person without naming the price or making a contract, the property being afterwards sold by another broker for a sum less than that for which the complaining broker was entitled to sell.

A similar case and holding to the same effect is Hollyday v. Southern Farm Agency, 100 Md. 294, 59 Atl. 646, where, after an agent had failed to effect a sale with a certain intending purchaser, the land was

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purchaser for said property on the terms and conditions required by the defendant, and the defendant thereupon assented thereto by giving plaintiffs until January 1st to complete the transaction, and signed the following agreement to that effect, *viz.:*

I hereby agree to give a clear bill of sale to the furniture and good will of the rooming house, No. 323½ Washington street (known as the Raleigh block), Portland, Oregon, which includes all the furniture on all of the three upper floors of said building, for the sum of seven thousand dollars ($7,000.00), said sale to be made by the 1st day of January, 1905; and I also agree to loan the purchaser, Mrs. Lange, $4,000, said $4,000 to be secured by a first mortgage on said furniture, the principal to be paid off $500 each quarter, with interest. Said interest is to be at the rate of 8 per cent per annum. It is understood that Jennings & Co. are to get their commission over and above said $7,000.

Done this 23d day of December, 1904.

L. Trummer.

Although plaintiffs did not actually introduce Mrs. Lange to the defendant, it was not necessary that they do so. They did advise him of the prospective sale and of the name of the purchaser, and, if defendant dealt with her as the result of such information, then plaintiffs brought them together; and the evidence was sufficient to be submitted to a jury on that question.

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sold by another agent to a different purchaser, and by him resold to the first agent's intending purchaser.

In Freeman v. Polstein, 49 Misc. 644, 97 N. Y. Supp. 1032, it was held that a broker who as agent for the intending purchaser fails to negotiate a contract for the sale of property cannot, upon another broker stepping in and procuring an acceptable offer, recover commissions from such purchaser.

In McCloskey v. Thompson, 26 Misc. 735, 56 N. Y. Supp. 1076, it seems to have been held that a real-estate broker who merely negotiates with a person to rent a certain property, without binding the bargain, is not entitled to commission, and therefore where, as in this case, the prospective renter, after talking with the broker and promising to come back in a few hours, goes away to get the keys and find the landlord, and in the meantime falls in the hands of another broker, who in fact rents the property to him, the first broker cannot recover commissions. The court said: "To entitle him to a commission, it is necessary that a broker should earn it by effecting the bargain which his employer has asked him to make, and, unless he effects this, however strenuous may have been his efforts, he has no claim to reward."

In Staehlin v. Kramer, 118 Mo. App. 329, 94 S. W. 785, it was held that a real-estate broker having property for sale, in the absence of a definite contract, has a reasonable time in which to find a purchaser, and if after such a time the property is sold through another agent, though to a purchaser with whom the first agent had unsuccessfully negotiated, such agent first appointed cannot recover commissions.

This was also recognized in Nadler v. Menschel, 110 N. Y. Supp. 384, where, after a person procured by one broker failed to consummate the sale, because of a mortgage on the property, the land was sold by another broker to the first-named person's partner.

In Mead v. Arnold, 131 Mo. App. 214, 110 S. W. 656, it was found that the complaining real-estate broker, although having called the purchaser's attention to the property, was not the procuring cause of the sale, and therefore, as against another broker who afterward did sell the property, he was not entitled to the commissions.

In Shipman v. Wilkeson, 112 N. Y. Supp. 895, it was held that, under a contract employing a broker to procure a purchaser for real estate before a designated date, and stipulating the payment of full commissions if the property were sold after such date through information obtained through his agency, such broker is not entitled to commissions where it appears that, although he at one time brought the parties together, they failed to come to any agreement, and that sixteen months afterwards the land was sold to the purchaser through another broker, independently of the former broker and on a different basis, bad faith on the part of the owner being wholly lacking.

In Edwards v. Pike (Tex. Civ. App.) 107 S. W. 586, it was held that a broker who, with knowledge of the employment of other brokers also, secures a prospective purchaser upon terms agreed to by the buyer, cannot recover commission if, before the contract was reduced to writing, the purchaser falls into the hands of other brokers who consummate a sale upon slightly different terms. The court said: "The broker who undertakes a sale of property with full knowledge that another broker has also undertaken to sell it ought not to expect more of the owner than that he will not interfere in favor of the one or the other. It is then an even contest between them, where the chances of success in contemplation of the competition to be expected should be presumed to have been duly weighed by each; and, if as a result of such competition, without interference or fault on the part of the owner, the sale is actually consummated by his competitor, the broker who brought the prospective purchaser and the owner together, but failed to consummate a sale upon the terms agreed upon between him and the buyer, ought not to be permitted to charge against the owner the loss sustained by him, not by the owner's fault, but as a

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Miss Lange, who is the daughter of Mrs. Lange and was her agent in this transaction, had agreed with the plaintiffs as to the terms of the sale, except that she desired to make a deposit of only $10, instead of $100, as asked by plaintiffs. This fact is evidenced by a blank receipt drawn up in the presence of Miss Lange, and read over and assented to by her, except as to the $100 deposit required thereby.

Whatever may be the rights of a real-estate broker who takes a customer away from another, and closes a sale between such customer and the owner, if done without the aid or connivance of the owner, yet if the owner, with knowledge of the facts, deals with the customer of the first broker, even through another agent, he will be liable to the first broker; and, in view of the evidence in this case, it is a question for the trier of the facts to determine whether the defendant did not collude with Cottrell to defeat plaintiff in his efforts to complete the sale. The agreement of defendant of December 23d, set out above, was so signed soon after 12 o'clock M.

Mr. Cottrell testifies that, on the afternoon of that day, defendant showed him a copy of this agreement, and they discussed whether or not it gave Jennings the exclusive right to sell to Mrs. Lange; and he says:

I read it over, and I said: "I don't see that this is the sole option. It looks to me like he has the privilege to sell it at this price if he can do so before that time."

Q. And you considered that you had an opening to get in?

A. Mr. Trummer seemed to be of the same opinion.

Q. He thought that did not give him the exclusive option, and he told you you could go ahead?

A. He said: "You can have it at the same price."

This was before Cottrell had seen Mrs. Lange. Trummer testifies that at the same conversation he told Cottrell "to go ahead and make the sale."

The cases quoted from in defendant's brief upon this question are to the effect that the owner cannot interfere, but the several brokers are free to act independently of each other; and the owner is under no obligation to decide between their conflicting claims, but only to remain neutral, both as between them and between them and the purchaser. The owner cannot step in and complete the

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result of acts of his competitor and conduct of the purchaser, which he reasonably should have contemplated might ensue when he undertook and performed the service."

It would follow from the above cases that, where a real-estate broker begins negotiations for the sale of property, and continues these negotiations until finally, through his efforts and as a direct result thereof, the sale of the property is brought about, he in fact is the procuring cause of the sale, and he cannot be deprived of his right to commissions because the negotiations were finally completed through another agent, whether on the same terms or on different terms. As was said in some cases, the courts will not permit one person to shake the tree and another to gather the fruits.

Cases of this nature are: Rigdon v. More, 226 Ill. 382, 80 N. E. 901, reversing 128 Ill. App. 447; Wood v. Wells, 103 Mich. 320, 61 N. W. 503; Cunliff v. Hausman, 97 Mo. App. 467, 71 S. W. 368; Smith v. Truitt, 107 Mo. App. 1, 80 S. W. 686; Hovey v. Aaron, 133 Mo. App. 573, 113 S. W. 718; Elmendorf v. Golden, 37 Wash. 664, 80 Pac. 264; Sullivan v. Tufts (Mass.) 89 N. E. 239.

Although the contract was modified in minor details. Hall v. Grace, 179 Mass. 400, 60 N. E. 932.

And although the property was exchanged for other real estate, instead of sold, Grether v. McCormick, 79 Mo. App. 325.

In Buehler v. Weiffenbach, 21 Misc. 30, 46 N. Y. Supp. 861, where a real-estate 23 L.R.A.(N.S.)

broker who had been employed to effect a sale of property brought a prospective purchaser, who made an offer which was refused on the ground of it being insufficient, and it appeared that, without terminating such broker's authority, the owner accepted the same offer from the same person, through another broker, the first-named broker was held entitled to the commission.

In Levy v. Wolf, 2 Cal. App. 491, 84 Pac. 313, it was held that a real-estate broker who, within the time allowed by his contract of employment, procures an oral offer from a responsible purchaser, of which he informs his vendor, as well as of his intending purchaser's name, is entitled, upon the vendor accepting the offer, to his commissions, although the property was in fact subsequently sold, on the terms procured, after the expiration of the term of employment, by the vendor through another broker.

The principle that a real-estate broker is entitled to his commissions where the property is sold directly through his efforts, although the final negotiations are effected through another agent, is especially applicable where the last broker acted with the connivance of the owner of the property.

A case of this nature is Gilmour v. Freshaur, 126 Mo. App. 299, 102 S. W. 1107, where the owner induced a prospective purchaser to deal with another firm of real-estate brokers, telling him he could there get the property for a lower price.

And, where the owner assisted the agent

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sale, and escape liability for the commission. The above quotation from the evidence shows not only that the defendant did not remain neutral, but, within a few hours, gave to a competing broker the confidence obtained from the plaintiffs, and aided him in diverting the customer from plaintiffs. Such conduct is entirely lacking in good faith toward plaintiffs. Between the principal and the broker, the utmost good faith must be exercised. The case of Wood v. Wells, 103 Mich. 320, 61 N. W. 503, is very much in point here. The purchaser was procured by Wood, but the sale was consummated by Calkins, another broker, to Wood's customer on practically the same terms; defendant having been previously informed by plaintiff of his negotiations and with whom he was dealing. It was held that the plaintiff was the procuring cause of the sale, and entitled to his commission. To the same effect is Elmendorf v. Golden, 37 Wash. 664, 80 Pac. 264, where the plaintiffs procured the purchaser, of which defendant had full notice. Another broker interfered, and the defendant completed the sale to the second broker for the benefit of plaintiffs' customer; and it was held that plaintiff was entitled to his commission. To the same effect is McCormack v. Henderson, 100 Mo. App. 647, 75 S. W. 171.

Defendant urges that plaintiff has not established, by a preponderance of the evidence, that Mrs. Lange had agreed to buy from the plaintiff at the price of $7,750. Although the evidence is conflicting upon this question, three witnesses testify that she did; and that was a question of fact to be determined from the evidence, which we cannot review. Tinsley v. Scott, 69 Ill. App. 352, 355, makes the proper distinction in such a case as this: "Of several independent brokers under such employment at the same time, the one who first so sells is entitled to the commission. No express contract to that effect is required to give him that right. But, to be a producer, the party presented must be a client or customer of his own, and not one then sustaining that relation to another broker under like employment. If he was first in negotiation with such other, he continues to sustain that relation to him until it is expressly broken off, or the matter of the purchase has ceased to be held by him under consideration. The employer, with notice of the pendency of such negotiation, cannot escape liability to the broker for his commission, by selling to his customer through another, even though he first

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consummating the sale by authorizing him to sell for less than the complaining agent was allowed to accept. Holland v. Vinson, 124 Mo. App. 417, 101 S. W. 1131. See, in connection with the above two cases, JENNINGS v. TRUMMER.

In Barton v. Rogers, 84 Ill. App. 49, it was held that, where property is placed with a real-estate agent for sale, and a sale is brought about through his agency, the vendor cannot escape the payment of commissions to him by declaring the deal off upon his failure by a certain time to furnish or procure money necessary on the part of the vendee to consummate the deal, and by paying commission to another agent who was able and willing to furnish the necessary money.

In Lewis v. McDonald (Neb.) 120 N. W. 207, it was held that, where a real-estate broker has practically induced a person to buy certain property, such broker cannot be deprived of his commission by the acts of the intending purchaser in going to another real-estate broker and prevailing upon him to get the agency of the property, and to divide the commission between them; the owner of the property in this case having conveyed the same in good faith, and without knowledge that the complaining broker had negotiated with the purchaser.

In Lovett v. Clench, 115 App. Div. 635, 101 N. Y. Supp. 174, a real-estate broker procured a purchaser on the terms authorized by the owner, who, however, refused to consummate the sale because, as it appeared, another broker with whom, unknown to the first broker, the property had also been listed, had previously procured an oral offer from this purchaser for a larger sum, which, however, had not at that time been accepted. Thereafter the owner, through the second broker, sold the property to the purchaser for a still larger sum than had theretofore been offered. In an action by the first-named broker to recover his commissions, it was held that, since the owner's contract with the broker was a promise of payment of commissions upon the latter procuring a customer ready, willing, and able to purchase at the former's terms, and it appeared that the purchaser at the time was financially able to buy, and also legally able to buy, since the previous verbal offer was not binding, such broker was entitled to recover. The court took occasion to say that a commission had been paid to the other broker, or that he was in a position to compel the payment of one, under the circumstances, had nothing to do with the case.

In Sylvester v. Johnson, 110 Tenn. 392, 75 S. W. 923, it was held that a real-estate broker having the exclusive authority to sell certain property, and who had been negotiating with a certain intending purchaser, cannot be deprived of his commissions by another agent stepping in, pending the negotiations, and effecting the sale.

In Gouge v. Hoyt, 127 Iowa, 340, 101 N. W. 463, it was held that, under a contract to pay a stated commission upon the owner effecting a sale to a certain purchaser, who had already been introduced by the agent to the vendor for that purpose, the agent

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discharges the former, if he does so without giving him a reasonable time to effect a sale." To the same effect is Day v. Porter, 60 Ill. App. 386, 389. It is said: "Knowing that appellees were, by his procurement, negotiating with and had procured an offer from Mr. Corneau on the 25th, and were still endeavoring to sell to him, he could not, on the 30th, without giving them a reasonable time in which to effect a sale, avail himself of their efforts and deprive them of all compensation, by suddenly terminating their employment. . . . The verdict of the jury in this case must be held as establishing that appellant, when the negotiations of appellees with the customer were in progress, terminated their authority for the purpose of avoiding the payment of commissions to them."

The evidence in this case tends to establish that, in the afternoon of the 23d of December, just after Jennings had secured the agreement from defendant giving him until January 1st to conclude the sale to Mrs. Lange, he gave to Cottrell information of the whole transaction, and consented to his interfering at least eighteen hours before Mrs. Lange phoned to the plaintiffs that she would not purchase, and, on the afternoon of the same day, Cottrell concluded an agreement of sale with Mrs. Lange, eight days before the expiration of the time given to plaintiffs in writing in which to close the sale; and it is a question of fact, to be determined from all the evidence, whether defendant and Cottrell were not the occasion of the sudden termination of her dealings with plaintiffs. There was sufficient evidence upon these questions to raise an issue of fact, and it was not error to deny the motion for judgment of nonsuit.

The judgment is affirmed.

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was entitled to commission upon the sale being effected, although it was finally consummated through another agent.

In Terry v. Reynolds, 111 Wis. 122, 86 N. W. 557, it was held that, under a contract to pay a real-estate broker a certain commission on sale of a farm, or any part of it, at a price accepted by the owner, to be paid only in case of sale to a party to whom the broker had offered the property, such real-estate broker is not bound actually to make the sale, and therefore where the property was sold through another broker, to a purchaser with whom the first-named broker had negotiated, the owner is liable to the first-named broker for commissions, since, as the court said, the contract seemed to imply that the broker was employed only to assist in selling the land.

In Hopkins v. Moseley, 31 Ky. L. Rep. 1308, 105 S. W. 104, it was held that where a landowner listed his land with two brokers for sale, although both are instrumental in inducing the purchaser to buy, both of them cannot recover commissions, the court evidently holding that only the one who succeeded in bringing the parties together and induced them to enter into the contract of sale is so entitled to recover.

An interesting case on this question is Shapiro v. Shapiro, 117 App. Div. 817, 103 N. Y. Supp. 305, reaffirmed after a new trial in 125 App. Div. 608, 110 N. Y. Supp. 11. In this case a person had some property for sale; a member of a brokerage firm called the property to the attention of certain persons, who went to look at the property; these persons a few months thereafter, in attempting to call the owner by telephone, by mistake got another person of the same name, who was also a real-estate broker; this last broker made an appointment to bring the owner and the intending purchasers into personal communication, with the result that the owner finally agreed to sell the property. When the time of closing the contract came, it appeared that these intending purchasers were in fact real-estate brokers themselves, and admitted that they represented another person; the deed was therefore made to this last-named person. Upon the question being raised as to which one of the three firms of real-estate brokers was entitled to the commission, the municipal court granted it to the brokers who first tried to sell the property. The appellate court upheld the municipal court in holding that the broker who, by mistake, received the telephone call, could not recover, because, no matter whether the buyer was the one who finally received the property or was the firm of brokers who posed as purchasers, it did not appear that either was induced by him to apply to the seller. As regards the firm of brokers who posed as purchasers, however, the appellate court held that it was error to exclude their claims on the ground that they were not employed as agents prior to the making of the contract of sale, since, as the court said, proof of such employment was not essential, but that "a conscious appropriation" or a "mere acceptance" of such labor was sufficient. And as to the first-named firm of brokers, a judgment in their favor could not be upheld, since they did not produce the real purchaser; and, if the firm of brokers was the real purchaser, and the one to whom the property was finally sold but a mere dummy, the evidence was still insufficient to sustain their claim, the court saying in effect that, if such were the case, and they could go further to show that they produced the real purchaser, and that the sale to another person was a device to avoid the payment of commissions, or that the owner capriciously changed his mind, then quite another question would be presented.

Right of broker to commission on sale by owner, after stipulated time of agency, to customer introduced by broker within the time limited, see case note to Brown v. Mason, 21 L.R.A.(N.S.) 328.

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PENNSYLVANIA SUPREME COURT.

WILLIAM H. COLLER, Appt.,
v.
ALEXANDER G. KNOX.

(222 Pa. 362, 71 Atl. 539.)

Negligence — runaway team — presumption.

1. The mere running away of a team does not imply negligence on the part of the owner.

Evidence — negligence — runaway team.

2. Negligence on the part of the owner of a runaway team which will render him liable for its injuring a person is not established by evidence that, a few minutes before the accident, it was standing in a private lane, with a man standing at the horses' heads.

(November 2, 1908.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Lawrence County refusing to take off a nonsuit in an action brought to recover damages for injuries alleged to have been caused by defendant's runaway team. Affirmed.

The facts are stated in the opinion.

Mr. C. H. Akens for appellant.

Messrs. J. Norman Martin and A. Martin Graham, for appellee:

There was no negligence in the fact that a man was standing at the horses' heads.

Gray v. Tompkins, 40 N. Y. S. R. 546, 15 N. Y. Supp. 953; Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 608; Stevenson v. United States Exp. Co. 221 Pa. 59, 70 Atl. 275; Swanson v. Crandall, 2 Pa. Super. Ct. 85; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627.

It must be shown that the running away and the consequent injury would not have occurred but for the owner's negligence in the use or management of the horses.

2 Shearm. & Redf. Neg. 5th ed. § 647; 1 Thomp. Neg. § 1297; Cotton v. Wood, 8 C. B. N. S. 568.

Per Curiam:

There was no evidence of negligence on the part of defendant. The only testimony as to the facts of the occurrence was from the plaintiff himself, and was to the effect that, when he passed the lane leading from defendant's house to the public road, he saw the team of defendant standing in the lane, and a man standing at the head of the horses. He drove slowly past the end of the lane, and when he had gotten 180 or 200 feet down the road, he heard a warning to "look out," and immediately after was struck by the runaway team. In all this there is no evidence of negligence. The mere fact of a runaway does not by itself imply negligence, nor would even leaving a team standing in a private lane do so. But, in this case, the affirmative evidence is that, when last seen, only a few moments before the collision, there was a man standing at the horses' heads. The cases cited by the appellant, of horses left unhitched and unattended on a city street, stand upon an entirely different footing.

Judgment affirmed.

Case Note. — May negligence be inferred from mere fact that a horse runs away.

There is an apparent conflict among the cases on this question. In examining the cases, it is to be kept in mind that, even if the bare fact, without more, that the horse ran away, would not, in itself, be sufficient to make out a prima facie case of negligence, rendering it incumbent upon the defendant to produce exculpatory evidence, that fact, in connection with the circumstances attending the running away, might, in a particular case, have that effect, even in the absence of any direct evidence of negligence. And, upon the other hand, even if it were to be held in general that the bare fact of running away, without more, would be sufficient to make out a prima facie case of negligence in the first instance, the inference from that fact in a particular case might be repelled by the attending circumstances, whether shown by plaintiff or defendant. It is also important to keep in mind the distinction between the question whether there is a presumption of negligence in favor of the plaintiff, and the question whether the burden of proof has been shifted to the defendant. On that subject, see note to Cleveland, C. C. & St. L. R. Co. v. Hadley, 16 L.R.A.(N.S.) 527.

In accord with the rule followed in COLLER v. KNOX, that negligence may not be inferred from the mere fact of a runaway, are: Gottwald v. Bernheimer, 6 Daly, 212; Furlong v. Broadway & 7th Ave. R. Co. (general term case, not reported, cited in 6 Daly, 212); McGahie v. McClennen, 86 App. Div. 263, 83 N. Y. Supp. 692; Button v. Frink, 51 Conn. 342, 50 Am. Rep. 24; O'Brien v. Miller, 60 Conn. 214, 25 Am. St. Rep. 320, 22 Atl. 544; Creamer v. McIlvain, 89 Md. 343, 45 L.R.A. 531, 73 Am. St. Rep. 186, 43 Atl. 935; Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; Gray v. Tompkins, 40 N. Y. S. R. 546, 15 N. Y. Supp. 953; Manzoni v. Douglas, L. R. 6 Q. B. Div. 145.

In O'Brien v. Miller, supra, a nonsuit was granted at the close of the plaintiff's evidence, and this action of the trial court was upheld on the appeal, the court saying: "He argues, however, and upon this his whole claim rests, that the fact that the defendants' horse was running away was, without explanation, evidence from which

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the jury might find such negligence. If, by this argument, it is intended to claim that, as a matter of law, there is any evidence of negligence in the fact of a runaway horse, it is clearly wrong. . . . If, however, it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then, of course, it must be taken in connection with the other facts." The other facts were taken to show no negligence, and hence the affirmance of the nonsuit.

But, in Maus v. Broderick, 51 La. Ann. 1153, 25 So. 977, it was said that the fact itself that a team is found running away upon the streets of a city, without a driver, requires explanation as to how this should have been; and, if it is not given, it is not an unfair inference that no satisfactory explanation can be made.

And it was held, in Gorsuch v. Swan, 109 Tenn. 36, 97 Am. St. Rep. 836, 69 S. W. 1113, that when a team is found running away, unattended, upon a public thoroughfare, and doing hurt to one lawfully thereon, negligence is prima facie fairly imputable to the owner from this fact alone.

In Strup v. Edens, 22 Wis. 432, the exception urged on the appeal was the refusal to grant a nonsuit. The court, affirming the ruling, said that, at the time the motion was made, there was evidence tending to show that the horses were not properly hitched, and, in addition, "the fact that the horses got loose and ran away is some evidence of negligence. It is true such a thing might occur notwithstanding due care in hitching. But such would not be the ordinary result; and unexplained, the reasonable inference from the fact would be that there had been negligence in fastening the horses."

Affirming the trial court, and approving its charge that, "when a horse and wagon are found running along, without a driver, upon the sidewalk of a public street, and injury to another person or his goods is caused by it, it is prima facie evidence of negligence on the part of the owner," Gannon v. Wilson, 1 Sadler (Pa.) 422, 18 W. N. C. 7, 5 Atl. 381, holds that it is the duty of the owner of a horse not voluntarily to permit it to run on the sidewalk of a public street, and, when so found, the owner must rebut the presumption of negligence arising therefrom.

The fact that a team of runaway horses was found dashing along a public highway, without the attendance of the owner or his servants, was held, in Kokoll v. Brohm & B. Lumber Co. (N. J. L.) 71 Atl. 120, to raise a presumption of negligence in their management and care which will render the owner liable, in the absence of explanation, for injuries caused by their unrestrained acts. This holding was cited and followed in Francois v. Hanff (N. J. L.) 71 Atl. 1128.

The fact that a horse runs away in a city street and does injury shows a prima facie case of negligence which calls for explanation on the part of the defendant owner, and a nonsuit was held erroneous in Crawford v. Upper, 16 Ont. App. Rep. 440, where such circumstances appeared, and nothing was proved as to the origin or cause of the runaway.

In Unger v. Forty-second Street & G. Street Ferry R. Co. 51 N. Y. 497, a team of horses became detached from one of the defendant's cars and ran away, injuring the plaintiff. No proof was offered as to how the horses became detached from the car, or as to the cause; one witness testified that he was in the car, but was not looking when the horses became detached; his attention was attracted by the stopping of the car, and he then looked and saw the horses running away from the car. The court said this was sufficient to make out a prima facie case, and the fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant, and hence no error was committed in refusing to nonsuit the plaintiff at the close of his evidence.

The law presumes negligence on the part of the owner of a horse attached to a wagon or carriage, found running away on a city sidewalk, and it lies upon the owner to show that there was no fault on his part. Hummell v. Wester, Brightly (Pa.) 153.

In the case of Watson v. Weekes, decided March 19th, 1887, and later affirmed, it was held by Smith, J., as stated in Tolhausen v. Davies, 59 L. T. N. S. 436, that, upon proof given by a plaintiff that the defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly nonsuit, for such facts were more consistent with the absence of ordinary care in the superintending a horse, than with such care having been used.

Snee v. Durkie [1904] 6 F. 42, is cited in 1 Butterworths' Dig. 67, as holding that a presumption (though a rebuttable one) of negligence arises if a runaway horse and carriage knock a person down in a public street.

Upon the question of negligence in leaving a horse unhitched in the highway, see the subject note in connection with Moulton v. Lewiston, B. & B. Street R. Co. 10 L.R.A. (N.S.) 845.

VIRGINIA SUPREME COURT OF APPEALS.

WILLIAM SUTHERLAND, Appt.,
v.
COMMONWEALTH OF VIRGINIA.

(— Va. —, 65 S. E. 15.)

Concealed weapons — receptacle.

Carrying in the hand a pair of saddlebags with the lids down, which contain a pistol, which is hidden from common observation, is not a violation of a statute making it an offense to carry a pistol about

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the person, hidden from common observation.

(June 17, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Dickenson County convicting him of carrying a concealed pistol. Reversed.

The facts are stated in the opinion.

Mr. S. H. Sutherland, for appellant:

The pistol was not carried about the person, hidden from common observation, within the meaning of the statute.

Ladd v. State, 92 Ala. 58, 9 So. 401; George v. State (Tex. Crim. App.) 29 S. W. 386; Cunningham v. State, 76 Ala. 88.

Mr. William A. Anderson, Attorney General, for appellee:

The word "about," in the statute, is used in the sense of "close to" or "near at hand."

State v. McManus, 89 N. C. 555; Garrett v. State (Tex. Crim. App.) 25 S. W. 285; Diffey v. State, 86 Ala. 66, 5 So. 576; Warren v. State, 94 Ala. 79, 10 So. 838.

Harrison, J., delivered the opinion of the court:

In this case the accused was charged with unlawfully carrying about his person a pistol which was concealed from common observation.

The evidence in support of this charge is that the accused placed a pistol, incased in its scabbard, in a pair of saddlebags, pulled the lids of the saddlebags down, hiding the pistol from view, and carried the saddlebags

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Case Note.—What manner of carrying or concealment of weapon violates statute against carrying concealed weapons.

What constitutes carrying.

It is generally held not necessary, in order to constitute a carrying of concealed weapons on or about the person, that the weapon should be concealed strictly upon the person, but, if it is shown to have been carried in a position near by, where it could readily be resorted to for use, this is sufficient. 5 Am. & Eng. Enc. Law, p. 733.

Thus, carrying a pistol in a basket which is held in the hand violates a statute against carrying weapons on or about the person. Johnson v. State, 51 Tex. Crim. Rep. 648, 104 S. W. 902.

And carrying a pistol in a hand basket on the arm, and placing the basket on the seat by the side, while riding in a street car, is a violation of such a statute. Diffey v. State, 86 Ala. 66, 5 So. 576. The court said: "The purpose of the statute is to interdict carrying a weapon in a manner so connected with the person that it may be easily and promptly used, and yet others not discover its presence. About the person does not mean necessarily on the person. All the essential elements of the offense exist if an interdicted weapon is carried near the person, and so connected therewith that the locomotion of the body necessarily carries the weapon, and so that it may be promptly used when desired; as in the pocket of an overcoat carried on the arm, or in a hand basket or other receptacle, held by the hand. Such carrying one of the forbidden weapons concealed comes within the letter and purview of the statute, and constitutes the offense denounced."

And having a pistol in a basket which is upon accused's lap is a violation of a statute forbidding the carrying of a weapon concealed "about" the person. State v. McManus, 89 N. C. 555.

So, carrying a pistol in a basket on the arm for convenient use and access, and not merely for transportation, violates a statute against having or carrying a pistol about the person otherwise than in an open and exposed manner. Boles v. State, 86 Ga. 255, 12 S. E. 361; Warren v. State (Ga. App.) 64 S. E. 111.

But an unqualified charge that "carrying a pistol in a basket or bag upon the arm, and not for transportation alone," violates a statute against carrying a pistol concealed, is erroneous where there was no evidence that the pistol was concealed in the basket, but rather that it was carried in an open-top arm basket, fully exposed to view. Sullivan v. State (Ga. App.) 65 S. E. 354.

Having a pistol in a satchel with a strap attached, which rests upon the shoulder of the accused while a passenger in a railway car, violates a statute against carrying concealed weapons about the person. Willis v. State, 105 Ga. 633, 32 S. E. 155.

So, a pistol is carried "about the person" within the meaning of the statute, where accused carries it in a hand satchel which is suspended by a strap from his shoulder, although the satchel is locked and the key is in his pocket. Warren v. State, 94 Ala. 79, 10 So. 838. The test adopted in this case was whether the weapon moved with the person, and not whether it was readily accessible for use.

Where it is unlawful to carry pistols except openly in the hand, carrying a navy in a scabbard hung to the horn of a saddle is indictable. Barton v. State, 7 Baxt. 105.

And, if one knowingly carries in his hand a pistol so wrapped and inclosed within a bundle that it cannot readily be seen and recognized as a pistol, he violates the statute against carrying concealed weapons. Edwards v. State, 126 Ga. 89, 54 S. E. 809.

One who carries a pistol in a box or compartment beneath the driver's seat of a hack is guilty of unlawfully carrying a weapon concealed about his person. Kendall v. State, 118 Tenn. 156, 121 Am. St. Rep. 994, 101 S. W. 189, 11 A. & E. Ann. Cas. 1105.

Whether a pistol in the box under a wagon seat is carried as a weapon, so as to be accessible for use in a fight, is a question

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in his hand down the road until out of sight.

The question presented is whether or not it is a violation of the statute against carrying concealed weapons for a man to carry in his hand a pair of saddlebags containing a pistol, which is hidden from common observation.

So much of the statute as is necessary to the consideration of this question is in these words: "If any person carry about his person, hid from common observation, any pistol, . . . he shall be fined not less than $20, nor more than $100." Acts 1908, chap. 259, p. 381.

This is a penal statute, and it is an ancient maxim of the law that all such statutes must be construed strictly against the state, and favorably to the liberty of the citizen. The maxim is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, and not in the judicial department. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute. If these principles are violated, the fate of the accused is determined by the arbitrary discretion of the judges, and not by the express authority of the law. Harris v. Com. 81 Va. 240, 59 Am. Rep. 666; Lescallett v. Com. 89 Va. 878, 17 S. E. 546; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37.

In the light of this fundamental rule of construction, we are of opinion that the question raised by this record must be answered in the negative. The purpose of the statute was to interdict the practice of carrying a deadly weapon about the person,

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for the jury. Easlick v. United States, 7 Ind. Terr. 707, 104 S. W. 941.

Evidence that a pistol was on the wagon seat near defendant is sufficient to support a verdict against him, under a statute forbidding the carrying of a pistol on or about the person. Garrett v. State (Tex. Crim. App.) 25 S. W. 285; Hill v. State, 50 Tex. Crim. Rep. 619, 100 S. W. 384.

And if one who borrows a buggy knows that there is a pistol under the cushion, and carries it to town in that position, he is guilty of unlawfully carrying a pistol. Leonard v. State (Tex. Crim. App.) 119 S. W. 98.

So, a person carrying a pistol on his person in a buggy clearly violates a statute forbidding carrying concealed weapons on or about the person. Prewitt v. State, 49 Tex. Crim. Rep. 323, 92 S. W. 800.

But, carrying a pistol in a box in the wagon in which defendant is riding is not a carrying on or about his person. Hardy v. State, 37 Tex. Crim. Rep. 511, 40 S. W. 299.

Neither does placing a pistol on cotton in a wagon, half way between the seat and rear end of the wagon, violate the statute. Thompson v. State, 48 Tex. Crim. Rep. 146, 86 S. W. 1033.

And evidence that defendant reached down in his wagon and picked up a pistol from a corner of the wagon body has been held insufficient to show a carrying on or about his person. Cathey v. State, 23 Tex. App. 492, 5 S. W. 137.

So, a traveler may carry a pistol down in his buggy without violating an act prohibiting the carrying of deadly weapons about the person. Maxwell v. State, 38 Tex. 170. The court said: "In the opinion of this court, the act prohibiting the carrying of deadly weapons was not intended to prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense, or even from carrying them from place to place for an innocent purpose. We can hardly conceive that a traveler would be compelled to lock up his arms in his trunk or valise, where they would be useless to him if attacked."

And it was held that a conviction for unlawfully carrying a pistol was not sustained by evidence that a pistol was carried in the pocket of an overcoat which defendant placed on his load, and did not wear at any time during the trip. George v. State (Tex. Crim. App.) 29 S. W. 386.

A conviction for carrying a pistol concealed on or about the person cannot be had on evidence that, when a quarrel arose, defendant went down under the seat of the wagon in which he was riding, got a satchel and took a pistol from it, there being nothing to show to whom the grip or wagon belonged, or who placed it in the wagon. Com. v. Sturgeon, 18 Ky. L. Rep. 613, 37 S. W. 680.

And a case warranting conviction for carrying concealed weapons is not shown by evidence that accused went with her mother to watch a watermelon patch; that she took a revolver with her in the box it originally came in, carrying it in her hand; that she took it out of the box later, and went to her brother's assistance, and at times had it under her cloak with her hands folded. Smith v. State, 69 Ind. 140.

A conviction for carrying a concealed weapon was upheld in Holt v. State, 89 Ga. 316, 15 S. E. 316, where the evidence was conflicting as to whether the accused drew the pistol from his hip pocket or took it from a dinner box which was in his wagon.

Where there was evidence that defendant, in an information for carrying a revolver on the person, did not have the revolver on his person, but in a scabbard in his buggy, the evidence was held contradictory, so that the court more carefully scrutinized the evi-

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concealed, and yet so accessible as to afford prompt and immediate use. "About the person" must mean that it is so connected with the person as to be readily accessible for use or surprise if desired. A pistol in a scabbard and in a pair of saddlebags, with the lids down, though the saddlebags be in the hand, does not fall within the language of the statute, which says: "If a person carry about his person, hid from common observation, any pistol," etc.

Evidence that the defendant had a pistol concealed under a rug in the bottom of the buggy in which he was riding was held not to be sufficient to convict him of carrying a pistol concealed about his person. Ladd v. State, 92 Ala. 58, 9 So. 401.

Evidence that the defendant had a pistol concealed in saddlebags while riding along the public road was held not to be sufficient to convict him of carrying a pistol concealed about his person. Cunningham v. State, 76 Ala. 88.

The act of which the accused stands convicted in this case does not come within the spirit, and certainly not within the letter, of the statute, which it must do.

As said by Chief Justice Marshall in United States v. Wiltberger, supra: "It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated."

If the statute be less comprehensive than the legislature intended, it is for that body to extend its operation, and not for the courts to do so.

The judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.

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dence upon which the conviction was had. Walburn v. Territory, 9 Okla. 23, 59 Pac. 972.

The question of the necessity of an intent to conceal is not intended to be covered in this note. It may be of value, however, to call attention to two cases involving this question. In State v. Gilbert, 87 N. C. 527, 42 Am. Rep. 518, where defendant, a business man, purchased a pistol as a sample, and placed it in his pocket to carry to a store for packing with other things, he was held not guilty. The court said: "It is true, it will always be presumed to be a man's intention to do what in fact he does, and that he must contemplate the natural consequences of his conduct. But when the jury expressly find the contrary, and that, notwithstanding the act done, there was no criminal intention connected with it, that must put an end to the prosecution. In this instance, their only other meaning could have been that the act proceeded from accident or inattention, or some such like cause. And to hold that a merchant who, having just purchased a pistol with a view to his trade, and in carrying it from one store in a town to another, for the purpose of having it packed with other goods, thoughtlessly puts it in his pocket, not caring and not thinking whether it could be seen or not, is guilty of a criminal violation of the laws of his country, is more, we think, than was ever contemplated by those who framed the law upon the subject, and very certainly seems far removed from the mischief that it was intended to remedy."

And carrying a pistol in a sack does not violate a statute which contemplates making the offense of carrying to depend upon the intent to go armed, where there is an entire want of evidence to show such intent. Robinson v. State, 3 Shannon, Cas. 59.

23 L.R.A.(N.S.)

What amounts to concealment.

A weapon is generally held to be concealed when so placed that it cannot be readily seen under ordinary observation.

Thus, it is not necessary, under a statute prohibiting the carrying of a deadly weapon concealed about the person, that the weapon should be entirely concealed; if it is so concealed as to be generally hidden from ordinary observation, this is sufficient. State v. Johnson, 16 S. C. 187. The court said: "It is contended in the argument here that, unless the weapon is entirely concealed from observation, there is no violation of the law; and that, when it is only partially concealed, the statute is not violated. It is very true that the rule is that penal statutes must be construed strictly, but they are not to be so strictly construed as to defeat the obvious intention of the legislature. . . . Now, in this case, if the word 'concealed' should be construed to mean entirely or completely hidden from observation, then the manifest object of the legislature would be defeated, and the statute would, to a great extent at least, be nugatory. For, if a person could not be convicted unless the proof showed that the weapon was entirely and completely concealed, then it is difficult to perceive how in any case the act could be made effective unless the person charged should furnish evidence against himself. It seems to us clear, therefore, that such cannot be the proper construction, but, on the other hand, that the true construction is that, if the weapon is so concealed as to be hidden from ordinary observation, even though it may not be entirely concealed, and might be seen on closer examination, the offense is complete, and that it is for the jury to determine, from all the evidence, whether the weapon is so concealed. Again, if the weapon is so carried as not to be at all times

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exposed to the ordinary observation of the bystanders, the offense would be complete, even though at times it might be exposed to such observation. For example, if the weapon is carried under the coat, not exposed to view except when the coat is removed or thrown back by the wind or other cause, this would be a concealment in the sense of the statute."

And it was held, in Jones v. State, 51 Ala. 16, that, to constitute concealment, it is sufficient if the weapon is hidden from ordinary observation, although it may be seen on closer examination; and that this should be determined by the jury.

So, evidence that accused held a pistol in one hand, partially concealed by his vest and pants, and that no part was in open view, and that it could only be seen by looking in a certain direction, and from a certain point, is sufficient to support a verdict for carrying concealed weapons. State v. Miles, 124 Mo. App. 283, 101 S. W. 671.

And wearing a pistol in such manner that it is at all times partially concealed by the pants, and sometimes entirely concealed by the coat, is a violation of a statute prohibiting the carrying of arms secretly, but authorizing the carrying thereof openly, outside of all the clothes. Sutton v. State, 12 Fla. 135.

And it is not enough to warrant an acquittal that the pistol could be seen when accused took off his coat, or, by some accident, the skirt of the coat was so displaced as to expose it to view. There must be evidence that it was so worn that persons near enough to see it if not hidden could see it with ordinary observation. Street v. State, 67 Ala. 87.

It is held that concealment for but a moment violates the statute. Brinson v. State, 75 Ga. 882.

But a charge assuming defendant guilty of carrying a concealed weapon if the pistol was so carried that it was concealed from the view of those occupying a particular position, though it might have been open to the ordinary observation of those occupying different positions, is erroneous. Smith v. State, 96 Ala. 66, 11 So. 71. In discussing the meaning of ordinary observation, the court said: "What is ordinary observation in such cases cannot well be defined so as to meet all the varying conditions under which weapons may be carried about the person, but it may be said, generally, that the meaning is, the weapon must be open to the ordinary observation of persons who may come in contact in the usual and ordinary associations of life with one who carries a weapon about his person. If parties approaching a man carrying a weapon about his person, or passing him on the streets or highways, or thrown with him in ordinary social contact, can see the weapon without inspection or examination for that purpose, and from ordinary observation, then such weapon is not concealed about the person, within the meaning of the statute. Whether or not, however, it is so concealed, is a question for the jury, under all the facts and circumstances of each case." To the same effect is Driggers v. State, 123 Ala. 46, 26 So. 512; Hampton v. State, 133 Ala. 180, 32 So. 230.

And it was held, in Hainey v. State, 147 Ala. 146, 41 So. 968, that whether a pistol was carried in such manner as not to be discernible by ordinary observation was a question for the jury.

Testimony of defendant that "the pistol could have been seen by ordinary observation" is inadmissible, since it is a mere opinion or conclusion of the witness. Nichols v. State, 100 Ala. 23, 14 So. 539.

An instruction that a pistol must be carried in such an open manner and so fully exposed to view that a person "meeting" the carrier would readily see and know that he had a pistol about his person is erroneous, since "meeting" implies coming together from opposite directions; and a weapon might be carried so that it would be clearly visible from the rear, although not from the front, and thus no violation of the statute would exist. Stripling v. State, 114 Ga. 538, 40 S. E. 733.

The mere holding a pistol in the hand, although it may be concealed for a period from the only witness present, does not violate a statute against carrying it about the person. Ramsey v. State, 91 Ala. 29, 8 So. 568. The court said: "It cannot be gainsaid that an ordinary pistol might be so carried in the hand as to amount to the offense of carrying it concealed about the person. To do so, however, would require more concealment than results from simply holding it in the hand. The true inquiry and test, in such cases, are, Was it so carried as not to be discernible by ordinary observation? . . . That is not enough. The proper inquiry was, Could it have been so seen by ordinary observation, as to disclose it was a pistol, held or carried as the testimony convinces the jury the real facts were? If it could, then the statute was not violated."

Where a pistol is carried in the pocket so that persons standing in full view of accused cannot see it, it is concealed. Brown v. State, 2 Ga. App. 417, 58 S. E. 549.

There is *dicta* in Cotton v. State, 88 Ala. 168, 7 So. 148, that a pistol is concealed, within the meaning of the statute, if it is hidden from sight, although the impression made on the coat is so clear that, at a distance of 15 feet, it could be recognized as a pistol.

Although, as already stated, it is not necessary that the weapon be entirely concealed in order to constitute a violation of these acts, yet it is held that a part of the weapon may be covered and hidden from view so long as it is still open to ordinary observation.

Thus, if a pistol is carried in an open manner, and so plainly and fully exposed to view that any person can see and know that it is a pistol, the statute against carrying weapons otherwise than in an open manner is not violated, although part of the pistol is concealed. Stockdale v. State, 32 Ga. 225.

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And a pistol is not concealed where the evidence shows that a sufficient part of it is exposed to enable witness to recognize it as a pistol. Stripling v. State, 114 Ga. 538, 40 S. E. 733.

And if a pistol is carried so exposed to view that it can readily be seen and recognized as a pistol by one having his person in view, it is, in legal contemplation, carried in an open manner and fully exposed to view; but, if it is so far concealed that it cannot be readily seen and recognized as a pistol, it is carried in a manner prohibited by the statute. Killet v. State, 32 Ga. 292.

So, it is error to refuse defendant a continuance because of the sickness of a witness by whom he expected to show that the handle and a portion of the barrel of the pistol alleged to have been concealed were exposed to view. Barnard v. State, 73 Ga. 803.

In State v. Reams, 121 N. C. 556, 27 S. E. 1004, accused put a pistol in his coat pocket so that 2 inches of the breach and handle were showing. It was held error to instruct in effect that, if any part of the pistol was concealed, the accused was guilty of an indictable offense. The court said: "Whether the weapon is concealed from the public, and whether the defendant has rebutted the presumption of guilt raised by the statute when possession is shown, are questions of fact solely for the jury, under proper instructions from the court. If the weapon is partly exposed to public view, it would be difficult and unreasonable to say, as a legal conclusion, that it was concealed."

Evidence that defendant, in a prosecution for carrying concealed weapons, wore his pistol so that the cylinder and handle were above his waistband, and open to view, tends toward the inference that the pistol was not concealed. Newell v. State, 109 Ala. 5, 19 So. 511.

So, the presumption of concealment, raised by the statute upon proof that a weapon was found on accused, is rebutted by evidence that a pistol was carried by defendant buckled around him, without scabbard, and naked in a belt on the outside of his clothing. State v. Roten, 86 N. C. 701.

There is *dicta* in Carr v. State, 34 Ark. 448, 36 Am. Rep. 15, that a weapon, to be concealed, must be hidden in such a way as to put others off their guard.

But, the carrying of a pistol in the pocket or under the clothes, although partially exposed, is a violation of a statute defining as concealed any weapon carried by a person, not appearing in full, open view. State v. Smith, 11 La. Ann. 633, 66 Am. Dec. 208.

And this statute is violated by carrying a pistol with the barrel and cylinder stuck inside the waistband of the pants in front, although the handle and guard are exposed. State v. Bias, 37 La. Ann. 259.

And a person carrying a deadly weapon so that a part only is concealed, the other part being visible, is guilty of carrying a concealed weapon, within the meaning of a statute making it unlawful to carry a weapon concealed "in whole or in part." Martin v. State (Miss.) 47 So. 426.

Evidence that accused had a pistol in his hip pocket, concealed by a coat, is sufficient to warrant a conviction for carrying concealed weapons. Sanders v. State, 122 Ga. 143, 50 S. E. 66.

Where the defense was that defendant was in his shirt sleeves, and a part of the handle of the pistol could be seen protruding from his pocket, a charge that, "if the pistol in question was not concealed, but was so carried that enough of said pistol was exposed to public view to show plainly that it was a pistol," the defendant was not guilty, was as liberal as the latter was entitled to. Orrick v. Akers, 109 Mo. App. 662, 83 S. W. 549.

A conviction for carrying concealed weapons is not supported by evidence that witness saw accused and other boys leave his premises; that he ran after them, and, upon coming within 3 or 4 feet of them, accused pulled a pistol from in front of his person; that the pistol was a very large one, as long as witness's arm; that the boys had been hunting; that accused did not have on any vest, but a sack coat, and had a belt around his waist; and that witness did not see him until accused turned around,—since it is plain from such evidence that the pistol could not have been "concealed." Williams v. Com. 18 Ky. L. Rep. 663, 37 S. W. 680.

Where there was evidence that one accused of carrying a concealed weapon had a pistol on his person, under his overcoat, but it was not shown whether the coat was buttoned, and there was evidence that the pistol could be seen, it was held error to instruct the jury that, if they believed the testimony, the defendant was guilty, since it was for them to determine whether the evidence was sufficient to rebut the presumption of concealment raised by the statute upon proof that the weapon was found about defendant's person. State v. Lilly, 116 N. C. 1049, 21 S. E. 563.

The word "concealed," in a statute against carrying concealed weapons, means "wilfully or knowingly covered or kept from sight." Owen v. State, 31 Ala. 387.

So, a person who bears a pistol in his vest pocket, which is wilfully or knowingly covered, is guilty of the offense. Ibid.

WISCONSIN SUPREME COURT.

CELIA ELLIS MARLING, Appt.,
v.
CHARLES FITZGERALD et al., Respts.

(138 Wis. 93, 120 N. W. 388.)

Note — consideration — promise.

1. A promise to lend money as needed in the future is a sufficient consideration for a promissory note of the intending borrower for the amount, although the same is never in fact advanced.

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Same — transfer — liability.

2. One who executes a note secured by mortgage which is placed on record, to another, who does not comply with a condition subsequent, which is to form the consideration for it, will not be permitted to set up that fact as a defense to a suit by one to whom the securities were assigned for value, without notice, although he did not take them in due course, so as to be within the protection of the law merchant, where the maker was charged with notice of the possibility of an assignment of the securities for value.

Same — defenses — time.

3. The rule that an assignee of a promissory note, not in due course, takes it subject to equities or defenses existing between the original parties, does not include defenses arising subsequently to the transfer, such as the failure of the payee to comply with a promise which formed the consideration for the note.

(February 16, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendants' favor in an action brought to foreclose a mortgage. Reversed.

Statement by Marshall, J.:

Action to foreclose a mortgage.

The issues raised by the pleadings were closed by findings of fact, which may be presented, as follows: March 19, 1903, defendant Charles Fitzgerald, the then owner of the premises described in the complaint, duly mortgaged the same to defendant Herman to secure payment of said defendant's note of like date, for $3,000, payable to the order of said Herman, three years after date, with interest at the rate of 5 per cent per annum, and said mortgage was duly recorded. The transaction occurred pursuant to an application by said defendant to said Herman for a loan of $3,000, to be used in the erection of a building on the mortgaged premises, the money to be advanced as fast as the improvement progressed. Upon the delivery of the note and mortgage to Herman, he delivered to said defendant an acknowledgment of the purpose thereof, and,

Case Note. — Estoppel to set up original obligee's breach of condition to make future advances as against assignee of contract for payment of money, not protected by the law merchant.

The foregoing case presents what appears to be an unusual application of the doctrine of equitable estoppel, and there appears to be no precedent where the facts are identical or at all similar. At first glance the case would seem to be fully within the rule that an assignee without indorsement takes the instrument subject to the equities existing between the original parties. And a further examination seems to confirm this view, and to raise the query whether, if the holding of the court be correct, the doctrine of estoppel may not be invoked in every case in favor of the holder of commercial paper, whether negotiable in form or not, who has taken it in such a manner as not to be protected by the law merchant, although there be no representations by the maker as to its validity, save the existence of the paper alone.

The court distinguishes between the effect of a delivery of a note and mortgage which are not to take effect until the performance of a specified condition, and the delivery of an instrument in consideration of money to be advanced in the future, the security to take effect immediately. It is true that, in the former case, the security would not be valid until the performance of the condition, while, in the second case, there would be a certain valid effect from the start, sufficient, undoubtedly, to prevent the maker from maintaining an action for the cancelation of the instrument. But it cannot be contended that the payee could have enforced the securities before any advances had been made, and it does not appear in what way the payee's position differs in the one case from what it would have been in the other, if the action is one to enforce the securities. Nor does it clearly appear how the assignee could be affected by the distinction noted.

The court says that the rule that a negotiable instrument in the hands of an assignee is subject to all the defenses or equities existing between the original parties refers only to such defenses as existed at the time of the transfer; but, in the case at bar, the defense pleaded, *viz.*, lack of consideration, did exist at the time of the transfer, and would have been available in an action brought by the payee. It was not merely some subsequent default that the maker pleaded, but it was the absence of anything in the way of consideration, and the defense existed at the time of the transfer as well as at the time that the action was brought.

The quotation given in MARLING v. FITZGERALD from Bush v. Cushman, 27 N. J. Eq. 131, would seem to support the argument in the former case, but an examination of that case shows that an entirely different state of facts existed. The mortgage was given to secure a loan of $15,000, $5,000 of which was to be loaned immediately, and $10,000 to be thereafter advanced. At the solicitation of the mortgagor, the plaintiff loaned $5,000 to the mortgagee for the first loan, and took an assignment of the mortgage. In an action to foreclose it, it was held that the mortgagor was estopped by his acts in inducing the plaintiff to make the loan upon the mortgage, and by his representations that the mortgage was valid. In regard to the fact that the equities did not exist at the time of the transfer, there was a consideration of $5,000 which passed to the mortgagor, and the case merely held that the

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in effect, that he was indebted to said defendant to the amount of the loan, payable as before indicated. March 20, 1903, said Herman borrowed of George Ellis $1,900, giving his promissory note therefor, payable three months after date, and for collateral security for the payment of the debt, delivered to said Ellis said first-mentioned note and the mortgage, duly assigning the same in writing, but not so as to enable the said Ellis to record the assignment, and it never was recorded. Before the commencement of the action, plaintiff became the owner of said $1,900 note, and succeeded to all rights of said George Ellis to said collateral security. The said $1,900 note is wholly unpaid, as well as the interest thereon from its date. No part of said $3,000 loan was ever paid to said Fitzgerald, nor could he ever collect any part thereof. Herman was known to Fitzgerald, at the time the mortgage was given, to be engaged in dealing in notes and mortgages, and in loaning money for himself and others on real estate security.

On such facts the court concluded: First, the note and mortgage were given without consideration; second, neither said Ellis nor plaintiff took said note in due course, so as to be entitled to the protection of the law merchant; third, the latter holds the same subject to equities and defenses, including the defense of failure of consideration, which said Fitzgerald would have, had the security remained in the hands of said Herman, and is, therefore, not entitled to enforce the same at all, and is liable to Fitzgerald for his costs and disbursements in the action.

Judgment against plaintiff was ordered accordingly and was so rendered.

Messrs. **Goff, Hayes, & Hannan** for appellant.

Messrs. **Dorr & Gregory**, for respondents:

The rights of the parties to the note are governed by the law relating to commercial paper.

Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904.

The holder of an unindorsed note cannot

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latter was estopped from pleading as a defense to the foreclosure of the mortgage, the fact that the mortgagee had failed to make the subsequent advances which he had agreed to make. It does not appear that the assignee was endeavoring to hold the mortgagor liable for the $10,000 called for by the mortgage, which he had not advanced, and which the mortgagor had never received.

In McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, the plaintiff, to cover advances to be made for him, assigned certain stock to his brokers by a written assignment similar in all respects to those used ordinarily in passing title to stock. In an action to recover the stock from one to whom the brokers had wrongfully pledged it, the court held that while, ordinarily, an assignee of non-negotiable securities stands in no better position than his assignor, yet the plaintiff, by clothing his brokers with all the external *indicia* of title to the stock, was estopped to deny their title as against an innocent third party who had dealt with them in reliance upon their apparent title. It does not appear in this case, however, that, in the pledge of the securities to the third party, there was any omission on the part of the original assignee which ought to have put the third party on his guard, while in MARLING v. FITZGERALD the payee of the note did not deliver it to the third party by indorsement, which is the recognized manner of transferring paper of that character.

And the McNeil Case was cited with approval and followed in Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173.

There are many cases where the doctrine of estoppel has been held applicable where there have been some express representations on the part of the maker which influenced the third person to take the note, but such cases present a different question from that presented in MARLING v. FITZGERALD.

One other point should be noted. The court holds that the maker is estopped by his conduct in giving a note negotiable in form, and without any conditions thereon, to the payee, whom he knew to be a note broker, and who was likely to sell the note to some person without disclosing the nature of his business relations with the maker. But it might well be argued that the assignee could have fully protected himself from the defense of lack of consideration by insisting upon the payee's indorsement upon the note; and, in failing to do this, he was not in a position to say that he was a bona fide assignee for a valuable consideration.

In Robertson v. Merriam, 106 Ill. App. 610, the defendants took out policies of insurance upon their lives in consideration of a promise made by the agent that the company would thereafter make a loan upon their real property. Payments upon the notes were refused, as the loan was not given. The agent afterwards assigned the notes, but it does not appear whether they were assigned before or after maturity. The court said that if, as the plea alleged, the notes were assigned after maturity, the same defense could be made against the assignee that could have been made against the original payee. A recovery upon the notes, however, was allowed upon the ground that, in refusing to pay the notes, the makers were in effect rescinding their contract, and this could not be done unless they returned the policies for which the notes had been given.

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claim the protection of the law merchant, as he stands in the same position as the payee, the note being subject to all the equities of the maker as though no transfer had taken place.

Beard v. Dedolph, 29 Wis. 136; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; Allison v. Manzke, 118 Wis. 11, 94 N. W. 659; Terry v. Allis, 16 Wis. 479.

Marshall, J., delivered the opinion of the court:

The foregoing statement presents this proposition: If A mortgages his property to B to secure a loan of money, to be advanced from time to time, knowing that he is a dealer in such securities, B agreeing to make the advancements at times and in a manner specified, and, in harmony with the understanding between the parties, placing the mortgage upon record, acquiring the status as to all the world of being the owner of the securities and a debtor to A for the money agreed to be advanced, and thereafter B, for value, sells and duly assigns such securities to C, who takes the same without knowing of the relation of debtor and creditor between A and B under the agreement as to the advancement of money, the transaction between B and C not being such as to give the latter the protection of the law merchant, and B, neither before the assignment nor thereafter, advances the money or any part thereof to A, and wholly breaches his agreement in that regard, can C, nevertheless, enforce the note and mortgage against A?

If the proposition as stated be answered in the negative, as counsel for respondents contend it should be, and the learned circuit court decided, the judgment must be affirmed. If, on the contrary, it be answered in the affirmative, as counsel for appellant contend it should be, the judgment must be reversed and the cause be remanded for judgment according to the prayer of the complaint.

The situation is governed by a few plain legal principles in respect to which the learned circuit court went astray.

Manifestly, the note was not without consideration to support it, merely because the money called for thereby was not advanced at the time it was given, nor at all. The agreement to advance the money, and the creation of the relations of debtor and creditor between Herman and Fitzgerald, were amply sufficient to support the note, respecting the consideration feature, as the actual transition of the money from the former to the latter at the time the securities were delivered by the one to the other, would have been. That is too manifest to require discussion. The learned trial court, it seems, failed to distinguish between delivery of a note and mortgage by the payor to the payee for money to be advanced subsequently, the security to take effect presently, and delivery thereof, but not to take effect till performance of a specified condition as to making the advancement. In the former circumstances, the security would be a valid obligation from the start, but in the latter, performance of the condition would be essential to such validity. Nutting v. Minnesota F. Ins. Co. 98 Wis. 26, 73 N. W. 432; Thorne v. Ætna Ins. Co. 102 Wis. 593, 78 N. W. 920; State ex rel. Jones v. Chamber of Commerce, 121 Wis. 110, 98 N. W. 930; Golden v. Meier, 129 Wis. 14, 116 Am. St. Rep. 935, 107 N. W. 27; Hodge v. Smith, 130 Wis. 326-333, 110 N. W. 192; Ware v. Smith, 62 Iowa, 159, 17 N. W. 459; Belleville Sav. Bank v. Bornman, 124 Ill. 200, 16 N. E. 210; Merchants' Exch. Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816.

Again, the learned circuit court misapprehended the law in assuming, if the note would be subject to defenses as between Fitzgerald and Herman, because of the latter not having kept his agreement with the former by advancing the money, the former could, under all circumstances, including the taking of the securities for value and in good faith, without negligence, from Herman, by a third person, George Ellis, and without such taking having the essential of due course, of an indorsement of the note by Herman before maturity, make such defenses as against the third person. Such a situation is not governed absolutely by the law merchant. Before it can be solved in favor of the payor of the note, the familiar principle of equity, essential to the promotion of justice, must be dealt with,—that, if a person, by conduct reasonably calculated to lead another to act upon the faith thereof, and he does so act, without negligence, and in such manner that he would suffer damage if the appearances created by such conduct were not warranted by the true situation, such person is precluded from taking advantage thereof to such other's injury. Whether that would apply in a case of this sort—in case of a want of consideration to support the note, or in case of its not having validity as between the original parties except upon performance of a condition precedent, which is not performed, or even in case of the maker not having any reasonable ground to apprehend a probability of the note being taken by a third person, for value, without apprehending the existence of any equities in regard thereto or being negligent in respect to the matter—need not be

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considered, because no such situation characterized this case, as we have seen.

It would seem, upon principle, that the law of estoppel ought to govern this case in favor of appellant; especially since Fitzgerald knew, or ought to have known, when he gave Herman the securities, that the latter was liable to transfer the same to another, who would take the same as George Ellis did, and in the exercise of due care, having a right to believe that they were just what they appeared to be. He put Herman in a position to easily delude another in that regard, even making no restriction as to a transfer of the paper or recording of the mortgage, notwithstanding knowledge of his business. Can one do that, and then take advantage of circumstances which such other had no knowledge of, nor any reasonable ground to suspect; to such other's injury? Can one put up the bar of his own negligence, and thereby save himself from loss by failure of another to perform an agreement with him, forming a full consideration for his note, and thereby effect, as to an innocent third person, a fraud to such third person's injury? It would seem that the principle of estoppel plainly arises to the contrary,—so plain that illustration by reference to precedents to support such conclusion is not necessary.

Passing to the field of precedents, we find, as would be expected, that the principle suggested has been often applied to situations the same or similar to the one before us, for the protection of the innocent third person, and search fails to enable one to discover where it has been invoked in vain. On this, many cases cited by the learned counsel for appellant show so clearly the trend of authority that we will refer thereto with others: Two Rivers Mfg. Co. v. Day, 102 Wis. 328, 78 N. W. 440; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Marling v. Nommensen (Marling v. Milwaukee Realty Co.) 127 Wis. 363, 5 L.R.A.(N.S.) 412, 115 Am. St. Rep. 1017, 106 N. W. 844, 7 A. & E. Ann. Cas. 364; Bogart v. Stevens, 69 N. J. Eq. 800, 115 Am. St. Rep. 627, 63 Atl. 246; Bush v. Cushman, 27 N. J. Eq. 131; Combes v. Chandler, 33 Ohio St. 178; Wilson v. Hicks, 40 Ohio St. 418; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Davis v. Bechstein, 69 N. Y. 442, 25 Am. Rep. 218; Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 182; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; Simpson v. Del Hoyo, 94 N. Y. 189; Cable v. Ellis, 86 Ill. 525; Marshall v. Ender, 20 Ill. App. 312; Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 42 S. W. 482; Kempner v. Huddleston, 90 Tex. 182, 37 S. W. 1066; Norfolk & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755; Jones, Mortg. § 683.

In the text-book referred to the rule is laid down thus:

If a person induces another to take an assignment of the mortgage from the holder of it "upon the representation that it is a good and valid security," he cannot subsequently impeach the validity of the mortgage "in the hands of such assignee." Having, by word or deed, induced another to part with his money for the security, he is not allowed to repudiate the truth of his representation, and escape the payment of the obligation by showing that, as between himself and the former holder, it was invalid.

Whether that applies generally we need not now decide or go further than the facts of this case.

The principle stated is not restricted to acts or representations directly between the maker of the securities and the assignee. Constructive representations, conduct equivalent to actual representations, as by giving to the holder of securities all of the characteristics of ownership, so that he may hold and transfer the same with all the usual appearances of absolute right to do so, and with reasonable knowledge that he will or may do so, is certainly sufficient. That runs through all the cases cited and many more that might be referred to. True, such cases do not all exactly fit the facts of this case, but they do so in principle. Bush v. Cushman, supra, is exactly in point, when we consider that conduct equivalent to actual representation *inter partes* is likewise equivalent thereto in effect, as to estoppel *in pais*. It is particularly applicable here, since Fitzgerald, as we have seen, must have known from the nature of Herman's business that he was liable to, and probably would, sell the securities to some person without disclosing the nature of his business relations with the payor.

Bogart v. Stevens, supra, is quite like this case. We are unable to see any material distinction between clothing an agent with the semblance of being the owner of securities, accompanied by actual authority to transfer the same for value, and vesting the actual title to such securities in a person, with all the semblance of absolute ownership, knowing that he is liable to, and probably will, transfer them to another, for value, having no knowledge, or reasonable means of knowledge, of any present or future defense thereto.

In McNeil v. Tenth Nat. Bank, supra, it is said, in effect, that, except as regards the effect of the law merchant, an assignee of assignable papers obtains no greater right

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than his assignor possesses; but, said the court:

"It does not interfere with the well-established principle that, where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

Counsel for respondents place their sole reliance on the idea that the note was without consideration at the start, hence without validity (which is wrong, as we have seen), and on the law merchant as incorporated into § 1676–19 of the negotiable instrument statute (Laws 1899, chap. 356, p. 703), to the effect that the taker for value of a negotiable instrument without indorsement takes no better title than his assignor had thereunder, and § 1676–28, to the effect that a holder of negotiable paper, who does not acquire it in due course, is subject to the same perils as regards defenses by the payor as the payee was. Those rules, as we have seen, give way to the supreme rule of estoppel *in pais*. We are referred with confidence to Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904. Suffice it to say that we are unable to see that it touches the question in hand.

We are further referred to Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. 1052, where the court grounded its decision on the doctrine that an assignee without indorsement, of negotiable paper, takes it subject to all the defenses available as to the original parties, holding it to be applicable because the note and mortgage in question never had validity as obligations, since they were delivered to the named payee to take effect according to their tenor and not otherwise at all, only upon the happening of a condition precedent. Under those circumstances, negligence or inexcusable holding out on the part of the payor, essential to efficient application of the doctrine of estoppel *in pais*, was not found to exist. Without appreciation of the precise grounds for the decision, one would be quite liable to be led astray; especially in view of a brief discussion at the closing of the opinion of the invocability of the doctrine of estoppel *in pais*. The court reasoned thus:

"It is a rule of last resort, applicable only where all others fail; it is a doctrine subordinate, and not dominant, which reverses no other, but submits to the authority of all, and is adequate to an ultimate decision only when it has the field to itself."

As those expressions are liable to be understood, they hardly give proper dignity to the doctrine of estoppel *in pais*. True, it is a rule of last resort, but, where it is applicable, it is not subordinate. It stays the operation of other rules which have not run their course, when to allow them to proceed further would be a greater wrong than to permanently enjoin them. It is a rule of justice, which, in its proper field, has a power of mastery over all other rules. It is a rule by no means to be discredited, but rather one entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords.

There is this further insurmountable difficulty in sustaining the judgment. The rule that a negotiable instrument in the hands of an assignee for value and without notice of defenses as between the original parties is subject, nevertheless, to such defenses, has relation to such equities or defenses as existed at the time of the transfer, not to latent defenses or equities which possibly may, at some future time, exist. As said in Bush v. Cushman, *supra*: It does not embrace "equities or defenses springing from defaults, or even fraud of the assignor, committed subsequent to the assignment, and which had no existence, and were simply possibilities, at the time of the assignment."

The same doctrine was applied in Coster v. Griswold, 4 Edw. Ch. 364–374. The views of the court are thus expressed:

"All that the court of law or equity can do in such cases, since they recognize and protect the rights of assignees of choses in action, is, to allow them to take, subject always to any defense, legal or equitable, which existed in favor of the debtor against the original holder or creditor at the time of the transfer or assignment. Now, the question arises: What existing equity or defense was there against these bonds" when they were pledged to the "United States Bank as collateral security . . .?" And, again, "Where an assignee takes in good faith, his right to hold will not be disturbed or devested by any subsequent event or after-accruing right or equity of the debtor."

To the same effect are Chance v. Isaacs, 5 Paige, 592; Cornish v. Bryan, 10 N. J. Eq. 146; Losey v. Simpson, 11 N. J. Eq.

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253; Murray v. Lylburn, 2 Johns. Ch. 442; Flemming v. Hoboken, 40 N. J. L. 270; North Bergen v. Eager, 41 N. J. L. 184–189; Ex parte Hale, 3 Ves. Jr. 304; Terney v. Wilson, 45 N. J. L. 282.

Here, as we have seen, at the time of the assignment to George Ellis, Herman was the absolute owner of the note and mortgage. They were not waiting upon the happening of any event to give them validity. Herman owed Fitzgerald $3,000, but was not in default. He had, at best, a possible contingent defense or equity. Under those circumstances, within the authorities cited, Ellis could safely take, in good faith, for value, the note from Herman. The latter's subsequent mere default could not operate to his prejudice.

The judgment is reversed, and the cause remanded for judgment according to the prayer of the complaint.

Winslow, Ch. J., took no part.

ALABAMA SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,
v.
NATHAN MELTON.

(— Ala. —, 47 So. 1024.)

Animal — death — fright — liability.

A railroad company is liable for the value of a horse which it frightens to death by its wrongful act, although no bodily injury is inflicted upon it.

(December 17, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Elmore County in plaintiff's favor in an action brought to hold defendant liable for the value of a horse alleged to have been killed through defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Goodwyn & McIntyre for appellant.

Mr. Frank W. Lull for appellee.

Dowdell, J., delivered the opinion of the court:

But one question is presented for our consideration, and that arises on the action of the lower court in overruling the demurrer of defendant, appellant here, to the complaint. The complaint contained two counts, in both of which it is charged that the defendant's servant and employee, in the operation of one of defendant's locomotive engines, by loud and terrifying noises unnecessary in the operation of the engine, intentionally frightened plaintiff's horse "to the extent that it died from fright." The demurrer interposed contained a single ground, *viz.*: "For that the only claim made in said complaint is for alleged fright of the horse, unaccompanied by any bodily injury inflicted by the defendant, and the complaint therefore states no cause of action."

On demurrer, facts stated in the complaint or plea demurred to are to be taken as confessed. The "claim" made in the complaint is that the horse died from fright, and that the fright was caused by the wrong of the defendant's servant. The claim, therefore, is for more than the "alleged fright of the horse." It is for the death of the horse, caused by the alleged fright. The demurrer admits that the alleged fright caused the death, and, if this is true, it is unimportant that it was "unaccompanied by any bodily injury inflicted." The damages claimed are for the loss of the horse; and, if the loss was the direct and proxi-

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Case Note. — Liability for frightening animal to death.

An extensive search has disclosed but one other case presenting the novel question decided in LOUISVILLE & N. R. Co. v. MELTON, as to a defendant's liability for the death of an animal where the death results directly from the fright itself.

In Moshier v. Utica & S. R. Co. 8 Barb. 427, a horse was being led upon a highway which ran along the defendant's railroad tracks, and, as a train passed, became greatly frightened, jumped about, reared, and fell dead. The court held that a neglect of duty on the part of the defendant, if the proximate cause of the damage to the plaintiff, as was found on a reference, rendered the railroad company liable. It was urged in this case that an action did not lie for so exciting the fears of an animal as to cause its death, but the cases cited by the court indicate that no distinction was in mind between the case in hand and those where the fright of an animal was what may be termed the instigating cause of its death. Numerous cases have been before the courts since the decision in the Moshier Case, turning upon the liability of a defendant for the death or injury of an animal resulting indirectly from a fright for which the defendant was responsible, but these seem to present a somewhat different question from a case where fright itself causes the death.

See also Hazel v. People's Pass. R. Co. 132 Pa. 96, 18 Atl. 1116, where a horse, apparently frightened at one of the defendant's cars, reared and fell dead. The defendant was held entitled to the direction of a verdict because the case was absolutely devoid of testimony establishing any relation of cause and effect between the acts of the defendant and the death of the plaintiff's horse.

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mate result of the wrong of the defendant, it is immaterial as to the agency employed in causing the damage. The case of Pullman Co. v. Lutz, 154 Ala. 517, 14 L.R.A. (N.S.) 907, 45 So. 675, cited by counsel for appellant, involved a different question from that here presented. The question there presented was whether damages could be had for mental pain and distress occasioned by fright; and in that case, while the court was divided, it was ruled by the majority that such damages were recoverable.

While the complaint in the present case may have been objectionable on some other ground, it was not open to the ground of demurrer stated. It follows, from what we have said, that the judgment must be affirmed.

Tyson, Ch. J., and **Anderson** and **McClellan**, JJ., concur.

ALABAMA SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,
v.
J. D. SCRUGGS et al.

(— Ala. —, 49 So. 399.)

Fire — interference with extinguishment — liability.

A railroad company which, in the ordinary course of its business, stops a train between a hydrant and a burning building, without notice of any intention on the part of anyone to run a hose from the hydrant to the fire, owes no duty to the owner of the burning building to move the train before the conductor has received his proper clearance card, for which he stopped, and cannot therefore be held liable for injury to the building because of its failure so to do.

(McClellan, J., dissents.)

(April 6, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Morgan County in plaintiffs' favor in an action brought to recover damages for loss alleged to have been caused by defendant's interference with the extinguishment of a fire on plaintiffs' property. Reversed.

The facts are stated in the opinion.

Messrs. **John C. Eyster, George W. Jones, J. M. Foster, and Lowe & Tidwell** for appellant.

Mr. **E. W. Godbey**, for appellees:

The railroad company is liable for loss caused by failing to move its train out of the firemen's way.

Alabama G. S. R. Co. v. Fulton, 144 Ala. 340, 39 So. 282; Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A.(N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 A. & E. Ann. Cas. 626; Tutwiler Coal, Coke & I. Co. v. Nail, 141 Ala. 374, 37 So. 634; Ft. Worth & D. C. R. Co. v. Beauchamp, 95 Tex. 496, 58 L.R.A. 717, 93 Am. St. Rep. 864, 68 S. W. 502; Clark v. Grand Trunk Western R. Co. 149 Mich. 400, 112 N. W. 1121, 12 A. & E. Ann. Cas. 559; Phenix Ins. Co. v. New York C. & H. R. R. Co. 122 App. Div. 113, 106 N. Y. Supp. 696; Little Rock Traction & Electric Co. v. McCaskill, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997; Houren v. Chicago, M. & St. P. R. Co. 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 613, 29 Cyc. Law & Proc. pp. 1151, 1153.

Messrs. **Tyson, Wilson, & Martin** also for appellees.

Dowdell, Ch. J., delivered the opinion of the court:

This case was tried by the court without the intervention of a jury, and judgment was rendered for the plaintiffs. From this judgment the defendant appeals and here assigns its rendition as error.

But one question is argued and presented for our consideration, and that is whether there was a duty owing from the defendant to the plaintiffs, under the facts, for a violation of which the plaintiffs have a cause of action. There is no pretense that the defendant was in any way connected with the origin of the fire which destroyed the plaintiffs' property. The undisputed evidence is that, when the defendant's servants moved the locomotive and train of twenty-four freight cars from the company's yards to the point intervening between the hydrant or water plug and the plaintiffs' property that was on fire, it was without any knowledge or notice on the part of the defendant or of its servants of any purpose or intention of the fire department, or of anyone else, of laying a hose across the defendant's track, from said water plug to the plaintiffs' property. The movement of the train of cars was in the orderly course of the defendant's business. The place at which the train of cars was stopped, near the despatcher's office, was its

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Note. — As to the duty of a steam or street railway company to avoid interference with extinguishment of fires, see the case notes to Houren v. Chicago, M. & St. P. R. Co. 20 L.R.A.(N.S.) 1110, and American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A.(N.S.) 382.

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customary and usual place for stopping to receive orders and clearance card from the despatcher, before it could proceed over what was termed the "block"—indicating, in this case, a certain section of railroad used in common by the defendant company and the Southern Railway Company—on its journey to Nashville, the place of its destination. The evidence as to the length of time the train remained stationary varies from five to "fifteen or twenty" minutes; but we think this unimportant, as the evidence is without dispute that the train moved on its journey over the block, immediately upon the receipt by the conductor, who had control of its movements, of the clearance card from the despatcher. Thus it is seen that the defendant company was in the rightful use of its property, in the ordinary and usual course of business. It was guilty of no negligence, in the exercise of its rights, resulting in injury to the plaintiffs' property. In the legitimate use of its own tracks, in the orderly course of business, the defendant, under the evidence in this case, was not by law charged with the duty to move its train of cars otherwise than according to its own rules and regulations.

We fully recognize the principle of law expressed in the maxim. *Sic utere tuo ut alienum non lædas;* but this principle finds no application under the facts of this case. We find the doctrine applicable here well stated in Cooley on Torts, 1st ed. p. 81, where it is said: "It is *damnum absque injuria* also if, through the lawful and proper exercise by one man of his own rights, a damage results to another, even though he might have anticipated the result and avoided it. That which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of another. Nor can the absence of commendable motive on the part of the party exercising his rights be the legal substitute or equivalent for the thing amiss which is one of the necessary elements of a wrong. 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.'" Again, in 8 Am. & Eng. Enc. Law, 2d ed. p. 695, the doctrine is thus stated: "Applying this principle, it may be stated as a general proposition that every man has a right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own property may cause damage to another without any legal wrong." Applying this doctrine to the case before us, our conclusion is that, on the undisputed evidence, the trial court should have rendered judgment in favor of the defendant.

In respect to legal responsibility to a third person, there is, we think, a distinction to be drawn between an active and a passive use, in the enjoyment of one's property rights. To illustrate: If, in the present case, the fire hose had been laid from the hydrant, across the tracks of the defendant, to the fire, and the defendant's servants, with knowledge of the existing conditions as to the fire and the laying of the hose, had wilfully or negligently run the train of cars over the hose, destroying it, and thereby prevented the extinguishing of the fire, a legal liability for such conduct would have arisen. That would have been an active use of one's property in violation of the maxim, *Sic utere tuo ut alienum non lædas.* On the other hand, if (as was the case here) the defendant's train of cars was already rightfully standing on its tracks intervening the hydrant and the plaintiffs' burning house, and the defendant merely failed or refused to promptly move its train out of the way when requested so to do, in order that the hose might be laid across its tracks, there would be no case for the application of the above-quoted legal maxim. In the latter instance the use would be merely passive. The law imposes no duty on one man to aid another in the preservation of the latter's property, but only the duty not to injure another's property in the use of his own.

In the case of American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A.(N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 A. & E. Ann. Cas. 626, cited and relied on by counsel for appellees, the facts are different from those in the case at bar. In that case the train of cars rested across a street crossing where the firemen wished to lay a hose to reach the fire. It is true it is stated that the street had been abandoned, as such, by the city, but it was maintained as a crossing by the company. The case, we think, when properly understood, is not opposed to the views we have expressed. Moreover, it was decided in that case that the railroad company was not liable.

Other cases cited by counsel are different in their facts from the case at bar, and are easily to be differentiated in principle.

The judgment appealed from will be reversed, and one here rendered in favor of the defendant.

Simpson, Mayfield, and Sayre, JJ., concur.

McClellan, J., dissenting:

The case made for the plaintiffs is, in

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substance, this: A freight train of the defendant, in orderly course of operation, was rolled up to a point on its track near defendant's office, and there stopped, thereby raising an obstruction between a building on fire and the nearest convenient fire plug; and when the employees having the physical control of the engine and train were requested to move the train so as to permit the fire hose, already connected with the plug, and which hose was of sufficient length to reach the conflagration, they wrongfully failed or refused to do so, and, in consequence, the property of the plaintiffs was damaged or destroyed. Of course, this statement takes no account of the conflict instituted by the testimony favorable to the defendant.

The right that one has to the use and enjoyment of his property, even for the purposes entirely lawful, is not absolute; and the lack of this absoluteness is expressed in the maxim, *Sic utere tuo ut alienum non lædas.* And when the use and enjoyment of private property is opposed in exercise to casualties such as conflagrations in populous communities, the private right must yield to the qualification expressed in the maxim, *Salus populi suprema est lex.* Phœnix Assur. Co. v. Fire Department, 117 Ala. 649, 42 L.R.A. 468, 23 So. 843. The soundness and wholesomeness of the doctrine of these two maxims cannot, of course, be disputed. They are at least as old as the common law itself, and attach to the right of use and enjoyment of all property; but the controversy here does not involve a questioning of the doctrine stated in the first maxim. It involves the denial of the application of the doctrine to the mere inactive wrong, the omission, alleged to inhere in the failure or refusal to remove—as the ability and facility so to do, with safety, existed—the obstruction to the laying of the connected hose from the plug to the burning building. Since negligence can be predicated only upon breach of duty, it is clear that the inquiry is: Was it the duty of the employees in physical control of the engine and train occasioning the mentioned obstruction, to remove it, either by moving the train or by "cutting" the train; notice of the necessity to do so, in order to permit the application of the water to the fire, being given these employees? There is no serious contention that the backing of the train, or the cutting of it, so as to admit of the laying of the hose across the track, would have endangered that or other property of the defendant, or the safety of persons in its employ or using its service, nor was any hazard assigned, on the occasion, as a reason for such failure or refusal.

It has been ruled, upon what seems to me conclusive reasoning, that the duty rests on a railway or street car company to refrain, after notice, from severing hose laid across its track with the view to the extinguishment of a fire, and that a breach of this duty is a wrong for which the company is liable, if the damage claimed is a proximate consequence thereof. American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. 12 L.R.A.(N.S.) 382, and note (75 C. C. A. 47, 143 Fed. 789, 6 A. & E. Ann. Cas. 626); Little Rock Traction & Electric Co. v. McCaskill, 75 Ark. 133, 70 L.R.A. 680, 112 Am. St. Rep. 48, 86 S. W. 997; Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; note to Byrd v. English, 64 L.R.A. 95, 96. In my opinion, the cases of the cited class rest on a principle common to them and to that at bar. I cannot improve on the statement of the principle to be found in the American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co. supra: "It is not denied that a natural person, or a corporation, by its corporate agencies, may so interfere with the rights of another, growing out of the emergency of a fire or conflagration of or on such other person's property or premises, as to make him or it liable for injury and damage directly resulting from such interference. Actionable interference of this kind is the violation of a fundamental social duty, and is within the definition of a common-law tort. Private property may be entered by the public authorities, or by the person, or his agents, who is owner of a burning property, for the purpose of using reasonable means to save the same or extinguish the fire; and undoubtedly, in the case now before us, the plaintiffs' employees, as well as the public firemen, had the right to cross the right of way and tracks of the defendant company for the purpose of leading the hose from the source of supply to the burning buildings." In the case just quoted, the question under consideration in the case at bar was presented; and following the principle declared, as quoted, the court, through Judge Gray, exonerated the defendant upon the evident assumption that the duty to move or cut the train, so as to avoid interference with the efforts to extinguish the fire, was met by those in physical control of the train; the proof showing a promptly announced and acted-on willingness and purpose of the enginemen to relieve the emergency of the interference occasioned by his train. The majority attempt to distinguish this case upon the ground that a street was blocked by the standing train. Yet the statement of facts made by the learned judge shows (at page 384 of 12 L.R.A. [N.S.] that the "so-called Fifteenth street

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crossing was a way maintained by the *company* across the tracks of the railway company, on the line of what was *formerly* Fifteenth street, but for a long time abandoned as a city street." (Italics supplied.) The attempted differentiation is expressly refuted.

Besides, a principle may be applicable or not, owing to the facts; but a principle is never altered, whatever the facts. And the principle, clearly announced by Judge Gray, affects the duty due from the carrier to the firemen regardless of the public character of the place whereat the crossing of the track with the hose is necessary to the application of water to the fire. A perfect analogy, in principle, is afforded by the decision in Alabama G. S. R. Co. v. Fulton, 144 Ala. 340, 39 So. 282, where it was held to be the duty of the train men to stop the train (if practicable) in order to allay the discovered fright of an animal being driven near the track, but not on a public highway. The doctrine of the maxim, *Sic utere tuo ut alienum non lædas*, was in fact applied in Fulton's Case to the effect that the right to the use and enjoyment of the carrier's property was qualified by the stated emergency, not attributable to the carrier in any degree. Houren v. Chicago, M. & St. P. R. Co. 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611, is an authority opposed to the majority view in this case. In my opinion there are none in support of the conclusion of the majority.

According to the testimony for the plaintiffs, the employees in the physical control of this train evinced, after full notice, an indifference to the situation and emergency that was little short of shocking. If A own an alleyway leading from the street to near B's dwelling to the rear, and such alleyway is bounded on either side by buildings owned by A, and the entrance to that alley is by a heavy gate on which A has a lock of special pattern, and it becomes necessary, in the reasonable judgment of the firemen, to approach B's burning building through A's alleyway, and the firemen request A to unlock his gate that the hose may be carried from the plug to the fire, and A refuses to unlock the gate, although he might readily do so, and the firemen undertake, in the interest of the extinguishment of the conflagration, to break down the gate, within their right to do, and great delay, in applying, from the indicated direction, water to the flames, ensues, and injury and damage to the property of B results as a proximate consequence of the delay in removal, by force, of A's gate, could it be doubted that A's conduct was within the common-law definition of "tort," based on a high social duty mentioned by Judge Gray? Other illustrations readily suggest themselves.

Counsel for appellant seek to show the unsoundness of the conclusion attained by the court below by an illustration hypothesizing circumstances where the owner of a building, adjoining another building then on fire is requested by the owner of one beyond that so adjoining the burning building to raze it, because the safety of the latter building is endangered by the fact that the intervening building will be ignited by the one already burning, and the fire thence communicated; and, in consequence of the refusal of the owner so requested to raze his building, the building more removed from the original building is burned. Whatever may be the ruling with respect to liability in such a case when it arises, the illustration is inapt in this case, for the reason that here no destruction of property, nor its hazarding, was involved in the requested removal of the interference, with the right to cross the tracks of the defendant as and for the purpose set forth in the complaint and shown by the testimony for the plaintiffs. The interference here complained of arose from a cause easily removable at the will of the person in control thereof,—an agency contrived to be propelled.

Of course, it follows that the application of the doctrine of the maxim, *Sic utere tuo ut alienum non lædas*, excludes an appeal to the doctrine of the maxim, *Damnum absque injuria*, for the obvious reason that the latter doctrine is grounded in rightful use; whereas, the status raised by the interference with the extinguishment of the fire on appellees' premises was a violation of a duty created by the emergency, coupled with the right to reach the burning building with the appliances maintained for the purpose of extinguishing fires.

The judgment should, in my opinion, be affirmed.

Petition for rehearing denied May 11, 1909.

ARKANSAS SUPREME COURT.

B. F. BIGGER, Appt.,
v.
J. R. ACREE.

(87 Ark. 318, 112 S. W. 879.)

Livery-stable keeper — injury to horse — liability.

A livery-stable keeper is not liable for injury to a horse by its getting loose in the night and being kicked by another horse, where it was tied in the usual and custo-

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mary manner, and as the owner had tied it when he brought it to the stable.

(September 21, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Randolph County in plaintiff's favor in an action brought to recover damages for the loss of a horse, alleged to be due to defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Witt & Schoonover** for appellant.

Messrs. **Henderson & Campbell** for appellee.

Hill, Ch. J., delivered the opinion of the court:

Acree ran a hack between Maynard and Pocahontas, arriving each day at Pocahontas about 11 o'clock in the forenoon and departing at about 1 o'clock in the afternoon. He had two teams, and alternated in the use of the same, leaving one in the livery stable of Bigger, at Pocahontas, while he was using the other. Pittman was hostler for Bigger, and was in charge of the stable. When Acree came in each day, he tied the horses in the stalls himself, or Pittman did so. At the time in question, Acree brought in his team and tied them in their stalls himself. In the afternoon of that day, Pittman took the team out to water them, and returned them to the stable, and tied them in the same manner that Acree had tied them. In the night, Pittman heard a noise, and, going in the stable, found that one of Acree's horses was loose and standing in another stall. He tied it in that stall with the

Case Note.—Care required of keeper of boarding stable.

The keeper of a boarding or livery stable, taking charge of a horse or carriage for hire, is not an insurer of it. Hunter v. Ricke Bros. 127 Iowa, 108, 102 N. W. 826; Dennis v. Huyck, 48 Mich. 620, 42 Am. Rep. 479, 12 N. W. 878; Searle v. Laverick, L. R. 9 Q. B. 122; dissenting opinion in Templeton v. Waddington, 14 Manitoba L. Rep. 495.

Ordinary care is all that is required at his hands. Hunter v. Ricke Bros. supra; Weick v. Dougherty, 28 Ky. L. Rep. 930, 3 L.R.A. (N.S.) 348, 90 S. W. 966; Eaton v. Lancaster, 79 Me. 477, 10 Atl. 449; Swann v. Brown, 51 N. C. (6 Jones, L.) 150, 72 Am. Dec. 568.

In Searle v. Laverick, supra, it was held that where a livery-stable keeper undertook, for a reward, to receive a carriage and lodge it in a coachhouse, he was bound only to take reasonable care of the same.

In Weick v. Dougherty, supra, it was held that if, by the exercise of ordinary care, a livery-stable keeper could have saved a wagon and its contents, left in his keeping for hire, and destroyed by the burning of his stable, he was liable.

In McPherrin v. Jennings, 66 Iowa, 622, 24 N. W. 242, plaintiff recovered the value of a horse which he had placed in charge of the keeper of a feed stable, to be cared for and fed for a consideration, the horse having killed itself in struggling to get its head free from a box in which its food was placed. The court said that the express liability for loss arose out of defendant's failure properly to care for the horse.

In Eaton v. Lancaster, supra, it was held that a jury might properly find that there was a want of due care on the part of a livery-stable keeper's night watchman, where, contrary to a rule of the keeper, he permitted drunken men to go into the hay loft, knowing that they were tobacco smokers and had pipes and matches with them, to stay during the night, and, about half an hour afterward, the loft was on fire, and the stable was destroyed, together with plaintiff's horse, which had been delivered at the stable to be kept for hire.

In Byrnes v. Holscher, 96 N. Y. Supp. 89, it was held that livery-stable keepers were liable for the loss of a sleigh which, while in their keeping, they let out to someone, who destroyed it.

In Hexamer v. Sonthal, 49 N. J. L. 682, 10 Atl. 281, it was held that a livery-stable keeper who undertook to board a horse assumed the duty of furnishing proper treatment when the horse became sick, and for death resulting from improper treatment, he was liable.

In Swann v. Brown, supra, it was held that it was the duty of a livery-stable keeper who permitted other horses, kept in the same stable, with a common door, to be taken out by their owners during the night, to have had an agent or servant present to see that the door was properly closed, so as to have prevented plaintiff's horse from escaping.

In Durocher v. Meunier, 9 Lower Can. Rep. Dec. Des Tribunan, 8, it was held that where a tavern keeper, who maintained stables in connection with his tavern, put plaintiff's mare into his stable for a compensation, and the mare's mane and tail were shorn in the night, the presumption was that the act was done by the keeper's own servants, or, at least, in consequence of his or their negligence, for which he was responsible.

In Powers v. Jughardt, 101 App. Div. 53, 91 N. Y. Supp. 556, where it was shown that a horse, while being boarded, was placed in a stall in good condition at night, and in the morning was found injured in a way that ordinarily does not occur without negligence, it was held that it then devolved upon the keeper to show that the accident occurred without negligence on his part.

In Hunter v. Ricke Bros. supra, where plaintiff's team, left with livery-stable keepers for hire, to be kept over night, was destroyed by fire, which consumed the barn and

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same rope that it had been previously tied with in the other stall. He did not at that time discover that the horse was injured; but the next morning he discovered that it had been hurt, apparently kicked on the leg, and he felt sure it had been kicked by its mate, as it was the only other horse in the stable. He and Acree treated the horse for several days, when it died. Acree brought suit against Bigger for the value of the horse, alleging that it had been injured, and died as a result thereof, through the negligence of Bigger in permitting the horse to run loose in the stable among other horses confined therein, as a result of which it had been kicked and injured, from which injuries it died. Bigger denied negligence, and the case was tried upon this issue, resulting in a verdict for Acree, and Bigger has appealed.

The only testimony as to the care of the animal was that of Pittman called by the plaintiff. He testified that he tied the mare in the stall with the same rope and in the same manner that the owner had tied it earlier in the same day, and that this was the usual way that it had been tied theretofore; that this mare had been in the habit of breaking loose at night, and he used a small rope with which to tie her, for the reason that, if a larger rope had been used, she might have broken her neck, or choked herself to death; that he had not tied a rope or chain at the rear of the stall to prevent her from backing out, for the reason that he did not think it necessary, nor was it customary in the livery business, with which

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its contents, it was held that the burden was on the keepers to overcome the presumption that the loss occurred through a want of ordinary care; but where they showed that the loss occurred through the operation of forces not within their control, the plaintiff, failing to disprove the asserted cause of loss, or to show that a want of ordinary care on the part of the keepers co-operated with such destroying cause, was not entitled to recover.

In Lockridge v. Fesler, 18 Ky. L. Rep. 469, 37 S. W. 65, it was held that a livery-stable keeper charged with negligently permitting a horse left in his keeping to be injured was entitled to plead and prove that the injury was caused by accident, without any carelessness or negligence on his part, or on the part of his employees.

In the preceding case, it was held that, where there was no proof that the alleged carelessness and negligence of the livery-stable keeper or his employees necessarily resulted in the injury and death of a horse left in his keeping, or that the result might reasonably have been expected to follow from the alleged negligence, the owner of the horse was not entitled to recover.

In Berry v. Marix, 16 La. Ann. 248, it was held that a livery-stable keeper was not liable for the disappearance or theft of horses from stalls rented at a stipulated price to the owner of the horses, who furnished his own provender, and kept his own employee in the stable to take care of the horses, since the contract related merely to the stalls, and not to the keeping of the horses.

In Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211, it was held that, merely because of his obligation to take reasonable care of a horse left in his keeping for hire, a livery-stable keeper was not to be held liable where the owner of the horse interposed, and requested one of the keeper's servants to ride the horse out for exercise, during which it was injured through carelessness, this being no part of the contract of livery.

In Templeton v. Waddington, 14 Manitoba L. Rep. 495, where plaintiff paid to have his mare kept by a livery-stable keeper in an ordinary open stall, and she was kicked and injured by another horse which broke halter, it was held that defendant was not liable, in the absence of evidence showing knowledge that the horse was a vicious one, or that he had ever broken halter before.

In Bradley v. Cunningham, 61 Conn. 485, 15 L.R.A. 679, 23 Atl. 932, it was held that a livery-stable keeper who, for hire, stored a hearse under an agreement which did not expressly specify any particular stable, though both parties expected that it would be kept at the main stable, at which place only it was covered by an insurance policy, was not liable for the loss of the hearse by fire, not due to his negligence, while stored in another stable also used in his business, where he did not in fact know of the limitation of the insurance, although a similar limitation existed in the policies upon his own vehicles.

In Peyser v. Lund, 89 App. Div. 195, 85 N. Y. Supp. 881, it was held that the keeper of a boarding stable was not liable for the value of property stolen from a truck left standing in the street in front of his stables, although, in violation of his contract to receive and care for such trucks and their contents, he had refused to receive the same.

Whether or not a livery-stable keeper, in the exercise of ordinary care, sufficiently guarded against fire the barn in which he kept horses which he was boarding, is a question for the jury. Weaver v. Montana Stables, 46 Wash. 65, 89 Pac. 154; Colby v. Montana Stables, 46 Wash. 699, 91 Pac. 1135.

And where the court tries the case without a jury, the decision of the court that the facts constituted negligence in the care of the horse has the effect of the verdict of a jury. Ponceler v. Palace Livery Co. (Ala.) 47 So. 702.

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business he testified he was familiar. The rope with which she was tied was either half-inch or three-quarter inch rope, and was sufficient to hold any ordinary animal.

A livery-stable keeper for hire is required to use ordinary care of the animals committed to his charge. And he is liable for injuries to horses placed in his charge when, and only when, such injuries are occasioned by negligence on his part. "The ordinary care required, according to the familiar definition, is that degree of care which a person of ordinary prudence would take of the property, under the same circumstances, if it were his own." 19 Am. & Eng. Enc. Law, 2d ed. p. 432. See also, where the same principles were announced, Swann v. Brown, 51 N. C. (6 Jones, L.) 150, 72 Am. Dec. 568; Weick v. Dougherty, 3 L.R.A.(N.S.) 348, and note (28 Ky. L. Rep. 930, 90 S. W. 966); Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211; Hunter v. Ricke Bros. 127 Iowa, 108, 102 N. W. 826; 25 Cyc. Law & Proc. p. 1512. In the case of Lockridge v. Fesler, 18 Ky. L. Rep. 469, 37 S. W. 65, the court of appeals of Kentucky had before it a case quite similar to this one. A horse, intrusted to a livery stable, had slipped his halter and escaped, and was killed. The defense was that the horse was hitched in the usual and customary manner in the stable; that the owner saw the manner in which the horse was hitched and placed, and did not object thereto; and that the horse was properly hitched, but, being breachy and restless, slipped its halter and escaped, without any carelessness or negligence on the part of the defendant or his employees. It was held that these facts constituted a defense. This case cannot be distinguished from that one, and the principle of it is correct and in consonance with all the authorities on the subject. Under the undisputed evidence in the case, the horse was cared for in the usual and customary manner of caring for horses in livery stables; and in the same manner that the owner cared for this horse in this stable. To hold the livery keeper liable under this evidence would be to make him an insurer of the safety of animals in his stable; and that is not the law.

Judgment reversed, and cause remanded.

Wood, J., is also of opinion that the evidence is insufficient to show that the death of the animal resulted from the injury received.

23 L.R.A.(N.S.)

ARKANSAS SUPREME COURT.

J. S. HANDFORD et al., Appts.,
v.
C. M. EDWARDS.

(89 Ark. 151, 115 S. W. 1143.)

Deed of trust — redemption — surety — subrogation.

A surety advancing money to his principal to redeem from a statutory foreclosure sale of property deeded in trust to secure the sum for the payment of which he is surety is not entitled to subrogation to the rights of the creditor, where the statute authorizes the

Case Note. — Right of one who advances money to another for purpose of redeeming from a sale under a mortgage to be subrogated to the lien of the mortgage.

It will be noted that the foregoing decision turns upon the fact that, by the redemption itself, the lien was extinguished, and consequently there was no lien to which the defendant could be subrogated. In this way the case is to be distinguished from those cases in which one loans money merely to pay off a lien, and thereafter seeks to be subrogated to the lien. That the one loaning the money had an interest to protect, or that it was his intention to preserve the lien for his own protection, is consequently wholly immaterial, although ordinarily these facts are very important in cases involving subrogation.

There appear to be but few other cases involving the right to subrogation where money is loaned to redeem from a sale, and in none of these does it appear that the decision turns upon the fact that the lien had been extinguished by the act of redemption.

In Rodman v. Sanders, 44 Ark. 504, on the foreclosure of a vendor's lien, the vendee's father paid off the encumbrance, and received the outstanding purchase note and a deed to his son. The deed, however, was not put on record or delivered to the son, but was retained, together with the note, by the father, and it was held that he would be subrogated to the vendor's lien, as it was clearly his intention to preserve the lien for his protection.

In Backer v. Pyne, 130 Ind. 293, 30 Am. St. Rep. 231, 30 N. E. 21, it was held that a judgment creditor who, relying upon the debtor's fraudulent representations, advanced money to redeem the debtor's property from a sale under an execution, and to pay off other liens, in order to protect his own judgment, and who took a mortgage for the amount advanced, would be subrogated to the rights of the persons whose liens he satisfied, both as against the debtor and against other lienors whose liens were subsequent to the liens he paid, but were prior to the mortgage.

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mortgagor to redeem the land sold free from the mortgage lien.

(February 1, 1909.)

APPEAL by defendants from a judgment of the Independence County Chancery Court overruling a demurrer to the complaint in an action brought to enjoin a sale of certain real estate. Reversed.

The facts are stated in the opinion.

Mr. Samuel M. Casey, for appellants:

Although the surety is entitled to the benefit of a security held by the creditor for the payment of the debt, yet, if the whole security has been applied upon the debt without paying it in full, and the surety has been compelled to make up the deficiency, he cannot then resort to the security for subrogation or contribution.

Sheldon, Subrogation, 2d ed. § 116; McConnell v. Beattie, 34 Ark. 113.

Plaintiff merely furnished the money for redemption to the judgment debtor as a part of the purchase money of the land, and is not entitled to subrogation of the land.

Nichol v. Dunn, 25 Ark. 129; Chaffe v. Oliver, 39 Ark. 531; Cohn v. Hoffman, 50 Ark. 108, 6 S. W. 511.

Mr. Samuel A. Moore, for appellee:

The complainant, having paid the surety debt, had a right to protect his own interest by furnishing the $400 with which to redeem the property.

Sheldon, Subrogation 2d ed. §§ 12, 19, 86; 27 Am. & Eng. Enc. Law, 2d ed. pp. 209, 237, 235; Talbot v. Wilkins, 31 Ark. 411; Chaffe v. Oliver, 39 Ark. 531; Newton v. Field, 16 Ark. 216; Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753; Davies v. Pugh, 81 Ark. 253, 99 S. W. 78; Schoonover v. Allen, 40 Ark. 132; Fleming v. Beaver, 2 Rawle, 128, 19 Am. Dec. 629; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; Hughes v. Thomas, 131 Wis. 315, 11 L.R.A.(N.S.) 744, 111 N. W. 474, 11 A. & E. Ann. Cas. 673.

Hill, Ch. J. delivered the opinion of the court:

In 1905 the Bank of Newark obtained a decree in the Independence chancery court against C. J. Magness in the sum of $2,865.62. This decree was based on a note secured by a deed of trust upon real and personal property, and a foreclosure was decreed. Two lots in the town of Newark were sold under said decree for $400, and the purchase price thereof credited upon the decree. Edwards was one of several sureties of Magness to the bank, and after the foreclosure, the property being insufficient to discharge the debt, he was compelled to pay $197.28 as his *pro rata* of the debt due the bank. Magness was insolvent and unable to pay the same. In order that he might protect himself, Edwards advanced the sum of $400 with which to redeem the lots from the commissioner's sale, and in consideration of said $400, and the $197.28 paid as surety, Magness executed to Edwards on the 20th of May, 1907, his warranty deed for said lots.

Handford and Adams obtained judgment in the Independence chancery court against Magness on the 14th of May, 1907, and in July, 1907, had execution issued and placed in the hands of the sheriff, and levied on the lots conveyed by Magness to Edwards, and said lots were thereupon advertised for sale. Edwards brought a complaint in equity, alleging that a sale of said lots would be a cloud upon his title, and asking that, if they should be sold, he be subrogated to the amount of $597.28, the amount which he had advanced as surety and to redeem said lots. The court directed a cancelation of the deed of Magness to Edwards, but decreed a subrogation to the amount he had advanced as surety and for the redemption of said lots, to wit, $597.28, and declared it a lien upon the lots superior to the title of Handford and Adams, derived through the execution upon their judgment. The court overruled a demurrer to a complaint setting forth these facts, and after judgment, Handford and Adams appealed.

The statutory right of redemption from mortgage sales entitles the mortgagor to redeem the lands sold, free of the mortgage lien. Fields v. Danenhower, 65 Ark. 392, 43 L.R.A. 519, 46 S. W. 938. In this case the court said: "For the purpose of redemption, the statute conclusively presumes that the price for which the property sells at the mortgage sale represents its actual value, and it allows the mortgagor, within a reasonable time after the sale, to redeem and reclaim the property by substituting therefor its money value, as determined by such facts." This was said in regard to a sale under a power in the mortgage, but the reasoning is equally applicable to the statutory right to redeem from a mortgage foreclosure in chancery. As pointed out in Fields v. Danenhower, this principle only applies to the statutory right of redemption.

It follows that the land redeemed by Magness, through the advance of the money to him by Edwards, was redeemed, free from any lien, and there was no lien to which Edwards could be subrogated. This was a simple advance to Magness of money to enable him to redeem this land, which he did, for which he took a deed to the property; but, at the time he took the deed to the property, there was an outstanding judg-

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ment in favor of Handford and Adams, which constituted a lien upon the property prior to the rights acquired by him under the deed. Cohn v. Hoffman, 50 Ark. 108, 6 S. W. 511; Rodman v. Sanders, 44 Ark. 504. It follows that the court erred in decreeing subrogation in favor of Edwards.

Decree reversed, and cause remanded, with directions to sustain the demurrer.

COLORADO SUPREME COURT.

FRANK MANNING et al., Plffs. in Err.,
v.
CITY OF CANON CITY.

(— Colo. —, 101 Pac. 978.)

Intoxicating liquors — sale — distribution by club.

The distribution of liquors kept by an unincorporated club to members who pay therefor sums which are used to replenish the supply of liquor, or to defray the expenses of the club, is a sale within the meaning of a prohibition law.

(May 3, 1909.)

ERROR to the Fremont County Court to review a judgment convicting defendants of selling intoxicating liquors in violation of a municipal ordinance. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles E. Waldo, Clyde C. Dawson, and James A. Stump,** for plaintiffs in error:

The distribution of liquors among the members of a bona fide unincorporated club does not constitute a sale within the prohibitory law.

People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; People v. Andrews, 115 N. Y. 427, 6 L.R.A. 128, 22 N. E. 358; 11 Am. & Eng. Enc. Law, p. 727; Black, Intoxicating Liquors, § 142; Graff v. Evans, L. R. 8 Q. B. Div. 373; Com. v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340; Com. v. Smith, 102 Mass. 144; State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604; Com. v. Baker, 152 Mass. 337, 25 N. E. 718; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; Barden v. Montana Club, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042; Klein v. Livingston Club, 177 Pa. 224, 35 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606; Piedmont Club v. Com. 87 Va. 540, 12 S. E. 963; State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; Seim v. State, 55 Md. 566, 39 Am. Rep. 419; Newell v. Hemingway, 16 Cox, C. C. 604; 23 Cyc. Law & Proc. p. 117; R. v. Slattery, 26 Ont. Rep. 148; R. v. Austin, 17 Ont. Rep. 743; R. v. Hughes, 29 Ont. Rep. 179.

Messrs. **Taylor & Sayre,** for defendant in error:

The distribution by the club constituted a sale within the meaning of the ordinance.

People v. Soule, 74 Mich. 250, 2 L.R.A. 494, 41 N. W. 908; People v. Andrews, 115

Case Note. — Applicability of liquor laws to social club dispensing liquors to members.

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In Spokane v. Baughman (Wash.) 103 Pac. 14, it was held that where liquors were purchased by an incorporated club, the corporation became the owner; and when dispensed to a member, with intent to pass title, the act constituted a sale within the terms of an ordinance making it a misdemeanor to sell intoxicating liquors without first obtaining a license therefor.

In State v. Johns (Iowa) 118 N. W. 295, it appears that, by § 2404 of the Iowa Code, it is made a misdemeanor to keep or aid in keeping a clubroom or other place in which intoxicating liquors are received or kept for the purpose of distribution or division among the members of any club or association.

In Ex parte Manning (Kan.) 101 Pac. 464, it appears that a similar statute is in force in Kansas. Gen. Stat. 1901, § 2466.

In State v. Kapiesky (Me.) 73 Atl. 830, it was held that, under a statute which provided that "all places used . . . for the illegal sale or keeping of intoxicating liquors, and all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, are common nuisances," a place of resort was a nuisance if used by a club to sell intoxicating liquors to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members liquors which were bought for and belonged to them individually.

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Steele, Ch. J., delivered the opinion of the court:

The defendants were found guilty of a violation of § 1 of an ordinance of the city of Canon City which is as follows: "Section 1. Whosoever, by himself or another, either as principal, clerk, agent, or servant, shall sell or dispose of, or shall give away for the purpose of avoiding any of the provisions of this ordinance, any intoxicating, spirituous, malt, vinous, fermented, or mixed liquors within the corporate limits of this city, or within 1 mile beyond the outer boundaries thereof, shall be fined not less than one hundred ($100) dollars, nor more than three hundred ($300) dollars for each offense; provided that this ordinance shall not apply to regularly licensed druggists, who may have a permit from the city council to sell such liquors, when sold in accordance with said permit." From the judgment the defendants appealed.

The single assignment of error is that, "under the law and the evidence in this case, no judgment against plaintiffs in error or any of them can be sustained, but that the judgment rendered therein is contrary to law, under said evidence." The defendants constitute the board of control of the Elks' Club of Canon City. The club is a part of and under the control of the Canon City Lodge of the Benevolent Protective Order of Elks of the United States of America. The membership of the order is in excess of a quarter of a million persons, and it, through the subordinate lodges, maintains clubs in many of the towns and cities of the country, and there are clubs of the order maintained in most of the important cities and towns of this state. This club is a bona fide club, and, as found by the court below, is composed of about 400 substantial and respectable citizens of Canon City. It is maintained for the entertainment, pleasure, and benefit of the members of the order, and any member of the order, whether a resident of Canon City or elsewhere, is entitled to the privileges of the club. The club is supplied with newspapers, magazines, and such reading matter as the management may deem advantageous or desirable for the members. It maintains billiard, pool, and card tables. Food and liquors are dispensed to such of the members as may desire them. In short, it is a social club, like any other social club to be found in the larger towns and cities of the country, the dispensing of liquors being a mere incident to, and not the object of, the organization. It is an unincorporated association. No visitor or guest of a member is permitted to spend money in the club, but the member introducing the visitor or guest is responsible for his guest's entertainment. The club keeps on hand a supply of the various kinds of intoxicating liquors, which it dispenses to its members and guests, and the members of the order, at the rates fixed by the board of control. Those to whom liquors are supplied may pay cash or have the amount charged. The amount received from the members for the liquor goes to replenishing the supply of liquors and defraying the expenses of the club.

Section 4403, subdiv. 18, Mills's Anno. Stat. grants to cities and towns the right, subject to the laws of the state, to license, regulate, or prohibit the sale or giving away of intoxicating liquors; and it is contended that, in so far as the ordinance prohibits the disposal of intoxicating liquors, it is in excess of the powers granted by the legislature to the city. We shall not determine the question, for reasons which will presently appear, but shall confine our discussion to a determination of the question whether the dispensing of liquors by the defendants in the clubroom is or is not a sale within the meaning of the statutes and the ordinance in question.

It is contended by counsel for defendants that the process by which members of the club obtain the title to a quantity of liquor, to be disposed of by the individual as he may desire, is not a "sale," but a mere distribution of the liquor of the club among its members. On the other hand, it is contended by the city that such process is a sale, and is within the prohibition of the ordinance; and

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ment in favor of Handford and Adams, which constituted a lien upon the property prior to the rights acquired by him under the deed. Cohn v. Hoffman, 50 Ark. 108, 6 S. W. 511; Rodman v. Sanders, 44 Ark. 504. It follows that the court erred in decreeing subrogation in favor of Edwards.

Decree reversed, and cause remanded, with directions to sustain the demurrer.

COLORADO SUPREME COURT.

FRANK MANNING et al., Plffs. in Err.,
v.
CITY OF CANON CITY.

(— Colo. —, 101 Pac. 978.)

Intoxicating liquors — sale — distribution by club.

The distribution of liquors kept by an unincorporated club to members who pay therefor sums which are used to replenish the supply of liquor, or to defray the expenses of the club, is a sale within the meaning of a prohibition law.

(May 3, 1909.)

ERROR to the Fremont County Court to review a judgment convicting defendants of selling intoxicating liquors in violation of a municipal ordinance. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles E. Waldo, Clyde C. Dawson, and James A. Stump,** for plaintiffs in error:

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It is contended by counsel for defendants that the process by which members of the club obtain the title to a quantity of liquor, to be disposed of by the individual as he may desire, is not a "sale," but a mere distribution of the liquor of the club among its members. On the other hand, it is contended by the city that such process is a sale, and is within the prohibition of the ordinance; and

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upon a determination of these propositions the whole controversy depends. If such disposing of liquors constitutes a sale, then the defendants were legally convicted, and the judgment should stand; otherwise, the judgment should be reversed and the defendants discharged.

The decisions are in irreconcilable conflict. In the decisions where courts hold that clubs are exempted from the license laws, it is generally because of some peculiar word or phrase contained in the statute; and it should be noted that no case is presented where a prohibition statute has been construed as exempting social clubs from its operation. In the case of State v. Kline, 50 Or. 426, 93 Pac. 237, decided in 1907, and the latest case we have seen on the subject, Mr. Justice Moore, in the course of the opinion, said: "In the note to the case of Barden v. Montana Club, 24 Am. St. Rep. 27, immediately following the excerpt hereinbefore quoted, the editors of that valuable series of case law make the following observation; as deducible from an examination of adjudications applicable to the inquiry, to wit: 'The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales, or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases cannot be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members, in the manner above stated, is a sale, and a violation of laws of the nature stated.' Several cases are cited, and quotations therefrom are contained in the note that fully sustain the conclusion thus reached, and we adopt that part of such deduction as relates to the disposal of intoxicating liquor by a club to its members in violation of the provisions of a local option law, without further calling attention to the cases relied upon."

In the case of South Shore Country Club v. People, 228 Ill. 75, 12 L.R.A.(N.S.) 519, 119 Am. St. Rep. 417, 81 N. E. 805, 10 A. & E. Ann. Cas. 383, decided in 1907, it is held that a social club where liquors are dispensed to its members is a dramshop, within the statute, which defines a "dramshop" as a place where spirituous, vinous, or malt liquors are retailed by less quantity than 1 gallon. In the course of the opinion, the court said: "The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common . . . or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership. . . . A member of such an association has no individual right or interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale." This decision adheres to the former opinion of the court, and holds that it is immaterial whether the club is or is not bona fide, and quotes with approval the language of the court in 73 Md., and says: "We agree with the views expressed in State v. Easton Social, Literary, & Musical Club, 73 Md. 97, 10 L.R.A. 64, 20 Atl. 783, that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit persons in combination to do what individuals without combination could not do."

In the case of People ex rel. Stevenson v. Law & Order Club, 203 Ill. 127, 62 L.R.A. 884, 67 N. E. 855, it is held that the dispensing of intoxicating liquors by a social club to its members, without having a license, is a violation of the dramshop act, and that the fact that the club was organized in good faith, for social and benevolent purposes, and not as a shift or device to evade the provisions of the law, is not material.

The earlier decision of Maryland (Seim v. State, 55 Md. 566, 39 Am. Rep. 419) held that the dispensing of intoxicating liquors by a social club was not a sale; but the later cases and the controlling ones in that state (State v. Easton Social, Literary, & Musical Club, 73 Md. 97, 10 L.R.A. 64, 20 Atl. 783, and State v. Maryland Club, 105 Md. 585, 66 Atl. 667), hold that such dispensing of liquors is a sale. The court, in the case reported in 73 Md., said, with reference to the other decisions of that court: "When the question was presented to this court in the case of The Chesapeake Club v. State, 63 Md. 446, the judges who heard the case were equally divided in opinion, resulting in the affirmance of the ruling of the court below, which had held the club criminally liable for furnishing liquor to its members in violation of the local option law. That case, resulting as it did, may not furnish a binding precedent or authority for the decision to be made in this; but, after a careful examination and comparison of all the decisions upon the subject, we are decidedly of opinion that the furnishing of

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liquors by the club to its members for a price fixed by regulation, and paid by the member upon receipt of the liquor, constitutes a sale, and is therefore in violation of the statute."

Supporting the doctrine announced in the foregoing decisions are the decisions of the supreme courts of Alabama, Kansas, Kentucky, North Carolina, Mississippi, Indiana, Michigan, Georgia, West Virginia, and Louisiana; and whenever the question has been presented to a Federal court, that court has held the clubs liable as retailers to pay the government tax. Not only is the greater weight of authority, but, in our opinion, the better reason, on the side of those courts that hold the transaction between the club and its members, such as we have described herein, to be an ordinary sale. In addition to the cases we have cited are: State v. Horacek, 41 Kan. 87, 3 L.R.A. 687, 21 Pac. 204; Martin v. State, 59 Ala. 34; State, Newark, Prosecutor, v. Essex Club, 53 N. J. L. 99, 20 Atl. 769; Kentucky Club v. Louisville, 92 Ky. 309, 17 S. W. 743; State v. Lockyear, 95 N. C. 633, 59 Am. Rep. 287; State v. Neis, 108 N. C. 787, 12 L.R.A. 412, 13 S. E. 225; Nogales Club v. State, 69 Miss. 218, 10 So. 274; Marmont v. State, 48 Ind. 21; People v. Soule, 74 Mich. 250, 2 L.R.A. 494, 41 N. W. 908; Mohrman v. State, 105 Ga. 709, 43 L.R.A. 398, 70 Am. St. Rep. 74, 32 S. E. 143; State v. Shumate, 44 W. Va. 490, 29 S. E. 1001; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895.

There are many authorities supporting the view that the transaction by which a member of a club acquires a quantity of liquor for his own use upon the payment of a stipulated price is not a sale. It is so held in Missouri, by the supreme court, in State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604; but Judge Phillips, then district judge for the western district of Missouri, held, in the case of the United States v. Giller (C. C.) 54 Fed. 656, that social clubs where liquor was dispensed were retail dealers, and were required to pay the government tax; and, in a case decided by the St. Louis court of appeals (State v. Bacon Club, 44 Mo. App. 86), it is held that such a transaction is a sale within the prohibition of the statute of the state. The opinion closes with this significant sentence: "The principle of law that prohibits a laboring man from buying a drink of liquor in a saloon ought to prevent wealthy gentlemen from organizing themselves into a corporation for the purpose of selling it to their members."

In Massachusetts the supreme court holds that the distribution of liquor to the members of a club, by a transaction similar to the one before us, is not a sale. Com. v. Smith, 102 Mass. 144. But the Federal court of Massachusetts held that such transactions were sales, and the clubs were liable for the violation of the Federal laws as retail dealers. United States v. Wittig, 2 Low. Dec. 466, Fed. Cas. No. 16,748.

The Pennsylvania supreme court holds, in Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606, that, where an incorporated social club is organized and conducted in good faith, owning its property in common, to which the furnishing of liquors to its members is merely incidental to the purpose for which it was organized, the furnishing of liquors does not constitute a sale; but the Federal courts of Pennsylvania hold that such dealing with members of clubs does constitute a sale, and requires the clubs to pay the government tax as retail liquor dealers. United States v. Alexis Club (D. C.) 98 Fed. 725. The facts in the Federal case were about as they are here, and Judge McPherson, in his opinion, says, among other things: "Did the defendant, then, sell liquor to its members? I shall not review the irreconcilable cases upon this subject, nor make the superfluous attempt to produce a new argument in support of my conclusion. I content myself with saying, briefly, that I agree with the general opinion of the community, and hold the transaction to be a simple, ordinary sale. If a chartered club, such as the defendant, buys liquor, the legal title to this property is in the corporation, and not in the members. . . . The legal title, then, being in the corporation, it is further to be observed that, when the title passes to a consumer, it passes by a transaction that exhibits every element of a sale, and shows no outward sign of being anything else. The intending consumer asks to be served with a definite quantity of intoxicating drink. The owner of the legal title to the liquor, acting by a paid servant, agrees to the request, requires the price to be paid in cash, or accepts the consumer's promise to pay in the future, and thereupon delivers the subject of the bargain. Nothing else takes place, and, if this is not a sale, but is really a partial distribution of the common stock, the truth is so veiled that the participants in the transaction, I venture to assert, rarely suspect that they are taking part in anything but a commonplace sale. It is safe to say that—except, perhaps, among those lawyers that may be

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familiar with the discussion upon the subject—to order and receive liquor at a club is always regarded as a sale, and I see no sufficient reason for declining to accept the popular estimate of an act so generally known and so easily comprehended. . . . I may perhaps be permitted to add a single word in conclusion: If the result that I have reached is correct, I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society, than which there is none more vital. Privilege and a privileged class are, and ought to be, intolerable; and it comes irritatingly near to a privilege when social clubs, offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burden because a refined reasoning declares that they are doing no more than distributing a common stock of liquor among their members, while the robust sense of the community, not excluding the club members themselves, knows the transaction to be a sale."

There are other authorities which sustain counsel in their contention that the transaction of the club in dispensing liquor is not a sale, but we are unable to distinguish the act of the club in disposing of its liquors to its members and any other process by which the title to intoxicating liquors is passed from one person to another by delivery and payment. In many of the cases cited, the liquor disposed of in clubs was the property of a corporation, and the courts hold that, as the legal title to the liquor was in the corporation, and not in the individual members, the transfer by the corporation to the member constituted a sale; and counsel attempt to distinguish between the case at bar and those cases.

When one becomes a member of the Elks' Club, he places his interest in the club property in the hands of a board of control, and he has a joint interest in the club property as long as he remains a member, subject to the right of the board of control to dispose of it as provided by the by-laws. The testimony shows that the Elks' Club, through its board of control or a servant thereof, delivers to the member on demand such quantity of liquor as he may desire, for such price as has been fixed by the board, to be paid for in cash or to be charged to the member's account. The liquor thus delivered may be consumed by the member, or may be given away, or may be destroyed. The money that is received is used to replenish the treasury of the club and in buying other liquors or supplies. The member, assuming that he has an interest in it, has but a minute interest; and, when he exchanges his money for a quantity of liquor, he pays for his minute interest and the interest of each of the other members. But it is doubtful if he has any interest which he may take by this method of distribution. "By becoming a member of a society or club a person acquires not a severable right to any of its property, but merely a right to its joint use and enjoyment so long as he continues to be a member, which right ceases upon his withdrawal or expulsion from the society. The right of membership invests him with no individual transmissible interest in the property and effects of the association, and neither he nor any number less than the whole can dispose of such property, or any supposed proportionate part or interest therein." 25 Am. & Eng. Enc. Law, 2d ed. p. 1135.

But when the members of the club clothe the board of control with the authority to dispose of liquor belonging to the club, they relinquish their right to have the entire property of the club remain intact for joint use, occupancy, and enjoyment of all the members, and make such board their agents to dispose of the liquor; and, in our opinion, such disposal by the board is a sale, pure and simple. The transaction appears to contain all the elements of a sale. Such transaction is but a contract between the parties to give and to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold; and it would require, to paraphrase the remarks of Judge McPherson, a refined reasoning to declare that the club is doing no more than distributing a common stock of liquor among its members, while the robust sense of the community, not excluding the members themselves, knows the transaction to be a sale.

Under the by-laws of the club, any one of the several hundred thousand members of the order of Elks in the United States is entitled to all the privileges of the club, and it is not seriously contended that, under a by-law such as this, the delivery of liquor for pay does not constitute a sale; but we have determined not to base our judgment upon such fact alone. Owing to the great number of social clubs in the state whose status concerning the disposition of intoxicating liquors should be determined, we have concluded to rest our opinion on the broader ground and settle the controversy.

The judgment is affirmed.

All the Justices concur.

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INDIANA SUPREME COURT.

STATE OF INDIANA, Appt.,
v.
MATT WILLETT.

(— Ind. —, 86 N. E. 68.)

Contract — burial insurance — validity.

1. A contract founded upon a legal consideration by which the obligor undertakes to furnish the obligee, or one of the latter's near relatives, a burial at death, reasonably worth a fixed sum, is valid.

Insurance — burial — regulation.

2. A contract issued by an association to furnish the holder with burial at death, at a specified cost, the money to be raised by assessments upon members of the association, who are secured by solicitation from the general public, is one of life insurance, within the meaning of a statute regulating such business.

Same — beneficiary.

3. The beneficiary of a burial insurance contract which provides that, at the death of the insured, a certain sum shall be paid to a certain named undertaker, his heirs or assigns, for burial of the insured, is the undertaker.

Same — interest.

4. An undertaker designated by a burial association to bury its members for a specified sum each has no insurable interest in such lives, within the meaning of a statute forbidding the taking of an application of insurance in favor of any person who has not a bona fide interest in the life of the insured.

Case Note. — Burial insurance and funeral benefits.

In general.

Where, in respect to funeral benefits, the scheme of the society is purely charitable, from which it derives no pecuniary benefit, it is in no sense an insurance company. Cowan v. New York Caledonian Club, 46 App. Div. 288, 61 N. Y. Supp. 714.

In State v. Taylor, 56 N. J. L. 49, 27 Atl. 797, it was held that mutual associations for the purpose of securing sick benefits and burial expenses did not come within the operation of the insurance laws, since a contract to pay sick benefits or funeral expenses was not a contract of insurance.

But, in State ex rel. Coleman v. Wichita Mut. Burial Asso. 73 Kan. 179, 84 Pac. 757, it was held that an unincorporated association which secured to each of its members a burial worth $100, in consideration of stipulated assessments to be paid by such members during their lives, the association having no ritual, no lodge or other place provided for holding meetings or transacting its business, was engaged in "the business of insurance," within the Kansas statute regulating such business, although the funds collected were used exclusively for the payment of burial expenses of deceased members, and the only expenses of the association were those included in the burial benefits.

This was also the view taken by the court *in* STATE v. WILLETT.

In Hysinger v. Supreme Lodge, K. & L. H. 42 Mo. App. 627, where the charter of a benevolent corporation authorized it to establish a relief fund, and to pay not exceeding a certain sum to the family of a deceased member, "or as he or she may have directed," it was held that a certificate which recited that $1000 was to be paid to trustees for the burial of a member and the improvement of his burial place, was a valid contract authorized by the defendant's charter.

In Lysaght v. St. Louis Co-op. Stone masons' Asso. 55 Mo. App. 538, it was held that a by-law of a benefit society, providing for the payment of a fixed amount for funeral expenses of members or their wives, was authorized by its charter, empowering it "to afford relief, comfort, and protection" to its members, and to make by-laws to that end.

Where the laws of a mutual benefit society provide for the payment of benefits to defray the funeral expenses of its members, such members have property rights in the society, and cannot be deprived of membership by proceedings not authorized by the laws of the association. Ibid.; Froelich v. Musicians' Mut. Ben. Asso. 93 Mo. App. 383.

In Taylor v. Pettee, 70 N. H. 38, 47 Atl. 733, where it appeared that a number of local voluntary councils combined to form a funeral benefit association, and each individual council was required to adopt a by-law providing for the payment of the full amount of the funeral benefit received from the association, less the cost of the claim and all charges due the local council at the time of the death,—it was held that the local treasurer, having received the amount of money from the association as the funeral benefit of the deceased, was bound to pay it over to the persons entitled to receive it, and that the local council could not, without the consent of the association, make its payment depend upon any other condition.

But, in McClenaghan v. Cincinnatus Council, 20 Pa. Super. Ct. 229, it was held that, where the general association had provided that "it shall be lawful, however, for any council to make a by-law requiring such beneficial members to be a member for a period of time, not exceeding one year, before his widow or dependent shall be entitled to such benefits," a subordinate council could not be compelled to pay funeral benefits for a member in default under its by-law, although the council itself had received the funeral benefit from the funeral benefit association.

When recoverable.

In Weber v. Home Benev. Soc. 21 Ind.

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Same — medical examination.

5. A statutory provision requiring applicants for life insurance to pass a satisfactory medical examination by a physician applies to applicants for burial insurance.

(November 24, 1908.)

APPEAL by the State for a judgment of the Circuit Court for Hancock County quashing an indictment charging defendant with writing insurance in violation of the provisions of the statute. Reversed.

The facts are stated in the opinion.

Messrs. **Charles L. Tindall, James Bingham, E. M. White, H. M. Dowling,** and **A. G. Cavins** for appellant.

Messrs. **Felt & Bulford** for appellee.

Hadley, J., delivered the opinion of the court:

The prosecuting attorney filed an affidavit charging appellee with writing a policy of insurance in violation of § 4713, Burns's Anno. Stat. 1908 (§ 4894ul, Burns's Anno. Stat. 1901). Appellee's motion to quash the affidavit was sustained, and the state appeals.

The first count of the affidavit stated, in substance that the appellee, on the 10th day of December, 1907, knowingly and unlawfully wrote a policy of insurance upon the life of one Davis, who was then and there an individual in the state of Indiana; the policy reading as follows:

No. 8539.

Greenfield, Indiana, Dec. 10, 1907.

This is to certify that Charles C. Davis, who was born on the 1st day of July, 1867, is entitled to membership in the Greenfield Mutual Burial Association, and entitled to all the benefits as a member of said association, in accordance with the by-laws thereof.

M. T. Smith, President.

Attest: Oak S. Morrison, Secretary.

The affidavit then sets out the by-laws of the Greenfield Mutual Burial Association,

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App. 345, 52 N. E. 462, it was held that, under a policy in a benevolent society providing that "if death shall result from any cause, at any time while this member is in good standing, then this society shall . . . pay to his estate . . . $100 as a funeral fund," followed by the clause, "no benefits will be paid for self-inflicted injuries,"—there could be no recovery of the funeral fund where the member committed suicide.

But, in Penn Lodge, No. 105, K. P. v. Chalfant, 1 Chester Co. Rep. 133, where there was no such provision against payment of benefits for self-inflicted injuries, it was held that the administrators were entitled to the funeral benefit, although the deceased member committed suicide.

Funeral benefits cannot be recovered upon the death of one who has been expelled as a member of the benefit association, and has taken no steps to have himself reinstated. Dodd v. Armstrong, 43 Phila. Leg. Int. 270.

The fact, however, that charges were pending against deceased at the time of his death, does not affect the right to recover his funeral benefit, in the absence of a by-law to that effect. Mullen v. Court Queen City, O. F. 70 N. H. 327, 47 Atl. 257.

In Frey v. Fidelity Lodge, No. 123, K. P. 6 Pa. Co. Ct. 435, where it appeared that the by-laws of a benefit society provided for sick benefits, and, "on the decease of a beneficial member, the lodge shall appropriate $75 towards defraying the expenses of his funeral," and further provided that a member taken sick when in arrears could not, by the payment of such arrears, become entitled to benefits during that sickness,—it was held that the society was not liable for the funeral expenses of a member, who, being in arrears, paid the same while afflicted with a sickness which continued until his death.

In Anthony v. Carl, 28 Misc. 200, 58 N. Y. Supp. 1084, where the by-laws of an unincorporated association provided for the payment of funeral money to the widow of a deceased member if he had paid all dues "that may legally be demanded of him by the lodge," it was held that the widow of a member who was in default at the time of his death could not recover the funeral money, although the lodge had not legally demanded payment of him.

In Hess v. Johnson, 41 App. Div. 465, 58 N. Y. Supp. 983, it was held that the widow of a deceased member of a voluntary association was not entitled to recover the amount of a funeral benefit where it appeared that the constitution of the association, which was subscribed by the widow's husband, provided that the sum of $100 should, on the decease of any member of one year's standing, be paid to the relative who should assume or be responsible for the expenses of his funeral, the payment being subject to the proviso that "no funeral benefits shall be paid by this union in the case of a member who shall have been three months in arrears during the six months immediately preceding his death," and the deceased husband was in arrears for a period of over three months, which he discharged less than four months before his decease.

In Cowan v. New York Caledonian Club, 46 App. Div. 288, 61 N. Y. Supp. 714, it was held that there could be no recovery of a funeral allowance payable by a club's rule "on the death of a member in good standing," where the deceased member was in arrears for dues, and, in order to pre-

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which state that the object of the association is to provide a plan for the payment of funeral expenses for the members thereof, which plan consists of the payment, by assessment, of funeral expenses to the amount of $75 for each member ten years of age or over, and $37.50 for each member under ten years of age. Any person in good health, between the ages of one year and seventy years, may become members by paying an initiation fee of 10 cents if over ten years of age, and 5 cents if under ten years of age. The officers shall consist of president, vice president, secretary, and treasurer,—the duties of the last two to be performed by the same person,—and these three shall constitute a "board of control," and have full power to direct the affairs of the association. These officers are to be elected annually, if necessary, and the various adult members are each given one vote. When a member dies, if over ten years of age, every member over ten years old shall be assessed and pay 11 cents; 10 cents of this being used as "funeral expenses," and 1 cent being used for "paying for collections." All members under ten years old and over five years old must pay 5 cents, all of which is to go for funeral expenses. If a member under ten years of age dies, each member over ten years of age shall pay 6 cents, 5 cents of which is to go to pay funeral expenses, and 1 cent for collections; and members under ten years shall pay 3 cents each, all of which is to be used for funeral expenses. Failure to pay any such assessment for thirty days forfeited the membership and all previous payments. In case the membership becomes so reduced that the benefits promised in the by-laws cannot be paid, only such benefits are to be furnished as the above assessments would justify. If there should be an excess of revenue from the assessments, such excess shall be paid into the treasury, to be applied on future benefits as the necessity therefor may arise. A member removing to such a distance as to render the services of the association's undertaker impracticable must notify the association's undertaker of such removal, and give the name of an undertaker preferred at the new place of residence.

vent his name from being erased from the roll of membership on account of being in arrears, it was necessary that he should make excuse satisfactory to two thirds of the members present at the next regular meeting, and, at the time of his decease, he had not made such excuse.

In Hess v. Johnson, supra, it was held that a provision in the constitution of a voluntary association, that, in case of a member being in arrears for three months, even when he paid those arrears, his family should not be entitled to funeral benefits unless he continued his payments for six months thereafter, was valid and binding.

In Sherry v. Plasterers' Union, 139 Pa. 470, 20 Atl. 1062, where it appeared that the constitution of an incorporated beneficial society provided that a member should be entitled to $100 for funeral expenses if he was not more than three months' dues in arrears at the time of his death; that deceased was three months in arrears and he died the day before the fourth payment was due,—it was held that the society was liable for the $100.

In O'Keefe v. William M. Barry Benev. & Athletic Asso. 74 N. J. L. 435, 66 Atl. 601, where the constitution of a benevolent association provided that upon the death of a member there should be appropriated $75 to defray his funeral expenses if his dues were not "unpaid for over three months," and it appeared that his dues were paid up to July 1st, and he died on September 24th of the same year,—it was held that a verdict for the association was erroneous.

In Talbot v. Tipperary Men Nat. Social & Benev. Asso. 23 Misc. 486, 52 N. Y. Supp. 633, it was held that a benevolent corporation was not liable for the burial expenses of a member's wife where, by its constitution, it had expressly reserved the right to itself to expend the money towards the burial of its members or their wives, or hand it over for that purpose to the next of kindred, and it had no notice of the death of such member's wife until after her funeral, and consequently no opportunity to exercise its option.

In Emmons v. Hope Lodge No. 21, I. O. O. F. 1 Marv. (Del.) 187, 40 Atl. 956, it was held that, in order to recover funeral benefits, under a by-law of a beneficial association, it was necessary to show that the deceased member was a member in good standing, and had strictly complied with the provisions of the by-laws and constitution of the association.

In Mullen v. Court Queen City, O. F. supra, it was held not necessary first to submit a claim for a funeral benefit to the adjudication of the lodge before bringing a suit therefor.

Who may recover.

In Matoon v. Wentworth, 4 Ohio L. J. 513, it was held that, since it was the duty of the administrator of the deceased to defray the expenses of the funeral, he was entitled to recover the funeral benefits provided for in deceased's benefit certificate.

Where the by-laws of a voluntary unincorporated association, providing for the payment of a funeral benefit, make no provision as to whom it shall be paid, the administrator of a deceased member is entitled to recover the amount. Taylor v. Pettee, 70 N. H. 38, 47 Atl. 733; Pearson v. Anderburg, 28 Utah, 495, 80 Pac. 307.

In Miller v. Wolf, 18 Lanc. L. Rev. 105, where it appeared that the constitution of an unincorporated beneficial society pro-

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Failure to do so forfeited all rights in the association. No salary shall be paid to any officer. The initiation fee shall be paid into an expense fund, for the "expenses of organizing the association—and such subsequent expenses as may be legitimately incurred." The president can call meetings of the association at his pleasure, and must do so upon written request of ten members. Each member shall receive a certificate as follows:

No. ———.

Greenfield, Ind., ———, 190—.

This is to certify that ———, who was born on the ——— day of ———, ———, is entitled to membership in the Greenfield Mutual Burial Association, and entitled to all the benefits as a member of said association in accordance with the by-laws thereof.

———, President.
———, Secretary.

Applicants for membership are required to be in good health. Articles 14 and 15 are in these words:

The benefits herein provided are for the purpose of furnishing respectable funeral and burial services for deceased members, and the benefits provided are to be paid to the undertaker furnishing such services, and not to surviving relatives and friends as death benefits. It is agreed that the goods for said funerals shall be furnished and

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vided that, "upon the death of a member entitled to weekly benefits, a funeral benefit . . . shall be paid to the nearest competent relative, to aid in defraying the expenses of his burial, for which purpose the said benefit is paid, . . . provided that, if in any case it shall be deemed advisable for the noble chief to receive the money and defray the funeral expenses, it shall be lawful for him to do so;" that the noble chief had paid over the funeral benefit of a deceased member to the executor, who had paid funeral expenses in excess of the benefit; that plaintiffs had not contracted for or paid any funeral expenses,—it was held that plaintiffs, although the nearest competent relatives, had no right to the benefit, and that it was properly paid to the executor.

In Radient Temple, No. 2, O. U. A. v. Piper, 62 N. J. Eq. 565, 50 Atl. 177, where the constitution of a beneficial association provided that a funeral benefit should be paid to the head officer of the subordinate lodge, "should the member leave no relative," and the by-laws directed that $25 should be immediately "paid to the family or to the person bearing the expense of the burial," and further provided for the payment of an additional $125 as funeral benefits, without naming the person to whom it was to be paid,—it was held that the additional amount was presumably to be paid to the same person, and that deceased's husband, being her sole survivor, and having paid the funeral expenses, was entitled to the $125.

In Fanton v. Coachmen's Benev. Union, 13 Misc. 245, 34 N. Y. Supp. 162 where the constitution of a benevolent association provided that, "in case of the death of a member entitled to benefits, the sum of $150 shall be allowed as a funeral benefit. In the absence of competent friends, the association shall appoint a committee to take charge of the deceased brother"—it was held that the deceased's widow could not recover the $150, since she was not designated as beneficiary, and, as the benefit provided was expressly a "funeral benefit" as distinguished from a benefit in the nature of life insurance, a rational interpretation of the words used restricted the "benefit" to an allowance for burial expenses defrayed by the "competent friends," or by the committee appointed to act in their absence.

Likewise, in Hughes v. Journeymen Horseshoers' Protective Union & Benev. Soc. 29 Misc. 327, 60 N. Y. Supp. 526, where the by-laws of a benevolent society provided that, "on the death of a member in good standing, the sum of $100 shall be appropriated for his funeral expenses," to be paid by the society to the "proper parties," so as to "insure a decent and Christian burial," it was held that the widow of a member was not entitled to recover the $100 in the absence of proof that she defrayed the funeral expenses.

In Berlin Beneficial Soc. v. March, 82 Pa. 166, it was held that a widow who had voluntarily left her husband, and was not living with him at the time of his death, and who bore no part of his funeral expenses, could not recover from an incorporated beneficial society of which he was a member, under its by-law providing that, at the death of a member, the association shall pay to his widow or relatives $25 for and towards his decent interment.

In Smith v. Theatrical Mechanical Beneficial Asso. 5 Pa. Dist. R. 326, it was held that, under a by-law of a beneficial association which provided that, "in the event of the death of a brother, a funeral benefit of $100 shall be appropriated to the wife or other proper person," the widow could not recover the sum where it appeared that she had wilfully and maliciously deserted her husband; that his mother attended him during his last illness, and paid the bills for medical attendance, etc.; and that the association stood ready to make payment to the mother.

In Battersby v. Schuylkill Tribe No. 202, I. O. R. 29 Pa. Super. Ct. 288, it was held that, where the by-laws of a beneficial society provided that a funeral benefit should be paid to the widow of a deceased member unless the officers of the association were satisfied that it would be diverted from its legitimate purpose, in which case they were

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services rendered by C. W. Morrison & Son, their heirs and assigns, and they are hereby designated the official undertakers of this association.

Board of control:

Marshall T. Smith, President.
Joel B. Pusey, Vice President.
Oak S. Morrison, Sec'y and Treas.

The affidavit further charged that neither the beneficiary named in said policy of insurance, nor any member of the firm of C. W. Morrison & Son, had any bona fide insurable interest, in whole or in part, in the life of said Charles C. Davis, at the time said policy was issued, nor at said time was the beneficiary of such policy, nor was any member of the firm of C. W. Morrison & Son, related to said Charles C. Davis in any degree of kinship whatever.

The statute referred to at the head of this opinion forbids the taking, or the receiving, of any application for any insurance upon the life of any person in the state of Indiana, in favor of any person who has not a bona fide insurable interest in the life of the insured, or who is not related to him within a degree not further removed than first cousins. It also forbids the issuance of a policy of insurance where the insured has not been subjected to, and satisfactorily passed, a medical examination by a duly authorized physician. The offenses created by this statute relate to the character of the interest or relationship of beneficiaries in contracts of insurance, and the state of

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given power to see that the funeral expenses were paid,—an undertaker who was a mere volunteer without contract with the association could not recover from the latter the funeral benefit of a deceased member merely because he had notified the association that the widow had declared that she would not use the same, or any part thereof, to defray the funeral expenses.

In Sleight v. Supreme Council, M. T. 121 Iowa, 724, 96 N. W. 1100, it was held that, where the constitution and by-laws of a benevolent society provided that $100 should be paid towards defraying funeral expenses "to the nearest of kin of the deceased member, or one having the burial of such member in charge," plaintiffs could not recover in the absence of an allegation that they were the nearest of kin, or that they had the burial of the member in charge.

Where they so allege and prove the allegation, they are entitled to recover. Sleight v. Supreme Council, M. T. 133 Iowa, 379, 107 N. W. 183.

In Sherry v. Plasterers' Union, 139 Pa. 470, 20 Atl. 1062, it was held that, where the amount agreed to be paid for burial purposes was to be paid to deceased's nearest relatives, a complaint which alleged that "the plaintiffs are the father and mother of . . . deceased, and his nearest relatives," was sufficient, and made out a prima facie case, since, if decedent was married and left a widow or child living, this was matter of defense.

Duty of receiver of fund to pay funeral expenses.

In Redmond v. Redmond, 112 Ky. 760, 66 S. W. 745, it was held that, where, by the rules of a society to which deceased belonged, $40 was appropriated to be applied to the payment of burial expenses, the widow, collecting the same, could not claim it as part of her distributive share.

A widow who has received funeral benefits from beneficial societies of which her deceased husband was a member, in her account as administratrix of his estate, can be allowed only the excess of his funeral expenses over and above the funeral benefits received by her. Hyneman's Estate, 2 W. N. C. 571; Sharp's Estate, 2 W. N. C. 631; Nixon's Estate, 6 W. N. C. 496.

And after the widow has paid the funeral expenses out of the funeral benefit, she will not be allowed credit for the same out of her deceased husband's estate in the hands of an administrator. Haas's Estate, 3 Pa. Co. Ct. 345.

In Martin's Estate, 2 Chester Co. Rep. 47, it was held that, where the funeral benefit, according to the constitution of a beneficial society, was paid to the widow to aid in defraying the expenses of a deceased member's funeral, he having expressly stipulated by his membership in the society that the benefit should be so used, the money so received by the widow was impressed with a trust to pay such funeral expenses, and the widow's estate was held liable to his estate for the amount of the expenses in fact paid by his estate; but the portion of the funeral money received by the widow, beyond what was necessary to discharge the funeral expenses, went to the widow absolutely, the deceased having made no provision for the use of any surplus there might be.

In Althouse v. Roth, 35 Pa. Super. 400, it was held that, where a policy of insurance provided for the payment of funeral benefits to the executors or administrators of the insured, and also provided that the company could make payment to "any relative by blood, or connection by marriage, of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in anyway on behalf of the insured for his or her burial," and it appeared that the company paid the benefits in good faith, and in the exercise of its discretion, to the husband of the insured,—he acquired title to the money, in the absence of fraud or misrepresentation, and, although he used no part of the money on account of expenses incurred for the burial of his wife, her administrator could not recover the same from the husband.

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the health of the insured. The first question therefore to be determined is whether the Greenfield Mutual Burial Association, as shown by its by-laws and certificates of membership, is engaged in doing a life insurance business; or, in other words, whether their "certificates," such as was issued in this case, are, in legal contemplation, insurance contracts upon the life of persons named.

There are three kinds of insurance companies—stock, mutual, and mixed. A "stock company" is one where the stockholders contribute all the capital, pay all the losses, and take all the profits. A "mutual company" is one wherein the members constitute both the insurers and the insured, where the members all contribute, by a system of assessments, to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests. "Mixed companies" are such as the term implies. They embody the characteristics of both the others. The subjects of insurance are numberless. The various systems, with their ramifications, offer indemnity for almost every conceivable loss or injury that may be sustained, and which depends upon future possibility or uncertainty in point of time. It embraces the hazards of navigation, losses by fire, lightning, tornadoes, accidents of almost every character, insolvency of debtors, dishonesty and negligence of employees, failure of title to real estate, death of animals and of human beings. In life insurance, the event insured against is sure to happen, and at some time the indemnity promised the beneficiary is sure to demand the full amount stipulated in the contract. But the contracts made by all kinds of insurance companies are plain indemnity contracts; contracts by which one party agrees, for a stipulated sum, to assume some risk borne by the other party, and, if the apprehended loss occurs, to make the loser whole by reimbursing him fully, or to the extent agreed upon in the contract. There is no doubt but a contract founded upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or to one of the latter's near relatives, as the case may be, at death, a burial reasonably worth a fixed sum, would be a valid contract. If the citizen of small means, or for any other reason, desires to make a definite arrangement for the expenses of his funeral, and thus make certain of a sufficient amount to secure a respectable burial, the law will sustain him, if he will keep his contract within certain well-defined limitations, demanded by both the statute and public policy. Such a contract, however phrased, would be an indemnity contract.

23 L.R.A.(N.S.)

Bouvier defines an "insurance contract" to be one "whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specified perils." Bouvier's Law Dict. p. 1008, "Insurance." In State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co. 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93, life and accident insurance is defined to be "a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death." In Com. v. Equitable Beneficial Asso. 137 Pa. 412, 18 Atl. 1112, it is said: "A contract of insurance is purely a business adventure, not founded on any philanthropic or charitable principle; and the design and purpose of an insurance company, and the dominant and characteristic feature of its contract, is the granting of an indemnity or security against loss, for a stipulated consideration." The same subject is stated in Cooley's Briefs on Law of Ins. vol. 1, p. 5, thus: "Perhaps a better definition is that a contract of insurance is an agreement by which one party for a consideration promises to pay money, or its equivalent, or do some act of value, to the assured, upon the destruction or injury of something in which the other party has an interest." "To render a contract one of life insurance, the payments must be contingent upon the duration of human life." 25 Cyc. Law & Proc. p. 697. See also May, Ins. § 112; Standard Dict. "Insurance;" People ex rel. Kasson v. Rose, 174 Ill. 310, 44 L.R.A. 124, 51 N. E. 246; 4 Words & Phrases, p. 3674, "Insurance;" 15 Am. & Eng. Enc. Law, p. 878.

In the light of the foregoing definitions, we again inquire: Was the contract solicited and taken of Charles C. Davis, by appellee, any kind of life insurance, within the meaning of the statute? The contract was issued by an association whose declared object is to secure, or make certain, by a system of mutual contribution, to each member of the association, at death, the specific benefit of $75 for application to his burial service. This was indemnity or security that, at the cessation of the life of the member, a certain sum of money should be payable by the association for his burial, whether the deceased had paid one assessment or a thousand. The controlling elements of the contract, as interpreted by the by-laws, are in all material respects similar to those of an ordinary mutual life insurance company. The members of the association are both the indemnitors and the indemnitees. It pays its losses from a mutually contributed fund, and divides its profits among the members. Death assessments must be paid by the contract holder during the life

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of the insured, and the promised indemnity is payable in a lump sum, and in a definite amount. The association needs and employs agents to represent it. It solicits from the general public. It is founded on no principle of philanthropy, benevolence, or charity. It is not a benefit and protective society, designed to furnish relief to its sick and disabled members out of funds mutually contributed for that purpose. It is simply a business enterprise in which the contract holder is promised a definite thing, in consideration of his performance of a definite undertaking on his part. The contract is determinable by the cessation of a human life, and belongs to that extended class of agreements dependent upon such contingency, and commonly known as "life insurance." It is therefore life insurance within the meaning of § 4713, supra, and subject to the wholesome provisions of our insurance laws. State ex rel. Coleman v. Wichita Mut. Burial Asso. 73 Kan. 179, 84 Pac. 757; Fikes v. State, 87 Miss. 251, 39 So. 783; State v. Beardsley, 88 Minn. 20, 92 N. W. 472; Re Solebury Mut. Protective Soc. 4 C. P. Rep. 11. The Kansas case, supra, involved an association that had by-laws, and issued certificates of membership, substantially identical with those under consideration; and, concerning the purposes of the association, that court said: "The business designed to be transacted under the plan of the Wichita Mutual Burial Association is plain ordinary insurance." In the case before us, some of the details of the plan, as outlined by the by-laws, are veiled, and give evidence of an effort to avoid the classification just made. Some of the provisions are unreasonable, some unguarded, and others indefinite, and tend to expose the concern to the suspicion that the whole system is, in real design, but the scheme of an undertaker to promote his private business, largely at the expense of persons of small means. A wise public policy demands that the laws be liberally construed to circumvent any attempt by such bodies, to evade the reasonable and beneficent restraints of the statute.

This leads us to the important inquiry: Does it appear that the beneficiary of the contract has an insurable interest in the life of the insured, Charles C. Davis? First, who is the beneficiary of the insurance contract? It is contended by the attorney general that it is C. W. Morrison & Son, the official undertakers, and by the appellee that it is Davis's estate and next of kin, who, but for the insurance would be called upon to furnish the burial. "Beneficiary" is defined in Webster's Int. Dict. as "one who receives a benefit or advantage." "The 'beneficiary' is the person to whom a policy of insurance effected is payable." 1 Words and Phrases, p. 750. There is no beneficiary named in the certificate of membership issued to Davis, and nothing of the contract is mentioned beyond the statement that Davis is a member, "and entitled to all the benefits of a member of the association in accordance with the by-laws thereof." So we must go to the "by-laws" for an exposition of the contract. From these by-laws we learn the terms of the contract to be that Davis, as a member, had undertaken to pay to the association 11 cents on every death in the membership that should occur before his own, and in consideration of which, upon his death, the association was to pay to C. W. Morrison & Son $75 for burial goods and service. It is expressly agreed, as shown by articles 14 and 15, above set out, that C. W. Morrison & Son, their heirs and assigns, as undertakers, shall furnish the supplies and services for the burial, and the association shall pay to them the full amount of the benefits accruing under the policy contract, for such services, and no part thereof "to the surviving relatives and friends as death benefits." It is plain that the contracting parties intended to make Morrison & Son the sole beneficiary. Under the by-laws the insured is not entitled to withdraw profits, or to receive dividends, or sick or other benefits. He is not even entitled to revoke the appointment of his undertaker, and commit that duty to his relatives and friends. The $75 benefit must be paid to Morrison & Son, their heirs and assigns, and to no one else. Neither the administrator nor the heirs of the insured could maintain an action against the association for a default in payment. The right to bury the insured is a contract right of Morrison & Son, deemed so absolute and personal and beneficial as to be descendible and assignable. If it should turn out that the insured, at the end of life, has neither estate nor next of kin, would that contingency make Morrison & Son any more beneficiaries than they otherwise are? It is argued that the undertakers will take no benefit; that they will return the money's worth to the deceased. In answer, it may be said that they may at least take the contractor's profit, which, under the by-laws, is left to their unbridled greed. We conclude that, if the estate or next of kin can, under the terms of the contract, be considered, in any just sense, beneficiaries, it must be ascribed to a secondary degree, and we hold that Morrison & Son, as the official undertakers of said association, are the primary and intended beneficiary.

The question then arises: Have Morrison & Son a bona fide insurable interest, in whole or in part, in the life of the insured?

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The second count alleged substantially the same facts as did the first, and set out a copy of the by-laws, and then charged that, at the time said policy was written and issued, said Charles C. Davis, the person whose life was thereby insured and to whom the policy was issued, had not first passed a satisfactory medical examination by a physician duly authorized to practise medicine in the state of Indiana. This count also stated a sufficient charge under said section.

The judgment is reversed, and the cause remanded, with instructions to overrule the motion to quash the affidavit.

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(— C. C. A. —, 169 Fed. 321.)

Municipal corporation — functions — negligence.

1. The city of Winona maintained a shrill, startling steam whistle on its waterworks building, within 110 feet of its bridge across the Mississippi river, which was 40 feet in height at that point. This whistle was connected with its fire-alarm system, so that it gave notice automatically by its blasts of fires and their location when an alarm was sent in. The city directed the engineer of its waterworks to blow this whistle daily, by hand, at 5 P. M., to give notice to union men and its employees of the end of their day's work. There was substantial evidence that the blasts from this whistle had frightened horses traveling on the bridge for years before this accident. As Nichols was driving his horses over the bridge at a point about 110 feet from the whistle, at 5 P. M., the assistant engineer of the waterworks blew a blast of the whistle which frightened his horses, caused them to run away, to throw him and a girl who was riding with him to the ground below, and to kill him and injure her.

Held: (1) The whistle was not blown in the exercise of the city's power to protect itself and its inhabitants against fires, but in the exercise of its power to maintain waterworks and to care for its own property.

(2) There was substantial evidence that it failed to discharge its duty to so use its property as to do no unnecessary damage to others, and its duty to use reasonable care to keep its bridge reasonably safe for travelers.

Evidence — negligence — similar accidents — competency.

2. In an action for damages caused by frightening horses on a highway by the blast of a whistle, evidence that tractable and gentle horses had been frightened previously by blasts of the same whistle under similar circumstances was competent.

Negligence — jury.

3. It is only when the material facts and the rational inferences from them are so clearly established that but one finding would be sustained by the court that the question of the negligence of the defendant is for the court. Evidence considered, and

Headnotes by SANBORN, Circuit Judge.

Case Note. — Liability of municipality for torts of its officers or employees in connection with its waterworks.

In a note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33, upon establishment and regulation of municipal water supply, the earlier cases upon this subject are collected and discussed at page 58. This note will be confined to decisions rendered since the preparation of the earlier note.

Where a city maintains and operates a waterworks system solely for the protection and welfare of its inhabitants, it is generally held to be exercising one of its governmental functions, and, in the absence of statutory provisions, is not liable for any injuries resulting therefrom, even though such injuries are caused by the negligence of its officers or employees. But, if a city maintains and operates a system for the purpose of selling the water to its inhabitants or to others, as well as for protection against fire, etc., then it is generally held to be exercising merely its private rights, and is liable for injuries incurred through

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held sufficient for the consideration of the jury.

Same — injury — proximate cause.

4. The proximate cause of an injury is the primary moving cause, without which it would not have been inflicted, and which, in the natural and probable sequence of events, without the intervention of any new and independent cause, produces the injury.

The intervening cause, which will relieve of liability for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated.

The blast of a whistle frightened horses on a bridge; they ran, the tugs came unhooked, the tongue slipped from the yoke, fell to the bridge and broke, the wagon box crashed against the railing, threw the occupants over it to the ground, and injured them.

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Same — assumption of risk.

5. Notice or knowledge and appreciation of the danger are indispensable to an assumption of the risk of it.

Contributory negligence — burden of proof — evidence — jury.

6. The burden of proof to establish the contributory negligence of the plaintiff is upon the defendant.

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the negligence of its employees, the same as any private corporation.

Upon the general question of distinction between private and public functions of a municipality, see note to Barron v. Detroit, 19 L.R.A. 452, and case note to Dickinson v. Boston, 1 L.R.A.(N.S.) 665.

The distinction between the two classes of acts, and the difference in the liability of the city in connection therewith, is thus clearly expressed in Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487: "Municipal corporations are agents of the state in the exercise of certain governmental powers; they are also treated in certain respects as private corporations, and may be authorized, by way of special privilege, to perform certain acts, in part for the special benefit of the corporation and its inhabitants, which the state may lawfully perform in the exercise of its governmental power. When the state imposes upon an incorporated city the absolute duty of performing some act which the state may lawfully perform, and pertaining to the administration of government, the city, in the performance of that duty, may be clothed with the immunities belonging to the mere agent of the state; but, when the city is merely authorized by way of special privilege to perform such an act, in part for its corporate benefit and the benefit of its inhabitants, the city is not clothed with these immunities, and is liable to be sued for injuries inflicted through its negligence in the performance of such an act."

This same distinction is recognized in practically all of the recent cases upon the subject of the liability of a municipality for tort of its officers or employees in connection with its waterworks.

Thus, in Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279, it was held that, in the extinguishment of fires and in making arrangements therefor, the municipality acts in its governmental capacity, and is not liable for damages caused by the negligence of its fire department; as, for instance, where the pipes burst from excessive pressure during a fire and flooded adjacent cellars; but, where the water system is conducted by the municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by its negligent management.

That a city may use its waterworks system for protection against fire as well as for the purpose of selling and distributing water to its inhabitants does not relieve it from liability for negligent acts of its servants or agents in the conduct of the system, except for such acts as are performed by them in the actual work incident to extinguishing fires. Piper v. Madison (Wis.) 122 N. W. 730.

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And a city authorized, not required, to acquire and use land and water rights for the purpose of storing, distributing, and selling water for corporate profits, and to use the water for the purpose of protecting its citizens from fire, and of promoting public health, is not, while engaged in enlarging its reservoir, performing that public governmental duty which can clothe it with immunity from liability for its negligence. Hourigan v. Norwich, supra.

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Negligence — driver — imputation to passenger.

7. The negligence of the driver of a vehicle may not be imputed to a passenger who is riding with him without charge or compensation.

Municipal corporation — streets and bridges — duty.

8. The duty of a city to exercise reasonable care to keep its bridge or street reasonably safe for travelers is not limited to acts of commission and omission within the limits of the bridge or street, but extends to those outside the bridge or street that render it unsafe for travelers.

The duty to so use its own property as to do no unnecessary injury to others extends to effects produced by the use beyond the limits of its property.

Same — injury — damages.

9. Damages sustained by injuries to persons as well as to property are recoverable for a breach of these duties.

Public nuisance — legislative grant — defense.

10. Where the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance, but the nuisance results from the method of the use and enjoyment, the grant is no defense to an action on account of the creation or continuance of the nuisance or its effects.

Municipal corporations — powers — nature — negligence — damages.

11. Municipalities have two classes of powers,—the one, political, public, in the exercise of which they govern their people and act as delegates of the state; the other, private, business, in the exercise of which they act for the advantage of their inhabitants and themselves.

They are not liable for damages for the acts and omissions of their officers and agents in the exercise of the former. But they are liable for damages for the wrongful and negligent acts and omissions of their officers and agents within the scope of their authority in the exercise of the latter.

Same — waterworks.

12. The municipal power to construct, maintain, and operate waterworks is a private or business power, and a city is liable for damages caused by the wrongful or negligent acts and omissions of its officers and agents in the exercise of that power to the same extent as a private corporation or individual.

(March 26, 1909.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review judgments for the plaintiffs in consolidated actions; the one brought to

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ligence of one of its employees while engaged in the necessary business of its water department, maintained voluntarily by the city, and partially for the purpose of selling the water.

And in Augusta v. Mackey, 113 Ga. 64, 38 S. E. 339, it was held that a municipal corporation was liable for injuries caused by an excavation made by its employees in a highway while it was, under legislative sanction, constructing its waterworks system outside the limits of the corporation, for the purpose of selling water to strangers.

So, in St. Germain v. Fall River, 177 Mass. 550, 59 N. E. 447, it was held that a city is liable for injuries caused by hydrant so set as to constitute a defect in a street, where the hydrant is a part of the system of waterworks operated in part by the city as a source of profit.

A number of other cases may be cited in which the court approaches the question from a somewhat different point of view.

Thus, in Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114, the court said that it was a rule of that court that a party who, for his own profit, keeps on his premises anything not naturally belonging there, the natural tendency of which is to become a nuisance and to do mischief if it escapes, is liable if its escapes, without proof of negligence, for all damages directly resulting therefrom; and the rule was applicable where the plaintiff's property was destroyed by the breaking of the defendant city's reservoir, for, although a municipal corporation, it was engaged in the business of supplying water to its inhabitants, for profit, which was an undertaking of a private nature. And the same rule was applied in 100 Minn. 548, 111 N. W. 1134, in which the facts were identical, but there was a different plaintiff.

And, in Southeast v. New York, 96 App. Div. 598, 89 N. Y. Supp. 630, it was held that the city was liable for injuries to the bridges of a town, due to its negligence in the maintenance of a reservoir dam, even if it should be held that, in furnishing water to its inhabitants, the city was exercising a governmental function. A distinction not noticed in the other cases is made between personal injuries and injuries to property. The court said: "The many cases in which a municipal corporation has been held exempt from liability to respond in damages for personal injuries occasioned in the negligent exercise of governmental functions have no controlling application to the case, because the property of the citizen is protected by a constitutional provision from the assault even of the sovereign unless just compensation is made for the taking involved. Neither the state nor any political division can take the property of others for public use without just compensation. Const. art. 1, § 6. It can hardly be claimed that an act which results in a trespass upon and the actual injury to or destruction of the property of a citizen is not the taking of such

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recover damages for personal injuries sustained by plaintiff Botzet's daughter, and alleged to have been caused by defendant's negligence; the other, to recover damages for the alleged negligent killing of plaintiff Nichols's intestate. Affirmed.

Statement by Sanborn, Circuit Judge:

At 5 o'clock in the afternoon of a cold, blustering day in January, 1907, the assistant of the engineer of the waterworks of the city of Winona blew a steam whistle on the waterworks building for the purpose of notifying union men and city employees that their workday was over, and thereby scared a team of horses which James N. Nichols was driving about 110 feet distant from the whistle, over the city's bridge across the Mississippi river, so that they ran away, threw him and Irene Botzet, a schoolgirl thirteen years old, who was riding with him, over the railing of the bridge to the frozen ground, 40 feet below, killed him, and seriously injured her. Mary Alice Nichols, the administratrix of his estate, brought an action against the city for alleged negligence in causing the death of Mr. Nichols in this way. August Botzet, the father of Irene, brought an action against the city for alleged negligence in causing the injuries to her. The two causes were tried together, and resulted in judgments for the plaintiffs, of which the city complains.

For more than twenty years the city of Winona has maintained waterworks, and, as a part thereof, a building in which the pumping engines are located and operated. It has also maintained an organized fire department under legislative authority. In 1888, under this authority, it installed an electric fire-alarm system, and, as a part of it, a 12-inch fire whistle, which it placed on the roof of the waterworks building, and which automatically notified the members of the fire department and others by its blasts in what part of the city a fire was whenever an alarm was sent in from any one of some sixty fire-alarm boxes scattered throughout the city. This whistle, including the fire-alarm system, was tested three times a day, so that it gave forth many blasts, sometimes about 100 in a day. After this whistle and fire-alarm system had been established, and in 1891, the city of Winona, under authority conferred upon it by the legislatures of Minnesota and Wisconsin, constructed, and has maintained ever since, a toll bridge across the Mississippi river for the use of pedestrians, teams, and carriages. It constructed this bridge in such a way that the driveway of the approach to it upon the Minnesota side started on an easy ascent at the intersec-

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property, at least, *pro tanto*, and such an act cannot be defended as an exercise of a sovereign power which may not be redressed by action."

In Ennis v. Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585, it was held that a city could not, in constructing and operating its waterworks, maintain a nuisance, and was liable in damages for any injuries caused thereby.

Where a town has authority to lay water mains in its streets, and, in the prosecution of that enterprise, it becomes necessary to destroy private drains, the case, in the absence of negligence, is one of *damnum absque injuria*. Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

Where the negligent act causing the injury is performed in connection with work pertaining to fire protection, a number of cases have held that a city is not liable.

Thus, in Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430, it was held that a city is not liable for the negligence of one of its firemen in flushing a hydrant maintained and used solely for fire protection, where the sole object of the flushing was to remove sticks and stones which had accumulated there. The court said: "The city had no pecuniary interest in establishing or maintaining this hydrant. It received no compensation for its use. It was maintained entirely by taxation upon the entire city, and its use was for the sole benefit of the city. It was constructed, maintained, and used in a governmental capacity."

That a hydrant is part of a borough's water system, and is flushed under the supervision of the superintendent of the water department, does not prevent the flushing from being so incident to the fire service alone as to relieve the borough from liability for injuries through the negligent performance of the act. Judson v. Winsted, 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999.

This note does not include cases like Rhobidas v. Concord, 70 N. H. 90, 51 L.R.A. 381, 85 Am. St. Rep. 604, 47 Atl. 82, where a servant of the defendant city is injured by the negligence of another servant, or of the city itself.

As to acts which are not essentially police functions, but are connected therewith, see case note to Wilcox v. Rochester, 17 L.R.A. (N.S.) 741.

As to liability of municipality for injuries inflicted by servant while engaged in removing ashes or garbage, see case note to Haley v. Boston, 5 L.R.A.(N.S.) 1005.

As to liability for negligent operation of electric light plant, see case note to Davoust v. Alameda, 5 L.R.A.(N.S.) 536.

As to municipal liability for acts or negligence of members of fire department, see case note to Cunningham v. Seattle, 4 L.R.A.(N.S.) 629.

As to municipal liability for torts of police officers, see case note to Gilmore v. Salt Lake City, 12 L.R.A.(N.S.) 537.

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tion of Second and Main streets in Winona, ran north on Main street about 400 feet, then turned and ran west one block of 300 feet to Johnson street, where it was at least 45 feet above the ground. At that point the driveway turned and ran east across the river about 300 feet to a point where it connected with a pile bridge and a road leading across the Wisconsin bottoms. Where the roadway turned east on the Minnesota side, it was not more than 110 feet distant from the steam whistle on the waterworks building, which was in a plane not more than 15 feet below it. The roadway of the bridge was provided with a sidewalk on one side of it, 6 feet in width, a driveway for carriages, 18 feet in width, and substantial wooden railings, 4 feet, 2 inches in height.

In May, 1905, the city council of Winona, on a petition of the trades and labor council, adopted a recommendation of its fire committee that this fire whistle should be blown at 5 in the afternoon to notify mechanics and others when their workday ceased. Thereupon the water commissioner directed the engineer of the waterworks to blow this whistle at that hour each day, and he did so by means of a cord attached to the valve from that time until the injuries were inflicted which resulted in these actions.

By chapter 165, p. 238, of the General Laws of Minnesota, 1903, the management of the waterworks was transferred on May 1, 1906, to the board of municipal works of the city of Winona; but that board gave no directions concerning the blowing of this whistle, and the engineer, who continued in charge of the waterworks building, continued to blow the whistle as before.

The blast of this whistle was produced by a stream pressure of about 100 pounds to the square inch, and it sent forth a shrill, startling sound which could be heard 5 miles, and much farther under favorable conditions. In the discharge of its functions as a fire whistle it was blown automatically by the action of the fire-alarm system. But, in the discharge of its functions as a time whistle, it was blown by hand by the engineer of the waterworks, or his assistant, who pulled the valve open by means of a cord attached to it. Gentle and tractable horses had been scared by the blasts of this whistle, and had attempted to run away while they were traveling upon the bridge, and this had occurred many times during the preceding nine years. Mr. Nichols was a dairyman who lived about 12 miles distant from Winona, in the state of Wisconsin, and who had been accustomed for four years to drive over the bridge once a week and sometimes more frequently, so that he probably knew that the whistle sounded for fire alarms; but the evidence does not indicate whether or not he was aware that it blew at 5 in the afternoon. He drove into Winona on the morning of the day of the accident a pair of young horses, four and five years old, and started to return about 5 o'clock in the afternoon. Irene Botzet, a schoolgirl who lived in Wisconsin and attended school in Winona, asked him for a ride across the bridge, and he granted her request. As he drove up the approach of the bridge toward the turn near the whistle, he was holding his horses down to a slow walk, so that another team walked past him. There were then two teams in front of him on the bridge, and he was following. Just after he arrived at the turn of the driveway to the east, the steam whistle blew, and his team, and that next in front of him, began to run. He held onto his horses and guided them past the two teams in front of him, but one, and, a little later, two more, of the tugs in his harnesses, unhooked, the end of the tongue slipped out of the yoke, dropped, and broke, the horses ran on, drove the end of the broken tongue against the guard rail, raised the box on which the occupants were sitting, and threw them over the railing to the frozen ground on the Wisconsin side, 40 feet below. The court submitted to the jury the questions, Was the city guilty of negligence which was the proximate cause of the injuries inflicted by the runaway? and Were the victims guilty of negligence which contributed to cause these injuries? and the jury answered the former in the affirmative, and the latter in the negative.

Argued before Sanborn, Van Devanter, and Adams, Circuit Judges.

Messrs. **Richard A. Randall and Tawney, Smith, & Tawney,** for plaintiff in error:

The admission of the petition and the action of the city council thereon more than six months after they become inoperative, like the admission of a void ordinance, was prejudicial error.

Dugan v. St. Paul & D. R. Co. 43 Minn. 414, 45 N. W. 851.

The evidence that other teams were frightened at different points while crossing the bridge at various times covering a period of nine years previous to the accident, by the sounds produced by the fire whistle, without reference to the distance the teams were from the whistle, or the number of sounds produced each time, or the length or volume of each sound, or whether the team so frightened was a team of ordinary gentleness, or was then and there being carefully driven, was inadmissible.

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1 Greenl. Ev. §§ 52, 448; Cleveland, C. G. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; Bloor v. Delafield, 69 Wis. 273, 34 N. W. 115; Lewis v. Eastern R. Co. 60 N. H. 187; Phillips v. Willow, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731; Gillrie v. Lockport, 122 N. Y. 403, 25 N. E. 357; Dye v. Delaware, L. & W. R. Co. 130 N. Y. 671, 29 N. E. 320.

The city was not responsible for injuries caused by negligent acts not within the highway.

Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430; Becker v. La Crosse, 99 Wis. 414, 40 L.R.A. 829, 67 Am. St. Rep. 874, 75 N. W. 84; Temby v. Ishpeming, 140 Mich. 146, 69 L.R.A. 618, 112 Am. St. Rep. 392, 103 N. W. 588; Hubbell v. Viroqua, 67 Wis. 343, 58 Am. Rep. 866, 30 N. W. 847; Hixon v. Lowell, 13 Gray, 61; Favor v. Boston & L. R. Corp. 114 Mass. 350, 19 Am. Rep. 364; McHugh v. St. Paul, 67 Minn. 441, 70 N. W. 5; Tarras v. Winona, 71 Minn. 22, 73 N. W. 505; Wood, Nuisances, 3d ed. § 322.

If the blowing of the whistle was a nuisance at all, it was a nuisance established and maintained by the affirmative act of the city council, under express legislative authority, in the performance of a governmental duty.

Cunningham v. Seattle, 40 Wash. 59, 4 L.R.A.(N.S.) 629, 82 Pac. 143; Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Vande Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; Heininger v. Great Northern R. Co. 59 Minn. 458, 61 N. W. 558; Goodin v. Fuson, 22 Ky. L. Rep. 873, 60 S. W. 293.

The city was acting in a governmental capacity, and therefore is not liable for the negligence of its officers or agents.

Detroit v. Osborne, 135 U. S. 492, 32 L. ed. 260, 10 Sup. Ct. Rep. 1012; Denver v. Porter, 61 C. C. A. 168, 126 Fed. 292; Lane v. Minnesota State Agri. Soc. 62 Minn. 176, 29 L.R.A. 708, 64 N. W. 382; Snider v. St. Paul, 51 Minn. 473, 18 L.R.A. 151, 53 N. W. 763; Wilcox v. Rochester, 190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 A. & E. Ann. Cas. 759; Bank v. Brainerd School Dist. 49 Minn. 106, 51 N. W. 814; Ihk v. Duluth City, 58 Minn. 182, 59 N. W. 960; Gulbikson v. McDonald, 62 Minn. 279, 64 N. W. 812; Williams v. Greenville, 130 N. C. 93, 57 L.R.A. 207, 89 Am. St. Rep. 860, 40 S. E. 977; Hughes v. Auburn, 161 N. Y. 104, 48 L.R.A. 636, 55 N. E. 389; Dodge v. Granger, 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643; Smith v. Rochester, 76 N. Y. 506; Frederick v. Columbus, 58 Ohio St. 546, 51 N. E. 35; Yule v. New Orleans, 25 La. Ann. 394; Irvine v. Chattanooga, 101 Tenn. 291, 47 S. W. 419; Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377; Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; Higgins v. Superior, 134 Wis. 264, 13 L.R.A. (N.S.) 994, 114 N. W. 490; Peterson v. Wilmington, 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853; Lawson v. Seattle, 6 Wash. 184, 33 Pac. 347; Terhune v. New York, 88 N. Y. 247, 42 Am. Rep. 248; Brink v. Grand Rapids, supra; Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533; Cunningham v. Seattle, supra; Maxmilian v. New York, 62 N. Y. 164, 20 Am. Rep. 468; Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811; Saunders v. Ft. Madison, 111 Iowa, 102, 82 N. W. 428; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420; Simon v. Atlanta, 67 Ga. 618, 44 Am. Rep. 739; Burrill v. Augusta, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177; Lerch v. Duluth, 88 Minn. 295, 92 N. W. 1116; Becker v. La Crosse, supra; Ehle v. Minden, 70 App. Div. 275, 74 N. Y. Supp. 903; Wabaska Electric Co. v. Wymore, 60 Neb. 199, 82 N. W. 626; Love v. Raleigh, 116 N. C. 296, 28 L.R.A. 182, 21 S. E. 503.

The unhooking of the tugs, which was due to the negligence of the driver, was the intervening and proximate cause of the injuries.

McFarlane v. Sullivan, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71.

Messrs. **Webber & Lees** and **M. L. Fugina**, for defendants in error:

The council and the board of municipal works are both representatives of the city, for whose acts and omissions within the scope of their powers the city is liable.

Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; District of Columbia v. Woodbury, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990; Kleopefert v. Minneapolis, 90 Minn. 158, 95 N. W. 908; Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; Fisher v. New Bern, 140 N. C. 506, 5 L.R.A. (N.S.) 542, 111 Am. St. Rep. 857, 53 N. E. 342; Denver v. Spencer, 34 Colo. 270, 2 L.R.A.(N.S.) 147, 82 Pac. 590; Burridge v. Detroit, 117 Mich. 557, 42 L.R.A. 684, 72 Am. St. Rep. 582, 76 N. W. 84.

Evidence that horses were frightened by the whistle prior to the date of the accident was admissible.

1 Wigmore, Ev. § 461, p. 568; Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840;

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Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665; House v. Metcalf, 27 Conn. 631; Knight v. Goodyear's India Rubber Glove Mfg. Co. 38 Conn. 438, 9 Am. Rep. 406; Hill v. Portland & R. R. Co. 55 Me. 438, 92 Am. Dec. 601; Crocker v. McGregor, 76 Me. 282, 49 Am. Rep. 611; Bemis v. Temple, 162 Mass. 342, 26 L.R.A. 254, 38 N. E. 970; Nye v. Dibley, 88 Minn. 465, 93 N. W. 524; Brown v. Eastern & N. R. Co. L. R. 22 Q. B. Div. 391; Topeka Water Co. v. Whiting, 58 Kan. 639, 39 L.R.A. 90, 50 Pac. 877.

The city's maintenance and operation of the whistle under the circumstances constituted a public nuisance.

Wood, Nuisances, § 71; 1 Thomp. Neg. 1261; Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797.

The city cannot escape liability on the ground that, in causing the whistle to be blown, it was performing a purely governmental function, and hence is not liable for the negligent performance of such function.

Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288; Denver v. Davis, 37 Colo. 370, 6 L.R.A.(N.S.) 1013, 86 Pac. 1027; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434; Hill v. New York, 139 N. Y. 495, 34 N. E. 1090; Dickinson v. Boston, 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68, Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Denver v. Spencer, supra; Naumburg v. Milwaukee, 77 C. C. A. 67, 146 Fed. 651; Neuert v. Boston, 120 Mass. 338; Dodge v. Granger, 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100; Roe v. Lucknow, 21 Ont. App. Rep. 1; Brown v. Eastern & N. R. Co. supra; Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212.

As the owner and occupier of the waterworks, the city is liable for private injuries due to its improper and negligent management of its property, on the ground that it maintained a nuisance on its own premises.

2 Dill. Mun. Corp. 985; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Briegel v. Philadelphia, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Ft. Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52; Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622; Wood, Nuisances, § 747; Haag v. Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654.

As the owner of city waterworks, having power to manage and control such works and furnish water to private consumers for pay, as well as for public use, a city is not engaged in a purely governmental enterprise, and is liable for negligence in the operation of its waterworks system in any of its parts.

Wiltse v. Red Wing, supra; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; Hand v. Brookline, 126 Mass. 324; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Aldrich v. Tripp, supra; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 691; Palestine v. Siler, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345.

The legislative authority which will shelter an actual nuisance must be express, or a clear, unquestionable implication from powers conferred; should be certain and unambiguous, and such as to show that the legislature must have contemplated the doing of the very act in question.

Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 8 N. E. 537; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Pine City v. Munch, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197.

The city cannot escape liability on the ground that the blowing of the whistle by its employees at the waterworks was unauthorized, or that, if authorized, the act was *ultra vires* the city.

Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; Sacks v. Minneapolis, 75 Minn. 30, 77 N. W. 563; Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; Stewart v. Wright, 77 C. C. A. 499, 147 Fed. 321; Greenwood v. Westport, 63 Conn. 587, 60 Fed. 560; Kobs v. Minneapolis, 22 Minn. 159; Tate v. St. Paul, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158; Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908; Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706; Lee v. Sandy Hill, 40 N. Y. 442; Hollman v. Platteville, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119; Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308; Burrill v. Augusta, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177.

A person cannot be held to have assumed the risk of injury from any cause unless he knew of the existence of such cause, and also appreciated the risk of injury which he would encounter therefrom.

Russell v. Minneapolis & St. L. R. Co. 32 Minn. 230, 20 N. W. 147.

The negligence of the driver would not be imputable to the passenger.

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Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763.

The blowing of the whistle was the proximate cause of the disaster.

Ætna F. Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395.

Sanborn, Circuit Judge, delivered the opinion of the court:

The city of Winona is a municipal corporation created, endowed with its powers, and charged with its duties, by the legislature of the state of Minnesota. The character and the limits of the powers and liabilities of such corporations are questions of local law, upon which the decisions of the highest judicial tribunals of the states which create them are authoritative in the national courts, because these questions are determinable by the construction of the Constitutions and statutes of the states under which the municipalities are organized. Detroit v. Osborne, 135 U. S. 492, 499, 35 L. ed, 260, 262, 10 Sup. Ct. Rep. 1012; Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489; Madden v. Lancaster County, 12 C. C. A. 566, 570, 27 U. S. App. 528, 65 Fed. 188, 192; Blaylock v. Muskogee, 54 C. C. A. 639, 640, 117 Fed. 125, 126. So far, therefore, as the supreme court of Minnesota has decided the extent of the powers and liabilities of municipal corporations, those decisions must control in this case. The opinions of other courts become immaterial, and it will be unnecessary to notice or consider them.

Under the decisions of the supreme court of Minnesota, municipal corporations are charged with the duty to exercise ordinary care to make and keep their roads, streets, and public ways reasonably safe for travelers thereon, and also with the duty to exercise reasonable care to so use their property and rights as to inflict no unnecessary injury upon persons or upon their property. Shartle v. Minneapolis, 17 Minn. 308, Gil. 284; Blyhl v. Waterville, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; Wiltse v. Red Wing, 99 Minn. 255, 260, 109 N. W. 114. The bridge across the Mississippi river, on which this accident occurred, is a public highway, and the city of Winona is liable for negligence in its maintenance and care, to the same extent as it is for negligence in the care and maintenance of its public streets. Willis v. Winona City, 59 Minn. 27, 26 L.R.A. 142, 60 N. W. 814. With these established rules in mind, let us consider the complaints concerning the trial of these cases.

The first specification of error presented is that the court received in evidence the petition of the trades and labor assembly that the fire whistle be blown daily at 5 in the afternoon, the action of the city council of the defendant in May, 1905, granting that petition, and the curfew ordinance passed in January, 1906, whereby the engineer of the waterworks was directed to designate 9 in the afternoon each day by nine short blasts of the whistle; and the argument is that, inasmuch as, on May 1, 1906, the management of the waterworks building passed to the board of municipal works, the water commissioner who, in May, 1905, directed the engineer to comply with the order of the council, then went out of his office, and the board never gave the engineer any direction on the subject thereafter, these acts of the common council were immaterial. But the question at issue was, Did the city exercise ordinary care to keep the bridge reasonably safe for travelers, and to use its waterworks and steam whistle so as to inflict no unnecessary injury upon the persons or property of travelers over the bridge? The acts of the council which were introduced in evidence clearly indicated the degree of care the city was exercising in the use of this whistle, and for that reason they were not immaterial. Again, the act of the city council which directed the blowing of the whistle at 5 in the afternoon unquestionably gave the engineer the authority and the direction of the city of Winona to blow it at that hour until that authority was revoked or an inconsistent instruction was given to him by the city. The same engineer remained in charge of the waterworks building and of the whistle after the control of them was transferred to the board of municipal works, and he undoubtedly had the same authority to blow the whistle thereafter that he had to continue to run the engines and to pump the water through the city. His authority continued until it was revoked. Moreover, this action of the council in connection with the continued blowing of the whistle subsequent to May 1, 1906, was competent, and persuasive evidence of the alleged negligence of the board of municipal works, for the board must have been aware that the whistle was being blown after it came into control of the waterworks, and it did not stop it, and, by the express terms of the act under which it was created, the city is liable for its acts of commission and omission within the scope of its authority. Gen. Laws Minn. 1903, chap. 165, p. 241; Kleopfert v. Minneapolis, 90 Minn. 158, 160, 95 N. W. 908; Barnes v. District of Columbia, 91 U. S. 540, 545, 551, 555, 23 L. ed. 440, 441, 443, 445; District of Columbia v. Woodbury, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990. There was no error in the admission of the acts of the city council.

It is assigned as error that the court per-

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mitted the introduction in evidence of testimony that other horses of ordinary gentleness and tractability were frightened while traveling over this bridge by the blasts of this steam whistle at various times during nine years preceding the accident in question. The reasons urged in support of this specification of error are: (1) That Nichols's horses were frightened by a single blast of the whistle, five seconds in duration, while the horses of the witnesses were scared by several blasts in quick succession, caused by the automatic action of the fire-alarm system; but it was evidently the first sudden sound that tended to frighten the horses far more than its subsequent repetition; (2) that the first blast is not, at its commencement, as loud as it becomes later, because there is at first stationary steam in the pipe which must be started forth; but there could have been no very substantial difference in the blasts on that account, because the steam pressure was constantly from 85 to 110 pounds to the square inch, and that pressure necessarily must have produced almost instant action and sound when the valve was released; and (3) because the defendant was charged with liability for the effect of the blast which it directly caused, so that this evidence was not necessary or competent to prove notice to the city of its dangerous character, and because this evidence introduces a collateral issue. But the main issue in this case was whether or not the blasts of this whistle were of such a character that a person of ordinary intelligence and prudence would have anticipated the frightening of horses traveling upon the bridge, and their rapid flight as the natural and probable effect of the blast. If these blasts were of that character, the production of them was actionable negligence; if they were not, it was not actionable negligence to make them. There were but two ways in which that question could be determined. It must be determined by the opinions or speculations of witnesses, or by the experience of those who had actually tried it. The latter is certainly more persuasive and convincing and more likely to accord with the fact than the former. The material conditions under which the horses of the witnesses were frightened were substantially the same as those under which the accident happened. They were scared while they were traveling upon the same bridge upon which the horses of Nichols were frightened. They were terrified by the same whistle, located in the same place, at the same distance from the bridge, and the testimony of the witnesses who were driving or observing these animals, that gentle and tractable horses had been frightened while they were traveling upon this bridge by the blasts of this whistle at various times preceding the accident, was, upon both reason and authority, material and persuasive evidence that these blasts were of a character likely to frighten horses under such circumstances, that their fright and flight were natural and probable consequences of the production of the blasts, and that these facts were so notorious that they might be considered by the jury to constitute notice to the city of the dangerous character and probable effects of the blowing of this whistle. Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Nye v. Dibley, 88 Minn. 465, 93 N. W. 524; District of Columbia v. Armes, 107 U. S. 519, 525, 27 L. ed. 618, 620, 2 Sup. Ct. Rep. 840; Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 622, 32 U. S. App. 168, 406, 67 Fed. 665, 672; Wigmore, Ev. § 458, subdiv. 2; Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657, 667.

Counsel for the city argue that the refusal of the court to instruct the jury to return a verdict in its favor was error: (1) Because there was no lack of care in the construction and the maintenance of the bridge, and the city was not liable for injuries caused by its acts of commission or omission outside of that structure; (2) because the whistle was blown for a governmental, and not for a private or corporate, purpose, and the city is exempt from liability for acts so done, and the rights of the injured were not thereby infringed; (3) because the location and the use of the whistle were discretionary with the city, and the exercise of that discretion was not reviewable by the courts; (4) because the act of blowing the whistle to indicate the time of day was beyond the corporate power of the city; (5) because there was no evidence of the city's negligence, or that its negligence was the proximate cause of the injury, and the persons injured assumed the risk of the blast of the whistle; and (6) because Nichols was guilty of contributory negligence, in that his whiffletree hooks were not in such a condition that they prevented the tugs from becoming unhooked while his horses were running away.

It is only when the material facts and the rational inferences from them are so clearly established that but one finding from them would be sustained by the court that the duty is imposed upon it to withdraw the question of the causal negligence of a defendant from the jury. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679; Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 243, 97 Fed. 423, 427. Ten witnesses testified to thirteen occasions within nine years preceding this accident, upon which gentle and tractable horses upon this bridge near the

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turn where Nichols was when the whistle blew had been frightened by blasts of this whistle, and had jumped or run or turned around. One witness testified that his horse was so terrified that he jumped and broke the shafts of his buggy; another, that his horses were so scared that they ran and tore the yoke near the tongue, and broke a strap from the evener; still another, that his horses were so frightened that they ran and caused a tug to unhitch; and another still, that his horses were so terrified that they ran while he was driving them, so that they threw his wife out of his wagon and injured her. At the time of this accident, Losinski was driving the leading team across the bridge, Duff the second team, and Nichols was either holding his team stationary or at a slow walk very near the turn of the bridge when the whistle blew. Losinski testified that his horses immediately jumped and became frightened, but he held them. Duff testified that Nichols stopped his horses near the turn to let him pass; that he passed Nichols; that the latter's horses were then quiet; that just after he passed him the whistle blew; that, the moment it blew, both teams were on the dead run; that his horses were gentle, but they were frightened, ran and jumped and nearly got away. This was substantial and persuasive evidence that the blowing of this whistle was likely to frighten horses passing it on the bridge, that it rendered the bridge unsafe for drivers of teams thereon, and that, in the light of the evidence that the sound it gave forth was shrill, startling, "awful loud," and could be heard from 5 to 10 miles, this fact was so notorious that a jury was warranted in finding that it must have been known to the city, and that a person of ordinary prudence and intelligence would have anticipated as its natural and probable result the fright and flight of passing horses, and serious injuries to those who should be drawn by them.

Nor can the contention be sustained that the unhooking of the tugs, the breaking of the pole, or any of the other events between the blowing of the whistle and the injuries and death was, and the blast of the whistle was not, the proximate cause of those dire effects. The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the original wrongful act or omission from the injury, and relieve of liability for it, must be an independent, intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result, which could not have been reasonably anticipated. Union P. R. Co. v. Callaghan, 6 C. C. A. 205, 210, 12 U. S. App. 541, 56 Fed. 988, 993, 994; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 597, 600, 124 Fed. 113, 117, 120. The blast of this whistle was the primary moving cause, without which the accident would not have happened. It was the cause which set in motion all the other events; the cause which set the horses into a dead run, made them uncontrollable, brought about the unhooking of the tugs, the breaking of the pole, the crash of the wagon against the railing, and the throwing of its occupants to the ground below. All these intermediate acts were dependent, not independent, causes. They were mere links in the chain of causation between the blowing of the whistle and the injuries and death it produced, and were themselves caused by the blast of the whistle.

There is a statement in the brief that Nichols and Irene Botzet knew that the whistle was blown daily at 5 in the afternoon, and that they assumed the risk of injury from it. The place in the record where the evidence that they had this knowledge may be found is not pointed out, and a search of the record for it has proved vain. The transcript, however, does show that Irene testified that she did not know that the whistle blew at 5 o'clock, and that, just as Nichols was approaching the turn of the bridge nearest to the whistle, a few seconds before 5 o'clock, he held his horses to a walk while Losinski passed him, and then stopped them very near the turn while Duff passed him, and then it was 5 o'clock, the whistle blew, the two rear teams ran instantly, and the injuries and death followed. It is difficult to believe that Nichols would have walked and then stopped his horses at the most dangerous place on the bridge at 5 o'clock in the afternoon, if he had known that the whistle blew daily at that hour, when he might just as easily have driven them on and been a few hundred feet distant when the blast came.

Notice or knowledge and appreciation of the danger are indispensable to the assumption of the risk of it (Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 247, 97 Fed. 423), and the evidence that the victims of this accident knew and appreciated the danger from the blast of the whistle was far from being so conclusive that it was the duty of the court to instruct the jury that they assumed the risk of it.

The burden was upon the defendant to prove contributory negligence, and it was the duty of the court to instruct the jury

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that Nichols and Irene were guilty of it, only in case the evidence of it was so clear that the court would not sustain a finding to the contrary. The evidence upon this subject was the testimony of one witness, who said that, some days before the accident, he rode with Nichols behind the team which ran away, and they were hitched up so loosely that he was of the opinion that Nichols was negligent in that regard; the testimony of Losinski that when Nichols's horses had run ahead of him 3 or 4 rods he saw that one of his tugs was unhooked and one was hooked; the established fact that, at some time during the run, all but one of the tugs became unhooked; the testimony of two witnesses that they were of the opinion that, if three tugs came unhooked at the same time, the horses could not have been properly hooked up; and the testimony of the livery man who unhitched the horses when they came into Winona, and assisted Nichols to hitch them up when they started out of Winona on the day of the accident, that they were properly hitched up when they came in and when they went out; that the hooks, the harnesses, and the straps were strong and right, and that the horses were so hitched up that the tongue of the sled could not slip out of the yoke. Since it does not appear that Nichols knew that the whistle was to blow at 5 in the afternoon, no duty was imposed upon him to so harness his horses that its blast and the fright and flight it caused would not unhitch his tugs, break his tongue and his harnesses; and, even if he had been aware of the coming blast, the evidence in this case was far from conclusive that he failed to fairly discharge the duty he would have owed. The evidence that he exercised reasonable care was the testimony of an eyewitness. The testimony that he failed to exercise such care was inference and opinion from more remote facts, and the refusal of the court to disregard the positive testimony and withdraw this question from the jury was not error.

There was no evidence in the cases that Irene Botzet was guilty of any contributory negligence, and, even if Nichols had been guilty of it, his negligence could not have been imputed to her. Union P. R. Co. v. Lapsley, 16 L.R.A. 800, 2 C. C. A. 149, 152, 4 U. S. App. 542, 51 Fed. 174.

The city concedes that it might be liable for defects and obstructions within the limits of the roadway of the bridge which rendered that highway unsafe for travelers, but its counsel insist that it was not liable for the blowing of its whistle, although it rendered the bridge unsafe, because the whistle and the blowing were beyond the limits of the bridge; and they argue that the declaration of the court below, that the city was not liable in this case if the horses were frightened by the whistle of a locomotive of a railroad company, sustains their position. But the city was not liable for the blast of the whistle of the locomotive, because there was no evidence that the whistling of this or other locomotives had theretofore scared horses on the bridge so as to impose upon the city the duty to suppress it, while the evidence was plenary that the blowing of the city's fire whistle had terrified horses in this way.

The general duties were imposed upon the city to exercise ordinary care to keep the roadway of this bridge reasonably safe for travel, and to so use its waterworks building and the whistle thereon as to inflict no unnecessary injury upon the rights or property of persons or corporations. These duties were not limited to care to prevent injuries arising from acts and omissions within the limits of the highway or bridge itself. The duty to care for the bridge and driveway extends to the prevention of any act outside its limits, the danger from which to travelers thereon may be reasonably anticipated by the city, such as unfenced excavations or depressions near but not in the highway or street (Augusta v. Dozier, 126 Ga. 524, 55 S. E. 234; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Halpin v. Kansas, 76 Mo. 335; Parker v. Macon, 39 Ga. 729, 99 Am. Dec. 486); walls, billboards, and other structures on private property beyond the limits of a street (Kiley v. Kansas, 69 Mo. 102, 108, 33 Am. Rep. 491; Id. 87 Mo. 103, 56 Am. Rep. 443; Duffy v. Dubuque, 63 Iowa, 171, 50 Am. Rep. 743, 18 N. W. 900; Bliven v. Sioux City, 85 Iowa, 346, 351, 52 N. W. 246; Cason v. Ottumwa, 102 Iowa, 99, 71 N. W. 192); an acrobat sliding on a wire above the street, fastened to a building beyond its limits and to a pole (Wheeler v. Ft. Dodge, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1057, 1059). And the duty of the city to so use its own property as not to unnecessarily injure persons or property of others extends to their protection against injuries from such use on their own property or on the property of others, such as from sewage leaking into the property of citizens (Allen v. Boston, 159 Mass. 324, 327, 38 Am. St. Rep. 423, 34 N. E. 519; Hunt v. Lowell Gaslight Co. 8 Allen, 169, 85 Am. Dec. 697; French v. Connecticut River Lumber Co. 145 Mass. 261, 14 N. E. 113); from a pesthouse which sends the seeds of disease to persons on private property near (Clayton v. Henderson, 103 Ky. 228, 44 L.R.A. 474, 476, 44 S. W. 667; Haag v. Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654); from garbage on a lot belonging to the city, which sends forth upon the

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property of others bad odors (Ft. Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52, 54); from fireworks in a street which set fire to private property adjoining (Speir v. Brooklyn, 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727; Landau v. New York, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631).

Persons and private corporations that negligently injure persons rightfully traveling upon a street or highway by blasting rock on their own premises, thereby throwing stones upon the highway, or by negligently frightening their horses by blowing whistles upon their own property, do not escape liability for the damages they thus cause (Albee v. Chappaqua Shoe Mfg. Co. 62 Hun, 223, 16 N. Y. Supp. 687; Knight v. Goodyear's India Rubber Glove Mfg. Co. 38 Conn. 438, 9 Am. Rep. 406; Powell v. Nevada, C. & O. R. Co. 28 Nev. 305, 82 Pac. 96), although it is not their special duty to care for the safety of streets and highways; and, *a fortiori*, a city, upon which the law imposes that particular duty, may not escape liability for the injuries it causes in that way.

Nor is the damage which may be recovered for negligence of this character limited to that inflicted upon property. Damages for injuries to the person are likewise recoverable, because the duty imposed on the municipality to avoid unnecessary injury to persons is at least as imperative and sacred as the duty to avoid injury to their property. Allen v. Boston, 159 Mass. 324, 337, 38 Am. St. Rep. 423, 34 N. E. 519; Clayton v. Henderson, and Ft. Worth v. Crawford, supra.

The statutes of Minnesota provide that "a public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission . . . shall unlawfully interfere with, obstruct, or tend to obstruct, or render dangerous for passage, a . . . street, alley, or highway." Rev. Laws Minn. 1905, §§ 4987, 4988.

And the supreme court of Minnesota has adjudged that, "where the statute, for the protection and benefit of individuals, prohibits a person from doing an act, or imposes upon him a duty, if he disobeys the prohibition, or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for any damages resulting proximately from such disobedience or neglect." Baxter v. Coughlin, 70 Minn. 1, 4, 72 N. W. 797, 798.

The duty was imposed upon the city to exercise care to render this highway reasonably safe for travelers, and it blew a whistle within 110 feet of it, which made it unsafe for travelers, and which constituted a public nuisance within the express terms and plain meaning of this statute.

But counsel contend that the city is not liable to pay damages for the injuries inflicted by the whistle, because, in locating it and blowing it, it was exercising one of its governmental powers in the establishment and maintenance of its fire department and fire-alarm system; and this upon the ground that, for the acts and omissions of its officers and agents in the exercise of a governmental power of this nature, it is, like the state, exempt for civil liability. There is more than one answer to this argument. In the first place, if the blast of the whistle which caused the injuries had been made in the exercise of the city's power to protect against fires, it would not have been exempt from liability, because the blowing of the whistle was a public nuisance, and it was not necessary for the city to create or to continue that nuisance in order to rightly exercise its power to establish and maintain a fire department. It could have exercised that power as completely and as beneficially without locating or blowing this whistle daily within 110 feet of this bridge. If the exercise of a legislative power does not necessarily and naturally create a nuisance, but that results from the manner of exercising the power, the legislative grant is no defense to an action for the damages it causes. Pine City v. Munch, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; Hill v. New York, 139 N. Y. 495, 34 N. E. 1090.

A city has two classes of powers,—the one, legislative, public, in the exercise of which it acts as a political subdivision and delegate of the state and governs its people; the other, private, corporate business, in the exercise of which it acts for the advantage of the inhabitants of the city and of itself as a legal personality. For the acts and omissions of its officers and agents in the exercise of powers of the former class, such as the police power (Wilcox v. Rochester, 190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 A. & E. Ann. Cas. 759; Kansas City v. Lemen, 6 C. C. A. 627, 631, 12 U. S. App. 640, 57 Fed. 905; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698; 115 N. W. 643; Gullikson v. McDonald, 62 Minn. 278, 280, 64 N. W. 812; New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426), the power to erect, maintain, and operate a city hall and courthouse (Snider v. St. Paul, 51 Minn. 466, 473, 18 L.R.A. 151, 53 N. W. 763), the power, through its board of health or other agency, to protect its inhabitants against disease and unsanitary conditions, and to care for the sick (Bryant v. St. Paul, 33 Minn 289,

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53 Am. Rep. 31, 23 N. W. 220; Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Barbour v. Ellsworth, 67 Me. 294), the power to maintain and operate a fire department to protect its inhabitants against conflagrations (Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Smith v. Rochester, 76 N. Y. 506; New York v. Workman, 14 C. C. A. 530, 35 U. S. App. 201, 67 Fed. 347; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196), the power to promote education (Ham v. New York, 70 N. Y. 459; Lane v. Woodbury, 58 Iowa, 462, 12 N. W. 478), the power to inspect steam boilers (Mead v. New Haven, 40 Conn. 72, 16 Am. Rep. 14), and the power to administer public charities (Haight v. New York [D. C.] 24 Fed. 93),—the city, like the state, is not liable to pay damages in civil actions.

But for damages caused by the wrongful acts and omissions of its officers and agents within the scope of their authority in the exercise of its powers of the latter class, such as its power to build and maintain bridges, streets, and highways, the power to construct and keep in repair sewers (Murphy v. Indianapolis, 158 Ind. 238, 63 N. E. 469; Williams v. Greenville, 130 N. C. 93, 57 L.R.A. 207, 89 Am. St. Rep. 860, 40 S. E. 977; Hamlin v. Biddeford, 95 Me. 308, 49 Atl. 1100; Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729), the power to collect refuse and to care for the dump where it is deposited (Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288, 294), the power to construct and operate the draws of bridges (Naumburg v. Milwaukee, 77 C. C. A. 67, 146 Fed. 641), and the power to build, maintain, and operate waterworks to furnish water to the city and to its inhabitants for compensation (Wiltse v. Red Wing, 99 Minn. 255, 260, 109 N. W. 114; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871), the city is liable to the same extent as a private individual or corporation under like circumstances. The power of a city to construct and operate waterworks is not a political or governmental, but a private or corporate, power, granted and exercised, not to enable it to control its people, but to authorize it to furnish to itself and its inhabitants water for their private advantage. Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 182, 40 U. S. App. 257, 76 Fed. 271, 272; Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 342, 105 Fed. 1, 10; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 271, 147 Fed. 1, 5.

The blast of the whistle which frightened Nichols's horses was not blown by the city in the exercise of its power to protect its inhabitants against fire and to operate its fire-alarm system or its fire department. It had no connection with or tendency to perform any of these functions. The blasts for those purposes were blown automatically through the fire-alarm system. This blast was blown by hand by the assistant engineer of the waterworks building, by direction of the water commissioner and the city council, in the exercise of the power of the city to maintain waterworks, and care for the pumping station, which was a part of them. It therefore falls far within the line of municipal liability.

The argument that the discretion of the city in the construction, location, and operation of its fire-alarm system is not reviewable by the courts has not escaped attention. But, if sound, it is not material, and hence will not be discussed, because it was not the exercise of that discretion, but the blowing of the whistle by the assistant engineer of the waterworks building, that was the proximate cause of the injuries and death, and that is the foundation of these actions. The location and use of the whistle for the fire department, dangerous as it was, would never have caused the death of Nichols and the injury to Irene, if the assistant engineer of the waterworks building had not pulled open the valve and sent forth the blast at 5 in the afternoon of that fatal day.

Finally, it is said that the city it not liable, because it had no corporate power to cause this whistle to be blown for the purpose of notifying union men and the employees of the city of the time of day. But it had plenary power to erect, maintain, and operate the waterworks building. It had the power, and it was its duty, to so use that building and the whistle upon it that it would not inflict any unnecessary injury upon travelers upon the bridge; to prevent, and, when it arose, to suppress, the public nuisance of the startling, dangerous 5 o'clock blasts of this whistle upon it, and to exercise ordinary care to keep the bridge reasonably safe for travelers thereon. For damages caused to travelers by the failure to discharge these duties, it was liable in these cases, and the evidence of such a failure was so substantial that the refusal of the court below to direct a verdict in its favor was not error.

In the Botzet Case attention is called to the facts that, while the whistle was blown, and the horses were frightened and started to run, in the state of Minnesota, Irene was not thrown over the railing of the bridge, and was not injured, until they had carried her into the state of Wisconsin; that there is a statute of the latter state which limits the amount of recovery from any city,

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county, town, or village, on account of any defects in a bridge or highway, to $5,000, and that the verdict and judgment in that case were far in excess of this amount, and in excess of the amount specified in the notice of the claim upon which the action is based which was originally given to the city. But this action was brought in the state of Minnesota, the city committed the wrong on which it is founded in that state, the statute of Wisconsin had no effect beyond the limits of the state of Wisconsin, and the plaintiff was not limited in his recovery to the amount claimed in his original notice. Terryll v. Faribault, 84 Minn. 341, 342, 87 N. W. 917.

There was no error in the trial of these cases, and the judgments below must be affirmed.

It is so ordered.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA, Appt.,
v.
DAVID T. MARTYN.

(82 Neb. 225, 117 N. W. 719.)

Carrier — pass — regulation.

1. A contract between a railroad company and a physician, by the terms of which he is to receive for professional services to be rendered by him for the company, at its request, the sum of $25 per month and an annual pass over its lines of road, where the physician does not spend a major portion of his time in the employment of the company is prohibited by the provisions of §§ 10,664, 10,665, Cobbey's Stat. 1907, and the acceptance and use of such a pass by the physician renders him guilty of a violation of those sections.

Same — anti-pass law — constitutionality.

2. The provisions of chapter 93, p. 342, Laws 1907, commonly called the "anti-pass law," prohibiting the issuance, acceptance, and use of free transportation, are a proper and reasonable exercise of the police power of the state and the power of the legislature to regulate the business of common carriers by preventing unjust discriminations, and are not unconstitutional.

(September 16, 1908.)

APPEAL by the State from a judgment of the District Court for Platte County dismissing an information charging defendant with accepting a pass in violation of law. Reversed.

The facts are stated in the opinion.

Mr. **J. J. Sullivan**, with Messrs. **W. T. Thompson**, Attorney General, and **W. B. Rose**, for appellant:

A pass issued to a physician who does not devote the major portion of his time to the services of the carrier is a free pass within the meaning of the anti-pass law.

McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; State v. Omaha Elevator Co. 75 Neb. 637, 106 N. W. 979, 110 N. W. 874; Gran v. Houston, 45 Neb. 813, 64 N. W. 245; Lake Superior &

Headnotes by BARNES, Ch. J.

Case Note.* — *Is pass issued as part of consideration for contract within statute prohibiting free transportation of passengers or discrimination in passenger rates.

Free transportation in the form of an annual pass issued to one not in the regular and stated service of an interstate carrier, nor receiving any wages or salary under a contract of employment, but requested by him as compensation for throwing in its way what business he conveniently could, is a violation of the interstate commerce act of February 4, 1887. Slater v. Northern P. R. Co. 2 Inters. Com. Rep. 243.

Free passes issued by an interstate carrier to shippers or dealers on account of interstate traffic furnished by them constitute an offense against the interstate commerce law, as affording transportation at less than established fares or charges, and, whether the holders are entitled to interstate passage or not, if granted on account of the interstate transportation of freight, the result is a "rebate or device" whereby the pass holders obtain such freight transportation, not only at less than tariff rates but for a less net price than is exacted from persons not so favored, who are shippers of like traffic transported under similar conditions between the same points. Milk Producers' Protective Asso. v. Delaware, L. & W. R. Co. 7 Inters. Com. Rep. 163.

So, the free transportation of certain newspaper employees upon interstate trains carrying newspapers pursuant to a contract, whose duty it is to sort, handle, and make them into packages for instant delivery at the various stations, which includes return transportation to the starting point, is a violation of such act, and does not fall within the exception authorizing free transportation "to necessary care takers of livestock, poultry, and fruit." Re Free Transportation of Newspaper Employees, 12 Inters. Com. Rep. 15.

But a contract between a common carrier and an express company whereby the former, among other things, is to transport the latter's messengers and property, and furnish passes for the free transportation of its officers, agents, and servants when traveling upon its business, for which the express company is to make specified payments and also carry free of charge certain property of the railway company, is not

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M. R. Co. v. United States, 12 Ct. Cl. 35; Marshall v. Nashville R. & Light Co. 118 Tenn. 254, 9 L.R.A.(N.S.) 1249, 101 S. W. 419, 12 A. & E. Ann. Cas. 675.

By making acceptance of a pass unlawful, the anti-pass law is not unconstitutional as depriving a railway physician of his property without due process of law, or as violating the terms of his contract to perform services for $25 a month and a pass.

Armour Packing Co. v. United States, 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 1, affirmed in 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Summerville v. Pressley, 33 S. C. 56, 8 L.R.A. 854, 26 Am. St. Rep. 659, 11 S. E. 545; Slaughter-House Cases, 16 Wall. 62, 21 L. ed. 404; Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120.

Mr. **W. N. Hensley** also for appellant.

Messrs. **W. M. Cornelius, Edson Rich,** and **J. E. Rait** for appellee.

Barnes, Ch. J., delivered the opinion of the court:

At the March, A. D. 1908, term of the district court of Platte county, an information was filed against the defendant, David T. Martyn, Sr., which, omitting the title and formal parts, was, in substance, as follows: That, on or about the 15th day of January, 1908, David T. Martyn, Sr., then and there being, did unlawfully accept from the Union Pacific Railroad Company, a corporation owning and operating lines of railroad in the state of Nebraska, a free pass for travel on and over all the lines of railroad owned and operated by the said Union Pacific Railroad Company in said state; and did then and there unlawfully use said pass for the free transportation of himself as a passenger on and over the said lines of railroad in said county and state; that said David T. Martyn, Sr., not being then and there an officer, agent, or bona fide employee the major portion of whose time is or was devoted to the service of said railroad company. The information in conclusion also stated facts sufficient to show that the defendant was not included within any of the exceptions contained in chapter 93, p. 342, Laws 1907, commonly called the "anti-pass law." To this information the defendant entered a plea of not guilty. In due time he was placed on trial, and the cause was finally

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impaired by a subsequent act of the legislature imposing a penalty upon a carrier who shall knowingly carry any person free of charge, or give any person or corporation a free pass or privilege or a substitute for pay, or a subterfuge which is used, or which is given to be used, instead of the regular fare or rate for transportation, or sell any transportation for anything except money, or for any greater or less rate than is charged to all persons under the same conditions, as such act was intended to be prospective only, and discloses no intention to affect transactions already passed. Texas & N. O. R. Co. v. Wells-Fargo Exp. Co. (Tex.) 110 S. W. 38, affirming (Tex. Civ. App.) 108 S. W. 172; Gulf, C. & S. F. R. Co. v. Wells-Fargo Exp. Co. (Tex.) 110 S. W. 41, affirming (Tex. Civ. App.) 108 S. W. 174.

In Texas & N. O. R. Co. v. Wells-Fargo Exp. Co. supra, the court said that the carrying of persons under the contract in question could not be an offense defined by such act, as the carrying would not be done free of charge, as the offense contemplated by the statute consists in carrying or hauling free, and not a carrying or hauling for which a carrier receives very substantial compensation for everything it does, in the form of money paid and services rendered.

A contract in consideration of a conveyance of land to an interstate railway company, to issue, or procure the issuance of, annual passes to the grantors, is not within the prohibition of the interstate commerce act, which forbids the issuance of passes gratuitously, and not for a money or other valuable consideration. Curry v. Kansas & C. P. R. Co. 58 Kan. 6, 48 Pac. 579.

So, a contract to furnish free transportation over the lines of an interstate carrier for the life of one who, in consideration therefor, releases the carrier from all damages, or claims for damages, for personal injuries received, is not within the interstate commerce act as amended by 34 Stat. at. L. 584, prohibiting the issuance, or giving directly or indirectly, of any interstate free pass or transportation, except for the carrier's employees, as such law was not intended to be retroactive as to existing contracts. Louisville & N. R. Co. v. Mottley (Ky.) 118 S. W. 982. A similar decision was made upon this contract in Mottley v Louisville & N. R. Co. 150 Fed. 406, although in 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42, the suit was dismissed for want of jurisdiction.

Nor, is such contract brought within the interstate commerce act by reason of the fact that it provided for the issuance of a pass each year, as the contract itself, not being within the act, cannot be brought thereunder by the mere act of issuing the pass pursuant to the terms thereof. Louisville & N. R. Co. v. Mottley, supra. The court said that the statute inhibits the issuance of free tickets or passes, and that a pass issued in the execution of the contract cannot be called free, as it was paid for in money just as certainly as if the actual cash were paid for a trip ticket, as the plaintiff, having received serious bodily injuries by negligence of the carrier, was entitled to damages, and it was competent for the parties to settle this unliquidated claim for money and agree upon its value, and it

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submitted on the contract under which the pass in question was issued, and an agreed statement of facts. It was provided, among other things, by said contract, that the defendant should furnish all necessary surgical and medical treatment to the sick and injured employees of the Union Pacific Railroad Company free of charge to said employees, and also render such services to passengers and others for whom the company should request the same, between Schuyler and Silver Creek, Nebraska, for which he was to receive an annual pass on the Nebraska division of said railroad, together with trip passes upon other divisions thereof, and $25 per month during his employment, which it was provided could be canceled and terminated at any time, for cause, by the said company. By the agreed statement of facts it was conceded, among other things, that the defendant was and is not employed a major portion of his time in the service of the said railroad company. On motion of the defendant's counsel the court directed the jury to return a verdict of not guilty, which was accordingly done, the defendant was discharged, and the cause was thereupon dismissed,—to all of which the state entered its exceptions, and has brought the case here for review under the provisions of §§ 483 and 515 of the Criminal Code. It is contended by the state that the record shows, beyond any question or chance of reasonable contention, that defendant was guilty of a plain violation of our statutes prohibiting the acceptance and use of free transportation. On the other hand, defendant contends, first, that a pass issued in good faith to a regular, practising physician, in return for services performed and to be performed by him in the treatment of persons injured on or about the railroad issuing it, is not a free pass within the meaning of the act of March 30, 1907, prohibiting the giving, acceptance, and use of passes, or free transportation of passengers over any and all lines of railroad within this state; second, that the act violates § 3, art. 1, Const., which provides that "no person shall be deprived of life, liberty, or property without due process of law;" and, third, that the act violates § 16 of article 1 of the Constitution, which provides that "no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or making any irrevocable grant of special privileges, . . . shall be passed."

To determine these questions, it is not

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was stipulated that the amount thereof was equal in value to such transportation as he should afterwards choose to make over its lines during his natural life, and, being valid when made, we do not think it is within the prohibition of the Federal statute.

The exchange of railroad transportation in payment for newspaper advertising constitutes an acceptance in payment for transportation, of compensation greater or less or different from that named in an interstate carrier's published rates, in violation of the interstate commerce act as amended by the Hepburn act, which prohibits any interstate carrier from accepting greater or less or different compensation than that named in its published schedule. United States v. Chicago, I. & L. R. Co. 163 Fed. 114.

And such a contract was condemned under a statute of similar purport to the interstate commerce act, in Hicks Pub. Co. v. Wisconsin C. R. Co. (Wis.) 120 N. W. 512, which required a publisher to pay four times as much for the transportation used by him as the public generally was called upon to pay.

So, a pass issued in consideration of the insertion of a schedule of a railway company in a newspaper, for the current year, violates an act of a state legislature prohibiting a common carrier, directly or indirectly, by any special rate, rebate, drawback, or other device, from charging, demanding, collecting, or receiving from any person a greater or less compensation for the transportation of passengers than it charges, demands, or receives from other persons for similar services. M'Neill v. Durham & C. R. Co. 132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 44 S. E. 34, s. c. second appeal in 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765.

But, in Hicks Pub. Co. v. Wisconsin C. R. Co. supra, the court, although not deciding the question, said as there was no positive prohibition against exchanging transportation for advertising, such a contract might be entered into if the transportation was of equal value to the advertising furnished.

A municipality is not prohibited from granting a franchise for a street railway with a condition therein for the carrying of policemen, firemen, United States mail carriers, and children under a certain age free, by reason of a constitutional prohibition against railroad or transportation companies, directly or indirectly, issuing or giving any free ticket, pass, or transportation to others than its employees and their families, its officers, agents, surgeons, physicians, attorneys at law, and ministers and other enumerated persons, not including those mentioned in such franchise. Oklahoma City v. Oklahoma R. Co. 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48.

A common carrier renders itself liable to the penalty provided by a statute against making unjust discrimination in rates for transportation over its road, by actually transporting a person without charge or for an inadequate consideration, and not by making a contract for free transportation. McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765.

In addition to the cases above cited, see also those discussed in the opinion to STATE v. MARTYN.

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only proper, but necessary, for us to consider all of the several provisions of our statutes relating to, or in any manner regulating, the business of common carriers within this state; and we should also take into consideration the evil sought to be corrected by the several legislative acts on that subject, together with the means adopted to accomplish that purpose. It is a matter of common knowledge that free passes first originated in favors granted to personal friends of railroad officials, and that this courtesy was gradually extended to public officers. This in itself, and in its inception, was not considered harmful or detrimental to the public welfare; but, long prior to the passage of the act in question, the giving, acceptance, and use of the free pass had become an intolerable evil, a menace to good government, and a stumbling block in the way of securing needed legislation, as well as a burden to the railroad companies themselves. With this situation confronting the legislative assembly of 1907, that body wisely determined to put an end to the whole matter, and so it first enacted chapter 90, p. 311, Sess. Laws 1907, commonly called the "railway commission act," which was approved by the governor and became a law on the 27th day of March of that year. By § 14 of the act it was provided that, "if any railway company or common carrier subject to the provisions of this act, directly or indirectly, through or by its agents, officers, or employees, by any special rate, rebate, drawback, or other device, shall charge, demand, collect, or receive from any person, firm, or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden, and declared to be unlawful." It seems perfectly clear that the giving of free transportation to any person whomsoever was thereby made unlawful; and, while it was not made a penal offense by that section to receive such transportation, yet the giving of it was made a crime punishable by a fine of not less than $500 nor more than $1,000. That the provisions of that section are broad enough to cover the transaction in question in this case, and render it at least unlawful, there can be no doubt, for the transportation of a passenger by a railroad company over its line of road is a service performed by it for such passenger; and the Union Pacific Railroad Company, by giving the defendant the pass in question, thus charged, collected, demanded, and received a different charge from the defendant than it charged, demanded, collected, or received from other persons or passengers for a like service. That this rendered the transaction unlawful there can be no question. To the operation of this law there was no exception, and the servants and employees of the railroad company could not be transported free, even while carrying out the terms of their employment. It was therefore apparent that the law, as it then stood, was too drastic in its provisions, and that there should be enacted some needed exceptions to its operation; and so the anti-pass law above mentioned was passed, approved by the governor, and took effect on the 30th day of March, 1907. See §§ 10664, 10665, Cobbey's Stat. 1907. By this act it was made a penal offense, not only for a railroad company to give, but for any person to receive and use, free transportation, who was not especially excepted from its operation by the language of the act itself. As we understand the question before us, it is not claimed by the defendant that he falls within any of those exceptions, and, while the defendant was an employee of the Union Pacific Railroad Company, yet it is frankly conceded that he did not, and does not, spend a major portion of his time in the service of that company. With the facts above stated before us, we come now to determine the foregoing questions.

The defendant's first contention is that his pass is not a free pass within the meaning of the statute above referred to. To support this proposition, his counsel cite Dempsey v. New York C. & H. R. R. Co. 146 N. Y. 292, 40 N. E. 867. In that case one Dempsey, a railroad policeman, appointed by the governor of the state of New York, pursuant to statute, had entered into a contract with the defendant railroad to protect its property, and be ready for such service at all times on demand; and it was also agreed that, if he would procure his appointment to the office of railroad policeman, the company would give him $75 per month for performing the duties of that office, together with an annual pass, which was required to enable him to perform his official duties. Upon these facts it was held that the pass contracted for was not a free pass within the meaning of the Constitution of New York, which prohibited the issuance of free passes to the public officers of that state. It thus appears that the rule announced therein has no application to the case at bar.

Our attention is next directed to the opinion of the attorney general of the state of Wisconsin, wherein he decided that a contract between the assistant attorney gen-

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eral and a railway company, by which that officer was to act as attorney for the company in consideration of an annual pass, was not a violation of the anti-pass law of that state. An examination of that opinion, however, discloses that it was based on Dempsey v. New York C. & H. R. R. Co. supra, and therefore has no application to the facts here in question, or the law by which our decision must be governed. Again, the obvious impropriety of the employment of the assistant law officer of the state by a railroad company, and the inconsistency of his position in accepting such employment, affords sufficient reason to justify us in declining to follow that opinion.

Finally, on this branch of the case, counsel present Smith v. New York C. R. Co. 24 N. Y. 222, and New York C. R. Co. v. Lockwood, 17 Wall. 359, 21 L. ed. 634. We find, upon an examination of those cases, that the point decided by each of them was that a shipper, traveling on a drover's pass issued to enable him to take care of his live stock *en route*, was not a gratuitous passenger in such a sense as to relieve the carrier from liability for negligence causing his death. Just how those cases can aid us in determining the questions under consideration we are not now advised, and so far have been unable to ascertain. On the other hand, we find that, in Marshall v. Nashville R. & Light Co. 118 Tenn. 254, 9 L.R.A. (N.S.) 1249, 101 S. W. 419, 12 A. & E. Ann. Cas. 675, the nature of a free pass issued by a railroad company to the chief of police of the city of Nashville was determined, and it was there said: "One of the assignments of error in this case is that the pass was not a mere gratuity, but that it was given for a valuable consideration; and, in this connection, it is said that the deceased was a member of the police force of Nashville, being chief of detectives, and that, to this class of persons, the company, as a rule, issued passes, which were based upon a valuable consideration. In other words, this pass was given, like others of its class, to encourage and to induce members of the police force, like the intestate, to ride upon the cars, and to be frequently about them, because their presence tended to preserve peace and good order for the passengers, and to protect the interest and operation of the road. We are of opinion that such a motive on the part of the road cannot be considered a valuable consideration, because the expected benefits are too remote, contingent, and uncertain to be so classed; and the pass must, therefore, be considered and treated, as it purports to be, a mere gratuity or compliment." An examination of the contract under which the pass in question was issued to the defendant discloses, as above stated, that it could be abrogated or annulled at any time for cause, and the impression is created thereby, and by the whole record, that, for the contingent services which the defendant was to render to the Union Pacific Railroad Company, if requested, he was to receive and accept $25 per month, and that the pass in question, by which he was permitted to ride upon the trains of that company over its Nebraska division free of charge, was a mere gratuity, and was so considered by both the defendant and the railroad company until after the passage of the act in question herein. It seems quite evident that any expected benefits by reason thereof, which might be received by the railroad company, were so remote and contingent as to constitute no consideration therefor. If the defendant's pass is not a free pass within the meaning of the act which is the basis of this prosecution, then the statute itself is as useless as the vermiform appendix. If a free pass can be lawfully issued by a railroad company and used by any person as an employee, who does not spend a major portion of his time in the service of the company, the whole purpose of the law is thwarted and destroyed, for, under the pretext of employment, any service performed for the company, however slight and trifling, would entitle the one performing it to free transportation, and the law would thus be rendered wholly nugatory. We therefore decline to adopt the construction contended for, and are of the opinion that the defendant's pass is just what it purports to be, a free pass, and its issuance, acceptance, and use was a plain violation of the statute which is the basis of this prosecution.

We come now to dispose of the defendant's second and third contentions, which strike at the constitutionality of the law involved in this controversy. These questions will be considered together, for what may be said as to one of them applies with equal force to the other. It is asserted that the anti-pass law is unconstitutional because it impairs the obligations of the contract existing between the defendant and the railroad company, and deprives defendant of his property without due process of law. To correctly decide this question, we should construe all of the provisions of our Constitution and statutes which relate thereto, or have any bearing thereon, together. By § 7 of article 11 of the Constitution it is provided that "the legislature shall pass laws to correct abuses, and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties." It thus appears that the power to regulate intrastate commerce and

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prevent unjust discriminations is not only granted to the legislative assembly by the Constitution, but it is thereby made a duty which the lawmaking body is commanded to perform. It is also well settled that the internal commerce of a state—that is, the commerce wholly confined to and carried on within the limits of a single state—is as much under state control as foreign or interstate commerce is under the control of the general government. Sands v. Manistee River Improv. Co. 123 U. S. 293, 31 L. ed. 151, 8 Sup. Ct. Rep. 113; Gibbons v. Ogden, 9 Wheat. 19, 6 L. ed. 27; Moore v. American Transp. Co. 24 How. 39, 16 L. ed. 681; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 210, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600. The exercise of this power necessarily includes the right to interfere with contract and property rights, so far, at least, as may be necessary to prevent extortion and discrimination. From even a cursory examination of the several acts of our legislature on this subject, it is quite apparent that the contract under consideration was, and is, discriminatory in its nature. We find that like contracts have been frequently declared to be so. The statutes of North Carolina upon this subject are the same as our own, and, in M'Neill v. Durham & C. R. Co. 132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 44 S. E. 34, it was held that a contract between a railroad company and the publisher of a newspaper, by which he was to publish the time-tables of the company, and receive a pass over its line of railroad as compensation therefor, was invalid, and was an illegal discrimination. In the opinion in that case we find the following: "Subject to the liberal exceptions just recited, the general assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine 'not less than $1,000 and not exceeding $5,000 for each offense.' Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion; to wit, that for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others, but, let it be what it may, it could not amount exactly, 'neither more nor less,' to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit, and not payable in money." This decision not only meets with our approval, but we find that the Federal courts, in construing like provisions of the interstate commerce law, have reached a similar conclusion. United States v. Wells-Fargo Exp. Co. (C. C.) 161 Fed. 606. Again, it may be said, if the contract for the pass, in the case at bar, ever had any validity, the provisions of our Constitution above quoted, entered into and became a part of it at its inception. And its terms and obligations were at all times subject to the power of the legislature to pass laws "to correct abuses and prevent unjust discriminations." Therefore, when the law in question took effect, the contract became illegal, and its obligations gave way and were suspended, for it cannot be said that it was of such a character as to suspend the provisions of the Constitution and the statute passed in response to the command of that instrument.

It may be further stated that our anti-pass law is simply a police regulation, adopted in pursuance to the mandates of the supreme law, and therefore cannot be said to be unconstitutional. In Tiedeman on Limitations of Police Power it is well said [§ 93, p. 233]: "Whenever the business is itself a privilege or franchise not enjoyed by all alike, or the business is materially benefited by the gift by the state of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a quasi public business, and, to that extent, may be subjected to police regulation." That such is the nature of the business of a common carrier there can be no doubt. In Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120, it was held that "existing contracts for special freight rates, or rebates from regular tariff rates which had been made with railroad companies subject to the interstate commerce act, became illegal when that act took effect, and were after that time incapable of enforcement." The contract in question herein is without doubt subject to the same rule. We are therefore of opinion that the issuance of the defendant's annual pass, and its acceptance and use by him, was a plain violation of the statute.

We are therefore constrained to hold that the District Court erred in directing the jury to find the defendant not guilty, and discharging him from further prosecution. For the foregoing reasons, the exceptions of the state are sustained. Judgment accordingly.

Petition for rehearing denied, January 23, 1909.

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NORTH CAROLINA SUPREME COURT.

ATLANTIC & NORTH CAROLINA RAILROAD COMPANY
v.
ATLANTIC & NORTH CAROLINA COMPANY, Appt.

(147 N. C. 368, 61 S. E. 185.)

Contract — assignment.

1. A contract to cut wood and deliver it to a railroad company is assignable by the company, so as to impose upon the assignee the duty to pay for the wood when delivered according to its terms.

Lease — assignment of contract.

2. A contract to take and pay for wood to be cut and delivered to it passes by a lease by a railroad company which undertakes to demise, let, hire, farm out, and deliver to the lessee the franchise and property of the lessor for a term of years, and which expressly includes all lands, interest in lands, timber, timber rights, and contracts now owned by the lessor, which rights and contracts are necessary to furnish the fuel used in the locomotives on the road.

Damages — breach of contract — assignment.

3. The damages for breach by a lessee of its agreement to carry out the lessor's contract for supplies is the amount of the judgment which the contractor recovers against the lessor in an action for breach of the contract, of which the lessee had notice, together with the costs and reasonable attorneys' fees incurred in resisting the recovery,—at least, where the lessee covenanted

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Case Note. — Assignability of executory contract to perform particular work, as distinguished from a contract for personal services or contract of sale.

This note is limited to cases passing on the assignability of executory contracts, where, as in ATLANTIC & N. C. R. Co. v. ATLANTIC & N. C. Co., by the terms of the contract one person agreed to do some particular work, not professional, for another; that is, where the relation is analogous to that of independent contractor and person by whom he is employed. Cases, therefore, concerning contracts involving the mere relation of master and servant, or involving services by a lawyer, physician, or other professional person, as such, are not included within this note. Cases involving the assignability of contracts for public work have been expressly excluded from this note, as well as those cases which depend for their decision as to assignability upon the terms of the contract.

The question of assignability of construction or building contracts which contain no provision with reference thereto is discussed in a case note to Johnson v. Vickers, 21 L.R.A.(N.S.) 359.

As was said in the note first referred to, the general doctrine that contracts are not assignable where they involve a personal liability, a relation of personal confidence, or call for the skill or experience of one of the parties, is well settled. The real question to be considered, therefore, in each particular case, seems to be whether it comes within the above-named rule.

In Tifton, T. & G. R. Co. v. Bedgood, 116 Ga. 945, 43 S. E. 257, a contract made by a railroad company with the owner of a lumber tract to build a side track to their property, in consideration for the latter's agreement to ship lumber over the company's railroad, was held not assignable by the owners of the lumber tract, so as to make it enforceable against the railroad company by the assignee.

In Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308, a contract for the sale and delivery of lead ore by a mining company to persons conducting a smelter, the ore to be assayed after delivery, and the price to be ascertained and paid according to the result of the assay, no security being given for payment except the character and solvency of the parties to whom the ore was to be delivered, was held not assignable by the latter; coming within the rule that contracts involving a personal confidence cannot be assigned; and therefore the mining company in this case could not be compelled to accept the liability of a smelting company as a substitute for the liability of those with whom it contracted.

In Edison v. Babka, 111 Mich. 235, 69 N. W. 499, a contract by a nurseryman with a farmer to plant fruit trees on the latter's farm, and to prune and care for them during a term of years, was held not assignable by the nurseryman.

So, in Eastern Advertising Co. v. McGaw, 89 Md. 72, 42 Atl. 923, where an advertising company assigned a contract with one of its customers to display his advertisements in street cars, the court, in holding that the assignee could not enforce the contract against the customer, said: "It is perfectly obvious that skill and judgment as well as taste were required by the contract to be exercised by the Eastern Company, both in the designing of the cards and in selecting the type in which they were to be printed, and in the arrangement of the cards in the cars. Its approval of the style and contents of the cards was necessary before any card could be placed in the cars. The contract was one where the *delectus personæ* was most material. It made no provision for an assignment; and a transfer of it for performance by another was clearly not contemplated by either of the parties to it. Its sale to the new company gave to that company no authority to execute it without the consent of McGaw; and that consent was refused. The Eastern Company disabled itself to perform the contract, and a suit in its name to the use of the assignee or vendee gave the latter no

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to save the lessor harmless from any damages which might be recovered against it because of the lessee's default, and the lessor undertook to notify the lessee of any cause of action for which the lessee would be liable, and tender defense of the action to the lessee.

Same — implied contract.

4. The assignee of a contract for supplies is, under the general doctrine of *indebitatus assumpsit*, bound to indemnify the assignor for loss which he may suffer at the suit of the other contracting party, because of the default of the assignee.

Lease — construction — assignment of contract.

5. A provision in a lease that the lessee shall not be liable for any debt of the lessor at the date of the contract does not include a liability to pay for supplies subsequently delivered to the lessee under a contract assigned by lessor to lessee.

Same — railroad — lessee's liability.

6. The rule that the lessee of a railroad is not liable on the contracts of the lessor, in the absence of a stipulation to that effect, is not applicable where the lessee has taken the contract by assignment, and thus made itself primarily liable thereon.

Evidence — confidential communication — attorney — common knowledge.

7. Testimony of an attorney for a lessee that a contract with a third person was mentioned and referred to at the time of taking the lease cannot be excluded from evidence in a suit to enforce the provisions of the lease with respect to it, as a confidential communication, since the fact must necessarily have been known to both parties at the time.

(April 15, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Craven County in plaintiff's favor in an action brought to hold defendant liable for a judgment which had been recovered against plaintiff on a contract which had been assigned to defendant. Affirmed.

Statement by Hoke, J.:

Civil action, tried at the November term, 1907. A jury trial having been formally waived by the parties, the court heard the testimony, found facts, and made conclusions of law thereon as follows: "(1) That

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right to recover for services it had not been engaged to render."

To the same effect are Fitch v. Brockmon, 3 Cal. 348 (contract with the owner of a stock ranch to take charge of ranch for a certain time and to give it his personal attention, in consideration for a certain per cent of the increase of the cattle, horses, and grain, together with certain other property); and Hudson v. Farris, 30 Tex. 574 (contract to locate colonists' land on shares and obtain a certificate therefor); and Streeter v. Sumner, 31 N. H. 542 (contract to move upon a farm and board lumbermen, and keep the owner's teams).

So, a contract to publish school books, between the author and a corporation, was held not assignable by the latter, in Wooster v. Crane & Co. (N. J. Ch.) 66 Atl. 1093, although, with one exception, the *personnel* of the assignee was the same as that of the assignor, and although the author, in making the contract with the publishers, used the word "assigns."

In Dr. Jaeger's Sanitary Woollen System Co. v. Walker, 77 L. T. N. S. 180, a contract between a woolen goods company and manufacturers, by which the latter agreed to manufacture for the former certain goods covered by their trademark, and of quality to be approved, and with right of inspection of the manufacturers' goods, with various conditions as to manufacture for other dealers, was recognized as not assignable, it being a personal contract.

In Spencer v. Woodbury, 1 Minn. 105, Gil. 82, a person agreed in writing to cut and split several thousand rails, to be delivered to a certain person or bearer. On the question whether or not this contract was assignable so as to make it enforceable in the hands of an assignee, the court said: "It is, at most, but a chose in action, and, as that class of rights were not assignable at common law, and, as the statute in force at the time, rendering notes assignable promising the payment of money, does not affect other obligations promising payment of anything else, or the performance of labor, the action in this case upon the obligation in question cannot be maintained at law."

However, in Janvey v. Loketz, 122 App. Div. 411, 106 N. Y. Supp. 690, it was held that a contract calling for the performance of painting, decorating, whitewashing, and wall papering involved no personal confidential relation, and no exceptional personal skill or knowledge, and was therefore assignable.

So, a contract to drill an oil well was held to be assignable, in Galey v. Mellon, 172 Pa. 443, 33 Atl. 560, the court saying that the work, of necessity, required the labor and attention of a number of men, and it did not appear that, because of his knowledge, experience, or pecuniary liability, or for any other reason, the assignor was especially fitted to carry it on.

In Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 So. 754, it was held that a contract giving a person the exclusive right to drill on another's land with a view of finding commercial substances, and obligating him, in case of success within a certain time thereafter, to pay a certain sum for the land, did not impose a personal obligation on him within a statute declaring an obligation personal when the obligor

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the plaintiff is a corporation duly organized and existing under the laws of North Carolina. (2) That the defendant is a corporation duly organized and existing under the laws of North Carolina. (3) That, on the 1st day of September, A. D. 1904, the plaintiff made, duly executed, and delivered a lease to the Howland Improvement Company; a copy of said lease is hereto annexed and made a part of these findings of fact. (4) That the defendant succeeded to the rights and liabilities of the said Howland Improvement Company under said lease. (5) That, previous to the execution of said lease, the plaintiff used in its locomotives for the transportation of freight and passengers over its railroad wood as fuel, and, for the purpose of supplying itself with a sufficient quantity of wood, the plaintiff had purchased timber lands and standing timber, and had entered into contracts with several persons for cutting timber, among others, one B. W. Ives, for the cutting and delivery to plaintiff of 15,000 cords of wood: and, in pursuance of said contract, the said Ives, prior to the date of said lease, had cut and delivered large quantities of said wood to plaintiff, and, at the time of the execution of said lease, the contract between plaintiff and Ives was in regular course of performance by both parties thereto. (6) That, when the defendant took over the property of the plaintiff under the said lease, all of the locomotives which it received were what are known as 'wood burners,' and it was necessary to have an adequate supply of wood as fuel for said locomotives, and that the defendant used in its railroad operations only those locomotives for several months, and used up large quantities of wood as fuel, including a portion of the wood cut and delivered to plaintiff by said Ives under said contract. (7) That, some months after defendant had been in the operation of said railroad under the said lease, it changed the locomotives from 'wood burners' to 'coal burners.' (8) That, after the lease, the defendant refused to carry out the wood contract with Ives, or to take any wood from him under and in pursuance of said contract between the plaintiff and said Ives; thereupon the said Ives demanded of the plaintiff that it carry out said contract, and, upon the failure of the plaintiff to perform said contract, the said Ives, on the 28th day of De-

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undertakes to perform anything that requires his personal skill and attention, and hence such contract was assignable.

In Sunday Mirror Co. v. Galvin, 55 Mo. App. 412, a contract stipulating for the support of a newspaper for the publication of a book was held not to rest on personal confidence, and was therefore assignable by the owners of the newspaper to a corporation formed to continue its publication.

In Rochester Lantern Co. v. Stiles & P. Press Co. 40 N. Y. S. R. 851, 16 N. Y. Supp. 781, reversed on other grounds in 135 N. Y. 209, 31 N. E. 1018, a contract whereby one agreed to make and deliver to another dies for lanterns which the latter intended to manufacture was held assignable by the person who was to receive the dies. The court said: "No reason is suggested why this contract should be held to be an exception to the general rule that contracts are assignable. Had Kelly died after entering into the contract, his representatives would have been entitled to the contract as an asset of his estate, and could have insisted upon the defendant's performing it. The defendant could have procured another to make the dies; and, if they complied with the contract, Kelly would have been compelled to accept them. . . . The parties could have prohibited the assignment of the contract by a provision in it to that effect, had they chosen. Not having done so, it must be held to be assignable."

So, where a contract was made to supply a party with slate, a portion of which was to be delivered immediately and another part monthly, at a fixed price, and the purchaser agreed to receive the slate in quantities of not more than a certain amount per month, such agreement to be in force until a time stated, it was held, in Wentworth v. Cock, 10 Ad. & El. 42, that such contract was not a personal one, and therefore would survive as an obligation and liability upon the administrator of the deceased contractor's estate.

Nor is a contract for the sale and delivery of a quantity of saw logs one of the class in which the *delectus personæ* is material (Poling v. Condon-Lane Boom & Lumber Co. 55 W. Va. 529, 47 S. E. 279); there being nothing in this case to show that the person who was to receive the logs was in anyway prejudiced by the assignment.

Cases closely related to those coming within the scope of the note, but not strictly in point here, are those passing on the question of the assignability of a lease upon shares.

Among such cases is Litka v. Wilcox, 39 Mich. 94, where it was held that, because of its personal nature, a contract whereby a person agreed to work a farm on shares with its owner, and the farmer's wife was to do the cooking and washing for the latter, was not assignable, and therefore the grantee of the owner could enjoin the assignee for committing waste on such property. And to the same effect are Randall v. Chubb, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429, and Lewis v. Sheldon, 103 Mich. 102, 61 N. W. 269, holding that a lease of a farm upon shares, because of its personal nature, is not assignable.

For cases on assignability of insurance agent's right to commission on renewal premiums, see case note to Re Wright, 18 L.R.A.(N.S.) 193.

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cember, 1904, brought suit against the plaintiff for the breach of said contract. (9) That, upon the institution of said suit, the plaintiff notified the defendant to come in and defend the same, which the defendant declined to do, and the plaintiff undertook the defense of said suit, and did defend it to the best of its ability and at considerable expense and cost, but judgment was finally awarded both in the superior and supreme courts against the plaintiff, and in favor of said Ives, for the sum of $8,106.90, with interest and costs. That, in addition to said amount, the plaintiff was forced to pay the following amounts: Interest on said amount, $216.16; cost superior court, $104.60; cost supreme court, $23.55; attorney's fee, $700,—amounting in all at the time of said payment to the sum of $9,147.21. (10) That the defendant knew of the existence of said contract at the time of the said lease, as shown by the paper writing itself and testimony of Howland, Davidson, and Bryan. (11) That said contract was assignable, and was duly assigned by the plaintiff to the defendant, and was broken by the defendant. (12) That said contract between the plaintiff and B. W. Ives was not in writing, nor was there any writing concerning same at the time of the making of the lease to the defendant. (13) The referee held that the defendant is liable to the plaintiff for the amount set out in paragraph 9 above, and that judgment be entered in favor of the plaintiff and against the defendant accordingly."

The portions of the lease referred to in finding of fact 3, pertinent to this inquiry, are as follows: "Now, therefore, for and in consideration of the several sums of money, rents, covenants, agreements, and stipulations hereinafter specified and agreed to be paid, kept, and performed by the Howland Improvement Company, the said lessor, namely, the Atlantic & North Carolina Railroad Company, has demised, let, hired, farmed out, and delivered, and by these presents doth demise, let, hire, farm out, and deliver to the said lessee, namely, the Howland Improvement Company, the entire railroad of the lessor, with all its franchises, privileges, rights of transportation, works, and property, including among other things its superstructure, roadbed, and rights of way incident thereto, situated in the state of North Carolina, and extending from Morehead City, in the county of Carteret, to the city of Goldsboro, in the county of Wayne, in the said state; and also all depots, houses, shops, piers, wharves, water fronts, water privileges, buildings, fixtures, engines, cars, and railroad equipment, and all franchises, rights, and privileges and other things, if any, of whatsoever kind and nature, to the said lessor belonging and necessary, incident, appurtenant to the free, easy, and convenient operation of the said railroad leased hereby and now or heretofore used in that behalf; and also including the property situated in the said Morehead City, known as the Atlantic Hotel, with all its rights, privileges, hereditaments, and appurtenances, and the furniture, fixtures, equipments, and appliances now therein or used therewith, and also all lands and interests in lands, timber, timber rights, and contracts now owned by the lessor, for the full term of ninety-one (91) years and four (4) months from and after the 1st day of September, 1904, and to be fully ended, commencing the 1st day of September, 1904." And, further, a covenant of indemnity as follows: "And the lessee further covenants to and with the lessor, its successors and assigns, to indemnify and save harmless the said lessor against and from any and all damages which may be recovered from or against it, according to law, by reason of any failure of the said lessee, its agents, employees, successors, or assigns, to perform in all things, or its or their violation of, their duties and obligations, whereby the lessor may become liable to any party injured or sustaining injury in his or her person, reputation, or property; and the lessor, on its part, covenants to and with the lessee, that, whenever any suit or action shall be instituted against it, the said lessor, for any causes of action for which the lessee would be liable to the lessor under the terms of this lease, the lessor will immediately give due notice and tender defense of such suit or action to the lessee,—such notice to be given to the resident agent of the lessee at either of the following named places, to wit: Morehead City, New Bern, Kinston, or Goldsboro, all in the state of North Carolina." And further: "It is further agreed between the parties that all cash on hand and all bills and accounts receivable, due and payable to the lessor at the date this lease goes into effect, shall not pass by this conveyance; nor shall the lessee be liable for any debts of the said lessor at said date."

On the findings of fact and conclusions of law there was judgment for plaintiff, and defendant excepted and appealed.

Messrs. Aycock & Daniels, Simmons, Ward, & Allen, and Moore & Dunn for appellant.

Messrs. George Rountree and P. M. Pearsall for appellee.

Hoke, J., delivered the opinion of the court:

The contract, by reason of which this re-

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covery was had, and its effect and binding force as between the original parties, were construed and determined in Ives v. Atlantic & N. C. R. Co. 142 N. C. 131, 115 Am. St. Rep. 732, 55 S. E. 74, 9 A. & E. Ann. Cas. 188, and it was there held that the contract was for the cutting and delivery to the present plaintiff, on its right of way, a specified amount of cordwood, and was not, therefore, within the statute of frauds, requiring that contracts concerning land should be in writing. The judgment obtained by Ives in that case having been paid off and discharged, the plaintiff instituted this action to recover of the present defendant the amount of that judgment, and the cost and reasonable expense incurred in defending the suit. Such recovery is resisted on the grounds chiefly: (1) That the contract in question was not assignable. (2) That, as a matter of fact, it was not assigned. But we are of opinion that neither position can be sustained.

While at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the Crown had an interest, could not be transferred by assignment,—a doctrine which Lord Coke attributes to the "'wisdom and policy of the founders of our law' in discouraging maintenance and litigation," but which Sir Frederick Pollock tells us is better explained as "a logical consequence of the . . . [archaic] view of a contract as creating a strictly personal obligation between the creditor and the debtor" [Pollock, Contr. 4th ed. p. 206],—the rule in its strictness was soon modified in practical application by the common-law courts themselves, and more extensively by the decisions of the courts of equity, and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule, that, unless expressly prohibited by statute, or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of same can be maintained by the assignee in his own name. The general doctrine as to the assignability of rights is very well stated in Pomeroy's Equity Jurisprudence (vol. 3, § 1275), as follows: "What Things in Action Are or Are Not Thus Assignable.—It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are, in general, thus assignable. All which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well-defined exceptions; and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs whereby an estate, real or personal, is injured, diminished, or damaged. The second class embraces all torts to the person or character where the injury and damage are confined to the body and the feelings, and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person,—such as promises to marry, injuries done by the want of skill of a medical practitioner, contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipulate solely for the special personal services, skill, or knowledge of a contracting party." And an interesting and well-considered article by Prof. Frederic C. Woodward, on the assignability of contracts, will be found in 18 Harvard Law Rev. 23. There is an exception, as indicated in the last part of this citation from Pomeroy, to the effect that executory contracts for personal services involving a personal relation or confidence between the parties cannot be assigned. Lawson, Contr. § 355. And another, equally well established and well-nigh as broad as the rule itself, is that executory contracts imposing liabilities or duties which, in express terms or by fair intendment from the nature of the liabilities themselves, import reliance on the character, skill, business standing, or capacity of the parties, cannot be assigned by one without the assent of the other. This last exception, and the reason upon which it rests, are stated by Justice Gray, delivering the opinion in Delaware County v. Diebold Safe & Lock Co. 133 U. S. 488, 33 L. ed. 680, 10 Sup. Ct. Rep. 404, as follows: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But, when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract,"—citing the case of

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Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308. And the same principle is stated in Clark on Contracts, 2d ed. p. 364: "It may be said generally that anything which . . . involves a right of property is assignable, with the exception that rights, when coupled with liabilities under an executory contract for personal services, or under contracts otherwise involving personal credit, trust, or confidence, cannot be assigned."

It is contended that, by reason of those exceptions stated in the authorities referred to, the contract before us was not assignable so as to impose liability of performance on defendant lessee; but we think the position is not well taken. In the first place, the exception noted arises for the protection of the other party, and, if such party assents, as he did in this instance, the restriction no longer exists. But, apart from this, it will be noted that the exception referred to does not arise or apply when the contract is entirely objective in its nature, and gives clear indication that the personality of the other contracting party was in no way considered. Anson, Contr. p. 288; Clark, Contr. p. 360. And this limitation imposed on the exception itself is applied and extended in numerous and well-considered decisions of courts of the highest authority. Horner v. Wood, 23 N. Y. 350; Devlin v. New York, 63 N. Y. 8; New York v. Twenty-third Street R. Co. 113 N. Y. 311, 21 N. E. 60; Rochester Lantern Co. v. Stiles & P. Press Co. 135 N. Y. 209, 31 N. E. 1018; St. Louis use of Sullivan v. Clemens, 42 Mo. 69; Galey v. Mellon, 172 Pa. 443, 33 Atl. 560; Tolhurst v. Associated Portland Cement Manufacturers [1903] A. C. 414; British Waggon Co. v. Lea, L. R. 5 Q. B. Div. 149. In Devlin v. New York, supra, the general principle we are discussing is stated and applied as follows: "(1) Where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and where the latter has not disqualified himself from a performance of the contract, it is assignable. (2) The assignment by the contractor of a contract with a municipal corporation for work is not against public policy so long as the corporation retains the personal obligation of the original contractor and his sureties; and, in the absence of anything in the statute which authorized the work prohibiting it, such an assignment is valid. It does not terminate the contract or authorize the corporation to repudiate it. (3) Accordingly held that an assignee of a contract for street cleaning, made between the corporation of the city of New York and another, under authority of the act entitled, 'An Act to Enable the Supervisors of the County of New York to Raise Money by Tax for City Purposes, and to Regulate the Expenditure Thereof,' etc. (chap. 509, Laws 1860), could maintain an action against the city for moneys due thereon, and for damages resulting from a repudiation of the contract and an interference on the part of the city authorities, preventing a further performance." And in British Waggon Co. v. Lea, supra, Chief Justice Cockburn, delivering the opinion, discusses the principle as follows: "We entirely concur in the principle on which the decision in Robson v. Drummond, 2 Barn. & Ad. 303, rests; namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is, in such a case, of the essence of the contract, which consequently cannot, in its absence, be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that, in stipulating for the repair of these wagons by the company,—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute,—the defendants attached any importance to whether the repairs were done by the company, or by anyone with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair. It was indifferent to them by whom the repairs should be done. Thus, if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the court of Queen's bench, in Robson v.

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Drummond, went to the utmost length to which it can be carried, as it is difficult to see how, in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for which it is known can only be executed by means of subcontracts. Much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim, *Qui facit per alium facit per se*, applies."

It will be noted here that while the case of Robson v. Drummond, frequently cited in support of the position that contracts imposing liabilities cannot be assigned, is not overruled, there is decided intimation that it has gone too far in the application of this principle, and there is doubt if the case of Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9, is not subject to the same criticism. Certainly neither one of these cases can, it seems to us, be supported except on the theory that there were terms in the contract importing reliance on the personal skill, business standing, or methods of the other contracting party. A correct application of the principle established by these cases leads to the conclusion that the contract in question was assignable. It was an ordinary business contract for the delivery of so much cordwood on the lessee's right of way, not requiring or importing any special reliance on Ives's skill or business qualifications. It could be performed as well by one man as another. As a matter of fact, there is testimony to the effect that it was to be done in this instance by convicts, and that quarters had already been constructed for their protection and accommodation while doing the work. As said by Justice Walker in the opinion of Ives v. Atlantic & N. C. R. Co. 142 N. C. 131, 115 Am. St. Rep. 732; 55 S. E. 74, 9 A. & E. Ann. Cas. 188: It was a contract of employment in the sense that it was to be performed by means of personal labor, but not in the sense that it was expected or intended that t should be performed by Ives. Nor did the credit or business responsibility of the original parties affect the matter one way or the other. Not that of Ives, for the wood was not to be paid for till it was delivered, and so the defendant assignee was fully protected. Nor that of the assignor, for, unless Ives had agreed to accept the defendant's responsibility instead and in place of the assignor, making it a new contract by way of novation, the assignor would, notwithstanding the assignment, still remain liable. Crane v. Kildorf, 91 Ill. 567; Martin v. Orndorff, 22 Iowa, 504. And see the article of Prof. Woodward, supra, wherein it is shown that the assent of the other party to an assignment does not always necessarily import that the assignor is relieved of liability. This ordinarily is all the books mean when they state the proposition in general terms,—that a contract imposing liability cannot be assigned; that the assignment of such a contract does not, as a rule, relieve the assignor from responsibility. It may be well to note that we are speaking of the assignment of the contract, and not of the transfer of the property about which parties may have contracted. In the last case it is generally accepted doctrine that, in the absence of an agreement, express or implied, a party who buys property from a vendee to whom the owner has contracted to sell it does not, as a rule, come under personal obligation to the owner to pay the purchase price. Adams v. Wadhams, 40 Barb. 225; Comstock v. Hitt, 37 Ill. 542. We have so held in effect at the present term in Biggers v. Matthews, 147 N. C. 299, 61 S. E. 55. The contract in question here, being for the delivery of so much cordwood on defendant's right of way, may be classed with a contract of sale of a given quantity of staple goods having a known market value; and, under the principle established by the authorities referred to, we hold that it was assignable, so as to impose on defendant the obligation to pay for the wood when delivered according to its terms. And we are also of the opinion that, by the terms of the lease, the contract was, and was intended to be, assigned. The operative words of the lease are that the parties of the "first part do demise, let, hire, farm out, and deliver to the said lessee, etc., the franchise, property, etc., of the lessor, for the full term of ninety-one years and four months, from and after the 1st day of Sept. 1904." And the descriptive words as to the property passed included the franchise, works, property, right of way, etc., appertaining to the railroad, also the Atlantic Hotel property, with all its rights, privileges, hereditaments, and appurtenances, and the furniture, etc., used therewith. And in reference to the matter now before us: "Also all lands and interests in lands, timber, timber rights, and contracts now owned by the lessor," etc. There was testimony to the effect, and it was found as a fact by the trial judge: "(5) That, previous to the execution of said lease, the plaintiff used in its locomotives for the transportation of freight and passengers over its railroad wood as fuel, and, for the purpose of supplying itself with sufficient quantity of wood, the plaintiff had purchased timber lands and standing timber, and had entered into contracts with several persons for cut-

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ting timber, and, among others, one B. W. Ives, for the cutting and delivery to plaintiff of 15,000 cords of wood; and, in pursuance of said contract, the said Ives, prior to the date of said lease, had cut and delivered large quantities of said wood to plaintiff, and, at the time of the execution of said lease, the contract between plaintiff and Ives was in regular course of performance by both parties thereto. (6) That, when the defendant took over the property of the plaintiff under the said lease, all of the locomotives which it received were what are known as 'wood burners,' and it was necessary to have an adequate supply of wood as fuel for said locomotives, and that the defendant used in its railroad operations only those locomotives for several months, and used large quantities of wood as fuel, including a portion of the wood cut and delivered to plaintiff by said Ives under said contract. (7) That some months after defendant had been in the operation of said railroad under the said lease, it changed the locomotives from 'wood burners' to 'coal burners.'"

It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction, this intent is to be gathered from a perusal of the entire instrument. In Page on Contracts, vol. 2, § 1112, we find it stated: "Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole." And while, in arriving at this intent, words are prima facie to be given their ordinary meaning, this rule does not obtain when the "context or admissible evidence shows that another meaning was intended." Page, § 1105. And further, in § 1106, it is said that the context and subject-matter may affect the meaning of the words of a contract, especially if, in connection with the subject-matter, the ordinary meaning of the term would give an absurd result. Again, as said by Woods, J., in Merriam v. United States, 107 U. S. 441, 27 L. ed. 533, 2 Sup. Ct. Rep. 540: "It is a fundamental rule that, in the construction of contracts, the courts may look not only to the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." And in Beach on Modern Law of Contracts, vol. 1, § 702, the author says: "To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have." Applying these accepted rules of construction, and considering the facts and attendant circumstances established by the parol testimony which was properly received for the purpose indicated (Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613; Ward v. Gay, 137 N. C. 397, 49 S. E. 884), we are of the opinion that the contract with Ives for the cutting and delivery of the cordwood came within the descriptive terms of the lease, and was assigned to the lessee as stated. It is true that the terms "demise" and "let" are usually applied to leases and conveyances of real estate, but they both contain the idea of a grant, and when, as in this instance, the parties have used them as the operative words applied to a transfer of timber rights and contracts, passing such interest for ninety-one years and more, by fair interpretation, and considering the nature of the interests, the parties could only have intended an assignment. And the term "contracts" in the descriptive words must have included this contract with Ives to cut cordwood. Referring to the parol testimony competent for the purpose stated, this and another contract with Overman, of like nature, were all the contracts of this kind they had. The terms "land, timber, and timber rights" included all the standing timber, and these two contracts to cut cordwood were the only interests on which the words could operate. The evidence, too, further shows that these two contracts were brought to the attention of the lessee before the contract was entered into; that the one here in question was being carried out by Ives at the time of the lease, and its benefits were, for a short while, accepted by the lessee. We do not attach any importance to the words "now owned by the vendors" at the conclusion of the descriptive words. The rights and benefits of a contract like this are considered as property, and the term "owned by them" is not inapt as a part of the description. Thurber v. La Roque, 105 N. C. 306, 11 S. E. 460. And so, as to the word "timber;" ordinarily this term applies to timber fitted for structural purposes; but it would be entirely improper to give it that significance when the testimony shows that the entire purpose of these holdings, and contracts concerning them, was to supply cordwood for the operating purposes of the railroad. And we think it a fair surmise, permissible in view of the facts and attendant circumstances, that, if the lessee had not decided to change its engines from wood to coal burners, this litigation would

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never have arisen. If we are correct in our position that the contract was assignable, and that, as a matter of fact, it was assigned, then we are of opinion that plaintiff has the undoubted right to recover of the defendant the amount of the judgment, together with the cost and reasonable attorneys' fees incurred in resisting the suit instituted by Ives. Though the lessee may have repudiated any and all obligations to Ives by reason of this contract, the lessor was not thereby relieved of the obligation to do what was reasonably required to resist recovery. Tillinghast-Styles Co. v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621; Bowen v. King, 146 N. C. 385, 59 S. E. 1044. And defendant's obligation, we think, arises by the express covenant of the lease, and in which it is evidently contemplated that resistance to such suits should be made whenever the facts and conditions offered reasonable grounds of defense. One of the stipulations of the lease (page 47, Record) provides as follows: "And the lessee further covenants to and with the lessor, its successors, and asigns, to indemnify and save harmless the said lessor against and from any and all damages which may be recovered from or against it, according to law, by reason of any failure of the said lessee, its agents, employees, successors, or assigns to perform in all things, or its or their violation of, their duties and obligations, whereby the lessor may become liable to any party injured or sustaining injury in his or her person, reputation, or property; and the lessor, on its part, covenants to and with the lessee that, whenever any suit or action shall be instituted against it, the said lessor, for any causes of action for which the lessee would be liable to the lessor under the terms of this lease, the lessor will immediately give due notice and tender defense of such suit or action to the lessee,—such notice to be given to the resident agent of the lessee at either of the following named places, to wit: Morehead City, New Bern, Kinston, or Goldsboro, all in the state of North Carolina."

When the defendant bought and took an assignment of this contract for the delivery of so much cordwood on its right of way, and thus acquired the right to enforce performance by Ives or recover damages for its breach, it assumed the liability to pay for it when delivered. It could not take over the benefits of the contract without bearing its burdens. Defendant took the contract *cum onere* (Union P. R. Co. v. Douglas County Bank, 42 Neb. 469, 60 N. W. 886; Smith v. Rogers, 14 Ind. 224), and having, in the stipulations quoted, agreed to "save lessor harmless from any and all recovery that may be had against the lessor by reason of the failure of the lessee and its assigns to perform in all things their duties and obligations," the liability to repay the amount comes within the express terms of the covenant of indemnity; and, having duly notified the lessee of the institution of the Ives suit, and "tendered the defense," the reasonable expenses of such defense may also be recovered. The words of this stipulation, "to indemnify against any and all damages which may be recovered against it, according to law, by reason of its failure to perform in all things the duties and obligations, whereby the lessor may become liable," etc., are broad enough to include this obligation to Ives. And, if it were otherwise,—if, as defendant contends, the covenant was only intended to apply to the charter obligations of these companies,—the result would be the same, for while, as heretofore stated, the lessor company was not relieved of the obligation under this contract unless Ives had agreed to accept the lessee in discharge of the former, as between these parties, the lessor and lessee, the force and effect of the assignment were to establish, in any event, a primary liability in the lessee, and, under the general equitable principles of *indebitatus assumpsit*, the lessor, having been forced to pay, can recover of the lessee the amount of this enforced recovery. Keener, Quasi Contr. p. 396; 15 Am. & Eng. Enc. Law, p. 1108. In the citation from Keener, supra, it is said: "It may be stated as a general proposition that a plaintiff can recover against a defendant as for money paid to his use to the extent that the claim paid by the plaintiff should have been paid by the defendant." This primary liability of the assignee is well brought out in the case of Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 10 L.R.A. 369, 21 Am. St. Rep. 63, 25 Pac. 52. In that case, speaking of the obligation of parties to an imperfect assignment as between themselves, Works, J., for the court, said: "We therefore think it plain that, as the plaintiff, as assignor, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligations, the plaintiff, as between it and the defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows that from the assignment an implied contract arose between the plaintiff and defendant, whereby the latter became bound to the former to receive and pay for the apricots according to the terms of the original contract." While this ruling was made to depend to some extent on a section of the California Code, the statute itself is

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only an embodiment of the generally accepted doctrine applicable to the facts indicated.

The assignment of the Ives contract having established, as between the parties, a primary liability on the part of the defendant lessee, the obligations of that contract would not, by any fair or correct interpretation, be included under the later stipulation of the lease, "that the lessee shall not be liable for any debt of the lessor at that date." This obligation, by the force and effect of the lease and assignment, had become the debt primarily of the lessee. And, for the same reason, the doctrine stated in general terms by Mr. Elliott, in his valuable work on Railroads, § 462, to which we were referred by counsel, "that the lessee, under an authorized lease, is not liable on the contracts of the lessor, in the absence of a stipulation to that effect," does not apply here. This is true when the lessee takes over the franchise and ordinary property of the lessor, without more, but, in the case before us, the lessee has taken the contract, thereby imposing on itself the obligation as a primary liability. And this distinguishes the present case from that of Pennsylvania Co. v. Erie & P. R. Co. 108 Pa. 621. In that decision it was held an oral agreement by the lessor company to give an annual pass in consideration of a release of a right of way through an owner's land was not binding on the lessee. The decision was put on the ground that, while the right of way, which had been obtained by the lessor company, passed under the lease, there was no connection between the two, so as to make them concurrent and dependent stipulations, and therefore, in taking over the road, including the right of way, there was not any implied agreement to make good the oral promise to give a pass. The opinion, on page 629 of 108 Pa., proceeds as follows: "But the parol agreement to provide a pass was no part of the release; the latter was an executed contract, absolute and unconditional in its terms, and a transfer of it, in the absence of an express provision to the contrary, carried with it to the transferee no legal responsibility to the former. Each, it is true, was the consideration of the other, but they were distinct and independent,—one secured a right, whilst the other evidenced a debt of the company." This decision will certainly not extend or apply to the facts presented here, where, as stated, a primary liability of the lessee company was assumed and established by taking over a contract having mutual and dependent stipulations.

The objection to the testimony of one who had been of counsel for Howland, the original lessee, as to the fact that the Ives contract was mentioned and referred to at the time of taking the lease, is without merit. This was a fact necessarily known to both parties, brought out during their negotiation concerning the lease, and could in no sense be considered a confidential communication. Weeks, Attorneys at Law, 289; Wigmore, Ev. 2311, 2312; 23 Am. & Eng. Enc. Law, p. 67; Elliott v. Elliott, 3 Neb. (Unof.) 832, 92 N. W. 1008, citing with approval Hills v. State, 61 Neb. 598, 57 L.R.A. 155, 85 N. W. 836.

After giving the case most careful consideration, we find no error in the record, and the judgment below must be affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

A. P. WHITE, Exr., etc., of William J. Bailey, Deceased, et al.,
v.
BLAND BAILEY, Impleaded, etc., Appt.

(— W. Va. —, 64 S. E. 1019.)

Deed — rescission — covenant — nonperformance by grantee.

1. Neither the reservation of a lien for maintenance and support in a deed of conveyance made in consideration of a covenant to support and maintain the grantor, nor the insertion therein of a clause giving him a right to re-enter and use and occupy the land during his life, in case of nonperform-

Headnotes by POFFENBARGER, J.

Case Note. — Does the grantor's right to rescind for breach of condition as to support descend to his heirs or representatives.

This note is confined to cases involving the right of the heirs or representatives of the grantor in a deed conditioned for the support of the grantor or some member of his family to take advantage of a breach of the condition; and cases involving the right of an assignee or of one to whom the grantor subsequently conveyed the premises to take advantage of such a breach have not been included. As to the transferability of a right of entry for breach of conditions in a deed, see note to Bouvier v. Baltimore & N. Y. R. Co. 60 L.R.A. 750. Cases have also been excluded where the heirs have sought to have a deed containing such a condition set aside merely because of fraud or undue influence.

The cases involving this question are not numerous, but are very harmonious in sustaining the views expressed in WHITE v. BAILEY.

Thus, in Parker v. Nichols, 7 Pick. 111, it was stated generally that the seisin of the grantee in a deed containing a condition for support is liable to be defeated by the covenantor or his heirs in case there should

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ance of the covenant, extinguishes, cuts off, or prevents right of rescission in the grantor in the event of failure of the grantee to perform the covenant.

Same — construction — purpose.

2. A deed should be so construed as to give effect to all of its parts and harmonize them; but functions and purposes not expressed nor necessarily implied should not be added after a reasonable and important function for every clause, which the parties may have had in contemplation, has been already perceived.

Same — implication.

3. Generally a provision, effect, or purpose is not read into an instrument as having been implied, unless necessity therefor is found in terms used, or purposes expressed, therein.

Same — intent.

4. The purpose and object of the parties to a deed or other contract, as shown by the instrument itself, read as a whole, at the time of its execution, in the light of the subject-matter, the situation of the parties, and the circumstances surrounding them, constitute the safest and best guide to their intention.

Same — laches — presumption of abandonment.

5. Mere delay, for a long period of time, in asserting a cause of action cognizable in equity only, working no injury or prejudice to the defendant in any way, bars relief only on the presumption of abandonment, which may be overthrown by proof of conduct showing the contrary.

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be a breach of the condition. And to the same effect was the decision in Thomas v. Record, 47 Me. 500, 74 Am. Dec. 500.

So, where a deed by a parent to his child, reserving a maintenance to himself, and requiring the payment of his debts, contained a condition giving a right of re-entry to the grantor in case the grantee neglected to pay such debts, and suffered the grantor to be put to cost, trouble, or expense on account of the same, it was held, in Jackson ex dem. Reeves v. Topping, 1 Wend. 388, 19 Am. Dec. 515, that, after the decease of the grantor, the neglect to pay a debt due by him, though not presented until after his decease, worked a forfeiture of the estate; and in an action of ejectment, another of the children of the grantor, who presented such demand, was held entitled to recover his share of the estate as one of the heirs at law for a breach of the condition, although the grantor had not been put to any cost, trouble, or expense on account of the debt, that part of the condition being adjudged operative only during the life of the grantor.

Where a deed contained a condition requiring the grantee and his heirs to support an imbecile son of the grantor, and, upon the latter's death, the condition was broken, it was held, in Cross v. Carson, 8 Blatchf. 138, 44 Am. Dec. 742, that the estate was forfeited and liable to be destroyed by the entry of the grantor's heirs; but, until such entry, the grantee or his heirs would hold the land, and one who had supported the imbecile, but who was a stranger to the deed, could not, as the imbecile's creditor, take advantage of the deed.

Where a deed was conditioned on the support of the grantor and his wife, and provided that, in case of a breach of the condition, the deed should be null and void and the property should revert to the grantors, it was held, in Fluharty v. Fluharty, 54 W. Va. 407, 46 S. E. 199, that a court of equity would take jurisdiction of a bill filed by the heirs of the grantor to set aside and cancel the conveyance for failure on part of the grantees to comply with the conditions of the conveyance.

In a few cases it has been held that the heirs could not maintain the action; but these cases are clearly distinguishable on the facts.

Thus, in Hensley v. Hensley, 17 Ky. L. Rep. 122, 30 S. W. 613, it was held that the heirs of a grantor in a deed conditioned on the support of himself and his wife during their lifetime, and containing a provision, in case of a breach of the condition, for the reversion of the property to the grantor and his wife, or to the survivor, did not, while the widow of the grantor survived, have any such interest in the land as would support an action to set aside the deed for breach of the condition as to the grantor, the widow being the only party in interest.

So, in Harwood v. Shoe, 141 N. C. 161, 53 S. E. 616, it was held that the heirs of a grantor in a deed containing a condition to support her were not, after having compelled the defendant to leave the premises, and, by force, prevented the grantee from carrying out his obligation to her, entitled to have the deed canceled for a breach of the condition.

Where a deed the consideration of which was in part the support and maintenance of the grantor and her son reserved the right to the grantor, in case of a failure to furnish the support, to contract with other parties for such support, it was held, in Arnett v. McGuire, 23 Ky. L. Rep. 2319, 67 S. W. 60, that, if the grantor failed to exercise the rights reserved in case of a failure to support, her heirs, after her death, could not maintain an action to set aside the conveyance, as the right was strictly personal. It will be noted that, in this case, there was no provision made for a reversion, but only a mere reservation to the grantor.

As to the right to equitable relief against a forfeiture of an estate for a breach of a condition subsequent, see note to Maginnis v. Knickerbocker Ice Co. 69 L.R.A. 833.

As to necessity of entry or formal declaration of forfeiture as a condition for maintaining action other than for damages, based on breach of condition subsequent in a conveyance of freehold, see case note to Mash v. Bloom, 14 L.R.A.(N.S.) 1188.

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Executor — deed — powers.

6. The executor of the will of a deceased person may prosecute a suit to set aside, for failure of consideration, a deed conveying away land he is authorized by the will to sell.

(Brannon, J., dissents.)

(April 27, 1909.)

APPEAL by defendant Bland Bailey from a decree of the Circuit Court for Lewis County in complainants' favor in a suit to cancel and set aside a deed to certain real estate, and for instructions respecting the duties of complainant White, as executor of William Bailey, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. **W. W. Brannon, A. B. Fleming,** and **R. F. Fleming** for appellant.

Mr. **John Bassel,** for appellees;

Failure of performance of the covenant for support and maintenance warrants cancelation of the deed.

Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730; McClure v. Cook, 39 W. Va. 579, 20 S. E. 612; Glocke v. Glocke, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118; Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156; Beckman v. Beckman, 86 Wis. 655, 57 N. W. 1117; Hartstein v. Hartstein, 74 Wis. 1, 41 N. W. 721; Bogie v. Bogie, 41 Wis. 209; Cooper v. Gum, 152 Ill. 471, 39 N. E. 267; Kusch v. Kusch, 143 Ill. 353, 32 N. E. 267.

Mr. **R. G. Linn,** also for appellees:

Laches will not avail defendant.

Coles v. Ballard, 78 Va. 139; Cranmer v. McSwords, 24 W. Va. 594; Evans v. Spurgin, 11 Gratt. 615; Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582; Tazewell v. Saunders, 13 Gratt. 354; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Pethtel v. McCullough, 49 W. Va. 520, 39 S. E. 199; Hale v. Hale, 62 W. Va. 609, 14 L.R.A.(N.S.) 221, 59 S. E. 1056.

Poffenbarger, J., delivered the opinion of the court:

Bland Bailey complains of a decree of the circuit court of Lewis county, canceling and setting aside a deed by which his father, William J. Bailey, had conveyed to him a tract of 208 acres of land, upon a bill filed for the purpose by the executor of the will of said William J. Bailey and Broaddus College, a beneficiary of a trust created by said will. The deed so set aside conveyed the land to the appellant, July 12, 1889, in consideration of $1 and a covenant, on the part of the grantee, "to remove to and occupy, use, and cultivate in a proper manner said tract of land, for the exclusive use and benefit of said Bland Bailey, and is to support and maintain at his exclusive costs and charge, the said William J. Bailey and his said wife during their joint lives and the life of the survivor of them, in sickness and in health, in a comfortable and careful manner in all respects, and on said land in the dwelling house of the said William J. Bailey, thereon, during the time to be occupied by the said William J. Bailey and wife with the said Bland Bailey and family." A lien for support and maintenance was expressly retained, and the following clause of re-entry inserted: "The right is reserved to said William J. Bailey to re-enter said land, and use and occupy the same during his life." The grantee, with his family, immediately moved into the dwelling house with the grantor, and remained there about nine months, when, becoming dissatisfied, he went away and never returned, leaving the grantor in possession. About two years after the execution of the deed, June 18, 1891, William J. Bailey, having no other land, and assuming he had become re-invested, by the breach of the covenant to maintain and support him, with the title, legal or equitable, to the land so conveyed, or a right to acquire the same, executed another deed, purporting to convey to certain trustees for Broaddus College, a corporation, an undivided half of the tract, and a will by which, after giving numerous legacies, he directed the executors therein named, Marcellus White and Perry (A. P.) White, to sell the residue of that and any other he might afterwards acquire and pay the legacies. Among the legacies there was one of $800 to Marcellus White and another of $400 to Perry White, given by the fourteenth and fifteenth items, respectively, subject to certain conditions, not material here. On the same day he executed a codicil, directing the payment of $3,000 out of his estate to Broaddus College, in the event the deed executed to the trustees for its benefit should fail to pass title to the land, and gave this legacy precedence over all others except the two above mentioned. By another codicil, made the same day, he reduced Marcellus White's legacy to $600. He retained the control and management of the land until his death, some time in the year 1903. The bill seeks instruction and guidance of the court respecting the duties of the executor in the premises, and a settlement of the estate.

Unless principles well settled, generally recognized, and often declared by this court are rendered inapplicable by the peculiar terms of the deed and the time and circumstances of the institution of the suit, the decree is manifestly right. This is frankly admitted. The principal contentions in the brief of counsel for the appellant are: (1) The provisions of the deed, reversing securi-

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ty for performance of the covenant, and prescribing a remedy for breach thereof, precluded resort to any other; (2) relief is barred by laches. The others are merely argumentative, collateral, and subsidiary in character.

The main reliance for reversal is the re-entry clause. As, by the deed, the grantor conveyed the fee-simple title, and then reserved a lien for support and a right to re-enter upon the land and "use and occupy the same during his life," it is said he was limited to these two methods of relief, since the parties contemplated possibility of failure and undertook to provide for it. In other words, it is contended that, by adding the words, "and use and occupy the same during his life," he limited the purpose of his re-entry and the scope and extent of his relief, in respect to title, to the recovery of a life estate. This view seems to rest upon the assumption of the existence of an ambiguity, calling for the application of a rule of construction requiring the terms of an ambiguous deed to be taken most strongly against the grantor. Resort is not had to this rule unless ambiguity or uncertainty remain after all others have been vainly appealed to in an effort to ascertain the meaning of the instrument. 2 Kent, Com. 556; 13 Cyc. Law & Proc. p. 609; Chitty, Contr. p. 137; Hammon, Contr. § 413. Nor will uncertainty or a doubt be unnecessarily introduced or raised. It must appear from the terms. When the terms are plain, and a reasonable function for all clauses or provisions contained in the instrument is clearly discernible, and no necessary friction, repugnancy, or inconsistency will result, and nothing in the purposes or objects contemplated requires any further effect to be given to any clause, the instrument should have effect according to the plain meaning of the terms used. All authority opposes construction, or the reading in of matter not expressed, when it is not rendered necessary in some way or for some reason. United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Jackson ex dem. Boyd v. Lewis, 17 Johns. 475; Waterford & W. Turnpike v. People, 9 Barb. 161; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743. These cases involved the interpretation of statutes, but the same rule applies in the interpretation of contracts. Chitty, Contr. 6, 113; Hammon, Contr. pp. 811–813, § 412; Devlin, Deeds, § 836.

What function could the re-entry clause have been intended to perform? Its object was to enable the grantor to regain possession in case of necessity. That it was not intended as a full, complete, and exclusive remedy, in case of failure, is made apparent by the retention of a lien reaching beyond the supposed life estate to the fee. Many contingencies might arise. The grantee might die, leaving only a widow and children, wholly incapable of managing the farm so as to sustain themselves and to render the support stipulated for, or he might become an invalid, in consequence of which failure could occur under peculiar circumstances and from unavoidable causes, such as might make it desirable to forego the equitable right of rescission, provided the grantor could take control himself or substitute some person capable of perfecting the object both parties had in view. A general re-entry clause would have made it necessary, under such conditions, to wholly terminate the estate of the grantee, or allow it to exist to the great disadvantage and embarrassment of the grantor. No right of re-entry at all would have made it still worse, as possession could not then have been rightfully regained until after a decree of rescission, perhaps delayed by protracted litigation. The clause of re-entry may also have been intended to supplement the lien for support, since any attempt to enforce that might have met with resistance, causing delay. Thus it appears to be wholly unnecessary to say this clause was intended to cut off the equitable right of rescission, in case of nonperformance of the covenant, in order to find an important function for it to perform. Moreover, there is no express waiver of the right of rescission, nor, indeed, any reference to that right by any word used in the deed. It does not deal with that subject at all. It relates solely to the right of possession, as a means of realizing support and maintenance from the land, treating it as that of the grantee, in case the grantor should desire to do so. It creates a right under the contract, not a right against it, widely different in nature. With what does this clause, so read, conflict? Plainly not with any express words of the deed. It is inconsistent with nothing except a mere unnecessary, and therefore fanciful, implication, or rather theory as to intent, not a necessary implication, for the clause may perform important and highly beneficial functions other than that of relinquishing right of rescission for adequate cause. If no purpose could be assigned to it other than that of barring right of rescission, an implication might be said to arise from necessity; presumption against intention to insert useless clauses being recognized and entertained by the courts.

One of the best and most potent indices of the intention of the parties to a deed or other contract is the purpose disclosed by it, considered as a whole in connection with its subject-matter and the situation and

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circumstances of the parties. The grantor, seised of a good farm, conceived the idea or purpose of conveying it in fee, in consideration of support and maintenance for himself and his wife. The grantee was a nephew, not a member of his immediate family. There are no words in the deed importing a gift. Tested by its terms, it conveys the land for a valuable consideration and nothing else. The consideration was entire, going to the whole estate conveyed. It is not to be presumed he intended the grantee to have either the fee-simple title or the remainder in fee, without rendering the consideration stipulated for. The construction contended for would have made the deed operate a gift pure and simple as to all except a life estate, and the grantee need never have performed his covenant. Thus, he would have obtained by far the most valuable part of the estate without rendering anything for it. This conflicts with the purpose disclosed by the terms of the deed. It purports a sale of the entire subject, not a gift as to any of it. It bound the grantee to remove to and occupy, use, and cultivate the land, and support and maintain the grantor and his wife on it in a comfortable and careful manner. Under this construction, he need not have done so. He could have compelled the grantor to earn his own living on the land as he had previously done, looking only to him for damages for breach of the covenant, and relying upon the right to sell what had been his own land as security. If unable to earn his living, and compelled to sell the land, he might then have been under the necessity of selling his own roof from over his head. Plainly no such results were ever contemplated by either party.

It is difficult to perceive any distinction between the effect of this clause and that of the clause reserving a lien for support and maintenance, upon the right of rescission. If one is exclusive of that right, why is not the other? The reservation of the lien contemplates possible failure of the grantee to render the support stipulated for, constituting the consideration. It affords a means of relief or remedy on the happening of such a contingency. Its incorporation in the deed shows that it was foreseen by the parties. What more can be said of any other clause giving a right to re-enter and hold the land during the lifetime of the grantor? We have two decisions setting aside deeds conveying land in consideration of a covenant for support, and containing clauses of forfeiture for failure of performance. Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266, and Fluharty v. Fluharty, 54 W. Va. 407, 46 S. E. 199. Equity never enforces a forfeiture, and did not do so in those cases. It rescinded the contracts, set them aside wholly, for failure of consideration. The argument used here would have denied equity jurisdiction there, and remitted the plaintiffs to actions at law for recovery of the possession under the forfeiture clauses. Those cases are express authority for the position that the insertion of a forfeiture clause does not preclude right of rescission on the theory of substitution, prescription of an exclusive remedy, or otherwise. These decisions say, in effect, that a mere surmise or conjecture as to intent will not be read into a deed. Necessity in some sense is a prerequisite. It is the ground upon which every implication arises.

The doctrine of laches cannot be invoked. The appellant was not in any sense prejudiced by the delay, and the intent of the grantor not to abandon his right of rescission is placed beyond possibility of doubt. He retained possession until the time of his death. Two years after the deed was made, he endeavored to dispose of the property to other parties by deed and will. Mere delay for a long period of time, standing alone, does no more than raise a presumption of intent to abandon the cause of action, if it be one of exclusive equity jurisdiction. Depue v. Miller (W. Va.) 64 S. E. 740; Hale v. Hale, 62 W. Va. 609, 14 L.R.A.(N.S.) 221, 59 S. E. 1056; Pusey v. Gardner, 21 W. Va. 469; Cranmer v. McSwords, 24 W. Va. 594; Kerr, Fraud & Mistake, 305; Pickering v. Stamford, 2 Ves. Jr. 583; Southern R. Co. v. Gregg, 101 Va. 308, 43 S. E. 570; Bell v. Wood, 94 Va. 677, 27 S. E. 504. Even long periods of delay do not bar, if the intent to abandon is negatived by conduct of the party showing the contrary. Berry v. Wiedman, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861; Roberts v. King, 10 Gratt. 184.

The only other question deemed worthy of consideration is whether any person other than the grantor can prosecute this right of rescission. If the plaintiff were a mere assignee of the cause of action, his right to sue would be gravely doubtful; but he is the representative of the estate to which it belongs, and sues as such. Hence, there is no shadow of maintenance and champerty, forbidding entry to courts of equity in so many cases reported in the books. Nor is the cause of action one that dies with the person. Fluharty v. Fluharty, cited; Booth v. Fuller, 35 App. Div. 117, 54 N. Y. Supp. 670; Kent v. Davis, 89 Ga. 151, 15 S. E. 457;

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Hensley v. Hensley, 17 Ky. L. Rep. 122, 30 S. W. 613.

Seeing no error in the decree, we affirm it, with costs and damages.

Brannon, J., dissenting:

I am decidedly averse to the decision in this case. I go upon the letter of the deed, the contract between the parties. The deed is an absolute grant of the fee. Its consideration, its vital purpose on the grantor's part, was support of himself and wife. To secure this, he chose his own remedies in case of the grantee's default to give such support. He chose two remedies: one, a lien, the other, a right to re-enter and hold for his life; in other words, reserved a life estate on the contingency of failure to support. His only object being support, he did not reserve right to re-enter absolutely and hold the fee, but only for his life, for that was all he asked. He did not desire to take back the fee, but only a life estate. He desired, in case of default, to choose one or the other remedy. He might not want the land, but money for support, and therefore he reserved a lien, which would hold the land liable in a court of equity for money support. On the other hand, he might prefer to hold the use of the land for life, and therefore he reserved a life estate. These remedies were regarded efficient, and as far as he went. He took no note of the fee after his death. Now, the decree takes back, not a life estate, but the fee. For what purpose? To support the grantor and wife? Not at all. They are dead. The grantors only reserved support. It cannot be rendered now, unless we can give bread to the dead. That was the grantor's sole purpose. It cannot be accomplished. The fee goes, not for Bailey's support, but to others. Were it not that the parties fixed their own remedies, I would not hold the opinion which I do hold. Bailey did not sue to enforce the lien. He did not sue to cancel in life. This court gives a remedy taking back the fee; whereas, the grantor stipulated that he could take back only a life estate. That would be sufficient for support, as he considered. I repeat that grantor Bailey inserted a clause of forfeiture for an estate for his life only, and the court gives him a clause of forfeiture forever. He reserved a life estate only, and he could not vest in Broaddus College a fee by a later deed. In Lowman v. Crawford, 99 Va. 688, 40 S. E. 17, was a deed in consideration of support, and the court held that equity would cancel it for default, giving as its reason that there was no clause of re-entry, indicating that, where there is such clause, that is the remedy, and that must govern.

As I have stated, the deed passed to Bland Bailey an absolute fee. There was left in William J. Bailey nothing but the right to re-enter to execute the condition. Failure to support was a condition of forfeiture. Could a grantee of Bailey take the right to enforce this forfeiture? In Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551, an act of Congress enacted that certain lands unsold after ten years should revert to the government if the railroad should not be then completed. The court said that such provision was "no more than a provision that the grant shall be void if a condition subsequent be not performed. In Sheppard's Touchstone, 125, it is said: 'If the words in the close or conclusion of a condition be thus, that the land shall return to the enfeoffor, etc., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffor shall *recipere* the land, these are, either of them, good words in a condition to give a re-entry,—as good as the word "re-enter,"—and by these words the estate will be made conditional.' . . . And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down." We find in Tiedeman on Real Property, § 207, this: "Conditions are reserved only to the grantor and his heirs. They cannot be reserved for the benefit of third persons. As a general rule, therefore, only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights if they should convey away the reversion in them. The right of entry is not an estate, not even a possibility of reverter; it is simply a chose in action. And although it has been held that an express condition can be devised with the reversion, and the devisee and his heirs enter for the breach, yet such a condition cannot be aliened or assigned, and does not pass with a grant of the reversion." Hooper v. Cummings, 45 Me. 359, holds: "At common law none but the grantor, his heirs and legal representatives, can take advantage of a breach of condition subsequent. When condition is annexed to a particular estate, and afterwards, by another deed, the reversion is granted by the maker of the condition, the condition is gone." In Nicoll v. New York & E. R. Co. 12 N. Y. 121, it is held that "right of entry is not a reversion

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or an estate in land, and it will not pass by assignment or by a conveyance of the premises held subject to the condition. Accordingly, where the grantor of premises on condition subsequent afterwards conveyed the same to a third person, and there was subsequently a breach, held, that the latter could not devest the title of the grantee on condition." In Den ex dem. Southard v. Central R. Co. 26 N. J. L. 21, we find it held that a contingent estate or a right for a condition broken was not devisable at common law, and the condition of a deed could only be taken advantage of by a party to it or privies in right and representation, as the heirs of natural persons or the successors of artificial persons. The opinion says: "It is a rule of the common law that none may take advantage of a condition in deed but parties and privies in right and representation, as the heirs of natural persons and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat, nor in deeds, as grantees of reversions, nor privies in estate, as he to whom the remainder is limited, shall take benefit of entry or re-entry by force of a condition. Shep. Touch. 149; Co. Litt. 214a; Lit. § 347; Doctor & Student, chap. 20, 161; Perkins, § 830; 4 Kent, Com. 127; 2 Cruise, Dig. chap. 2, § 49." In Avelyn v. Ward, 1 Ves. Sr. 422, it is held that, "if there is a devise to a stranger, not the heir at law, upon a condition subsequent, the devisee over cannot take advantage of the breach, for the benefit thereof is not devisable, but must go in privity to the heir at law of the grantor, who must enter for the breach, not the devisee." 2 Washb. Real Prop. 6th ed. § 954, says: "But of conditions in deed no one but he who creates the estate, or his heirs, as, for instance, the heirs of a devisor, or, in case of a devise of the contingent right, such devisee or his heirs, can take advantage by entering and defeating the estate. It is a right which cannot be aliened or assigned or passed by a grant of the reversion at common law." As to the right of the devisee to enforce a condition, the bulk of the common law is against it; and Tiedeman, Real Prop., in note to § 207, p. 279, says that that rule is local in Massachusetts. Why not? A grantee in a deed cannot enforce the condition, and a devisee takes, not by descent, but by purchase, and is a purchaser just as a grantee unless he is heir, and then he takes, not by devise, but by descent. Therefore the Broaddus College trustees could not enforce that condition, nor could Bailey's executors, for the will gave the executors a naked power, not coupled with title or interest, as the will only gave them power to sell.—23 L.R.A.(N.S.)

invested them with no estate. Having no right to enforce this condition, strangers to it, the trustees and executors cannot rescind in equity. Bailey did not grant the trustees right to sue for rescission, nor did his will grant it to his executors.

Some days after writing the above, I concluded to make further examination, and I have made it, with the result that I am more decided in my dissent than I was then, and I will supplement the above with some other authorities. I would recall to mind that William J. Bailey's deed to Bland Bailey passed from William J. Bailey a fee, every vestige or morsel of title, and vested the same in Bland Bailey forever, unless William J. Bailey had revested himself with title, and that could be done only by re-entry, or the enforcement of the lien and purchase of the land by William J. Bailey. No suit to enforce the lien was brought. No re-entry was made. Therefore, William J. Bailey had no estate in him when he made the deed to the trustees of Broaddus College or when he made his will. The books teem with the doctrine that, where title has passed with condition subsequent, defeating the estate for its breach by re-entry, there must be re-entry to revest the estate in the grantor. In 1854 the case of Nicoll v. New York & E. R. Co. 12 N. Y. 121, was fully considered, and it was held that, "a mere failure to perform such a condition does not devest the title. There must be an entry, or what is made equivalent thereto by the statute, by the grantor or his heirs, for a breach of the condition, to forfeit the estate. This right of entry is not a reversion or an estate in land, and it will not pass by assignment or by a conveyance of the premises held subject to the condition." In 1896 the New York court had this subject again under full consideration in Upington v. Corrigan, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359, and it reiterated this doctrine. It was there said that no action could be maintained by the assignee to recover the land, whether the breach was before or after the assignment; and no one but the grantor or his heirs could take advantage of the forfeiture. That re-entry is required to revest, I add the following authorities: Bowen v. Bowen, 18 Conn. 535; Board of Education v. First Baptist Church, 63 Ill. 204; Tallman v. Snow, 35 Me. 342; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75; Morris v. Hoyt, 11 Mich. 9; Adams v. Lindell, 72 Mo. 198; Rollins v. Riley, 44 N. H. 9; Vail v. Long Island R. Co. 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607; Phelps v. Chesson, 34 N. C. (12 Ired. L.) 194; Kibler v. Luther, 18 S. C. 606. Ohio Iron Co. v. Auburn Iron Co. 64 Minn. 404, 67 N. W. 221, holds that "the right of re-

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entry cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of which it is reserved. . . . The right of re-entry is not an estate or interest in land, nor does it imply the reservation of a reversion; and, when enforced, the grantor is in through the breach of the condition, and not by reverter." The Supreme Court of the United States, in Ruch v. Rock Island, 97 U. S. 693, 24 L. ed. 1101, citing a host of authorities, held that breach of a condition subsequent, not followed by limitation over to a third person, does not, *ipso facto*, work forfeiture. It only vests in the grantor or his heirs a right of action which cannot be transferred to a stranger, which they cannot, without actual entry, enforce by suit for the land. We find in 5 Ballard on Real Property, note to § 270, that right of re-entry for breach of condition subsequent "is a mere right in action, and not an interest in the land; that it is not assignable nor grantable; that it descends to the grantor's heirs but does not pass by a conveyance."

It may be suggested that these principles of common law everywhere held have been changed by § 5, chap. 71, Code 1899 (Code 1906, § 3024), providing that "any interest in or claim to real estate may be disposed of by deed or will." That statute cannot apply, because it requires some estate or actual interest for the foundation of a claim to come under that statute. It was suggested to the New York court in Nicoll v. New York & E. R. Co. and Upington v. Corrigan, supra, that its statutes of wills read, "Every estate and interest in real property descendible to heirs may be devised;" and another statute said that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession;" but the court said that these statutes did not change the common-law rule in this matter. The court said that the words "expectant estates" "'include every present right and interest, either vested or contingent, which may, by possibility, vest at a future day,' yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living." The court denied in those two cases that these New York statutes, though very broad, applied to such a case as this. If this statute could be held to change this organic principle of estates, held through the centuries, why did not that most reliable and eminent Virginia author, Prof. Minor, realize it when he laid down in 2 Minor's Institutes, 229, the following statement of the law: "The mere occurrence of the event which constitutes the condition does not, at common law, of itself, defeat the estate, supposing it to be a freehold, because, as a freehold can at common law only be created by the notoriety of livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor or his heirs, supposing the grant to be a private one." Our statute (Code 1899, chap. 93, § 1 [Code 1906, § 3394]), giving the grantee of any land let to lease or the reversion the same right against the lessee by action for entry upon any covenant or promise of the lease, has no application. That is between landlord and tenant. There is no lease here. There is no reversion. Nor does § 16 have anything to do with this case. It recognizes, as common law, the rule above stated, requiring actual re-entry, and changes that by dispensing with re-entry, but only by an action of ejectment. It gives no chancery jurisdiction.

But do the principles laid down show that a suit in equity for cancelation of the deed from Bailey to Bailey cannot be maintained? They do, because they show that William J. Bailey had no estate or present interest in the land. It had all gone out of him, and he could not, therefore, pass any interest or estate to the trustees of Broaddus College or to his executors. Section 16, chap. 93 (Code 1906, § 3409), will not help them to maintain ejectment, because, to do so, they must have "the right of re-entry," and we have seen that that is not conveyable or assignable; and the trustees and executors did not have a right of re-entry so as to maintain ejectment under § 16. This section does not give—create—right or title. It only gives ejectment to one who already has right on which to enter. It would give Bailey action, without entry, but not his grantees. William J. Bailey did not confer upon them by word or otherwise right to sue for cancelation. Now, I ask, how can a suit for cancelation, or any other legal proceeding, rest upon nothing,—no title, no right? How can the plaintiffs maintain any suit whatever, having no right recognized in law? How can a suit stand upon a nonentity?

I have above discussed the case on the theory that the grantor, Bailey, made no entry under the forfeiture clause, but that theory does not likely apply. He made what in law is re-entry. He was on the land when grantee Bailey left it. The latter yielded the possession to grantor Bailey. It was matter of agreement between them. The grantee Bailey agreed to and thus waived formal re-entry. The grantor

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Bailey remained in possession, and assumed authority over the land,—leased it, had it cropped. Even if grantee Bailey had not consented, grantor Bailey, being in sole possession when grantee Bailey quit possession, this, in law, was the equivalent of formal re-entry. Being in possession already, he could not enter upon himself. We cited authority in Guffy v. Hukill, 34 W. Va. 56, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754, for the proposition that "no man can enter upon himself." 2 Washburn on Real Prop. 6th ed. § 957, says: "If the grantor is himself in possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed, after the breach, to hold for the purpose of enforcing a forfeiture, unless he waive the breach." Therefore, we must treat William J. Bailey as having himself re-entered for breach of condition, and thus reinvested himself with an estate. But what estate was he invested with by such entry? With a life estate by the letter of the deed, not with a fee. Having exercised this right of re-entry, he used the remedy given by the deed. He did this himself, and he could not have that remedy and also rescission in equity. Having himself used this remedy, that was the extent of his remedy under the letter of the deed, and he could not convey any other remedy, by rescission or otherwise, to Broaddus College or others. The only estate he had by such entry was a life estate, and he could confer no greater. "The right to re-enter . . . means the recovery of possession in one way only." Michaels v. Fishel, 169 N. Y. 381, 62 N. E. 425. There it is said that, when parties have used the word "re-enter," it is presumed they used it in the common-law sense. Note 7, 24 Am. & Eng. Enc. Law, p. 216. It was held in that case that the statute remedy by summary proceedings could not be resorted to. I here repeat that, under the cases of Lowman v. Crawford, 99 Va. 688, 40 S. E. 17, and Guffy v. Hukill, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754, where a deed has a clause of re-entry, that is the remedy, and there is not the superadded remedy of rescission, especially where the re-entry is, by deed, only for a life estate. The decision gives a fee; whereas, re-entry, by the letter of the deed, gives only a life estate.

Thus, whether we say that Bailey did not re-enter, or did re-enter, we reach the same conclusion; that is, that the plaintiffs have no right to maintain their suit.

Petition for rehearing denied June 9, 1909.

23 L.R.A. (N.S.)

DISTRICT OF COLUMBIA COURT OF APPEALS.

OLAN G. ROOTE, Appt.,
v.
CHARLOTTE E. ROOTE.

(33 App. D. C. 398.)

Divorce — estoppel — premarital intercourse.

That a man had illicit sexual relations with his wife before marriage, and married her while she was an inmate of a house of prostitution, does not destroy his right to a divorce for her refusal to leave such house, and continued acts of adultery.

(June 1, 1909.)

APPEAL by complainant from a decree of the Supreme Court for the District of Columbia dismissing the bill in a suit for divorce. Reversed.

The facts are stated in the opinion.

Mr. William J. Neale for appellant.

No appearance for appellee.

Van Orsdel, J., delivered the opinion of the court:

This is an action for divorce, brought in the supreme court of the District of Columbia by appellant, Olan G. Roote, complainant below, against his wife, Charlotte E. Roote, alias Lottie E. Roote, alias Alice Williams, defendant. From a decree of the court dismissing the bill, the case comes here on appeal.

It appears that complainant and defendant were married in the city of Washington on April 30, 1907. Defendant, prior to her marriage, had been an inmate of a house of prostitution in this city. Complainant had been in the habit of visiting her at this

Case Note. — Effect of complainant's knowledge of spouse's antenuptial unchastity as a bar to divorce for subsequent adultery.

In Baylis v. Baylis, L. R. 1 Prob. & Div. 395, it appeared that petitioner had married a woman of loose character, with whom he had lived for several months previously. Soon after the marriage, she was detected in adultery. The court said: "It has been sometimes supposed that, if a man chooses to marry an immodest woman, he cannot afterwards free himself from her by reason of her unchastity. But there is no such law. Whatever the previous life of a woman may have been, she binds herself by marriage to chastity, and, if she break the conditions of marriage, her husband is entitled to claim its dissolution."

The only other case found upon this question is that of Levy v. Levy, 16 Ill. App. 358, which is cited and sufficiently set out in ROOTE v. ROOTE.

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place, and was fully cognizant of the kind of life she was living. The following statement of the testimony of complainant and defendant is inserted as it appears in the record: "The plaintiff, Olan G. Roote, in response to questions by the court, stated: That, at the time of his marriage to the defendant, on April 30th, 1907, he 'must have been drunk;' that after the marriage ceremony, which was performed about 4 o'clock P. M., he and his wife proceeded to a hotel on the north side of Pennsylvania avenue, N. W., in Washington city, where he engaged a room for himself and wife; that they stayed at the hotel for several days, and that he paid for his own and his wife's board and lodging there; that, on the Sunday following, he left Washington for Pittsburgh, Pennsylvania, where he hoped to obtain employment, and left his wife at the said hotel, and gave her money with which to support herself until he could become permanently settled, he having already paid to the hotel his wife's board in advance; that he stayed in Pittsburgh about a week, and failed to obtain employment, and then went to Baltimore, Maryland; stopped at the latter place for a few days; that, when he returned to the hotel where he had left his wife, he found that she had left, and located her in a house of prostitution on C street, N. W., Washington, District of Columbia; about four months after the marriage he rented two rooms on East Capitol street, and sent a carriage to the house of prostitution where his wife then was living, to bring her to his home, and that, when the carriage arrived, she sent him word that she had changed her mind and would not live with him; and ever since that time the defendant has not lived with the witness; the plaintiff further testified that, prior to his marriage to her, he had met her in Washington and Baltimore on different occasions, but could not remember at what places they had met; upon being further interrogated by the court, he stated that he did not know the name of the hotel on Pennsylvania avenue; that he did not know which side of the street it was on; that he did not know who kept it; that he did not know what streets it was between; that he did not know how many days he had stayed there; that he could not state how much he had paid the hotel for his own and his wife's board while there; that he did not know how much money he gave her to support herself with when he left; that he did not know how much he paid to the hotel for his wife's board in advance; that he did not know for how far in advance he paid the board, and that he could give no idea as to any of these amounts. That his wife had been an inmate of a house of prostitution before he married her; was at the time of the marriage; and that they went together from the house of prostitution to the minister's to be married. The aforegoing being the substance of all the testimony given by the plaintiff in open court. The defendant, Charlotte E. Roote, in response to questions by the court, made the following statements: That she had known the plaintiff for about two years prior to their marriage; that, for a long period of time before their marriage, she was a resident of a house of prostitution; that the plaintiff visited her at said house on various occasions, had sexual intercourse with her, knew the nature of her life, both prior to and at the time of their marriage; that, at the time of their marriage, she was living at a house of prostitution located at No. 1440 C street, N. W., Washington, District of Columbia, from which house she went with plaintiff to be married, and which was known to the plaintiff at the time; that they were married about 4 o'clock in the afternoon at the residence of the officiating clergyman on D street, N. W., near Third street, in Washington, District of Columbia; that they went from there to a saloon near Tenth and E streets, where they procured a drink, and later in the evening they proceeded to the house of prostitution from which she was married, and stayed there for two days together, when the plaintiff left her; that, prior to their marriage, plaintiff said that after they were married she would have to stay in the house of prostitution until he got the money to take her out; that they never did stop at a hotel on Pennsylvania avenue or anywhere else at any time; that her husband never went to Pittsburgh, and did not give her any money when he left her; that she was not at any time living with her sister in Baltimore; that, some weeks after leaving the defendant, the plaintiff called to see her, and requested her to leave the house of prostitution, and come and live with him, but she refused; that, about four months after the marriage, her husband again called to see her, and asked her to leave this house and come with him to live, which she agreed to do, provided he would pay the woman with whom she was living the sum of $15 for board which she then owed; that the plaintiff agreed to do, and gave her the money to pay the bill; that, later, during the same day, he telephoned to her that he had secured rooms on East Capitol street, and would send a carriage for her in the evening to bring her

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Bailey remained in possession, and assumed authority over the land,—leased it, had it cropped. Even if grantee Bailey had not consented, grantor Bailey, being in sole possession when grantee Bailey quit possession, this, in law, was the equivalent of formal re-entry. Being in possession already, he could not enter upon himself. We cited authority in Guffy v. Hukill, 34 W. Va. 56, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754, for the proposition that "no man can enter upon himself." 2 Washburn on Real Prop. 6th ed. § 957, says: "If the grantor is himself in possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed, after the breach, to hold for the purpose of enforcing a forfeiture, unless he waive the breach." Therefore, we must treat William J. Bailey as having himself re-entered for breach of condition, and thus reinvested himself with an estate. But what estate was he invested with by such entry? With a life estate by the letter of the deed, not with a fee. Having exercised this right of re-entry, he used the remedy given by the deed. He did this himself, and he could not have that remedy and also rescission in equity. Having himself used this remedy, that was the extent of his remedy under the letter of the deed, and he could not convey any other remedy, by rescission or otherwise, to Broaddus College or others. The only estate he had by such entry was a life estate, and he could confer no greater. "The right to re-enter . . . means the recovery of possession in one way only." Michaels v. Fishel, 169 N. Y. 381, 62 N. E. 425. There it is said that, when parties have used the word "re-enter," it is presumed they used it in the common-law sense. Note 7, 24 Am. & Eng. Enc. Law, p. 216. It was held in that case that the statute remedy by summary proceedings could not be resorted to. I here repeat that, under the cases of Lowman v. Crawford, 99 Va. 688, 40 S. E. 17, and Guffy v. Hukill, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754, where a deed has a clause of re-entry, that is the remedy, and there is not the superadded remedy of rescission, especially where the re-entry is, by deed, only for a life estate. The decision gives a fee; whereas, re-entry, by the letter of the deed, gives only a life estate.

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Divorce — estoppel — premarital intercourse.

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W., in Washington city, where he engaged a room for himself and wife; that they stayed at the hotel for several days, and that he paid for his own and his wife's board and lodging there; that, on the Sunday following, he left Washington for Pittsburgh, Pennsylvania, where he hoped to obtain employment, and left his wife at the said hotel, and gave her money with which to support herself until he could become permanently settled, he having already paid to the hotel his wife's board in advance; that he stayed in Pittsburgh about a week, and failed to obtain employment, and then went to Baltimore, Maryland; stopped at the latter place for a few days; that, when he returned to the hotel where he had left his wife, he found that she had left, and located her in a house of prostitution on C street, N. W., Washington, District of Columbia; about four months after the marriage he rented two rooms on East Capitol street, and sent a carriage to the house of prostitution where his wife then was living, to bring her to his home, and that, when the carriage arrived, she sent him word that she had changed her mind and would not live with him; and ever since that time the defendant has not lived with the witness; the plaintiff further testified that, prior to his marriage to her, he had met her in Washington and Baltimore on different occasions, but could not remember at what places they had met; upon being further interrogated by the court, he stated that he did not know the name of the hotel on Pennsylvania avenue; that he did not know which side of the street it was on; that he did not know who kept it; that he did not know what streets it was between; that he did not know how many days he had stayed there; that he could not state how much he had paid the hotel for his own and his wife's board while there; that he did not know how much money he gave her to support herself with when he left; that he did not know how much he paid to the hotel for his wife's board in advance; that he did not know for how far in advance he paid the board, and that he could give no idea as to any of these amounts. That his wife had been an inmate of a house of prostitution before he married her; was at the time of the marriage; and that they went together from the house of prostitution to the minister's to be married. The aforegoing being the substance of all the testimony given by the plaintiff in open court. The defendant, Charlotte E. Roote, in response to questions by the court, made the following statements: That she had known the plaintiff for about two years prior to their marriage; that, for a long period of time before their marriage, she was a resident of a house of prostitution; that the plaintiff visited her at said house on various occasions, had sexual intercourse with her, knew the nature of her life, both prior to and at the time of their marriage; that, at the time of their marriage, she was living at a house of prostitution located at No. 1440 C street, N. W., Washington, District of Columbia, from which house she went with plaintiff to be married, and which was known to the plaintiff at the time; that they were married about 4 o'clock in the afternoon at the residence of the officiating clergyman on D street, N. W., near Third street, in Washington, District of Columbia; that they went from there to a saloon near Tenth and E streets, where they procured a drink, and later in the evening they proceeded to the house of prostitution from which she was married, and stayed there for two days together, when the plaintiff left her; that, prior to their marriage, plaintiff said that after they were married she would have to stay in the house of prostitution until he got the money to take her out; that they never did stop at a hotel on Pennsylvania avenue or anywhere else at any time; that her husband never went to Pittsburgh, and did not give her any money when he left her; that she was not at any time living with her sister in Baltimore; that, some weeks after leaving the defendant, the plaintiff called to see her, and requested her to leave the house of prostitution, and come and live with him, but she refused; that, about four months after the marriage, her husband again called to see her, and asked her to leave this house and come with him to live, which she agreed to do, provided he would pay the woman with whom she was living the sum of $15 for board which she then owed; that the plaintiff agreed to do, and gave her the money to pay the bill; that, later, during the same day, he telephoned to her that he had secured rooms on East Capitol street, and would send a carriage for her in the evening to bring her

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away; that some time late in the evening the carriage arrived; but she changed her mind and refused to go to her husband, and sent him word to that effect; that she was informed a few hours later that her husband and his brother were at the house to see her, but she declined to see them."

We think, in view of other undisputed testimony appearing in the record, that it is not important what the relations of complainant and defendant were, before and after their marriage, up to the time they separated. According to defendant's own testimony, complainant, after leaving her, came back and requested her to leave the house of prostitution and live with him. This she agreed to do, if he would pay the woman she was living with a bill of $15. Complainant gave her money to pay the bill, rented rooms in a respectable part of the city, and sent for her; but, disregarding her promise, she refused to leave the place and live with him. Numerous acts of adultery committed by defendant subsequent to this time are proven beyond any doubt; and the record fails to disclose any similar act by complainant, or any act of his tending to connive at or condone the acts of defendant. True, the complainant took steps through the agency of another man, to secure proof of defendant's adulterous acts. He took a man to the house and pointed out his wife to him. The friend then acted as a detective. It was through the evidence of this friend that the co-respondent Mason was shown to have been closeted in a room with the defendant in the house where she was staying. The keeper of the house of prostitution corroborated the testimony of this witness to the extent that, during the time defendant was staying at her house, she habitually cohabited with men. The keeper of the house also testified that complainant visited defendant at one time when an altercation arose between them, and complainant struck defendant. Defendant afterwards told the witness that complainant wanted her to sign a paper, and also asked her to permit another man to commit adultery with her, so that he might get a divorce. This evidence, of doubtful materiality in the determination of the case here presented, purported to be nothing more than hearsay evidence; and, on the trial, defendant made no reference in her testimony to such an occurrence. We feel justified in dismissing it from further consideration.

The case may be determined upon the evidence of the defendant alone, except as to the proof of her adulterous acts, which, from the nature of the place of her habitation, might almost be presumed. These acts, however, as before stated, we consider fully established by the testimony of disinterested witnesses. With this fact established, the case may be disposed of solely upon the evidence of the defendant. Notwithstanding the unlawful conduct of complainant and defendant before their marriage, and their reprehensible conduct in living together for a short time in the house which had been the scene of their former shame and disgrace, the law always extends to the transgressor the offer of reform, and encourages any act that bears the semblance of repentance. We think, therefore, that the status of the parties in this court must be considered from the day complainant took steps to induce defendant to leave the house of prostitution, forsake her life of shame, and live with him as his lawful wife.

In the case of Levy v. Levy, 16 Ill. App. 358, a case in which the facts were similar to the case at bar, the court held that where a man knowingly marries a prostitute whom he had seduced before marriage, upon her promise of reformation, and she commits adultery after marriage, he is entitled to a divorce. It was also held that the rule would be the same whether there was an express promise of reformation, or the promise had to be inferred from the vows made at the marriage altar.

The complainant discharged his full obligation when he took steps to provide a respectable place of abode where he and the defendant might live together as husband and wife. Had she accepted, the complainant would be charged with having condoned her past offenses; but she refused and continued her adulterous life. This furnishes the complainant a complete cause of action for divorce. So far as the record discloses, complainant has been guilty of no offense since he offered to live with defendant and condone the past that will prevent him from maintaining this action. He is here with clean hands. The rule that, when a litigant comes into a court of equity, he must come with clean hands, refers only to the matter to be litigated, and no other. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187. The matter here to be litigated is the right of complainant to a divorce, by reason of defendant's refusal to join him when afforded an opportunity, and her subsequent adulterous acts. There is nothing shown in the conduct of complainant during this period to estop him from maintaining this action.

The judgment is reversed with costs, and the cause remanded for further proceedings in accordance with the views herein expressed.

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KANSAS SUPREME COURT.

CITY OF WICHITA
v.
GEORGE A. MURPHY, Appt.

(78 Kan. 859, 99 Pac. 272.)

Intoxicating liquors — illegal sale — ordinance — validity.

1. A city ordinance for the suppression of the sale of intoxicating liquors, enacted in pursuance of the authority conferred by § 2499, Gen. Stat. 1901, which provides that offenders under such ordinance shall be committed to the city jail, is not void because of such provision.

Same — conviction — repeal of ordinance — effect.

2. Where a defendant is convicted of selling intoxicating liquors in violation of the provisions of a valid city ordinance, and has been duly sentenced therefor, the subsequent repeal of such ordinance does not relieve him from such sentence.

(November 7, 1908.)

Headnotes by GRAVES, J.

APPEAL by defendant from a judgment of the District Court for Sedgwick County convicting him of the unlawful sale of intoxicating liquors. Affirmed.

Statement by **Graves, J.**:

The appellant was convicted, in the police court of the city of Wichita, of the unlawful sale of intoxicating liquors, and of maintaining a nuisance by keeping a place where intoxicating liquors were kept for sale, in violation of the ordinance of such city. As a part of the judgment against the appellant, he was committed to the city jail for thirty days, and adjudged to pay a fine of $100 on each count, and to be committed until the fine and costs of the action be paid. An appeal was taken to the district court September 19, 1907, where, on January 2, 1908, he was again convicted, and sentenced the same as in the police court. He was given ninety days in which to prepare and file a bill of exceptions in the supreme court. Pending the preparation of proceedings for an appeal, bond was given, and execution was stayed until final decision of the su-

Case Note. — Effect of repeal, without saving clause, of penal statute or ordinance upon prior conviction under it.

This note is confined to the effect of the repeal of a criminal or penal statute or municipal ordinance after a conviction or the recovery of a penalty thereunder, in the absence of a saving clause; and excludes the question of the effect of such repeal upon existing rights of action, or upon pending prosecutions which have not resulted in a verdict or judgment; or where there is a saving clause as to offenses or pending prosecutions under the repealed act.

As to the effect of the repeal, for repugnancy, of a criminal statute, upon prior offenses, see the case note to State v. Perkins, 9 L.R.A.(N.S.) 165.

Penal statutes.

It has been said that the repeal of a statute subsequent to conviction, pending an appeal to a superior court, operates as a pardon for the offense created by the act. Wharton v. State, 5 Coldw. 1, 94 Am. Dec. 214; State v. King, 12 La. Ann. 593; State v. Henderson, 13 La. Ann. 489; State v. O'Conner, 13 La. Ann. 486.

The repeal without a saving clause of a statute creating an offense, after conviction and sentence, and during the pendency of an appeal to a higher court, operates as a discharge of the accused person. Aaron v. State, 40 Ala. 307; Higginbotham v. State, 19 Fla. 557; State v. King, supra; State v. Johnson, 12 La. 548; State v. O'Conner and State v. Henderson, supra; Tuton v. State, 4 Tex. App. 472; Sheppard v. State, 1 Tex. App. 523, 28 Am. Rep. 422; Hubbard v. State, 2 Tex. App. 506; Kenyon v. State, 31 Tex. Crim. Rep. 13, 23 S. W. 191; State v. Allen, 14 Wash. 103, 44 Pac. 121; Mahoney v. State, 5 Wyo. 520, 63 Am. St. Rep. 64, 42 Pac. 13.

And this doctrine has been applied where the repeal of the statute occurred after conviction, and before sentence, but during the pendency of an appeal. Mullinix v. State, 43 Ind. 511; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Smith v. State, 45 Md. 49; Com. v. Kimball, 21 Pick. 373; State v. Williams, 97 N. C. 455, 2 S. E. 55; State v. Nutt, 61 N. C. (Bhill. L.) 20; State v. Perkins, 141 N. C. 797, 9 L.R.A.(N.S.) 165, 53 S. E. 735; Abbott v. Com. 8 Watts, 517, 34 Am. Dec. 492; Genkinger v. Com. 32 Pa. 99.

This doctrine is recognized in Re Kline, 70 Ohio St. 25, 70 N. E. 511, 1 A. & E. Ann. Cas. 219.

The basis for the doctrine of these cases is that an appeal supersedes the judgment of the lower court, which does not become final until affirmed by the appellate court, and the power to enforce the judgment falls with the repeal of the statute.

So, where, after a conviction for a violation of the local option law, and pending an appeal therefrom, by a vote of the electors such law is repealed as to a county, the prosecution will be dismissed, as there is no longer any law in force under which the judgment may be enforced. Mulkey v. State, 16 Tex. App. 53; Freese v. State, 14 Tex. App. 31; Prather v. State, 14 Tex. App. 453; Fitze v. State, 13 Tex. App. 372; Pinckard v. State, 13 Tex. App. 373; Monroe v. State, 8 Tex. App. 343.

Where a conviction was affirmed by the appellate court, and it afterward appeared that the statute under which the conviction was obtained was repealed during the

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preme court. The appeal was duly perfected, and the case filed here for review. On October 7th a plea in bar was filed in this court, asking that the case be dismissed for the reason that the ordinance under which the conviction was had was repealed by the mayor and council of the city of Wichita June 15, 1908, without any saving clause. This plea is supported by a certified copy of the repealing ordinance.

Messrs. **J. A. Brubacher** and **James Conly**, for appellant:

The court is bound to take judicial notice of the repeal of the ordinance, and should dismiss the proceeding.

Naylor v. Galesburg, 56 Ill. 285; Kansas City v. Clark, 68 Mo. 588; Barton v. Gadsden, 79 Ala. 495; 1 Beach, Pub. Corp. 526; 17 Am. & Eng. Enc. Law, p. 245; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Schoepflin v. Calkins, 5 Misc. 159, 25 N. Y. Supp. 696; Denning v. Yount, 62 Kan. 217, 50 L.R.A. 103, 61 Pac. 803; Maryland use of Washington County v. Baltimore & O. R. Co. 3 How. 553, 11 L. ed. 722; Speckert v. Louisville, 78 Ky. 287; Tuton v. State, 4 Tex. App. 472; Monroe v. State, 8 Tex. App. 343; Spears v. Modoc County, 101 Cal. 303, 35 Pac. 869.

Mr. **Fred B. Stanley**, for appellee:

Superior courts do not take judicial notice of city ordinances.

12 Am. & Eng. Enc. Law, p. 168; 16 Cyc. Law & Proc. p. 898; Case v. Mobile, 30 Ala. 538; Garvin v. Wells, 8 Iowa, 286; Cox v.

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pendency of the appeal, a judgment of reversal will be entered. Keller v. State, supra.

It was held, in Aaron v. State, 40 Ala. 307, where a conviction had been affirmed by the supreme court, but the death sentence was not executed upon the day fixed therefor, and the accused was again brought before the court, that the repeal of the act under which he was convicted subsequent to the day first set for his execution was a "legal reason" within a statute permitting the court "to inquire into the circumstances of the case, to see whether or not any legal reason existed why he should not be again sentenced to death," entitling him to be discharged.

And a saving clause in the repealing act, providing that it should not affect any pending prosecution, being of a penal nature, and requiring a strict construction, does not apply to such a case, as it is not a "pending" proceeding. Ibid.

Where, pending an appeal, and after the expiration of the time set for execution in a capital case, the law under which one was convicted was repealed, and a new act adopted which fixed the penalty for murder at imprisonment at hard labor for one year, after which the death penalty was to be inflicted when designated by the governor, it was held, in Hartung v. People, 22 N. Y. 95, to be void as to the case at bar, as an *ex post facto* law, by imposing a double punishment greater than that existing when the accused committed the crime of murder. However, the court, not being judicially able to see that, upon a new trial, the accused might not be convicted of manslaughter in some inferior degree, a new trial was ordered, notwithstanding it was held that there was no error on the first trial.

In discussing the extent to which changes of punishment might be applied to prior convictions, the court, in the last case, said: "It would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offenses; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection."

And where a conviction in a capital case was reversed and a new trial ordered, and, in the interim before the new trial was had, the penalty for the offense was reduced to imprisonment, in the absence of a saving clause, the reversal operated as a pardon of the prior offense, and the prisoner must be discharged. Wharton v. State, 5 Coldw. 1, 94 Am. Dec. 214.

But it was held, in State v. Addington, 2 Bail. L. 516, 23 Am. Dec. 150, where a capital sentence has been commuted by a conditional pardon, which the accused does not comply with, that the original judgment is in full force, and the court may fix a time for execution, notwithstanding the fact that, after the pardon, the statute under which he was convicted has been repealed, and a lesser punishment imposed for his offense, as the judgment, having been pronounced, becomes final, and the power of the court is at an end.

So, where a conviction has become final by sentence, and no appeal is pending, it is not affected by the subsequent repeal of the statute under which the conviction occurred. Re Kline, supra. The court said, not only is the case *res judicata*, and beyond the reach of the court, but it is in process of execution as a final judgment; and the only remedy left to the adjudged criminal, if the case calls for any remedy, is a resort to the pardoning power.

This doctrine is recognized in State v. Johnson, 12 La. 548, and People v. Hobson, infra.

And where, after one charged with the violation of a statute has pleaded *nolo contendere*, it is repealed, he may not be adjudged guilty and sentenced to pay a fine. Heald v. State, 36 Me. 62.

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St. Louis, 11 Mo. 431; Mooney v. Kennett, 19 Mo. 551, 61 Am. Dec. 576; Wilson v. State, 16 Tex. App. 497; Chicago West. Div. R. Co. v. Klauber, 9 Ill. App. 613; Austin v. Walton, 68 Tex. 507, 5 S. W. 70; Keane v. Klausman, 21 Mo. App. 485; Shanfelter v. Baltimore, 80 Md. 483, 27 L.R.A. 648, 31 Atl. 439; St. Louis v. Liessing, 190 Mo. 464, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 A. & E. Ann. Cas. 112; McPherson v. Nichols, 48 Kan. 430, 29 Pac. 679.

Graves, J., delivered the opinion of the court:

Numerous assignments of error have been presented, but in argument only one has been seriously discussed. It is insisted that the ordinance under which the appellant was prosecuted is void. The argument is based upon the rule announced by this court in the case of Re Van Tuyl, 71 Kan. 659, 81 Pac. 181. In that case it was held by this court that the purpose of the statute authorizing cities to enact ordinances for the suppression of the sale of intoxicating liquors as a beverage, containing substantially the same provisions as the statute enacted for that purpose, was to enlarge the facilities for maintaining the general policy of the state upon that subject, and cities, in the exercise of the power conferred by this statute, must fully comply with its provisions; and an ordinance enacted under this statute, which provided for a less punishment for the offense of selling liquor than

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Where one is convicted of a common-law offense, and, pending an appeal, a statute is passed covering the same subject, which supersedes the common-law action, it does not operate as a discharge from liability under the common-law judgment. Beard v. State, 74 Md. 130, 21 Atl. 700. It was said that there was no express repeal of the common-law penalty, and therefore the effect is different from the repeal of a statute creating an offense, which, of necessity, is obliterated by its repeal, and that that class of cases rests on an entirely different principle from the one applicable here.

But, where one has been convicted of a common-law offense, and judgment has not been pronounced prior to the adoption of an act prohibiting the prosecution by indictment therefor, the act puts an end to the prosecution. Com. v. Duane, 1 Binn. 601, 2 Am. Dec. 497.

Where a conviction in justices' court is reviewed on certiorari, the effect is simply to suspend the judgment of such court, and not to give a trial *de novo*, as, on affirmance, the order is that the justice's judgment shall be executed; therefore, the repeal of the statute under which conviction was obtained, during the pendency of such writ, does not put an end to the proceeding, and, upon affirmance, the judgment may be executed. People v. Hobson, 48 Mich. 27, 11 N. W. 771.

Statute permitting recovery of pecuniary penalty.

The repeal of a statute of a penal character, imposing a penalty enforceable in a civil action by the state, pending an appeal, terminates the right to recover the penalty. Pensacola & A. R. Co. v. State, 45 Fla. 86, 110 Am. St. Rep. 67, 33 So. 985; State v. Tombeckbee Bank, 1 Stew. (Ala.) 347; Smith v. State, 45 Md. 49; State v. Stone, 43 Wis. 481.

In an admiralty case, the condemnation of a vessel is not effected until final sentence of the appellate court is pronounced, the case being heard *de novo*; and therefore, the repeal of the law pending the determination of the appeal terminates the proceeding. Yeaton v. United States, 5 Cranch, 281, 3 L. ed. 101; The Rachel v. United States, 6 Cranch, 329, 3 L. ed. 239.

The repeal of a statute imposing a penalty for the benefit of an individual, pending an appeal, destroys all right to the penalty. Taylor v. Rushing, 2 Stew. (Ala.) 161; Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821; Denver & R. G. Co. v. Crawford, 11 Colo. 598, 19 Pac. 673; Union P. R. Co. v. Proctor, 12 Colo. 194, 20 Pac. 615; Eaton v. Graham, 11 Ill. 619; Speckert v. Louisville, infra; Mouras v. The A. C. Brewer, 17 La. Ann. 82; Lewis v. Foster, 1 N. H. 61; Cushman v. Hale, 68 Vt. 444, 35 Atl. 382; Palmer v. Conly, 4 Denio, 377. *Contra*, Dunham v. Anders, 128 N. C. 207, 83 Am. St. Rep. 668, 38 S. E. 832.

Where a statute, after a nonsuit which entitled the successful party to a penalty under it, was repealed before entry and signing of the judgment, his right to the penalty was thereby destroyed. Charrington v. Meatheringham, 2 Mees. & W. 228.

Where the statute imposing a penalty is repealed pending a motion for a new trial, the effect is to avoid the judgment and all proceedings thereunder. Ball v. Tolman, 135 Cal. 375, 87 Am. St. Rep. 110, 67 Pac. 339; Western U. Teleg. Co. v. Smith, 96 Ga. 569, 23 S. E. 899.

No vested right is acquired by a judgment for a penalty that cannot be devested by the repeal of the statute upon which the recovery is based. Denver & R. G. R. Co. v. Crawford; Union P. R. Co. v. Proctor; and Western U. Teleg. Co. v. Smith,—supra.

A statute imposing a penalty to be enforced by a civil action is not within a statute providing that the repeal of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal. Pensacola & A. R. Co. v. State, supra.

Municipal ordinances.

The repeal of a municipal ordinance pending an appeal from a conviction thereunder in an inferior court abates the proceeding. Barton v. Gadsden, 79 Ala. 495; Spears v. Modoc County, 101 Cal. 303, 35 Pac. 869;

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was prescribed by the statute, was void. It was further said that a part of the object of this statute was to have the law of each municipality in the state uniform with the provisions of the statute, so that offenders would be dealt with alike throughout the state. It is urged that, according to this view, a want of uniformity in the punishment prescribed for violators of the law, because of dissimilarity in the condition of jails, would as effectively destroy the uniform operation of the law as an express difference in the punishment prescribed by ordinance. The ordinance in question, enacted in pursuance of this statute, provides for imprisonment in the city jail of Wichita. It is insisted that city jails are not uniform in quality throughout the state. Some may be reasonably comfortable, while others are so exposed to the weather or other uncomfortable and unhealthy conditions as to imperil the lives of those confined therein; that this wide difference in the character of city prisons would make the punishment very unequal if all offenders were to be committed to the city prison, and therefore any ordinance is void which so provides. The logic of this argument seems to go to the extent that incarceration in a clean, comfortable city jail would be less repressive upon offenders than in one which might be offensive and unhealthy, and would amount to a milder degree of punishment in one place than another. We do not concur in this view. The statute, by not prescribing whether the imprisonment imposed shall be in the jail of the county or in the city prison, has left the question open for the determination of the city. It is impossible to make all prisons uniform in character, or equally comfortable; any of them are bad enough. If a city has a suitable jail, this is sufficient. If not, it can arrange for the use of the county jail. The legislature can do no better than to trust the officers of the city in this respect. If a joint keeper in any city thinks the jail there worse than in other cities, the law will permit him to move his business to wherever he can find a jail that is satisfactory. We do not think the ordinance is void, and therefore the judgment of the district court is affirmed.

The plea in bar is based upon the idea that a repeal of the ordinance nullified all proceedings had thereunder, including the judgment and sentence. The decided cases are not entirely harmonious upon this subject. The great weight of authority, as we think, is to the effect that a repeal of an ordinance before judgment places all further proceedings at an end. Before judgment the prosecution is engaged in ascertaining whether the provisions of the ordinance have been violated by the defendant or not. If the ordinance is repealed before this fact has been ascertained, then the inquiry becomes immaterial and useless, as the offense no longer exists, the law authorizing the proceeding having been extinguished. If the repeal occurs after sentence has been pronounced, the court acts upon the judgment, and not upon the ordinance. By the judgment it has been judicially determined that the defendant violated the provisions of the law and incurred the liability therefor. The will of the legislative representative of the people was thereby fulfilled, and it is then beyond the reach of further legislative action. It has been said that if the legislature could nullify the judgments of courts which have been regularly pronounced under a valid law, by repealing the law, this would amount to an appeal from a judicial to a legislative tribunal, which is contrary to well-established and fundamental principles. The question is quite fully discussed in the case of Re Kline, 70 Ohio St. 25, 70 N. E. 511, which is reported in 1 A. & E. Ann. Cas. 219, where the cases are collected in the notes. Practically the same conclusion is reached in the case of State v. Boyle, 10 Kan. 116.

We think that, after final judgment and sentence, the repeal of the ordinance under which the conviction was had does not relieve the defendant from the sentence. In this case the ordinance was repealed nearly six months after the defendant was sentenced, and therefore cannot affect the execution of the judgment.

The plea in bar is denied.

Petition for rehearing denied December 18, 1908.

Naylor v. Galesburg, 56 Ill. 285; Day v. Clinton, 6 Ill. App. 476; Speckert v. Louisville, 78 Ky. 287; Kansas City v. Clark, 68 Mo. 588; Rutherford v. Swink, 96 Tenn. 564, 35 S. W. 554.

And this doctrine has been applied where an ordinance was repealed after one had been found guilty thereunder, but before judgment was rendered on the verdict, or a motion for a new trial overruled. Earnhart v. Lebanon, 5 Ohio C. C. 578.

And this doctrine has been applied where the appeal is to a court which tries the case *de novo*. Barton v. Gadsden; Spears v. Modoc County; Naylor v. Galesburg; Day v. Clinton; Kansas City v. Clark; and Rutherford v. Swink,—supra.

And the repeal of the repealing ordinance during the pendency of such appeal does not thereby revive the repealed ordinance, so as to sustain the conviction. Rutherford v. Swink and Day v. Clinton, supra.

A statute which saves the proceedings where a law under which they are had is repealed does not apply to municipal ordinances, but solely to laws enacted by the general assembly. Barton v. Gadsden; Spears v. Modoc County; Rutherford v. Swink; and Kansas City v. Clark,—supra.

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KANSAS SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY, Plff. in Err.,
v.
A. W. BROWN.

(— Kan. —, 102 Pac. 459.)

Master — discharge of employee — cause — freedom of speech.

1. A statute which requires an employer of labor, upon request of a discharged employee, to furnish in writing the true cause or reason for such discharge, is repugnant to the eleventh section of the Bill of Rights of this state, and is invalid.

Same — personal liberty.

2. The duty imposed upon employers by § 2422, Gen. Stat. 1901, is not a police regulation, and is an interference with the personal liberty guaranteed to every citizen by the state and Federal Constitutions.

(June 5, 1909.)

ERROR to the District Court for Lyon County to review a judgment in plaintiff's favor in an action brought to recover damages for an alleged violation of a statute prohibiting blacklisting. Reversed.

Statement by **Smith, J.**:

Brown, plaintiff below, was in the employ of defendant railway company as a brakeman. It seems that on his run the company had a detective, garbed as a tramp, who rode on the train upon which Brown was employed from Florence to Newton. This detective reported to the train master of the company that Brown had received from him 40 cents as fare for riding between those stations, and had appropriated the same to his own use. Brown was called before the train master at Newton, under whom he was employed, and informed of the charge, and told that, unless he proved his innocence, he would be discharged. Brown asserted his innocence, and offered to be sworn to his statement, but, on such investigation as the company saw fit to make, he was discharged. Thereafter, in accordance with chapter 144, p. 322, Laws 1897, which is republished as §§ 2421–2424, inclusive, Gen. Stat. 1901, he demanded of the company a statement in writing of the true cause or reason for his discharge. This was given on a blank prepared for that purpose, the reason stated being "discharged for cause," and the same was signed by a superintendent of the company. This statement or service letter was delivered to Brown, who thereafter applied for employment in two or three railroad companies and, upon request therefor, presented his service letter, and was refused employment. He also made application to various officers of the defendant company, including the general manager, Hurley, to be reinstated, but this was denied. He thereupon brought this action, and recovered judgment for $300 damages and $30 attorneys' fees. The company brings the case here.

Messrs. **W. R. Smith, O. J. Wood,** and **Alfred A. Scott,** for plaintiff in error:

The statute is unconstitutional.

Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; 14 Am. & Eng. Enc. Law, p. 979; Townshend, Slander & Libel, 4th ed. 429; Ohio & M. R. Co. v. Kasson, 37 N. Y. 224; Cooley, Torts, p. 328; New York, C. & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; Illinois C. R. Co. v. Ely, 83 Miss. 519, 35 So. 873; Lawton v Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579.

Messrs. **Buck & Spencer** and **Kellogg & Kellogg,** for defendant in error:

The statute is constitutional.

State ex rel. Scheffer v. Justus, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; Wabash R. Co. v. Young, 162 Ind. 102, 4 L.R.A.(N.S.) 1091, 69 N. E. 1003.

Smith, J., delivered the opinion of the court:

It is not contended that the judgment is excessive, or that it is not supported by sufficient evidence, if the law (Laws 1897, chap. 144, p. 322; Gen. Stat. 1901, § 2422) is valid. The statute required the employer,

Headnotes by SMITH, J.

Note. — No recent cases dealing with the constitutionality of statutes requiring the employer to furnish a discharged employee with the cause of his discharge have been found, but the earlier cases found in a subject note to Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811, and to Wabash R. Co. v. Young, 162 Ind. 102, 4 L.R.A.(N.S.) 1091, 69 N. E. 1003, would seem to indicate that such legislation is not looked upon with favor by the courts, and has not generally been upheld.

In Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579, discussed in the earlier note, the statute was held a violation of that section of the Constitution granting liberty of speech, which is the main ground upon which the decision in ATCHISON, T. & S. F. R. Co. v. BROWN is based.

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upon the request of a discharged employee, to furnish in writing the true cause or reason for such discharge. The railroad company did not meet this requirement. Its "service letter," as it is called, stated only that Brown was discharged "for cause." This is not a statement of "the cause" or of any cause.

It is also alleged that the service letter was issued in furtherance of a conspiracy existing between the defendant and other railroad companies to prevent employees of one company from getting employment in another company without the consent of the former employer. This claim is not supported by any evidence. "To constitute a conspiracy, the purpose to be effected by it must be unlawful, either in respect of its nature, or in respect of the means to be employed for its accomplishment." People v. Willis, 24 Misc. 537, 54 N. Y. Supp. 129, 133; People v. Olson, 39 N. Y. S. R. 295, 15 N. Y. Supp. 778, 779; Payne v. Western & A. R. Co. 13 Lea, 507, 521, 49 Am. Rep. 666; 2 Words & Phrases, p. 1460. There was nothing in the evidence to show that there was an unlawful purpose contemplated, or that unlawful means were to be used. All that is shown, in substance, is that, upon Brown's application to two other railroad companies, request was made for his service letter when he informed the employment agent that he had worked for the defendant company, and that, upon the presentation of his letter, employment was refused him. Probably he could have secured employment only upon the presentation of a letter recommending him as a desirable employee, and that a letter stating the true cause of his discharge, which appears to have been sufficient in the mind of the employment agent of the defendant company, to remove him from the employment, would not have availed him. If so, he was not damaged by the failure of the defendant to state the true cause of his discharge.

It may be said that, if the law is valid, the company need have no concern as to the effect of its compliance with the letter of the law. This leads us to the principal contention of the company that the law is unconstitutional; that it is repugnant to the eleventh section of the Bill of Rights of the state of Kansas, which provides that: "All persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right." It is also contended that the law is repugnant to the 14th Amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." It has been conceded in argument that, in the absence of a contract of employment for a definite term, the master may discharge the servant for any reason or for no reason, and that the servant may quit his employment for any reason or for no reason. Such action on the part of the employer or the employee, where no obligation is violated, is an essential element of liberty in action. Can one, then, be compelled to give reason or cause for an action for which he may have no specific reason or cause except perhaps a mere whim or prejudice? Again, is not the freedom to remain silent, to neither write nor publish anything on a certain subject involved as an element in the guaranteed right to "freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right?" It would seem that the liberty to remain silent is correlative to the freedom to speak. If one must speak, he cannot be said to freely speak.

The statute in question, like its companion statute (Laws 1897, chap. 120, p. 226), was the outgrowth of the financial and business depression preceding that session of the legislature. Employers sought to recoup their loss of incomes by scaling the wages of the employees, and laborers sought to resist the decrease in wages, or to compel an advance, by uniting in labor organizations. The remarks of the late Mr. Justice Greene, in holding the provisions of chapter 120, Laws 1897, unconstitutional, are equally applicable to the provisions of the law in question. An excerpt from the opinion in Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 A. & E. Ann. Cas. 936, reads: "Before approaching a discussion of the question, let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety, or morals of the community, or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police regulation. Besides, the legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the Constitution, under the guise of a police regulation. It must also be remembered that the right which the plaintiff claimed was violated did not originate in contract, but was purely statutory: therefore the determination of the question whether he has any remedy depends entirely upon the validity of this statute." When the relation of employer and employee has ceased by discharge or by quitting the employment, if the employee has been efficient and trustworthy, the employer

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may be under a moral obligation to benefit the employee by giving him a statement to that effect. On the other hand, if the employee has been inefficient or untrustworthy, it may be the employer's moral duty to furnish a prospective employer upon request, or perhaps without request, a statement of these facts; but the former employer is under no legal obligation so to do either to his ex-employee, or to the prospective employer. The public has no interest in the matter, and in neither case can such a duty be imposed as a police regulation, and the attempt by statute to impose the furnishing of such a statment is an interference with personal liberty.

The mere matter of time requisite to comply with the requirement of the statute is perhaps a matter of trifling consideration, yet, if the state may compel the sacrifice of a few minutes of the time of one person for another, may it not compel the sacrifice of a few days of time? Where, and upon what principal, shall the limit be placed? Again, if the employer can be compelled to state the true cause of discharge, it implies that he should state the facts as he understands them, and the facts may be in dispute and may be regarded by the employee as libelous. Litigation may result therefrom which might be a great burden to the employer, although successfully defended. We think the state can impose no such possible burden. As in many other relations in life, the employer may be silent and be safe, or, at his option, he may be courteous and fulfil his moral obligation. It is a personal privilege.

The judgment is reversed, with instructions to set aside the judgment and to enter judgment for the defendant.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

UNITED STATES NATURAL GAS COMPANY, Appt.,
v.
TALMAGE HICKS, by Next Friend.

(— Ky. —, 119 S. W. 166.)

Proximate cause — unsafe gas apparatus — ignition.

1. The negligence of a gas company in maintaining in a public highway a leaky gate valve in its main, inclosed by a cracked and decayed box, and not the act of a four-year-old boy in throwing a match through a crack into the box, is the cause of an explosion of the gas to the injury of a person in the highway.

23 L.R.A.(N.S.)

Trial — contributory negligence — question of law.

2. The question of the contributory negligence of an eight-year-old child in playing near a leaky gate valve in a gas main cannot be decided by the court as matter of law, although he had been warned by his parents to keep away from it.

(May 19, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Lawrence County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Hager & Stewart**, for appellant:

The negligence of the gas company, if any was shown, was not the proximate cause of the injury.

Oil Creek & A. R. Co. v. Keighron, 74 Pa. 320; Shearm. & Redf. Neg. 4th ed. §§ 26, 31, 35; Chamberlain v. Oshkosh, 84 Wis. 289, 19 L.R.A. 513, 36 Am. St. Rep. 928, 54 N. W. 618; Setter v. Maysville, 114 Ky. 60, 69 S. W. 1074; Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Louisville & N. R. Co. v. Long (Ky.) 117 S. W. 359.

Messrs. **Pam & Hurd**, also for appellant:

The negligence in constructing and maintaining the gas box, if any, was not the proximate cause of the injury.

Shearm. & Redf. Neg. § 34; Friedman v.

Case Note. — May the intervening act of a child break the causal connection between the defendant's negligence and the injury.

This note includes cases which discuss the question whether the act or omission of a child may be an efficient, independent, intervening cause between the negligence of the defendant and the injury to the plaintiff, so as to break the causal connection and relieve the former from liability, and also cases which hold that an intervening act of a child is such a cause. Cases which merely hold that the act or omission was not an intervening cause, without reference to the age of the person responsible therefor, have not been included except so far as they have been used to illuminate the point in question.

In many cases adopting the attractive nuisance doctrine, the act of another child does intervene between the negligence and the injury; as, for example, in many of the turntable cases, it is the turning of the table by one child which immediately causes the injury to the other; but, in the great majority of the cases of this character, the court does not treat it as a case of an intervening cause, but holds that the result must

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Snare & T. Co. 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497; Mangan v. Atterton, 35 L. J. Exch. N. S. 161; Stephenson v. Corder, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Allegheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649; Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 A. & E. Ann. Cas. 441; Stefanowski v. Chain Belt Co. 129 Wis. 484, 7 L.R.A.(N.S.) 955, 109 N. W. 532; McFarlane v. Sullivan, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; Conley v. American Exp. Co. 87 Me. 352, 32 Atl. 965; Georgetown Teleph. Co. v. McCullough, 11 Ky. 182, 111 Am. St. Rep. 294, 80 S. W 782.

Mr. **M. S. Burns**, for appellee:

The negligence of the gas company was the proximate cause of the injuries.

1 Addison, Torts, 511; 1 Thomp. Neg. p. 304; Wharton, Neg. 112; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Westerfield v. Levis Bros. 43 La. Ann. 67, 9 So. 52; Houston & T. C. R. Co. v. Boozer, 70 Tex. 530, 8 Am. St. Rep. 615, 8 S. W. 119.

Mr. W. T. Cain also for appellee.

Nunn, J., delivered the opinion of the court:

Appellant prosecutes this appeal from a judgment rendered upon a verdict of a jury

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have been, or at least ought to have been, foreseen, and consequently the defendant is held liable under the general rule that a negligent person is responsible for all of the consequences of his negligence which ought reasonably to have been foreseen. The same is true of cases involving negligence in selling or giving to children firearms or other dangerous weapons or explosives. Most of these cases either hold that the defendant is not negligent, or hold that he is negligent and liable on the ground that he should have foreseen the consequences. Some cases of this character will be discussed later in the note.

The question in point does not seem to have been discussed in many cases. The general rule seems to be that the fact that the person responsible for the intervening act is a child does not affect the case, but, if the act itself is an intervening, efficient cause, it will break the causal connection between the defendant's negligence and the plaintiff's injury, even though it is the act of an irresponsible child.

This is expressly stated in Otten v. Cohen, 1 N. Y. Supp. 430, where, in an action based on the negligence of the defendant in the maintenance of a sign which fell and injured the plaintiff's child, it was held error to exclude evidence that the sign would not have fallen but for the interference of strangers, and the fact that the boy charged with the interference was under age was no ground for excluding the testimony.

And in Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379, it was held that the act of a boy who, because of his tender years, was not legally responsible therefor, in pushing the plaintiff into an unguarded cellar, and not the negligent act of the defendant in leaving the cellar unguarded, was the proximate cause of the injury to the plaintiff resulting from the fall. The court said: "His act was the proximate cause of the injury, and while he, because of his tender years, would not be legally responsible therefor, the situation of the injured child, who shows that she appreciated the danger to which she was exposed, was no different from what would have been that of an adult who, under similar circumstances, had been thrust over the embankment. In this respect, also, is the case to be distinguished from the 'turntable' cases, where several children are engaged in moving the turntable, all being equally ignorant of their danger, and one is injured; for in the present instance it was not in her play, and as part of her play, and in ignorance of the danger of her play, that she was injured. She was injured by the violence of her little brother, in a matter apart."

In the following cases the act of a child was held to be an efficient, intervening act, but the fact that it was a child that was responsible for the act, as distinguished from an adult, is not discussed:

Thus, in O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731, where the door of a vacant house was left open, and a young child playing therein was injured by the fall of a window which was being raised by a companion, it was held that the owner was not liable therefor, even if it was admitted that he was negligent in leaving the door open, as the injury was caused by the independent, intervening act of the infant's playmate.

So, negligence in failing to fasten one of two guy ropes supporting hoisting shears was held, in Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154, not to be the proximate cause of the fall of the shears where the evidence showed that the shears would not have fallen had not some boys swung in play upon the other rope, although it also appeared that the shears would not have fallen if both ropes had been properly fastened.

And the act of boys in picking up lime negligently allowed by the defendant to escape in the street, where it was being used for building purposes, and carrying it into a vacant lot, and putting it in a can containing water, is the proximate cause of the injury to another boy due to an explosion of the lime when it came into contact with the water. Beetz v. Brooklyn, 10 App. Div 382, 41 N. Y. Supp. 1009.

So, in Berman v. Schultz, 40 Misc. 212 81 N. Y. Supp. 647, it was held that the act of some boys in pulling the starting lever of an electric truck was an interven-

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for $250 in favor of appellee. Appellant owns and operates pipe lines for the purpose of conveying natural gas from its fields in Martin county, Kentucky, to its customers in several towns in Kentucky, West Virginia, and Ohio One of its lines passes through a small town in Lawrence county, Kentucky, called Buchanan, and is located in, or partly in, the public road at that point. In the construction and operation of gas lines, it is necessary, for the purpose of cutting off and turning on the gas, to place at intervals along the line what is known as a "gate valve," to be used in case of a break in the line, so that the persons between the break and the fields may have use of gas uninterrupted. The pipes which convey the gas are placed at a depth of 3 or 4 feet in the ground, and, at each place where there is a gate valve, the pipe and valve are incased in a wooden box which extends to the surface of the ground, and is covered with a lid which is fastened on one side with hinges and on the other with a clasp. Appellee alleged, and introduced testimony tending to show, that appellant negligently failed to place at the point referred to in Buchanan a reasonably safe gate valve, and to keep same in a safe condition and repair; and also made like allegations, and introduced testimony to sustain them, with reference to the box which inclosed the gate valve; that, by reason of the defective gate valve, large quantities of gas were allowed to escape; and that, on account of

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ing cause which would relieve the owner of the truck from liability for any injuries occasioned by the truck before it was stopped, although he may have been negligent in leaving the truck in a condition to be started by the boys.

And the act of a boy in drawing back the upper edge of a large flat stone negligently left by the defendant leaning against an electric light pole, and then allowing it to fall back against the pole, and not the negligence of the defendant, is the proximate cause of an injury to the plaintiff, whose finger was crushed between the pole and the stone as it fell back. March v. Giles, 211 Pa. 17, 60 Atl. 315.

So, the act of a boy in striking defendant's horse, frightened it so that it plunged, broke the halter with which it was tied, ran away, and injured plaintiff was held, in Stephenson v. Corder, 71 Kan. 475, 60 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, to be the proximate cause of plaintiff's injury, even though the defendant may have been negligent in using a defective halter.

The invention, by a thirteen-year-old boy, of a device to protect his fingers from the discomfort of handling links upon which he is employed to operate a drill, and which become heated, and require a handling because of defects in the drilling apparatus, which invention is unprecedented in experience, and the use of which results in entangling the boy's hand with the machinery to its injury, was held, in Stefanowski v. Chain Belt Co. 129 Wis. 484, 7 L.R.A.(N.S.) 955, 109 N. W. 532, to be such an intervening cause as to relieve the master from liability for the defect in the drill. The court said: "Obviously here was such novelty of invention as would almost, if not quite, satisfy the most hypercritical patent examiner. Surely it cannot be that an event which never occurred before in years of human experience, and which could not happen without what amounts to a spasm of inventive genius in an inexperienced boy, is either probable or within reasonable anticipation."

In Luehrmann v. Laclede Gaslight Co. 127 Mo. App. 213, 104 S. W. 1128, it was held that a lighting company was not liable for injuries resulting from a shock caused by coming in contact with a wire thrown over an electric light wire by boys in play, which was pushed along the electric light wire until it reached a spot negligently permitted by the company to remain uninsulated. The wire became dangerous only a few minutes before the accident, and upon this point the court distinguished Harrison v. Kansas City Electric Light Co. 195 Mo. 606, 7 L.R.A. (N.S.) 293, 93 S. W. 951, in which there had been an inspection of the wire for the purpose of locating some "trouble," and the wire hanging over the defendant's wires had not been discovered; the negligence of the defendant was held to be one of the direct and proximate causes, and the act of the boys in throwing the other wire over the defendant's wires was only a concurring cause. It will be noted that this latter case is not strictly within the scope of this note, but it is cited as showing, together with the Luehrmann Case, that the mere fact that the intervening cause was the act of irresponsible children does not affect the liability of the defendant for the results of his negligence.

In some cases where the injury results to the child who is himself responsible for the intervening act, the court discusses it as a question of intervening cause, although it may be that the child could not be held guilty of contributory negligence.

Thus, in Seymour v. Union Stock Yards & Transit Co. 224 Ill. 579, 79 N. E. 950, the plaintiff was attracted by clay piled along a railroad track, and, while there at play, a train passed by, and the boy began touching, playing with, and running alongside of, the slowly-moving cars, and finally fell under them, sustaining the injury complained of. The court said: "Here an element intervened between the acts induced by the allurements of the clay pile and the injury, *viz.*, the movements of the boy in placing himself in contact with, and in running alongside, the cars. . . . The proximate cause of the injury in this case was not the pile of clay, nor any danger with which the boy was brought in contact while gratifying any curiosity or desire excited by that pile. The injury was proximately

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the defective and rotten condition of the box, appellee was severely burned by the explosion of the gas. These allegations were controverted by appellant, both by pleading and proof.

The manner in which appellee received his injuries was about as follows: At the time of his injuries appellee was about eight years of age. He, with his brother, who was about four years old, and a neighbor boy, who was about seven years old, had been in the public road near this box for some time before the explosion, playing marbles. One of their marbles rolled through a crack into the box. It appears that about this time the neighbor boy went to his home, got some tar paper (it is not shown for what purpose), returned with it and some matches, placed the paper on top of the box, and set fire to it. Appellee at the time was on the box, as he stated, looking for the marble, and his four-year-old brother struck a match, threw it through a crack into the box, causing an explosion instantly, which burned appellee's face, hands, and arms, and singed his eyebrows and hair. His pain was severe. Part of the skin on his face and hands peeled off, and they became sore. Appellee's testimony also conduced to show that the leakage of gas at the valve was considerable, and had continued for several months before the explosion. One witness stated that he had trouble in getting the animal he was riding to pass by it because of the noise made by the escaping gas. The testimony further shows that the box was out of re-

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caused by the movements of appellant in placing his hands upon, and in running alongside, the cars."

So, in Stark v. Muskegon Traction & Lighting Co. 141 Mich. 575, 1 L.R.A.(N.S.) 823, 104 N. W. 1100, it was held that the act of a boy in seizing a broken telephone wire, to receive a shock, was the proximate cause of an injury resulting to him, and not the violation of the municipal ordinance as to the manner of stringing the electric light wire which charged the broken one, nor the fact that the wire was imperfectly insulated; and the fact that the boy was not aware of the risk was immaterial.

There are numerous cases holding the defendant liable for the injury, in which it appears that there was an intervening act for which a child was responsible, but, as was suggested above, the majority of these cases do not turn upon the fact that the person responsible for the intervening act was a child.

This question is expressly determined however, in Akin v. Bradley Engineering & Mach. Co. 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903, where it was held that the use, by a boy who had found a dynamite cap, of a dry electric battery which he also found, to explode the cap, was not such an intervening cause as to relieve one guilty of negligence with respect to the care of the cap, from liability to the boy from its explosion. The court said: "An intervening cause, to be a defense in an action of this kind, must ordinarily come from an outside source, as an act of God, or of some human or other agency, independent of the ignorant and inexperienced conduct or omission of the boy in question. The ignorance and inexperience of this boy, if found as stated by his counsel, relieves him from the charge of contributory negligence. If he knew or suspected that this cartridge would explode when brought in contact with the battery, and was old enough, and intelligent or experienced sufficiently, to understand that such an explosion would probably do him serious injury, then he would not be entitled to recover. . . . We think that, when the respondent left these dangerous explosives by the wayside, where it knew that children, naturally attracted by such things, were constantly passing and repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury; and that the explosion of such a cap by a dry battery, in the manner shown herein, did not constitute an intervening cause that should relieve respondent from liability."

The distinction between intervening acts of persons who are *sui juris* and acts of those who are not is suggested in Gulf, C. & S. F. R. Co. v. McWhirter, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26, which is a turntable case, but the court held that, conceding that the person who put the turntable in motion was *sui juris*, that would not relieve the defendant from liability under the facts of the case, as it was practically admitted that the turntable was not kept in a proper condition. The court said: "If a railway company should leave its turntable unfastened, or so slightly fastened that children not *sui juris* can unfasten it and use it, then it should be held liable for an injury resulting from its use by such persons, for, on account of their want of intelligence, the negligence of the company must be deemed the proximate cause of the injury. If a turntable, or like dangerous machinery such as is likely to attract children to it for purposes of amusement, be left unsecured, this is negligence on the part of its owner; and if, while in this condition, it be put in motion by one of sufficient intelligence to make his act negligence, then both parties ought to be held liable for their concurrent negligence, through which one not guilty of contributory negligence is injured."

In Fishburn v. Burlington & N. W. R. Co. 127 Iowa, 483, 103 N. W. 481, the act of the plaintiff, a child six years of age, in putting back a panel of a fence negligently erected by a railroad company on the premises of the plaintiff's father, to its original position, from which it was again blown down injuring the plaintiff, was not a sufficient intervening cause which would relieve the de-

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pair; that it had rotted near the upper edge of the box, leaving a hole immediately under the lid; that there were holes in the lid the full length thereof, caused by decay and shrinkage of the boards. It is further shown without contradiction that the place in the road where the box was situated was frequented by the children of the village for the purpose of play, and that this was known by the agents of appellant who represented it in that section. Appellee testified that he had been told, by both his father and mother, to keep away from the box; that it was dangerous. Appellant by its testimony tended to contradict the alleged fact that the valve was defective or improperly attached to the pipe, or that gas escaped in any considerable quantities, or that the box was made insecure by reason of the defects referred to. It also conduced to show that it had used care in making inspections of the valve and box and in keeping same in repair. Notwithstanding this, it appears without contradiction that there was enough gas in the box to cause an explosion when the lighted match was thrown into it. Appellant's counsel contend that, even admitting that it was guilty of the negligence charged, it was not the proximate cause of the injuries to appellee; that his injuries were the result of an act of a third person, to wit, the four-year-old boy, who threw the match into the box, and therefore it was entitled to the peremptory instruction asked for by it; and say that, if they are incorrect in this, the proof shows without con-

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fendant of its negligence. This case makes a distinction between the right of a child to recover in such a case and the right of an adult, but the reason for the distinction is based upon the doctrine of contributory negligence, and not upon the theory of an independent, efficient, intervening cause. The court said: "If the owner of the garden, or any person of mature years interested therein, had discovered the prostrate panels, and restored them to their position against the wire fence, and had thereafter been injured by reason of such panels being again blown down, he might possibly be precluded from a recovery of damages on the ground of contributory negligence; but we feel very certain his act would not be such an independent, intervening cause, disconnected from the primary act complained of, and not reasonably to have been anticipated by the defendants, as would be required to relieve the latter from liability for negligence in the original construction."

A few other cases may be cited as bearing somewhat upon the general question.

Where the defendant, having had a quarrel with a boy in the street of a city, took up a pickax, and followed him into the plaintiff's store whither he had fled, and, in endeavoring to keep out of the defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by reason of which a quantity of the wine ran out and was wasted, it was held, in Vandenburgh v. Truax, 4 Denio, 464, 47 Am. Dec. 268, that the defendant was liable to the plaintiff for the injuries. This decision is referred to the doctrine of the famous "squib" case, and the fact that the intervening cause was the act of a boy has no apparent effect on the decision.

In Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508, the court held that one who sold a child loaded cartridges, and was fully informed as to the use the boy intended to make of them, could not escape liability for resulting injuries, upon the ground that a pistol loaded with one of the cartridges was left lying where a young child could reach it. This decision is based upon the general ground that the resulting injury was one which must have been, or ought to have been, anticipated. The court said: "One who deals with children must anticipate the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads like those to whom he sold the cartridges, and it cannot be justly said that the act of the lads in carrying the pistol with them to their home, and leaving it upon the floor within reach of their brother and playmate, was an unnatural or improbable one."

In Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418, the court said: "If defendant was negligent in not securing the turntable so that it could not be revolved by children, to their injury, the mere fact that it was revolved by other children who were playing upon it at the time the child was injured will not excuse defendant, if such act ought to have been foreseen or anticipated by it. That it ought to have been foreseen, and provided against, is shown by the case of Koons v. St. Louis & I. M. R. Co. 65 Mo. 592. Not having been provided against, the original negligence continued and remained a culpable and direct cause of the injury, and the test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

In Edgington v. Burlington, C. R. & N. R. Co. 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, it was held that a railroad company is not relieved from liability to a child injured by an improperly fastened turntable, by the facts that the fastenings were undone, and the table put in motion, by playmates of the injured child. This decision is also referred to the general principles of negligence, and does not turn upon the fact that the intervening act was that of a child. The court said: "In the very nature of things, a child cannot well be injured upon a turntable without the intervention of some other person to revolve the machine. . . . The company's negligence, if it exist, is in the leaving, without proper care, of a danger-

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tradiction that appellee had been warned of the danger in playing around this box, and that he was guilty of such contributory negligence but for which he would not have received his injuries, as to entitle it to a peremptory instruction.

With reference to appellant's first contention, we are of the opinion it is without merit. The jury found under proper instructions that appellant was guilty of negligence in failing properly to construct, and keep in repair, the valve and box. It was negligent in placing this dangerous appliance within a public pass way, and of which the children of the neighborhood made a playground. It was its negligence that created the dangerous contrivance which made it possible for the irresponsible boy to do the act which produced the injury to appellee. Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, was a case where the child killed was a mere licensee playing on the lot of appellees when some lumber appellees had piled there fell upon it. In that case this court quoted with approval from Addison on Torts, 511, as follows: "It appears to us that a man who leaves in a public place along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." The facts in the case at bar are stronger in favor of the person injured then they were in that case, because appellee in the case at bar was neither a trespasser nor a licensee, but was in a public highway, a place he had a right to be. In the famous Turn-Table Case (Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745) the child injured or killed was sitting upon the table when it was put in motion by another child. The court, in that case, determined that the child was entitled to recover, notwithstanding the intervening act of the third person. See also the case of Illinois C. R. Co. v. Wilson, 23 Ky. L. Rep. 684, 63 S. W. 608.

With reference to the second proposition of counsel for appellant, we are of the opinion that the court did not err in refusing the peremptory instruction. The proof shows without contradiction that appellee was only eight years old at the time he received his injuries, an age at which the legal presumption is that he was not accountable for his conduct. He did not realize, nor fully appreciate, his situation and the probable result which might come to him. The general rule is that, when a child reaches the age of fourteen years, the legal presumption is that it knows right from wrong, and it is responsible for its acts. Between that age and seven years, the legal presumption is with the child, and to make it responsible it must be shown by testimony that it had sufficient intelligence and discretion to realize and to know what would be the result

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ous instrument in the place where it might reasonably have expected children to resort and put it in motion to the injury of themselves or others."

In Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, the defendant or its servants negligently placed and left on the track an unexploded signal torpedo at a place which had been used as a crossing. The torpedo was picked up by a boy nine years of age, and carried by him into a crowd of boys near by. Being ignorant of its explosive character, he attempted to open it. The torpedo exploded, and the plaintiff was injured. It was held that, under this state of facts, the negligence of the company's servants was the proximate cause of the plaintiff's injury, and the act of the boy in carrying the torpedo from where he found it was but a contributing condition which defendant's servants ought to have anticipated as a probable consequence of their negligent act or omission.

In connection with cases involving attractive nuisances, or negligence in regard to firearms, explosives, etc., it is suggested that it is not entirely clear that the question discussed in this note can arise in such cases independent of and unconnected with the peculiar duty chargeable to the alleged negligent person. In all negligence cases the duty, the breach of which is complained of, is always more or less a relative duty,—greater in some cases than in others. It is always "reasonable," but what is reasonable in one case may well be insufficient in another. And in respect to turntables and explosives, the duty is of such a character that, if there is a breach, it may be that the liability of the defendant is determined by the very breach itself, and is not relieved by any intervening act, especially by one of a class to which the peculiar duty is owed. At least, an impression to this effect is given by an examination of numerous cases of this character. UNITED STATES NATURAL GAS CO. v. HICKS and Akin v. Bradley Engineering & Mach. Co. supra, however, seem opposed to this view.

As to liability for injury to children from explosives left accessible to them, see case note to Akin v. Bradley Engineering & Mach. Co. 14 L.R.A.(N.S.) 580.

Upon the general question of attractive nuisance, see exhaustive note to Cahill v. E. B. & A. L. Stone & Co. 19 L.R.A.(N.S.) 1094.

As to liability of railroad company for injury to children playing on turntables, see case note to Pannill v. Potomac, F. & P. R. Co. 4 L.R.A.(N.S.) 80.

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of its acts. Hence, it is always proper to submit the question of contributory negligence in such cases to the jury. In the case of Illinois C. R. Co. v. Wilson, supra, appellee was a boy nine years old. He, with several other boys of about the same age, was playing with one of appellant's hand cars. In the movement of the car, one of appellee's feet was caught in the cogs and mashed. It seems that he had been warned to keep away from it because it was dangerous; yet this court in that case said the question of his responsibility for his conduct should have been, as it was, submitted to the jury. In the case of Owensboro v. York, 117 Ky. 294, 77 S. W. 1130, appellee, a boy about twelve years of age, with some other boys about the same age, was playing on the streets of the city, and found an electric light wire hanging from some object to within his reach. The boys began to dare each other to touch it, and York said he could take hold of it if he had a board to stand on. He obtained the board, stood upon it, and took hold of the wire, and was killed instantly. He had been told by one of the other boys, who was over fourteen years of age, immediately before he took hold of it, not to do so; that it would kill him. In that case counsel for the city insisted that it was entitled to a peremptory instruction, for the reason that it was shown without contradiction that York knew the danger and voluntarily took the risk, assuming that, if he stood upon the board, the electric current would not hurt him. In discussing this question, the court quoted with approval from the case of Macon v. Paducah Street R. Co. 110 Ky. 680, 62 S. W. 496, as follows: "It was also the province of the jury to determine whether or not plaintiff had, in fact, been warned of the danger of taking hold of the wire, and, if so, whether, considering his age and capacity, and all the other circumstances as shown by the evidence at the time he did take hold of it, he was guilty of such contributory negligence as barred his right to recover in this action." In that case the boy killed was only twelve years of age.

Under these authorities and others that might be cited, we are of the opinion that the lower court committed no error prejudicial to the substantial rights of appellant. Wherefore the judgment is affirmed.

23 L.R.A.(N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

RE ANNIE M. COLE.

FIRST NATIONAL BANK OF BIDDEFORD et al.
v.
ANNIE M. COLE, Petitioner.

(90 C. C. A. 50, 163 Fed. 180.)

Bankruptcy — appeal — record.

1. Upon a petition to revise an order in bankruptcy under the act of 1898, the court may search the opinion filed by the district court, not to eke out insufficient findings of fact, but for the purpose of ascertaining the issues which that court considered.

Same — review.

2. A petition for review is the proper method of taking to the circuit court of appeals the question of the correctness of an order committing a bankrupt for failure to

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Case Note. — Failure or refusal of a bankrupt or person having money or property belonging to a bankrupt to deliver it to trustee, as a contempt of court.

In general.

As a court of bankruptcy is empowered by § 2, ¶ 13, and § 41 of the act of 1898, to enforce obedience to its own orders or those of its officers by fine or imprisonment, one who fails or refuses to turn over to his trustee money or property belonging to a bankrupt's estate may be committed for contempt. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, affirming 104 Fed. 530, and reversing 44 C. C. A. 620, 105 Fed. 581; Re Lans, 85 C. C. A. 432, 158 Fed. 610; Samel v. Dodd, 73 C. C. A. 254, 142 Fed. 68; Re Levy, 73 C. C. A. 558, 142 Fed. 442; Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328; Re Schlesinger, 42 C. C. A. 207, 102 Fed. 117, affirming 97 Fed. 930; Re Purvine, 37 C. C. A. 446, 96 Fed. 192; Re Eddleman, 154 Fed. 160; Re Walder, 142 Fed. 784; Re Alphin & L. Cotton Co. 134 Fed. 477; Re Goldfarb Bros. 131 Fed. 643; Re Felson, 124 Fed. 288; Re Gerstel, 123 Fed. 166; Re Shachter, 119 Fed. 1010; Re Wilson, 116 Fed. 419; Re Taylor, 114 Fed. 607; Re De Gottardi, 114 Fed. 328; Re Levin, 113 Fed. 498; Re Arnett, 112 Fed. 770; Re Anderson, 103 Fed. 854; Ripon Knitting Works v. Schreiber, 101 Fed. 810; Re Deuell, 100 Fed. 633; Re McCormick, 97 Fed. 566; Re Tudor, 96 Fed. 942; Re Speyer, 42 How. Pr. 397, Fed. Cas. No. 13,239; Re Dresser, Fed. Cas. No. 4,077.

The power of the court to punish the violation of such an order as a contempt is no

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turn over property, in the exercise of the authority conferred upon the bankruptcy court by the act of 1898.

Same — scope.

3. Upon a petition to review an order of the bankruptcy court committing a bankrupt for failure to comply with an order to turn over property, made in the exercise of its authority under the act of 1898, the court may revise any question of law as to which it may justly infer the district court reached a conclusion, whether formally expressed or not, and whether or not formally presented.

Same — trial — witness.

4. The provision of the Federal Constitution entitling an accused to the right to be confronted by the witnesses against him does not apply to a summary proceeding to punish one for contempt in refusing to comply with an order in bankruptcy.

Contempt — refusal to turn over funds.

5. To sustain a decree against a bankrupt for contempt in wilfully refusing to obey an order directing him to turn over funds to the trustee, he must be shown to have had, at some specified time to which the proceedings may refer, so completely under his control funds which he could command that his failure to command them was a wilful contempt of court.

(October 24, 1907.)

PETITION to review an order of the District Court of the United States for the District of Maine, committing a bank-

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longer a debatable question. Schweer v. Brown, supra.

But a referee in bankruptcy may not commit one for disobeying his order to deliver property or money to a trustee in bankruptcy; he must refer the matter to the court, which alone has power to punish for the violation of such order. Mueller v. Nugent, supra; Re Miller, 105 Fed. 57.

One must be given an opportunity to be heard against the granting of an order requiring him to turn over money or property to a trustee, in order that his disobedience thereof may justify a contempt order. Boyd v. Glucklich, 53 C. C. A. 451, 116 Fed. 131; Re Miller, supra; Smith v. Belford, 45 C. C. A. 526, 106 Fed. 658.

And an order requiring a bankrupt to turn over money or property to his trustee cannot provide that, upon a failure to comply therewith, he shall stand committed for contempt, and that the marshal may take him into custody. Re Cole; Re Baum, 169 Fed. 410.

And the court may not make an order adjudging one guilty of contempt for disobeying such an order, without a hearing. Re Cole; Re Rosser, 41 C. C. A. 497, 101 Fed. 562, reversing 96 Fed. 308; Re Davison, 143 Fed. 674.

The power of the bankruptcy court to commit for contempt in such cases should be exercised with caution, and only where the propriety of the proceeding is beyond doubt. Re Levy; Samel v. Dodd; Re Purvine; Re De Gottardi; and Re Anderson,—supra; Ripon Knitting Works v. Schreiber, 101 Fed. 810, affirmed in 43 C. C. A. 682, 104 Fed. 1006; Re McCormick, supra; Re Salkey, 6 Biss. 269, Fed. Cas. No. 12,253.

A person is not imprisoned for debt when committed for contempt for disobeying such an order. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Samel v. Dodd; Schweer v. Brown; and Re Schlesinger,—supra; Re Rosser, 41 C. C. A. 497, 101 Fed. 562; Re Anderson, supra; Ripon Knitting Works v. Schreiber, 101 Fed. 810.

Such order is not for the payment of a debt, but for the delivery of specific property or money belonging to the bankrupt's estate. Re Kane, 125 Fed. 984; Re Rosser and Schweer v. Brown, supra.

Nor does the bankrupt's refusal to comply with such order convert the demand into a debt. Schweer v. Brown, supra.

A proceeding requiring a bankrupt to deliver money or property to his trustee upon penalty of commitment for contempt is not a criminal proceeding, but merely the ordinary method of enforcing the order of a court. Re Alphin & L. Cotton Co. supra. But, *contra*, see Moody v. Cole, 148 Fed. 295.

But it was said in Samel v. Dodd, 73 C. C. A. 254, 142 Fed. 68, that an order requiring a bankrupt to deliver to his trustee the value of, and not the specific goods which the referee finds he has not accounted for, would dangerously approach, if not overstep, the line of imprisonment for debt.

And it would be an imprisonment for debt, and not for a contempt, to commit a bankrupt for a failure to obey an order to deliver to his trustee money or property which is not in his possession or under his control. Boyd v. Glucklich, supra.

So, in Re Adler, 129 Fed. 502, it was said that, to require a bankrupt to turn over some intangible money supposed to be in his possession, which he may be forced to pay by raising money to meet the order of the court, would amount in effect to imprisonment for debt.

If it is impossible to point to any particular property or money, and definitely and specifically locate it, contempt proceedings are not justified. Re Rogowski, 166 Fed. 165.

Proof necessary to justify contempt order.

The power to punish for contempt should be exercised only upon proof establishing the facts beyond a reasonable doubt, or which, in any event, is clear and convincing. Re Levy, 73 C. C. A. 558, 142 Fed. 442; Re McCormick, 97 Fed. 566; Re Switzer, 140 Fed. 976; Re Walder, 142 Fed. 784; Re Anderson, 103 Fed. 854.

It has been said that a contempt order should not be made unless the court is mor-

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rupt for contempt in refusing to turn over property. Reversed.

The court reached a conclusion in this case and handed down an opinion on February 16, 1906, which is reported in 75 C. C. A. 330, 144 Fed. 392. But the opinion printed herewith, handed down after rehearing, so fully covers the questions involved that the former opinion is omitted.

The facts are stated in the opinion.

Argued before Colt and Putnam, Circuit Judges, and Aldrich, District Judge.

Messrs. **Elbridge R. Anderson and Charles W. Bartlett** for petitioner.

Mr. **Benjamin Cleaves** for respondents.

Per Curiam:

The court has no question as to adhering to its opinion passed down on February 16, 1906, in Annie M. Cole, petitioner, No. 618, that the order then under consideration is valid in so far as it may be regarded as a legal judgment against Mrs. Cole for the amount therein named; but the question before us now is whether that judgment can be enforced only in the ordinary way in which civil judgments rendered by the Federal courts are enforced, or whether the further order of the district court, providing for enforcing it by summary proceedings involving imprisonment of the petitioner, may also be availed of under the circumstances. Therefore the court desires reargument on the following questions:

First, what portion of the records and proceedings in bankruptcy relating to Annie

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ally certain that there has been a concealment of property (Re Sax, 141 Fed. 223); or unless shown by something "like incontestable proof" (Re Adler, supra); or where the evidence is "plain and convincing beyond reasonable controversy" (Re Alphin & L. Cotton Co. 134 Fed. 477).

It was said in Moody v. Cole, supra, that, as such a proceeding is of a criminal nature, a bankrupt should be adjudged guilty of contempt only on evidence inducing a belief of guilt beyond a reasonable doubt.

The courts should be governed by the same considerations that should influence a jury in criminal prosecutions, giving the bankrupt the benefit of any reasonable doubt. Re Switzer and Re Walder, supra.

The exercise of such power is justified by facts under which a jury would necessarily find the fact of possession and control upon admitted receipt of goods and repeated refusals to explain or account for their disappearance. Re Levy, supra.

In Re Anderson, supra, it was said: "Where the bankrupt denies possession or control, the fact of such possession should be established by indisputable testimony; for it is only in cases where it is proved beyond a reasonable doubt that the bankrupt is wilfully disobedient in refusing to obey its orders that the court should feel itself compelled to punish such disobedience. It follows that it is not sufficient to establish a probability, however strong, that the bankrupt is in the possession of the money, but there must be reasonable and moral certainty, and the circumstances tending to establish it must be such as to clearly exclude any reasonable supposition to the contrary."

It was said in Re Felson, 124 Fed. 288, that "it is sufficient if the evidence discloses the fact that, at a certain date, the bankrupt had the property or the money in his possession, and had not lost the same by fire or other casualty for which he is not responsible, or has not expended the same in gambling or in some other manner."

In the last case it was further said that "it is not necessary that the evidence show clearly and distinctly that the bankrupt has the money or property in his possession in such shape, or in such a location, that witnesses have seen it, and may, therefore, testify that the bankrupt actually has the money or property in his possession at some particular place."

An order requiring a bankrupt to turn over money or property to his trustee or be punished for contempt is not justified by evidence disclosing "a strong probability, and even more than a probability," that the former has dealt unfairly with his creditors, but which does not definitely and convincingly justify the conclusion that any definite, or even an approximate, amount of money or property, is being withheld. Re Goldfarb Bros. 131 Fed. 643.

The bankrupt's oath that he has no property or money belonging to his estate in his possession or under his control is not conclusive, but may be rebutted. Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328; Boyd v. Glucklich, 53 C. C. A. 451, 116 Fed. 138; Re Lasky, 163 Fed. 99; Moody v. Cole, 148 Fed. 295; Re Goldfarb Bros. supra; Re Gerstel, 123 Fed. 166; Re Shachter, 119 Fed. 1010; Re De Gottardi, 114 Fed. 328; Ripon Knitting Works v. Schreiber, 101 Fed. 810.

While the denial of the bankrupt is not conclusive, it should be given weight in connection with all the evidence, both direct and circumstantial, relating to the matter. Moody v. Cole, supra.

Where the bankrupt denies having any money or property he has not accounted for, he will not be committed for contempt for violation of a referee's order, where the evidence tending to contradict him merely casts suspicion upon the truth of his statements, and raises a doubt in the mind of the court. Re Adler, 170 Fed. 634.

And an order requiring a bankrupt to turn over money or property to his trustee which the former denies having is justified only when it is shown beyond a reasonable doubt that it is in his possession or under his control, or that he has transferred it to another, as a mere subterfuge. Moody v. Cole; Re Goldfarb Bros.; Re Kane; Re

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M. Cole, and what facts, may the district court, or may this court, properly consider with reference to the subject-matter of the pending petition?

Second, can the order brought in question by the pending petition be regarded as valid, or be enforced, unless it is shown that the petitioner, Mrs. Cole, had, at the date of said order, funds, or could then have obtained funds, from which the payment of the amount ordered to be paid by her could then have been made or in any way secured?

Third, what are the facts, pro and con, bearing on all the topics involved in the last preceding question?

Ordered that the case be reargued at the January, 1908, session on the questions propound by the *per curiam* passed down this day, and that printed briefs in reference thereto be filed on or before December 21, 1907.

The reargument having been had, **Putnam**, Circuit Judge, delivered the opinion of the court on February 5, 1908:

This petition relates to the same proceeding as that out of which our opinion arose which we passed down on February 16, 1906 (75 C. C. A. 330, 144 Fed. 392); namely, an order of the district court of March 4, 1905, that the bankrupt pay certain moneys to her trustee in bankruptcy. As a sequence thereto, the district court, on November 6, 1906, after suitable intervening proceedings, entered an order that Mrs. Cole stand committed to the marshal of the district, to be

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Gerstel; Re Shachter; Re Anderson; and Ripon Knitting Works v. Schreiber,—supra.

An order requiring a bankrupt to turn over to a trustee money, the noncompliance with which may be punished by contempt, should not be made, where he denies having the money, and the evidence that he has it is only inferential. Re Friedman, 2 Am. Bankr. Rep. 301.

Where money or property is traced into a bankrupt's hands, the burden rests upon him of making some reasonable explanation of what has become of it, or, at least, that it has ceased to be in his possession and control at the time an order to deliver it to his trustee is made; and a failure to make such explanation when the facts are fresh in his mind justifies an order for contempt. Re Alphin & L. Cotton Co. supra.

Effect of inability to comply with order.

The power to commit for contempt in order to compel a bankrupt to turn over money or property to his trustee should not be exercised where there is a reasonable doubt of his ability, by reason of not having the money or property, to comply with the order. Boyd v. Glucklich, supra; Re Taylor, 114 Fed. 607; Re Friedman, supra; Re Greenberg, 5 Am. Bankr. Rep. 840, 106 Fed. 496; Re Davison, 143 Fed. 673; Re Sax and Re Goldfarb Bros. supra.

And this doctrine will be applied where he has placed money out of his possession or control, no matter how foolishly or wrongfully. Re Goldfarb Bros. supra.

And it would be an abuse of power to commit a married woman for contempt for neglect to comply with an order to turn over money to a trustee, where her ability to comply with the order is doubtful, upon the conjecture that her husband or other person, actual principals in a fraud, may pay the amount for her. Re Davison, supra.

And this doctrine has been applied where an assignee for creditors has paid out money of the assignor for counsel fees, and also spent money retained by him as compensation prior to adjudication of bankruptcy, and which he is financially unable to repay, as contempt proceedings cannot be used to compel the performance of something the respondent is unable to perform, even though due to his own fault, or misconception of his legal rights. Sinsheimer v. Simonson, 47 C. C. A. 51, 107 Fed. 898.

Where a payment by a debtor to a bankrupt after the filing of a petition in bankruptcy is invalid as against the assignee, the latter thereby loses nothing, and the bankrupt will not be adjudged guilty of contempt for a failure to deliver to the assignee such portion thereof as he has spent. Re Hayden, Fed. Cas. No. 6,257.

It is not a contempt for a bankrupt to fail to turn over to a trustee, pursuant to order of a referee, money which he had paid to his creditor prior to commencement of an involuntary proceeding. Re Kane, 125 Fed. 984.

So, in Re Greenberg, supra, the court refused to compel a bankrupt to account for such an amount of money as it doubted he had in his possession or under his control at the time the order was applied for, and which had been dissipated through the fraud, profligacy, and waste of his son.

So, one who has been imprisoned one month for disobedience of an order to deliver money to his trustee will be discharged, where it is not certainly known he has the money he is called upon to surrender. Re Taylor, supra.

So, a bankrupt cannot be committed for contempt where he is unable to deliver to his trustee money he collected from his debtor after he had knowledge of the bankruptcy proceedings, and which has passed beyond his control, into the hands of others. The court said that, in the absence of fraud or concealment, the bankruptcy court can only order the delivery of such property as the bankrupt is physically able to deliver up by reason of having the same in his possession or control; and if it appears that he is not physically able to do this, proceedings for contempt by fine and imprisonment would be inconsistent with the principles of individual liberty. American Trust Co. v. Wallis, 61 C. C. A. 342, 126 Fed. 464.

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incarcerated until she delivered to her trustee in bankruptcy $2,425, or until otherwise discharged. The petition before us was filed under the statutes in bankruptcy to revise this order of committal in matters of law. The order was in pursuance of a petition filed by the trustee in bankruptcy on June 4, 1906, setting out that Mrs. Cole had not paid over the moneys required by the district court, as we will more fully show. The propositions of the present petitioner which we need to consider are: First, that the district court admitted proofs which it should not have admitted; and, second, that there were not proofs to justify the district court in making the order of committal.

If Mrs. Cole, who had been adjudged a bankrupt by the district court, has wilfully disregarded its order in reference to the payment of money to the trustee, she might be proceeded against under the general powers vested in superior courts of judicature with reference to contempt, or, also, under the 2d section of the act of July 1, 1898, chap. 541, 30 Stat. at L. 545, 546, U. S. Comp. Stat. 1901, p. 3420, which authorizes the district courts in bankruptcy to "enforce obedience by bankrupts, officers, and other persons, to all lawful orders, by fine or imprisonment, or fine and imprisonment." If the proceeding in the district court was taken by virtue of the specific provisions of the statute, it would be the natural presumption that the proper method of reaching us would be that which was in

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It was said in Re Adler, 129 Fed. 502, that the remedy under discussion applies only to a tangible fund which can be designated and traced into the possession of a bankrupt, and on which the court can lay its hands, and not to some intangible money supposed to be kept in his possession, which he can be forced to pay by raising or procuring the money to meet the order of the court. No doubt many bankrupts could be made, under coercion of imprisonment, to find the money with which to meet such a demand, and, unless the court can see that the bankrupt is in possession of the money, and withholding it wrongfully, he should not be committed for contempt; still, a bankrupt will be committed for contempt where he has concealed a large portion of his assets, until their value is paid to the trustee.

An order requiring a bankrupt to turn over to the trustee assets found to have been in his possession at the date of bankruptcy is not warranted, when made seven years thereafter, in the absence of proof of his present ability to comply with the order. Re Ruos, 164 Fed. 749.

When property is in bankrupt's possession.

Where property or money is traced to a bankrupt's possession shortly before or at the time of the adjudication of bankruptcy, which he fails or refuses satisfactorily to account for after an opportunity to do so, or his account thereof is improbable and unconvincing, he may be committed for contempt for his failure or refusal to obey an order to turn over the money or the property, or its value, to his trustee. Re Lasky, 163 Fed. 99; Re Shachter, 119 Fed. 1010; Re Wilson, 116 Fed. 419; Re Levy, 73 C. C. A. 558, 142 Fed. 442; Re Rogowski, 166 Fed. 165; Re Felson, 124 Fed. 288; Re Gerstel, 123 Fed. 166; Re Sax, 141 Fed. 223; Re Alphin & L. Cotton Co. 134 Fed. 477; Re Kane, supra; Ripon Knitting Works v. Schreiber, 101 Fed. 810; Re Schulman, 167 Fed. 237; Re Salkey, 6 Biss. 269, Fed. Cas. No. 12,253.

And such an order is justified where the amount of stock a bankrupt had on hand shortly before adjudication clearly appears, and there is also evidence of the amount of goods sold for cash, which was not deposited in bank, and how much was paid out, or, if not paid out, it appears with some degree of certainty how much was retained, as such facts would constitute *data* upon which to base some fair calculation of the amount in the bankrupt's hands which he should turn over to his trustee. Re Goldfarb Bros. 131 Fed. 643.

In Re Gerstel, supra, it was said that where it is shown that property came into the hands of the bankrupt shortly before the adjudication, and neither the property nor the proceeds are accounted for in the schedule, and the bankrupt, on answer or by examination under oath, fails to make any credible explanation as to what became of it, the court is authorized to consider the property or its proceeds as still in his possession or under his control, and may require it to be produced and delivered to the trustee, and may punish the failure to obey such order by imprisonment for contempt.

Where the books of a bankrupt disclose a large amount of merchandise received within a few months prior to bankruptcy, which is unaccounted for after the bankrupt has been given an opportunity to explain, but failed to appear and testify, an order requiring him to deliver such goods or their proceeds to the trustee, or be imprisoned for contempt on a failure to comply with the order, is justified. Re Levy, supra.

But a bankrupt's books, standing alone, would not be sufficient to justify such order. Ibid.

However, where it appears that a bankrupt, shortly before his failure, has on hand a large stock of merchandise, and, when bankruptcy proceedings are instituted, but a small amount of goods is found, and the stock has been depleted to an extent that could not have occurred in the ordinary course of business, and there are circumstances indicating that goods have been purposely and fraudulently removed so as to prevent their coming into the hands of the trustee, the court may require the bankrupt

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fact availed of; namely, a petition for revision, under the same act. If, on the other hand, the proceeding in the district court had relation to the general powers vested in superior courts of judicature with reference to contempts, the question would at once arise whether the present petitioner, Mrs. Cole, should not have come to us by writ of error. The parties themselves have made no issue as to either of these topics; but, as this application is without precedent in this court, and without authoritative exposition in all respects in the Supreme Court or in other circuit courts of appeals, and as the extent to which the conclusions in the district court may be reviewed may depend on the nature of the proceeding there, as also on the method taken to obtain a review thereof by this court, it is advisable that we should explain the position further.

When a case comes up on writ of error with reference to a jury-waived trial of a civil case, or to a proceeding for contempt according to the ordinary course of the common law, the then method of raising questions which do not appear on the face of the pleadings would, if applied to this record, very much limit the scope of our examination with regard to the merits. If, on the other hand, the proceeding in this case was that especially authorized by the 2d section of the act of July 1, 1898, so that a petition to revise would presumably be the ordinary way of reaching us, and if, on any petition to revise like that before us, we are not restricted as we would be on a writ of er-

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to produce the goods or give some reasonable explanation of their disappearance, and, on his failure to do so, may hold him guilty of contempt. Re Rogowski, supra.

It has been held that a contempt order for a failure to turn over money or property to a trustee is justified where it clearly appears that a bankrupt has money or goods in his possession (Re Sax, supra); or has sold a large quantity of merchandise before bankruptcy, and is unable to account for the proceeds (Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328; Re Kempner, Fed. Cas. No. 7,689); or where a bankrupt's account of the loss of property by theft, in the light of surrounding circumstances, is inconsistent and improbable (Re De Gottardi, 114 Fed. 328; Re Levin, 113 Fed. 498; Re McCormick, 97 Fed. 566); or where his explanation as to the theft is inconsistent with his statement to the police and his creditors, made immediately thereafter (Re Levin, supra); or where the bankrupt's unsubstantiated story as to the loss of money shortly after the adjudication in bankruptcy, as well as his conduct in relation thereto, does not convince the referee of its truth (Re Speyer, 42 How. Pr. 397, Fed. Cas. No. 13,239); or where he has concealed a large portion of his assets (Re Greenberg, supra); or where a bankrupt says he has no explanation for the disappearance of money or property (Re Salkey, supra; Re Deuell, 100 Fed. 633); and has not kept any books or account of goods sold, nor deposited any money in bank, but claims that no merchandise has been spirited away (Re Deuell, supra).

And a bankrupt will be charged with funds lost in dissipation and gambling (Re Wilson, supra); or which he has spent in a debauch, or in taking a long journey in search of employment (Re Tudor, 100 Fed. 796).

It is not sufficient, in order to avoid commitment for contempt, to show that money traced into a bankrupt's hands was given by him to his wife, who had spent it for the benefit of himself and family. Re Kane, 125 Fed. 984.

But it was held, in Re Tudor, supra, that a bankrupt should be allowed to deduct from the sum he will be required to deliver to his trustee what he has spent for his reasonable and economical living expenses.

An order committing a bankrupt, a married woman, for contempt, is justified, where she claims to have permitted her husband to sell her homestead and pay his debts with the proceeds, and her testimony touching the disposal of the money is indefinite, unsatisfactory, and inconsistent, and her husband does not testify at all. Moody v. Cole, 148 Fed. 295.

The refusal of a bankrupt to pay to his trustee money received by him shortly before the institution of the bankruptcy proceedings, upon the sale of certain real estate, which he delivered to his wife upon the claim that the property belonged to her, as she had furnished the purchase money, will justify a contempt order. Re Eddleman, 154 Fed. 160.

But he will not be required to turn over that portion of the money his wife has paid to her creditors, as the latter have thus acquired an adverse claim thereto, and the bankrupt cannot be punished for not turning over money claimed adversely by one having possession thereof. Ibid.

It cannot be found beyond a reasonable doubt that a bankrupt improperly disposed of goods on the eve of bankruptcy, sufficient to justify an order requiring him to turn over goods or proceeds of sale, where his uncorroborated testimony is that he sent goods to a brother to sell, and the latter retained a portion of the proceeds in liquidation of an old debt, paid a portion to a sister of the bankrupt for the same purpose, took up a note of the bankrupt at a bank, which had been indorsed by relatives, and paid out the balance in expenses. Re Walder, 142 Fed. 784.

A bankrupt will not be committed for contempt for a failure to deliver to the trustee money not accounted for, the loss of which may be attributed to loose business methods. Re Anderson, 103 Fed. 854.

It was held in Samel v. Dodd, 73 C. C. A. 254, 142 Fed. 68, that the bankruptcy court did not have jurisdiction to require a bank-

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ror, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered. While such opinions cannot be referred to for the purpose of eking out findings of fact when those findings are required to be of record, yet they are constantly made use of when (as, for example, on a writ of error from the Supreme Court to a state tribunal) the appellate tribunal is at liberty to ascertain at large the propositions of the common or statute or constitutional law on which the case proceeded. This a clear rule, a very late application of which is in Burt v. Smith, 203 U. S. 129, 134, 51 L. ed. 121, 126, 27 Sup. Ct. Rep. 37. As the parties have freely discussed the case at large without objection on either side, we feel safe to adopt the broader view, and it is our present opinion that it is our right so to do. We are supported in this by Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269. On the whole, we accept for this case the position that the proceeding in the district court was by virtue of the statutory provision expressly authorizing it to compel obedience to its orders; that the way for any party dissatisfied with the conclusion of that court to reach us was by a petition for review; that, on such petition, we can revise any question of law as to which we may justly infer that the district court reached a conclusion,

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rupt, under penalty of imprisonment for contempt, to turn over to the trustee the value of goods and merchandise found by the referee not to have been accounted for, as he should be required to turn over the specific property. As such an order, the court said, dangerously approaches, if it does not overstep, the line of imprisonment for debt.

And it is no excuse in a proceeding for contempt for a refusal to turn over merchandise shown to have been in the bankrupt's possession, after a full opportunity to account for its absence, that the referee's order did not specify the particular money or property to be turned over. Ripon Knitting Works v. Schreiber, 101 Fed. 810.

When property is in possession of or claimed by third person.

A bankrupt's wife may be committed for contempt for a refusal to obey an order to turn over to his trustee money and property delivered by the bankrupt to her just prior to the filing of the petition in bankruptcy, to which she does not assert ownership, but is advised by counsel not to deliver up unless ordered by the court. Re Moore, 104 Fed. 869.

So, the refusal of an agent of a bankrupt to comply with an order of the referee to deliver assets of the former to the trustee in bankruptcy may be punished by the court upon recommendation of the referee, as a contempt. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, affirming 104 Fed. 530, and reversing 44 C. C. A. 620, 105 Fed. 581.

So, a judgment creditor of a bankrupt may be punished for contempt for disobeying an order to turn over to a trustee the proceeds of a void attachment of a bankrupt's property, paid to him after adjudication of bankruptcy. Re Graessler & Reichwald, 83 C. C. A. 304, 154 Fed. 478.

So, one who claims ownership to certain property in the hands of a bankrupt as bailee, by petitioning for involuntary proceedings, and asserting himself a creditor, whose claim of ownership is disallowed and the value of the property, which has been delivered to him, found, may be punished for contempt in not returning the property or its value to the trustee, the question of ownership and value being *res judicata*. Re Strobel, 163 Fed. 380.

The treasurer of a bankrupt corporation will not be committed for contempt for refusal to deliver to the trustee money in his possession belonging to the bankrupt, where he is under an indictment in a state court for embezzlement thereof. Re Hooks Smelting Co. 146 Fed. 336.

When the person having possession of money or property claims it adversely to the bankrupt, he cannot be required to turn it over to a trustee, or be committed for contempt upon refusing to obey such order. Re Eddleman, supra; Re Mayer, 98 Fed. 839. See also Mueller v. Nugent, supra, where this doctrine is discussed.

When property is in custody of the law.

It was held, in Carling v. Seymour Lumber Co. 51 C. C. A. 1, 113 Fed. 483, reversing 112 Fed. 323, that a bankruptcy court should not make an order requiring a receiver appointed by a state court, on pain of punishment for contempt, to turn over to a trustee assets of a bankrupt in his possession, as comity requires, as a general rule, that an application should be first made to the state court for an order for the possession of such assets.

Where an assignee for creditors is administering the estate of an insolvent when ousted by bankruptcy proceedings, he should not be required to turn over to a trustee in bankruptcy the amount of money of the insolvent which he has paid out for counsel fees before bankruptcy proceedings, and that which he has retained as commission, and has spent, when it appears that he has no means or property of his own, and is unable to borrow money to repay it; as the court cannot, by contempt proceedings, undertake to compel the performance of something the respondent cannot perform, even through his own fault, where it arose through mis-

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whether formally expressed or not, and whether or not formally presented; and that, to that end, we may search not only the record in that court, but also its opinions.

As said in the opinion passed down by us on February 16, 1906, already referred to, the district court proceeded originally by a consolidated order, directing the bankrupt to turn over to the trustee the money in controversy, and also directing that, in default thereof, she should be committed. There is no doubt that that order was supported by some precedents; but it seemed to us not consonant with the rules intended for the protection of personal liberty, which rules ought to be applied with special strictness where the imprisonment of a citizen is, in any extent, absolutely at the control of a single judge, as is the fact here. Therefore we followed the practice in this particular shown by Mueller v. Nugent, 184 U. S. at page 5, 46 L. ed. 407, 22 Sup. Ct. Rep. 269. The proceedings there were more summary than before us; but the clear essentials were preserved as we directed them to be preserved here, in that the order to turn over the property was entered, notice thereof given to the individual against whom it ran, with an interval of time to comply therewith, and a refusal so to do, before any order was issued as against one in contempt. The fact that we thus, in a certain sense, dissevered the proceedings, gave rise to the contention now made as to what proofs were properly cognizable by the district court on the precise issue now before us. In our opinion we said that "a proceeding for contempt is of a different character from one resulting in a mere order for the payment of money to a trustee in bankruptcy."

We also added: "It is claimed that it is criminal in its nature, while an order for the mere payment of money is purely civil; that it would be justified only by the proofs and the amount of proofs requisite on ordinary criminal issues; and that it is in effect an independent proceeding which can be initiated only after an order for payment of money has been disobeyed, and on an order to show cause, or some other new notice, given to the person alleged to be in default."

On the present proceeding, the petitioner, Mrs. Cole, seems to assume that we ruled all that we said was claimed by her. We were so far therefrom that we added that it was sufficient then to say that the record did not show that she had had any day in court on the question of contempt. The sum and substance of all we authoritatively ruled was that the record should show that an issue had been made in some way on the question of contempt, and that the person adjudged guilty thereof had had an opportunity to be heard in reference thereto.

It now becomes necessary for us to take a definite position with regard to some of the propositions which we then left open, because now it is apparently claimed by the petitioner that the proceeding against her for contempt is not merely criminal in its character, but is governed by the strict rules of ordinary criminal proceedings, even apparently to such an extent that the allegations of the petition, that she be incarcerated for disobedience of an order for payment of money, must be supported by new proofs covering all the issues made thereby, and by witnesses confronting her in accordance with the 6th Amendment to the Constitution. The precise point is that the learned judge of the district court, in connection with the petition for committal, not only heard witnesses produced before him after the filing thereof, including Mrs. Cole, but also, to a certain extent, improperly examined the prior proceedings. The details we will come to hereafter. At the outset we may say it is enough for us to show generally on this point that, while the petition that Mrs. Cole should be incarcerated for contempt may well have raised, to a certain extent, a new issue, as, for example, the specific issue suggested by our previous opinion, whether or not there was in fact

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conception of his legal rights. Sinsheimer v. Simonson, 47 C. C. A. 51, 107 Fed. 898.

One holding property of a bankrupt under insolvency proceedings in a state court, which are suspended by the passage of the national bankruptcy act, may be punished for contempt for a refusal to turn it over to the marshal. Re Macon Sash, Door, & Lumber Co. 7 Am. Bankr. Rep. 66.

As a bankruptcy court has sole jurisdiction to determine a claim of a vendor to property sold to a bankrupt, it is contempt for the attorneys of the vendor, as well as an officer who seized the property on a writ of replevin, to take it from the sheriff, who has seized it on attachment against the

bankrupt prior to the filing of a petition, but who was notified by the referee, after the adjudication of bankruptcy, to hold it for the trustee. Re Walsh Bros. 159 Fed. 560.

But an officer who has seized the property of a bankrupt by legal process prior to an adjudication of bankruptcy, and who, in good faith, upon the advice of counsel, refuses to turn it over to a trustee, will not be punished for contempt, where it appears that the property seized is not worth much more than the lien debt, and that no advantage will accrue to the creditors by requiring him to surrender it to the trustee. Orr v. Tribble, 19 Am. Bankr. Rep. 849.

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an inability to obtain possession of the funds in question, which it appears from the record were actually in the hands of her husband, and while also it seems to be conceded on all sides that, before committing for contempt, the court should be satisfied beyond a reasonable doubt of a wilful refusal or a wilful act on the part of the person proceeded against, yet neither the 6th Amendment to the Constitution, nor any principle shadowed out by it, has strict application to proceedings of the character before us. Eilenbecker v. District Ct. 134 U. S. 31, 39, 33 L. ed. 801, 804, 10 Sup. Ct. Rep. 424; Re Debs, 158 U. S. 564, 596, 39 L. ed. 1092, 1106, 15 Sup. Ct. Rep. 900.

The general rule as to the effect of the first ten Amendments is distinctly stated in Robertson v. Baldwin, 165 U. S. 275, 281, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326, 329, as follows: "The law is perfectly well settled that the first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."

It is settled that the general rule thus stated in Robertson v. Baldwin applies to proceedings of the character before us. By necessity such proceedings are sometimes summary, and therefore informal in their character. Eilenbecker v. District Ct. 134 U. S. 31, 38, 33 L. ed. 801, 804, 10 Sup. Ct. Rep. 424. In Re Savin, 131 U. S. 267, 278, 33 L. ed. 150, 153, 9 Sup. Ct. Rep. 699, it appeared that objections were made because the court which entered the judgment as for contempt did not require service of interrogatories, according to the older practice. The opinion said that the court could have adopted that mode in trying the question of contempt, but it was not bound to do so. It added: "It could, in its discretion, adopt such mode of determining that question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt."

The court declared that such proceedings were analogous to proceedings for the removal of an attorney, according to what was done in Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285. In that case there was neither any formal accusation nor formal citation; but it was plain that the attorney understood the nature of the charge against him, and had been afforded ample opportunity to explain the transaction and vindicate his conduct. The opinion in Randall v. Brigham, where it is quoted in Re Savin, continued as follows: "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

Certainly, there is nothing in the nature of the thing which permits proceedings for the removal of an attorney to be more informal than those for punishment for contempt. The reverse is the fact, because the loss of a life's occupation is involved in the loss of the right to practise in courts of law.

There can be no question that, in reference to this topic, we may search the rules on practice in equity with safety. Equity rule 90 refers us to the practice of the high court of chancery in England for assistance in that direction, and this rule relates to the time when it was first enacted. Thomson v. Wooster, 114 U. S. 112, 29 L. ed. 108, 5 Sup. Ct. Rep. 788. There is nothing to show that the rules as to evidence in the Federal courts on proceedings in equity for punishment for contempt are any more stringent than formerly in England, where an issue of fact, when it arose, was often tried on affidavits. 3 Dan. Ch. (1841) 373; 4 Bl. Com. 288. That in the United *ex parte* affidavits may be thus used is shown by Rapalje, Contempts (1890) § 126. We may also cite the practice as approved by the experienced Judge Hammond in United States v. Anonymous (C. C.) 21 Fed. 761, 767, decided in 1884, and by the likewise experienced Judge Green, of the district of New Jersey, as shown in Mexican Ore Co. v. Mexican Guadalupe Min. Co. (C. C.) 47 Fed. 351, 353, decided in 1891. Affidavits were also used without disapproval before Mr. Justice Nelson in Whipple v. Hutchinson, 4 Blatchf. 190, 191, Fed. Cas. No. 17,517, and before Circuit Judge Bond and District

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Judge Giles in Birdsell v. Hagerstown Agri. Implement Mfg. Co. 1 Hughes, 59, 63, Fed. Cas. No. 1,436.

The great fullness with which we have explained this proceeding, and the practice in regard thereto, will be found to have been necessary. For example, the petition on which Mrs. Cole was ordered by the district court to be incarcerated is only such as would be required for ordinary supplemental proceedings for recovering a debt. It shows only that Mrs. Cole had been ordered to pay and had not. It contains no allegation that her failure to pay was wilful, nor anything to show that it was not caused by mere inability. Applying strict rules, this, of course, would not be sufficient to put her on the defensive. Nevertheless, the parties have made no issue on this account, they have proceeded to trial on the merits, they appear to have had no misunderstanding as to the fundamental questions involved, and therefore we pass this by.

The petition in bankruptcy against Mrs. Cole was involuntary, and was filed on November 23, 1903. It alleged that she concealed $2,700, being a part of the sum received by her on September 17, 1903, from the sale of her homestead at Saco, in this state. It described her as then living in Wakefield, in Massachusetts. She was duly adjudicated a bankrupt, and was examined, and thereupon, after a full report of the referee, which report and the statement of facts therein were confirmed by the district court, the order was entered on March 4, 1905, to which our opinion passed down on February 16, 1906, related, as follows: "It is therefore ordered that the bankrupt turn over and deliver to the trustee, within fifteen days, the said sum of $2,425; in default of which she stand committed to the marshal of this district, to be incarcerated until she obeys the order of this court, or is otherwise discharged by due process of law, or until the further order of this court."

The report of the referee on which that order was entered stated fully the transactions leading up to and following the petition in bankruptcy, so far as they affected, or could affect, the issue. It appeared thereby that Mrs. Cole's indebtedness consisted of indorsements of her husband's notes, held by several banks in Biddeford and Saco, amounting in all to $2,725. On September 14, 1903, Mrs. Cole, whose husband then lived at Saco, sold the homestead there for $3,800 in actual cash,—that is, bills,—which bills were paid directly into the hands of Mr. Cole. Less than two weeks after selling the homestead, Mr. and Mrs. Cole together moved to Wakefield, where they established a new home, and where they were when the petition in bankruptcy was filed. A day or two before the close of October, 1903, the cashier of one of the banks holding the notes of Mr. and Mrs. Cole called on them at Wakefield, and sought to secure an adjustment. During the conversation, in reply to a question to Mr. and Mrs. Cole as to what they had to say, she answered: "We have not got anything to say." Other conversation occurred, during which Mrs. Cole said that they did not have the money, adding: "We have sent it to his brother,"—meaning the brother of Mr. Cole. The referee reported also other evidence, including that of Mr. Cole, which suggested, among other things, certain remarkable improbabilities with reference to Mrs. Cole's statement that the money had been sent to Mr. Cole's brother. No reason for moving to Wakefield was suggested except a purpose of carrying out of the jurisdiction the money received for the homestead.

Thereupon, the court found in March, 1905, specifically as follows: "The referee has found affirmatively that the bankrupt has under her control the balance of the fund, to the amount of $2,425, that she had possession or control of it at the date of the filing of the petition in bankruptcy, that she has withheld and concealed the same from her trustee, and is now withholding and concealing the same from him."

On the proceeding before us to revise the order of March 4, 1905, we pointed out that we were not then obliged to go into any question whether Mrs. Cole was in manual possession of the money, or exercised such absolute control of it as would enable her to turn it over to the trustee; but, on the case now before us, it remains for us to consider whether, on the record here, we can find that it was permissible for the district court to find a contemptuous—that is, a wilful—refusal on the part of Mrs. Cole to turn over the moneys to the trustee, with the accompanying ability on her part to do so.

On this immediate proceeding Mrs. Cole testified orally, and other testimony was introduced. If the case rested, as Mrs. Cole now claims it should rest, on this subsequent testimony alone, we would be compelled to say, without hesitation, that there were in the record no proofs which would permit the district court, or any court, by reason thereof, to find Mrs. Cole in contempt on March 4, 1905, or at any subsequent time; but, at this hearing, Mr. Anderson appeared for Mrs. Cole, and Mr. Cleaves for the trustee in bankruptcy, and the following occurred:

Mr. Cleaves: I would like to have it appear that I offer the entire record which

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went to the circuit court of appeals; or rather, I offer all of the testimony and documents which have been taken or used in this case in bankruptcy.

Mr. Anderson: And that, may it please your honor, if your honor considers it,—I understand we are taking it *de bene*,—I desire to have whatever rights we have saved.

The court: The stenographer is to write out the testimony taken at this hearing, and the offers made by counsel. Upon this record and upon such part of the printed record as the court may find material and legal evidence—upon this evidence counsel shall be heard in court, and are requested also to prepare suitable and sufficient briefs, setting forth their exact positions in the premises.

With reference to this, the opinion of the learned judge of the district court of November 6, 1906, said as follows: "In the case before me I have treated the order to show cause as an independent proceeding, and have applied the rules of evidence pertinent to a criminal case. I find, upon the threshold of the proceeding, the decree of the circuit court of appeals that the bankrupt pay over certain money to the trustee, and that she have her day in court upon the question whether she shall be held to be in contempt. In pursuance of the request of the respondent, I have considered only the testimony of the bankrupt herself, the greater part of which I have given in full, and of Mr. Jordan, her nephew, together with her examination before the referee, which she has verified and made part of her testimony. With reference to the other rulings, requests for which have been preferred by the learned counsel for the respondent, I do not find it necessary to pass upon them affirmatively and in detail; but it will be seen that I have adopted substantially the rules of law which he has invoked in the proceeding. I have also examined the records of the district court, so far as they are material, relevant, and admissible."

Whatever the learned judge might have examined in the records of the district court, according to what we have quoted from him, he would have found nothing except the petition in bankruptcy, the schedules filed by the bankrupt, her prior examination, various proofs of debt, the ordinary bankruptcy proceedings, and the depositions of witnesses, taken in the presence of the bankrupt, and subsequently cross-examination by her. While the introduction of these at the stage of the case to which the petition now before us refers would not be permissible according to the strict rules of the Amendments to the Constitution in reference to criminal procedure, yet it would seem that they are of such authority, and arose under such circumstances, that they would come within the various expressions which we have cited from the Supreme Court, in that the use of them would have due regard to substantial rights, and even greater regard thereto than the affidavits which we have seen are sometimes used with reference to proceedings for contempts. Moreover, where a proceeding for contempt is on the heel of a strictly civil proceeding, like a decree in equity, or, in this case, like the order of the court of March 4, 1905, it would be almost an obstruction of justice if the court and parties could not refer back and make liberal use of what led up to the principal decree. But the conclusion we reach renders it unnecessary that we should dispose of all the questions submitted to us, and which we have discussed, or determine what the learned judge of the district court meant by "the records of the district court," etc., or whether he could properly make an examination, as stated by him, without exhibiting to the parties specifically what he regarded as material and admissible, so that the parties might make a direct issue with reference thereto if they saw fit. Examining all the proceedings which it is possible for the learned judge to have examined, we think we have stated the most significant facts that appear therefrom, and, although the case is a troublesome one, yet, taking it by and large, notwithstanding the combined judgment of both the learned judge of the district court and the referee, which, of course, in accordance with the decisions, should have great weight on a question of fact like this, we find that there was in fact not sufficient evidence of the kind which the law requires on the exact issue pending here; that is to say, whether Mrs. Cole wilfully refused to pay over moneys which it was necessary to show that she could pay over at the specific date to which the orders of the court properly related. Under the rules which touch petitions of this character, which permit only revision in matter of law, we could not interfere with the decree of the district court of March, 1905, because, under the circumstances, we would not be justified in declaring that there was not sufficient to permit the district court to pass on the question whether, as a result of collusion between Mrs. Cole and her husband, a mere debt, according to the rules of civil procedure, might not have been established against both her and her husband, or either of them; but, when it comes to the proposition that, at any specific date or time to which the proceedings might refer, Mrs. Cole had so completely under her control funds which she could command

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that her failure to command them was a wilful contempt of the court, or when it comes to the issue that funds might not have been squandered, or even wrongfully disposed of by sending them to her husband's brother, or in some other way, there is such a failure of proof that even the determination of the district court cannot supply it. With reference to the character of the proofs required for this purpose, we approve the language of Judge Shelby in Samel v. Dodd, 73 C. C. A. 254, 259, 142 Fed. 68, 72: "It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court is erroneous as matter of law, where the bankrupt, by sworn answer, denies that he has the money or the goods, and it does not appear clearly and affirmatively from the record, notwithstanding his denials, that he has the power to comply with the decree."

As our conclusion can hardly become a precedent for any future case that can arise, we do not deem it profitable to enlarge in regard thereto. It is to be borne in mind that our determination deprives the trustee of no ordinary rights given him by the law. It merely shuts him out from the extraordinary proceeding which, in case of an error on the part of the court, would result in most unfortunate and painful injustice. In our previous decision in regard to this proceeding we found, as we have said, sufficient to enable us to sustain the district court in entering a judgment against Mrs. Cole for the amount claimed by the trustee, and we leave him the ordinary remedies which the law gives for collecting a judgment from a debtor who is insolvent, or who claims to be so.

Let there be a decree reversing the decree of the District Court, with costs for the petitioner.

MICHIGAN SUPREME COURT.

PARKER, WEBB, & COMPANY et al.
v.
GEORGE F. AUSTIN, Sealer of Weights and Measures, Appt.

(156 Mich. 573, 121 N. W. 322.)

Municipal corporation — police power — scales.

A municipal corporation has no power to condemn for inaccuracy computing scales in use by merchants.

(May 25, 1909.)

APPEAL by defendant from a decree of the Circuit Court for Wayne County restraining him from condemning certain scales. Affirmed.

Statement by **Grant, J.:**

Complainants in this case, five in number, are retail dealers in meats in the city of Detroit, each carrying on an extensive business. They use certain scales known as the "Dayton moneyweight spring-balance barrel-shaped computing scales," and commonly known as the "Boston butchers' scales." These scales are manufactured by the Computing Scale Company, of Dayton, Ohio, which owns the patents thereof, and are sold by the Moneyweight Scale Company, of Chicago, Illinois. The complainants purchased and own these scales, and had used them for a long time; they having been properly sealed by the city sealer as correct. The defendant is the sealer of weights and measures for the city of Detroit. He threatened to condemn these scales and thus prohibit their use by the complainants and other merchants of Detroit. The complainants thereupon filed this bill to enjoin the defendant from taking this action, and thus destroying their property.

The scale in question is known as No. 63 scale. The platform of the scale, as in ordinary scales, is mounted upon a suitable base. From the base extend upward two arms upon which a stationary cylinder is mounted. Within this stationary cylinder is a revolving drum. At either end of the revolving drum are pinions or gear wheels. These pinions are worked by notched rods or racks, which, in turn, are worked by springs attached to the platform by a steel rod and thermostat, and, when the weight is placed upon the scale, the springs are elongated and the rack operates the drum within the scale. The drum consists of an

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Case Note — Power of municipality to regulate use of scales by merchants.

There is here no intention to deal with the question of the power of a city to erect city scales, and to require coal, cotton, hay, and other commodities to be weighed thereon when offered for sale within the city.

In Snell v. Belleville, 30 U. C. Q. B. 81, it was held that, under a statute which enabled councils of towns to appoint an inspector of weights and measures, to test, and, if found correct, to stamp the same, a by-law of the town which prohibited the use of spring scales for any market purpose was not beyond its power.

In Spring Valley v. Spring Valley Coal Co. 71 Ill. App. 432, it was held that where a city was granted the power "to provide for the inspection and sealing of weights and measures," and "to enforce the keeping and use of proper weights and measures by vendors," an ordinance providing for the election of an inspector of weights and

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aluminum frame upon which is mounted a specially prepared paper chart, both very light materials, so that the friction is reduced to a minimum. The chart and the frame make up the drum, which revolves within the cylinder. Down the center of the chart is a weight graduate and also an inverse weight graduate, giving graduations of weight for every ounce up to 24 pounds, which is the limit of the capacity of the scale. Upon either side of the weight graduate, figures are placed in direct alignment with each indication of weight for 2 ounces upon the weight graduate. These figures in horizontal columns are also arranged in perpendicular columns, and the drum is so placed inside of the stationary cylinder that each of the horizontal columns, when the drum revolves, shows through a slit on the face of the stationary cylinder. Immediately below the slit, across the stationary cylinder, are arranged figures which show the different prices per pound, and upon this particular scale the prices are 4, 5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 28, and 30 cents per pound. Hence, when a weight is placed upon the scale, the weight is shown through an opening in the stationary cylinder in front of the weight graduate, and, in direct alignment with each weight graduation of 2 ounces, will appear, through the slit on the face of the stationary cylinder, the computed value of the particular weight at the different prices per pound; each value appearing above the figure on the outside of the stationary cylinder, indicating the price per pound. The figures appearing through the slit are made larger by a magnifying glass, and stretched the length of the slit is a wire showing the line upon which the scale balances when empty, or, in some of the scales, the wire is replaced by a line upon the glass. This line, when it rests upon any two ounces of weight, indicates the value of such weight at the different

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measures, making it his duty to test the accuracy of scales used by persons or corporations in the sale of any article or commodity, and to condemn scales found not to conform to the standard of the state of Illinois, was reasonable, and a proper exercise of the power granted the city; and that a subsequent statute creating a state inspector of weights and measures of coal did not work a repeal of the ordinance with respect to scales at coal mines, since there could be only one correct standard, and it was to be presumed that each officer would only do his duty.

In New York v. Hewitt, 91 App. Div. 445, 86 N. Y. Supp. 832, it was held that an ordinance imposing a penalty for using incorrect scales was presumed to be reasonable.

In Springfield v. Starke, 93 Mo. App. 70, it was held that, in the absence of explicit authority in positive law, an ordinance was unreasonable which required every merchant and shopkeeper to pay fees twice a year to have the weights and measures necessarily used in his business approved by a local inspector.

But, in People ex rel. Gould v. Rochester, 45 Hun, 102, although it does not appear that the statute authorizing the city to inspect weights and measures positively stated at what intervals such inspection might be made, it was held that an ordinance was reasonable which made it the duty of the city sealer to inspect the weights and measures of merchants "at least once in every six months hereafter, and as much oftener as he thinks proper." It does not appear in this case, however, that the ordinance required the merchants to pay the inspector's fees.

In the absence of an express statutory provision delegating such power to a city, it has no authority to provide that its sealer of weights and measures may recover from merchants for unsolicited services in testing their weights and measures. Ford v. New York C. & H. R. R. Co. 33 App. Div. 474, 53 N. Y. Supp. 764; Fausnaugh v. Rogers, 62 App. Div. 535, 71 N. Y. Supp. 125.

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In Bangasser v. Citizens' Gas Co. 19 Alb. L. J. 400, it was held that a city had power to fix the fees of its sealer of weights and measures, and to require the owner of the scales or measures to pay the same, where it was expressly given the power to fix the salary or compensation to be paid such sealer, and to require every person who sold by weight or measure to submit his weights and measures to the sealer for his inspection and sealing.

In Hettenbach v. New York C. & H. R. R. Co. 18 Hun, 129, it was held that a city was not authorized to pass an ordinance which would compel one not engaged in selling merchandise to pay for the inspecting of his scales, where the only power conferred by its charter upon the subject was to make ordinances "in relation to the inspection and sealing of weights and measures, and enforcing the keeping and use of proper weights and measures by vendors."

But, in Bangasser v. Citizens' Gas Co., supra, it was held that a judgment for a city sealer's fees would not be reversed upon the ground that there was no evidence that the scales were used by defendant in selling commodities, or that defendant was engaged in the business of selling merchandise, where his motion for a nonsuit in the lower court did not point out such defect in the evidence.

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that her failure to command them was a wilful contempt of the court, or when it comes to the issue that funds might not have been squandered, or even wrongfully disposed of by sending them to her husband's brother, or in some other way, there is such a failure of proof that even the determination of the district court cannot supply it. With reference to the character of the proofs required for this purpose, we approve the language of Judge Shelby in Samel v. Dodd, 73 C. C. A. 254, 259, 142 Fed. 68, 72: "It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court is erroneous as matter of law, where the bankrupt, by sworn answer, denies that he has the money or the goods, and it does not appear clearly and affirmatively from the record, notwithstanding his denials, that he has the power to comply with the decree."

As our conclusion can hardly become a precedent for any future case that can arise, we do not deem it profitable to enlarge in regard thereto. It is to be borne in mind that our determination deprives the trustee of no ordinary rights given him by the law. It merely shuts him out from the extraordinary proceeding which, in case of an error on the part of the court, would result in most unfortunate and painful injustice. In our previous decision in regard to this proceeding we found, as we have said, sufficient to enable us to sustain the district court in entering a judgment against Mrs. Cole for the amount claimed by the trustee, and we leave him the ordinary remedies which the law gives for collecting a judgment from a debtor who is insolvent, or who claims to be so.

Let there be a decree reversing the decree of the District Court, with costs for the petitioner.

MICHIGAN SUPREME COURT.

PARKER, WEBB, & COMPANY et al.
v.
GEORGE F. AUSTIN, Sealer of Weights and Measures, Appt.

(156 Mich. 573, 121 N. W. 322.)

Municipal corporation — police power — scales.

A municipal corporation has no power to condemn for inaccuracy computing scales in use by merchants.

(May 25, 1909.)

APPEAL by defendant from a decree of the Circuit Court for Wayne County restraining him from condemning certain scales. Affirmed.

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aluminum frame upon which is mounted a specially prepared paper chart, both very light materials, so that the friction is reduced to a minimum. The chart and the frame make up the drum, which revolves within the cylinder. Down the center of the chart is a weight graduate and also an inverse weight graduate, giving graduations of weight for every ounce up to 24 pounds, which is the limit of the capacity of the scale. Upon either side of the weight graduate, figures are placed in direct alignment with each indication of weight for 2 ounces upon the weight graduate. These figures in horizontal columns are also arranged in perpendicular columns, and the drum is so placed inside of the stationary cylinder that each of the horizontal columns, when the drum revolves, shows through a slit on the face of the stationary cylinder. Immediately below the slit, across the stationary cylinder, are arranged figures which show the different prices per pound, and upon this particular scale the prices are 4, 5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 28, and 30 cents per pound. Hence, when a weight is placed upon the scale, the weight is shown through an opening in the stationary cylinder in front of the weight graduate, and, in direct alignment with each weight graduation of 2 ounces, will appear, through the slit on the face of the stationary cylinder, the computed value of the particular weight at the different prices per pound; each value appearing above the figure on the outside of the stationary cylinder, indicating the price per pound. The figures appearing through the slit are made larger by a magnifying glass, and stretched the length of the slit is a wire showing the line upon which the scale balances when empty, or, in some of the scales, the wire is replaced by a line upon the glass. This line, when it rests upon any two ounces of weight, indicates the value of such weight at the different

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measures, making it his duty to test the accuracy of scales used by persons or corporations in the sale of any article or commodity, and to condemn scales found not to conform to the standard of the state of Illinois, was reasonable, and a proper exercise of the power granted the city; and that a subsequent statute creating a state inspector of weights and measures of coal did not work a repeal of the ordinance with respect to scales at coal mines, since there could be only one correct standard, and it was to be presumed that each officer would only do his duty.

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prices per pound by means of the fact that the line bisects such value figure.

The No. 63 scale is made for the use of butchers or the fish market trade, for the purpose of weighing heavier articles than ordinary groceries, and for the purpose of weighing articles of smaller and lower values. Its chart is as large as can reasonably be made, and yet not be so heavy as to cause friction in its operation, and, at the same time, not have a centrifugal motion or a sort of a "fly wheel motion" as it rotates. The front of the scale faces the operator, and through the opposite side of the stationary cylinder, which faces the purchaser, is an opening showing the inverse weight graduation, but no computed values. Hence, in every weighing on the scale the purchaser sees the exact weight that is being given him by means of the weight graduate upon the purchaser's side of the scale, and, if the scale is brought to balance, that fact will show upon the purchaser's side as well as upon the dealer's side of the scale. The computed values that are placed upon the chart are mere matters of arithmetic, found by multiplying the weight by the price per pound. The result of the computation is placed exactly opposite the proper weight graduation, so that each of the weight graduations for 2 ounces is in direct alignment with the computed value opposite, and this computed value must necessarily be indicated simultaneously with the indication of weight. In these computations there are no fractions whatever. Anything less than one-half cent is disregarded; anything amounting to a half cent or more is called a whole cent. The result would be that any fraction less than one-half cent is given to the purchaser, and any fraction amounting to half a cent or more goes to the dealer.

The case was heard upon pleadings and proofs, taken in open court. The scales in question and other scales manufactured by a competing company were introduced at the hearing in the court below. Many experiments were made before the trial court by witnesses for the complainants and the defendant. The defendant was represented by the attorneys for the competing company, in whose interest evidently the action on the part of the defendant was largely taken. The complainants were represented by the attorneys for the company which sold them the scales. The trial court sustained the complainants' claim and entered a permanent injunction restraining the respondent from condemning their scales.

Mr. **Albert H. Meads**, with Mr. **Fred H. Warren**, for appellant:

The scale could be condemned under the police power.

23 L.R.A.(N.S.)

Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 N. E. 870.

Mr. **P. J. M. Hally** also for appellant.

Messrs. **Orla B. Taylor, John M. Zane**, and **Charles F. Morse**, for appellees:

The common council has no implied power to legislate upon the subject of weights and measures, under the general police power.

Dill. Mun. Corp. § 89; Horr & B. Mun. Pol. Ord. § 20.

The ordinance confers arbitrary power upon the city sealer.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; State v. Tenant, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; State ex rel. Garrabad v. Dering (Re Garrabad) 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Anderson v. Wellington, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; Barthet v. New Orleans, 24 Fed. 563; Sioux Falls v. Kirby, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156.

Grant, J., delivered the opinion of the court:

The record presents two questions, one of law and the other of fact. The legal question is: Has the defendant, the sealer of weights and measures of the city of Detroit, the legal authority to determine the accuracy of computing devices, and either to approve or condemn them? The question of fact is: Is the computing device dishonest and false? Or, stated otherwise, Does it give a greater price for the goods weighed and sold than the dealer is entitled to?

1. It is conceded that the scale weighs the goods purchased with absolute accuracy, and that the amount of such weight is correctly exhibited to the purchaser upon one side and to the seller upon the other side of the scale. The sealer is therefore bound under the law to place his seal of approval upon the weighing part of the machine, because it fully complies with the law. If this chart, showing the price of the commodity, was attached in a stationary way upon the front of the scale facing the seller, or upon the wall beside the scale, or upon the counter, so that the seller seeing the weight could look at the chart and find the price, it would still be a computing device, subject to the same criticism that it is when placed upon a revolving drum. The sealer can no more condemn the scale in one case than he can in the other, because in each case the weight is the same and is correct. The seller and purchaser are then upon an equal footing.

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The purchaser, knowing the weight and price per ounce or pound, can make the computation himself. The method by which the seller reckons the total price to be paid is of no material consequence to the purchaser. The seller may arrive at the price by mental process or with paper and pencil, or he may have a chart which shows the value of any amount purchased. This process does not enter into the transaction. It can make no difference to the purchaser how the seller arrives at the result. The purchaser is at no disadvantage so long as he is furnished the means to determine the accuracy of the charge made by the seller. The legal question is therefore narrowed to this: Is the sealer of weights and measures clothed with authority to condemn a chart adopted by the seller for his convenience and expedition in making sales?

By an amendment to the ordinance of the city of Detroit in 1906, it was made to read as follows: "The sealer of weights and measures shall test and prove all computing scales as to weights and values, and any such scale which may be found to give any weight other than the correct weight for any money value indicated shall be condemned; otherwise they shall be approved." The Congress of the United States has power to establish and adopt standards of weights and measures. These standards were early adopted by this state, and have continued in force ever since. Mich. Laws 1837, pp. 66, 67, No. 42; Rev. Stat. 1838, pt. 1, title 7, chap. 3, pp. 151-155; Comp. Laws, §§ 4882 et seq. The statute provides for furnishing these weights to each county and township in the state, and for an annual comparison of the scales and weights therein with the standards so furnished. It was held, in McGeorge v. Walker, 65 Mich. 5, 31 N. W. 601, that the only comparison to be made is with the standard weights so furnished. The legislature, by the charter of the city of Detroit, has expressly authorized the common council to regulate weights and measures to be sealed by a city sealer "so as to be made conformable to the standards of weights and measures established by the general laws of the state." Pub. Acts 1857, p. 105, No. 55. This is the sole power conferred by the legislature upon the common council. "Implied powers" are those which arise from, and are necessary to carry out, the powers expressly conferred upon municipalities. Taylor v. Bay City Street R. Co. 80 Mich. 77, 45 N. W. 335. The express power to examine and determine the accuracy of scales as to weights does not, by implication, confer upon the council the right to determine the accuracy of charts, ready reckoners, adding machines, or other devices by which the value of the goods weighed shall be determined. The object of the statute is to determine the accuracy of weighing, not the accuracy of the process by which the price is found. The statute aims to protect the public from false weights and measures, and not from the dishonesty of dealers in reckoning the cost of the goods purchased. Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44. In the latter case it was held that the power conferred upon the common council "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same," did not confer upon the council the power to regulate the sale of tobacco.

There is no hint in the charter of any intent on the part of the legislature to confer upon the common council the power to regulate or prescribe methods by which merchants compute the cost of purchases made by their customers, or to supervise adding machines, charts, ready reckoners, or other devices by which the cost is ascertained. It is, however, insisted that this right exists under the general police power inherent in, and conferred upon, municipalities by the very fact of their existence. Under the contention of counsel for the appellant, the common council of every municipality in the state is clothed with power to send its employee into the store of every merchant to investigate and condemn every method employed by the merchant, which, in the judgment of such employee, may be used to state an incorrect result. The statement of the proposition would seem to afford its best refutation. We are cited to no authority holding that a municipality is *per se* clothed with authority to investigate business transactions between merchants and their customers. The chart in question is conceded to show the correct price for even ounces and for pounds. Only in case of fractions of the odd ounce is it claimed to be susceptible of dishonest operation. A dishonest merchant under any method can defraud his customer who does not himself take care to estimate the cost. The chart saves time to both seller and purchaser, and greatly facilitates business.

Counsel cite and rely upon Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Crawfordsville v. Braden, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; Gundling v. Chicago, supra; Bluedorn v. Missouri P. R. Co. 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103; Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 N. E. 870. Harbison v. Knox-

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ville Iron Co. did not involve or discuss this inherent police power of a municipal corporation. The act before the court was a legislative act and involved the power of the legislature, and not a municipality. Crawfordsville v. Braden involved the right of a municipality under the expressly conferred power to light its streets, alleys, and other public places with electric light, etc., to furnish electric light for private houses and business places for a consideration. The right to do so was sustained upon the ground that "a light thus produced is safer to property, and more conducive to health, than the ordinary light." Whether, under our Michigan decisions, the rule of the Indiana court would be sustained—*quære*. In this state the power has been conferred by legislative enactment. In Gundling v. Chicago the sole question, aside from the one above referred to, was whether, under the express authority to provide for and regulate the inspection of tobacco, an ordinance regulating the sale of cigarettes was valid. In Bluedorn v. Missouri P. R. Co. the sole question was the power of the city to regulate the speed of railroad trains through the city. The soundness of that decision cannot be questioned, as it involved not only the right, but the duty of every municipality to protect the lives and persons of its citizens. It, however, furnishes no authority for interference in commercial transactions between its citizens. It is sufficient to say of Moneyweight Scale Co. v. McBride that it involved the inherent power of the legislature, and not of a municipality, the creature of the legislature. It is worthy of remark here that the court in that case held that "the correctness of these scales is not now before us." The court decided that the statute required the charts to be arithmetically correct, and sustained the law upon that basis. It also held that, if it conferred upon the sealer the power to determine the commercial correctness of the chart, it was unconstitutional.

Where power was conferred upon the municipality to prohibit anyone from circulating, distributing, or giving away circulars, handbills, or advertising cards of any description in or upon any of the public streets and alleys of the city, it was held that "this is not an express grant of power to the city of Detroit to pass a by-law or ordinance to prohibit a person from circulating, distributing, or giving away circulars, handbills, or advertising cards of any description, in or upon any of the public streets and alleys of said city, and to punish by fine and imprisonment in the county jail or the Detroit house of correction for violation, and there is no such power implied in these provisions of the charter." People v. Armstrong, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275.

All we now need to decide is that the power of inspection and regulation in such matters must find its authority in some express provision of the legislature. If, at any time, the legislature, conceiving that dishonest means are employed by merchants in selling their goods, shall enact a law conferring power upon municipalities to supervise and regulate them, it will then be time for the courts to determine the validity of such an enactment. Until then we choose not to discuss it.

The decree is affirmed, with costs.

MINNESOTA SUPREME COURT.

JOHN H. WOLL, Respt.,
v.
FRANK VOIGT, Appt.

(105 Minn. 371, 117 N. W. 608.)

Trespass — unlawful occupation — estoppel.

1. The owner, in constructive possession of land at the time of the initiation of trespass, may maintain trespass *quare clausum fregit* alike for cursory and for prolonged trespasses. A trespasser upon land cannot claim by reason of his unlawful occupation thereof (for less than the legal limitation period) that the real owner, although he had knowledge of the trespass, is estopped to sue for damages for the wrongful acts committed.

Same — abandonment of premises — damages.

2. "Claims for mesne profits are usually consequential to and dependent upon a recovery of the land (in ejectment); yet, where the disseisor has surrendered or abandoned the premises before suit, and the rightful owner is in possession, such owner may maintain trespass for the wrongful entry, and have damages for the same in the nature of mesne profits."

(August 14, 1908.)

Headnotes by JAGGARD, J.

Case Note. — Effect of continued occupation by trespasser for less than the limitation period to estop the owner to maintain trespass q. c. f.

Blew v. Ritz, 82 Minn. 530, 85 N. W. 548, which is sufficiently set forth in WOLL v. VOIGT, followed an earlier case in the same jurisdiction (Wayzata v. Great Northern R. Co. 46 Minn. 505, 49 N. W. 205), which was an action to restrain the defendant from maintaining and operating its railway, and from maintaining buildings, on certain streets of the plaintiff village, and in which it was held that one who entered upon and

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APPEAL by defendant from an order of the District Court for Stearns County granting a new trial after dismissing the complaint in an action brought to recover damages for trespass. Affirmed.

The facts are stated in the opinion.

Mr. William G. White, for appellant:

In order to maintain trespass *quare clausum fregit*, the plaintiff must have been in possession of the land at the time the acts of trespass were committed.

Moon v. Avery, 42 Minn. 405, 44 N. W. 257; Olson v. Minnesota & N. W. R. Co. 89 Minn. 280, 94 N. W. 871; 28 Am. & Eng. Enc. Law, 2d ed. p. 595; 21 Enc. Pl. & Pr. p. 817; Wilcox v. Conway, 115 Mass. 561; Gould v. Sub-Dist. No. 3, 7 Minn. 203, Gil. 145; Fogg v. Cushing, 40 Me. 315; Cowenhoven v. Brooklyn, 38 Barb. 9; 3 Bingham, Real Prop. 143; Bigelow, Torts, 160.

The complaint in this action is fatally defective, even if the action be considered as one for "trespass to recover mesne profits."

2 Waterman, Trespass, § 1160; 15 Cyc. Law & Proc. p. 206, note 71, p. 215, notes, 66–68; Young v. Downey, 145 Mo. 261, 46 S. W. 962; Holmes v. Davis, 19 N. Y. 488; Vandevoort v. Gould, 36 N. Y. 647; Schradsky v. Stimson, 22 C. C. A. 517, 40 U. S. App. 455, 76 Fed. 730.

Messrs. H. S. Locke and Donohue & Stephens, for respondent:

The allegation that plaintiff is seised in fee simple is a sufficient allegation that he has the possession as well as the title.

Gage v. Kaufman, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406; Blew v. Ritz, 82 Minn. 530, 85 N. W. 548; Schradsky v. Stimson, 22 C. C. A. 515, 40 U. S. App. 455, 76 Fed. 730; Bliss, Code Pl. 176; Betz v. Kansas City Home Teleph. Co. 121 Mo. App. 473, 97 S. W. 207; Cowenhoven v. Brooklyn, 38 Barb. 9; Olson v. Minnesota & N. W. R. Co. 89 Minn. 280, 94 N. W. 871; Sutherland, Damages, 363.

Jaggard, J., delivered the opinion of the court:

Plaintiff, in a complaint dated April 17, 1907, alleged that he is, and for more than seven years had been, the owner in fee simple and entitled to the possession of a described tract of land; that on or about November 1, 1902, the defendant unlawfully broke and entered said above-described land, and forcibly used, occupied, and farmed said land, and appropriated the crops and hay grown thereon to his own use from November 1, 1902, until September 1, 1906, to the damage of plaintiff in the sum of $400; that, between said last-mentioned dates, the defendant also cut down and carried away the trees and timber of the plaintiff then growing thereon, and converted and disposed of the same to his own use, and otherwise injured said premises, to plaintiff's damage. The complaint sought money judgment in the sum alleged, and other relief. The answer, in addition to denials, set forth that the defendant was the owner in fee, had entered into possession peaceably, had remained in possession for four years, and had made improvements under color of title. It prayed that he be adjudged the owner of the property, or that he have a lien for the reasonable value of improvements made and taxes paid, and for other relief. The reply denied such new matter. On trial, defendant objected to the introduction of any evidence in support of the complaint, and moved for judgment on the pleadings. Because of the form of the action, the court dismissed the action. Subsequently it granted a new trial. This appeal was taken from that order.

The defendant's argument, on principle, as we understand it, is that this, an action of trespass *quare clausum fregit*, did not lie, because it affirmatively appeared from the allegations of the complaint that, when the alleged acts of trespass were committed, the defendant, and not the plaintiff, was in possession. The necessary construction of the complaint and answer, however, is that defendant went into possession November 2, 1902, and remained in possession about four years thereafter. Plaintiff became the owner, and entitled to the possession, according to the complaint, some time in 1900. "The allegation that the plaintiff is seised in fee simple is a sufficient allegation that he has the possession as well as the title." Gage v. Kaufman, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406. Accordingly he was in constructive

possessed the land of another without right—a mere trespasser and knowing that he was such—could not, no matter to what use he might have put the land, or how much he might have improved it or expended upon it, claim that the owner was estopped, by mere delay in ousting him, to seek any remedy, legal or equitable, appropriate to the case.

In Abbott v. Abbott, 51 Me. 575, which was an action of trespass *q. c. f.*, there is a headnote to the effect that the fact that defendant had been in possession for six years claiming title, and had cultivated the land and made improvements thereon, did not affect the plaintiff's right to maintain such action; but, from an examination of the opinion, it would seem that the fact of the defendant's improvement and cultivation of the land was relied on by him, rather than his possession for less than the statutory period of limitation.

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possession at the time of defendant's wrongful entry. Trespass *quare clausum fregit* undoubtedly lay. Defendant's argument involves the position that, where a trespass has been committed, and the trespasser for some time thereafter "uses, occupies, and farms" the land, this wrongful occupancy avails to make it impossible for the disseised owner to sue in this form of trespass after the premises have been vacated. The statement of this proposition is its refutation. It is elementary that a trespasser's continued occupancy of the premises, when damages complained of were inflicted, neither impairs nor disturbs the owner's right to prevail in trespass *quare clausum fregit*. Defendant was a trespasser *ab initio*. It is immaterial, so far as the right of the plaintiff to maintain that action is concerned, whether defendant had possession for four years or for four hours; for there is no pretense in this case that defendant had acquired title by prescription. In a sense every trespasser is in possession of the close he violates. He at least occupies space therein. Trespass *quare clausum fregit* lies alike for cursory and for prolonged trespasses. "A trespasser upon land cannot claim by reason of his unlawful occupation thereof (for less than the legal limitation period) that the real owner, although with knowledge of the same, is estopped to sue for damages for the wrongful acts committed." Blew v. Ritz, 82 Minn. 530, 85 N. W. 548.

Moon v. Avery, 42 Minn. 405, 44 N. W. 257, is not at all inconsistent with plaintiff's right to prevail. There plaintiff had been the owner of the land in controversy since September 25, 1885. The answer set up that defendant went into possession some three months earlier, on June 10, 1885, and remained in possession until June 5, 1888. "The reply," Collins, J., said, ". . . must be taken as an acknowledgment by the plaintiff that from the day first mentioned [June 10, 1885] to that last named [June 5, 1888] the defendant was in the actual, continuous, and exclusive occupancy and possession of the entire tract of ground. Consequently the plaintiff did not have possession of any part of it, either actual (admitted to have been in another) or constructive, which she could not have had, because of defendant's actual adverse possession." In Olson v. Minnesota & N. W. R. Co. 89 Minn. 280, 94 N. W. 871, Collins, J., said: "It is well settled that, in order to maintain an action of trespass *quare clausum* by one not holding the legal title to land and thus in constructive possession, he must show an actual possession in himself at the time the alleged trespass was committed." The case is not in point. Here plaintiff is assumed to have had the legal title to the land. That the Olson Case "recognizes and affirms." Moon v. Avery, supra, is in nowise inconsistent with plaintiff's right to prevail. In Waterbury Clock Co. v. Irion, 71 Conn. 254, 262, 41 Atl. 827, plaintiff was neither in actual nor constructive possession at the time of the alleged trespass. In Galt v. Chicago & N. W. R. Co. 157 Ill. 125, 131, 41 N. E. 643, it was not "pretended that the plaintiff was the owner or in possession of the premises at the time of the original entry. . . ." In Collins v. Beatty, 148 Pa. 65, 23 Atl. 982, defendant went into possession under a parol contract prior to a similar contract to sell to plaintiff.

Plaintiff is presumed to have suffered some damage from the unlawful breach of his close. Injury to the freehold follows from the cutting of timber, whose extent plaintiff was entitled to show by way of enhancement of damages. 3 Sutherland, Damages, 375. This showing of damage was abundantly sufficient to sustain the trial court's final order. Moreover, the ruling in Blew v. Ritz, supra, on the subject has never been reversed, *viz.*: "Claims for mesne profits are usually consequential to and dependent upon a recovery of the land (in ejectment); yet, where the disseisor has surrendered or abandoned the premises before suit, and the rightful owner is in possession, such owner may maintain trespass for the wrongful entry, and have damages for the same in the nature of mesne profits." And see Schradsky v. Stimson, 22 C. C. A. 515, 40 U. S. App. 455, 76 Fed. 730. No reason for changing it has appeared.

Affirmed.

MISSOURI SUPREME COURT.
(Division 2.)

STATE OF MISSOURI, Respt.,
v.
SILAS DARLING, Appt.

(216 Mo. 450, 115 S. W. 1002.)

Homicide — assisting assault.

1. One who accompanies another to aid and assist him in assaulting a third cannot escape liability for manslaughter if his companion kills the victim by the use of a deadly weapon, on the theory that he did not know of the intended use of it or consent thereto.

Information — amendment.

2. The insertion of the words "wilfully" and "deliberately" in an information charging murder is within the operation of the statute allowing any information to be amended in matter of form or substance at

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any time before trial by leave of court, and it is therefore not necessary to reverify it after the alteration.

(February 2, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Cooper County convicting him of manslaughter. Affirmed.

The facts are stated in the opinion.

Mr. C. D. Corum, for appellant:

The defendant did not assault deceased, attempt to assault him, or encourage his brother to assault him; and, unless such brother killed the deceased in the attempt to execute a purpose common to both, defendant is not guilty of anything, and the question of common design must be left to the jury.

White v. People, 139 Ill. 149, 32 Am. St. Rep. 196, 28 N. E. 1083; Cortez v. State, 43 Tex. Crim. Rep. 375, 66 S. W. 459; Omer v. Com. 95 Ky. 353, 25 S. W. 594; Cecil v. State, 44 Tex. Crim. Rep. 450, 72 S. W. 197; Easterlin v. State, 43 Fla. 565, 31 So. 350; State v. Furney, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213; State v. May, 142 Mo. 153, 43 S. W. 637; 1 Bishop, New Crim. Law, §§ 461, 637; Hughes, Crim. Law, §§ 1193, 1195.

The court erred in declaring, as a matter of law, that the defendant was liable for the independent act of his brother in assaulting the deceased with a deadly weapon, and that such act was the natural and probable outcome of an attempt merely to whip deceased.

McLeroy v. State, 120 Ala. 285, 25 So. 247; Frank v. State, 27 Ala. 43; Bowers v. State, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247; Powers v. Com. 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735; State v. Furney, supra; Lusk v. State, 64 Miss. 845, 2 So. 257.

The test of criminal liability is: Did the parties act together, and was the act done in pursuance of a common design and purpose on which their minds had agreed?

State v. Hickman, 95 Mo. 332, 6 Am. St.

Case Note.—Criminal responsibility of one who aids another in assault in which the latter, without his knowledge or consent, uses a deadly weapon.

In Brown v. State, 28 Ga. 199, the defendant was charged with murder, as principal, in the second degree, and it was held that, although he was connected with the act of killing, yet, if the one who actually did the killing committed the assault with a deadly weapon, and his intention to assault the deceased with such weapon was unknown to the defendant, who supposed that his object was to assault and beat only, and who intended to participate in the assault and battery only, and participated in no design to kill, the latter was guilty of manslaughter only.

But, in Woolweaver v. State, 50 Ohio St. 277, 40 Am. St. Rep. 667, 34 N. E. 352, the defendant was tried for the murder of one who was shot by the defendant's son in a conflict in which the deceased was engaged with others against the defendant's party, and an instruction to the effect that, if the jury found that the defendant knew nothing of his son having a revolver or intending to shoot, and took no part in the killing, and did no overt act to produce that result, the defendant was in no way responsible unless the shot was fired in pursuance of a conspiracy previously formed by them, was held to be a correct statement of the law.

Again, in Bibby v. State (Tex. Crim. App.) 65 S. W. 193, it was held that the defendant was not responsible for a homicide if the proof showed that the use of a knife by someone in the defendant's party, while they were all engaged in a general fist fight, was without the knowledge or consent of the accused; or, as the court said: "To put it more strongly, the proof must show beyond a reasonable doubt that he [defendant] knew Wells was to use the knife beforehand, or that he had knowledge Wells was using the knife at the time he was so using it, and, by some act of his, aided and abetted him in the use of said knife."

R. v. Caton, 12 Cox, C. C. 624, was a prosecution for manslaughter, the defendant and another having committed an assault from which the victim's death resulted in consequence of a blow from a heavy timber which one of the assailants had picked up during the attack. Lush, J., said that the only question for the jury was whether the prisoner struck the fatal blow. "If two men concerted together to fight two other men with their fists, and one struck an unlucky blow causing death, both would be guilty of manslaughter. But if one used a knife or other deadly weapon, such as this piece of timber, without the knowledge or consent of the other, he only who struck with the weapon would be responsible for the death resulting from the blow given by it."

Although the evidence was not considered to present the question of conspiracy or design to assault, yet State v. May, 142 Mo. 135, 43 S. W. 637, cites with approval the rule that one of several who assault a third person may not be held liable where one of the others resorts to the use of a deadly weapon without the knowledge or consent of the first.

Where two bystanders at a fight, without preconcert or any connection with the original quarrel, suddenly take part therein, each acting independently of the other, and one of them, without the knowledge of the other, has a deadly weapon, with which he inflicts a fatal wound upon a combatant,

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Rep. 54, 8 S. W. 252; Kirby v. State, 23 Tex. App. 13, 5 S. W. 165; Corn v. State, 41 Tex. 301; Smith v. State, 21 Tex. App. 107, 17 S. W. 552; Alston v. State, 109 Ala. 55, 20 So. 81; People v. Fay, 70 Mich. 421, 38 N. W. 296; R. v. Caton, 12 Cox, C. C. 624.

Messrs. **Herbert S. Hadley**, Attorney General, and **F. G. Ferris** for respondent.

Gantt, P. J., delivered the opinion of the court:

This is the second appeal in this cause. The former appeal was decided at the October term, 1906, of this court, and reported in 202 Mo. 150, 100 S. W. 631. That appeal resulted in reversing the judgment and remanding the cause for a new trial. At the October term, 1907, the defendant was again put upon his trial, and convicted of manslaughter in the fourth degree, and his punishment assessed at imprisonment in the county jail for a period of twelve months, and from that sentence and judgment he has again appealed to this court.

The full statement of all the material facts will be found in the opinion of Judge Burgess on the former appeal. Much of the testimony, however, elicited on the first trial was eliminated on the last trial, and it will only be necessary to state, for the understanding of the questions presented on this appeal, the salient and controlling facts. On the 13th day of March, 1905, Samuel Jeffress was killed at the county of Cooper by Ernest Darling, on the farm of Charles Carroll, for whom he was working on that day. At the time of his death he was at work plowing in the field of Mr. Carroll. The evidence discloses that, in the month of December, 1904, or January, 1905, Ernest Darling had a fight with one Cramer, near the town of Blackwater, in said county. It seems that Cramer was a friend of the deceased, Jeffress, and, as Cramer had been quite badly beaten in his fistic encounter with Ernest Darling, Jeffress, the deceased, espoused the cause of Cramer, and hot words passed between Ernest Darling and the deceased. The evidence tended to show that the deceased was about eighteen years of age, and resided with his mother at the village of Nelson, in Saline county, near the Cooper county line. On the 11th of March, 1905, he left his home to work for Mr. Carroll in Cooper county. On the next day, which was Sunday, Emmett Yeager went to the Darling home, where he found the defendant, Silas Darling, his brother, Ernest, and Dorval Burris. Yeager told Ernest Darling that the deceased was going to work at Mr. Carroll's the next day. Ernest replied, "That will be all right." Ernest Darling then said to Dorval Burris, "Sam Jeffress is going to work out here at Charles Carroll's to-day." Burris replied, "Is he?" and Ernest said, "Yes, and I will get the s—— of a b—— to-morrow." Burris then said: "I would like to slip along and see it done. I have got to plow your mother's garden in the morning, but, if you will wait until to-morrow afternoon, I will go." After this the defendant, Silas Darling, joined Ernest and Burris, and Ernest said to defendant, Silas, "Sam Jeffress is going to work out here at Charles Carroll's," and defendant said, "Is he?" and turned and left the room, but before going Ernest said to him that he would get him (Jeffress). Burris told Silas, the defendant, that Ernest said he ought to go down to-morrow, and defendant said, "Yes, I believe you ought." That same afternoon Emmett Yeager and Ernest Darling were at the Finley home together. Ernest asked Millie Finley if she knew Sam Jeffress, adding, "He is a pretty good-looking boy," to which she replied, "Yes," and Ernest said, "Probably he won't look as well to-morrow as he does to-day." On the way home that night Ernest said to Yeager, "I told Sam, while he was cussing me on the street at Blackwater, I would get my revenge, and, by God, I will get it, too." On the same Sunday, Burris was riding behind Silas on a horse, on the way home from Speece's, when Silas, the defendant, said to him, "I had better go down with Ern to-morrow; Sam might come the knife play,"—referring to the deceased. After dinner the next day, as the defendant started out of the house, he said to Burris that he was going over to Carroll's, to which Burris replied, "No, we will go up and chop cord wood," and then they went towards the

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without the other's consent or knowledge, the latter cannot be convicted of murder on an instruction by the court which wholly ignores those phases of the testimony. State v. Howard, 112 N. C. 859, 17 S. E. 166.

In Cecil v. State, 44 Tex. Crim. Rep. 450, 72 S. W. 197, several persons were involved in a difficulty, and one of them was killed by being stabbed, but not, it appeared, by the defendant. It was held that the court should have charged that, if the jury believed that both defendant and another committed the assault, but the latter did the stabbing without any previous conspiracy, and without any knowledge at the time on the part of the defendant that his companion was so stabbing the deceased, and that the defendant's intention and purpose was simply an assault, then they could not find the defendant guilty of murder.

There are of course numerous decisions in which the criminal responsibility of one of several offenders, generally co-conspirators, has come in question where deadly weapons have been used, but no cases have been included here unless the question in hand was squarely presented.

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barn where they said they would go and settle upon what they were going to do. While at the barn, Ernest, Silas, and Burris discussed the subject of going over to Carroll's to whip the deceased. Burris said to Ernest, "Ern, you ought not to go down there, but catch him on the road," to which Ernest replied, "If I don't go over there now, G—— d——, if I don't go now, I won't ever get him." They started from the barn, Ernest and Silas, the defendant going around on the north side of the house where there was a pile of scrap iron, and Burris passing through the house to get a drink of water. The three then went on towards Carroll's place. As they came along the road Ernest said it would be a joke if deceased had gone to town. They met Charles Pyatt on the road, and said to him that they were duck hunting. As they approached the Carroll house, it was agreed that the defendant should do the talking, and he asked to borrow a leister from Mr. Carroll. At the Carroll house, the defendant asked Mrs. Carroll where Mr. Carroll was, and, being informed by her that he had gone to town, he said, "Well, we will go on down towards the Lamine river, and we will meet him." They left the house talking about the deceased for some distance, and then sent Burris back for the purpose of learning whether the deceased was about the place. When he came back and joined Ernest and the defendant, they saw the deceased at work in the field, and went across the field towards him. As they approached him they found him with his team stopped, leaning against one of the handles of the tongueless cultivator which he was working. He was wearing a pair of gloves, one of which he removed in taking a chew of tobacco. He had in his pocket a small monkey wrench for use with the cultivator. Burris and the defendant approached the deceased directly in front and engaged him in conversation, while Ernest passed around to the rear of the deceased, and without a word passing between the deceased and Ernest, and without any unpleasant or unusual conversation between the deceased and the defendant and Burris, or any hostile movement on the part of the deceased, Ernest Darling hit deceased on the side and back of the head with what appeared to be a piece of iron, and the blow felled him to the ground, at the cultivator handles. Ernest quickly followed the first lick with blows upon the head of the deceased with this iron, saying, as he did so, "You remember how you done me down at Blackwater; I will get even with you." He asked the deceased to holloo, "Enough," which deceased did. The head of the deceased was beaten down into the ground, and he was mangled and bleeding profusely when Burris lifted him, but he was too weak to stand. Thereupon the defendant, Silas, said, "I know what we will do; we will turn the team loose," and said they would make people think the team had injured the deceased. About this time Bill Spry, passing in the distance, was called to the scene by Burris, and to him Ernest said, referring to the deceased, "He called me a son of a b——, and I knocked him over the plow handles with the lines over his shoulders." Spry said, "The boy is bleeding a right smart." And Ernest said, "Yes, and let him bleed, d—— him; it is good enough for him." The deceased was taken to the home of Mr. Carroll by the defendant, his brother, and Burris, and died just as he reached the house. The defendant declined to help the deceased into the wagon, or to take him out when they reached the house, saying that he did not want to get blood on his hands. Witnesses for the state who visited the scene of the tragedy the next morning testified that the earth where the deceased fell bore the impression of his head and the stains of pools of blood. No rocks or other objects which could have been used as weapons were found near the scene, but witnesses for the defendant testified that, several days after the killing, they found several rocks at this immediate point with blood upon them. After the homicide, Ernest said to Burris in the presence of the defendant, "You must swear that he called me a son of a b——, and started at me with a monkey wrench, and that you put it back in his pocket." After the preliminary trial, the defendant told Burris that he must keep his mouth shut and not tell anything. And defendant said that he did not know what to do or think about that monkey wrench. While in the jail together, they had frequent conversations as to what their testimony would be. The coroner testified that he found the monkey wrench, which had remained in Jeffress's pocket while Ernest was beating him. The evidence on the part of the defendant tended to prove threats of the deceased against Ernest Darling. These threats were not communicated, however, to Ernest. There was also evidence impeaching witness Spry. The defendant testified in his own behalf that, if his brother, Ernest Darling, on the occasion of going to the field, had upon or about his person a piece of iron, he, defendant, was not aware of it. Burris testified that he was surprised when Ernest struck the deceased with a piece of iron.

1. The principal ground upon which the defendant seeks a reversal of the judgment is the giving of the following instruction by the court, over the objection of the defendant:

"If you believe from the evidence that,

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prior to the killing of Samuel Jeffress, Ernest Darling had formed a design to kill said Jeffress, or to inflict upon him some bodily harm, and he, Ernest Darling, armed himself with a deadly weapon, and sought the said Jeffress, and assaulted him with felonious intent of killing him or doing him great bodily harm, and that the said Ernest Darling did assault and kill said Samuel Jeffress; yet, if you further believe from the evidence, that the defendant, Silas Darling, went with his brother, Ernest Darling, to the scene of the killing for the purpose of and with the intention, if necessary, to aid, encourage, or to abet his brother, Ernest Darling, in assaulting said Jeffress, but that the defendant did not know that his brother, Ernest Darling, intended to use a deadly weapon in making such assault, and did not know of a felonious intent on the part of Ernest Darling, but understood at the time that it was the purpose and intention of his brother, Ernest Darling, merely to whip the said Jeffress,—then and in that event, the defendant cannot be guilty of any higher crime than manslaughter in the fourth degree."

It is insisted by the learned counsel for the defendant that this instruction authorizes the jury to find the defendant guilty of manslaughter in the fourth degree, notwithstanding he only entered into the conspiracy with his brother, Ernest Darling, with the intention merely of assisting Ernest Darling to assault and whip him, and not to kill him. "If," they say, "the jury had been called upon to determine that the defendant and his brother entertained a common intent to assault the deceased, Jeffress, and that Jeffress was killed in the execution of such common plan by Ernest Darling without resort by him to the use of a deadly weapon, then probably the instruction would have embodied the elements of manslaughter; but to say that a person intending to aid another in making a simple assault on a third party, who does not know that the party whom he intends to aid has a felonious intent against said party, and does not know that his associate has or intends to use a deadly weapon, is guilty of manslaughter, when the person he is aiding resorts to the use of a deadly weapon and takes the life of such a third person therewith, is a monstrous proposition." If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in furtherance of the original design is, in the construction of law, the act of all. And he who advises or encourages another to do an illegal act is responsible for all the natural and probable consequences that may arise from its perpetration. 2 Hawk. P. C. chap. 29; 1 Hale, P. C. chap. 34; Russell, Crimes, 24; 1 Chitty, Crim. Law, 264.

As to this familiar statement of the law, we understand the learned counsel consent. In its eighth instruction the court advised the jury as to what would constitute a conspiracy between the defendant and Ernest Darling, in these words: "That, if the defendant, Silas Darling, with the knowledge of the intention of his brother, Ernest, to so whip Samuel Jeffress, accompanied his brother, Ernest Darling, to the scene of the tragedy for the purpose and with the intention of aiding, encouraging, or assisting his brother, Ernest, if necessary, in making such assault, and was then and there present at the time of such assault for the purpose and with the intention of aiding, encouraging, and abetting his brother, Ernest Darling, therein, if necessary, then the defendant was guilty of manslaughter," if, as required in the other instructions, Ernest Darling did kill the deceased in pursuance of that understanding. In 1 McClain on Criminal Law, § 196, the author says: "It results from the principle stated in the preceding section, that everyone connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination, perpetrated in the prosecution of the common design. But it is not necessary that the crime committed shall have been originally intended. Each is accountable for all the acts of the others done in carrying out the common purpose, whether such acts were originally contemplated or not, if they were the natural and proximate result of carrying out such purpose, and the question whether the result is the natural and probable effect of the wrongful act intended is for the jury. Thus, if several persons agree to commit and enter upon the commission of a crime involving danger to human life, such as robbery, or assault and battery, or resisting an officer or resisting arrest, all are criminally accountable for death caused in the common enterprise. Thus, also, if the unlawful enterprise is likely to meet violent resistance, all will be liable for a felonious assault committed by one of their number in consequence of such resistance, and, if the common design in general involves acts of violence, all who participate in the common plan are equally answerable for acts of others done in pursuance thereof, although the result was not specially intended by them all." In 1 Wharton's Criminal Law, § 220, 8th ed. it is said: "It is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental, probable consequences of the execution of

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that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus, where A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan and in furtherance of the robbery, kills C., B. is guilty of murder."

The doctrine on this particular subject is nowhere better reviewed and announced than in Williams v. State, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179. In that case the court had occasion to consider the statement of Mr. Bishop in 1 Bishop's Criminal Law, 7th ed. 637, in which the learned author says: "If two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But, if the one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable." It is this exception to the general rule upon which the counsel for the defendant insists that the instruction given by the court in this case was erroneous, and he cites this statement of the law by Bishop, and the case of R. v. Caton, 12 Cox, C. C. 624, in support of the proposition.

Speaking of this limitation of the rule by Bishop, the supreme court of Alabama says: "The implied agreement here is evidently not to resort to the use of a deadly weapon, and the use of such weapon is therefore foreign to the contemplation of the parties, and a departure from the common design. It is said by some of the standard authors that, if the specific act agreed to be done was *malum in se*, the responsibility for unintended results would embrace acts arising from misfortune or chance; but otherwise if such specific act was *malum prohibitum* merely or lawful. 1 Bishop, Crim. Law, 7th ed. § 331. In some cases the distinction is taken that where persons unlawfully conspire to commit a trespass only, to make all the confederates guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a trespass, it will be murder in all, 'although the death happened collaterally, or beside the original design.' State v. Shelledy, 8 Iowa, 478. In another recent case the rule was announced that, 'if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not.' Lamb v. People, 96 Ill. 73. The question, then, in this case would seem to be, whether, if five or six men combine together to invade a man's household, and they go there armed with deadly weapons for the purpose of attacking and beating him, and, in furtherance of this common design, all of the confederates being present, or near at hand, one of them gets into a difficulty with their common adversary and kills him, all may not be guilty of murder, although they did not all entertain a purpose to kill. The question, we think, must be answered in the affirmative, in the light of both principle and authority. Every man has the right to defend his house against every unlawful invasion, and to defend his person, when within it, against every and all violence, without the necessity of retreat. The experience of mankind shows that very few men will fail to respond to instinct by exercising his right, to the extent even of killing an assailant if necessary. When a mob, conspiring together unlawfully, go to a man's house to do any serious violence to his person, especially in the nighttime, as here, they can expect nothing else than to meet with armed opposition, and the inference is not unreasonable that they intend nothing less than to oppose force to force in the furtherance of their design. The natural and probable consequence of this is homicide, either of one or more of the assailants or of the party thus assailed, and such homicide, when committed by any one of the conspirators, can be nothing less than murder in all who combine to commit the unlawful act of violence, especially if they be near at hand inciting, procuring, or encouraging the furtherance of the act of assault and battery."

In Peden v. State, 61 Miss. 268, several persons conspired together to take one Walker from his house and whip him. He was accordingly taken from his bed and severely beaten, and, in executing this design, one of the confederates struck him a fatal blow with a spade, from which he died. It was held that all were guilty of murder, whether they entertained a purpose to kill Walker or not. See also Brennan v. People, 15 Ill. 512.

That the evidence in this case fully justified the instruction of the court submitting to the jury the defendant's knowledge and intention of the intended assault and determination on the part of his brother, Ernest, to whip the deceased, and whether he had gone with him to aid, assist, and abet in the assault and battery, there can be no doubt whatever. That such an assault and battery is what the text writers denominate *malum in se* is also plain. It is to be observed that in this case the method and means by which Ernest was to make this assault were not limited, as in the case stated by Mr. Bishop, where they agreed to fight

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with fists only, and one used a deadly weapon without the knowledge of his confederate, but the evidence showed a conspiracy to assault and whip the deceased without any such limitation. As said by the Alabama supreme court, the defendant knowing of this purpose, and going along to assist in it, could expect nothing else than that the deceased would naturally oppose force to such unlawful design upon his person, as the experience of mankind shows that very few men would tamely submit to such an outrage and indignity, and a natural and probable consequence to such an encounter would be homicide, either of the deceased or of one of them. And the law will hold him responsible for the act of his brother. Most of the adjudicated cases hold that he would be guilty of murder in such a case, and he has no cause to complain that the court limited his offense to manslaughter in the fourth degree. We do not think that the court in this instruction lost sight of the question of common design as between Ernest Darling and the defendant. On the contrary, the liability of the defendant throughout the case was predicated upon the fact of his having entered into the unlawful design to assault and whip the deceased. Neither do we think this is a case falling within the principle that, where one of the conspirators goes outside of the common plan, and commits a fresh and independent act, wholly outside and foreign to the common design, the others are not to be held equally guilty of that act. Taken altogether, we think this instruction was exceedingly favorable to the defendant, and the court did not err in giving it. It follows from what we have already said that in our opinion the court committed no error in refusing to direct the jury to acquit the defendant.

2. After the information was filed and verified, by leave of the court, the prosecuting attorney amended the same by inserting in one place the word "deliberately" and in another "wilfully," but did not reverify the information after the amendment. Defendant moved to quash on the ground that the information was not verified. Section 2481, Rev. Stat. 1899 (Anno. Stat. 1906, p. 1490), provides that "any affidavit or information may be amended in matter of form or substance at any time, by leave of court, before the trial, and, on the trial, as to all matters of form and variance, at the discretion of the court, when the same can be done without prejudice to the substantial rights of the defendant on the merits," etc. This statutory provision was ample authority for the action of the court and prosecuting attorney. When the prosecuting attorney added the two words over his own signature and affidavit, he amended the information, and there was no need of a new affidavit, which was no part of the information. Clearly the insertion of the word "deliberately" did not affect defendant's rights, as he was found guilty of manslaughter only. Counsel concede that an information need not be reverified where unimportant amendments are made. We think the statute is a wise and salutary one, and should not receive a harsh construction. A broad distinction exists between allowing the amendment of an indictment, as it is the act of a grand jury, and an information by a prosecuting attorney, made by leave of court. The latter may very properly be made by the officer who prefers it, and, when he does amend it, there is no occasion for reverifying it.

3. The complaint as to the remarks of the prosecuting attorney, and the action of the court thereon, afford no ground for reversal. It is conceded that the language of the prosecuting attorney was not taken in his exact words, and the trial court, who heard the argument, overruled the point, and we think the whole colloquy taken together fails to show any prejudice. The result shows that the jury were not influenced to find defendant guilty of murder in either degree.

The judgment is affirmed.

All of this division concur.

NEBRASKA SUPREME COURT.

JOHN B. ALLEN
v.
CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Appt.

(82 Neb. 726, 118 N. W. 655.)

Carrier — horses — cars — duty.

1. A railway company engaged in the business of a common carrier is obliged to furnish reasonably safe and suitable cars for the transportation of horses tendered to it for shipment; and, if a car offered a

Headnotes by ROOT, C.

Case Note. — Duty of carrier to furnish bedding for live stock.

If it is shown that it is usual and customary to bed the cars used in the transportation of live stock, and that this is such a precaution as a prudent, competent, and faithful man, experienced in the business, would take, the carrier will be responsible for any injury caused by omission in this regard. East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489.

In Chicago, R. I. & P. R. Co. v. Clements (Tex. Civ. App.) 115 S. W. 664, it was held that where it was alleged that horses and

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shipper can only be made thus safe and suitable by the use of bedding, it is the duty of the carrier to furnish that bedding.

Same — contract of shipper — effect.

2. Nor is the carrier relieved of that duty by the agreement of the shipper to load and unload his stock, and to feed, water, and care for it in transit.

Evidence — burden of proof.

3. The burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end.

Appeal — admission of irrelevant evidence — effect.

4. In an action for the negligent failure of a carrier to properly bed a car so that it would be reasonably safe for the transportation of stock, where the proof is undisputed that the car was unsafe because of improper bedding, testimony concerning the custom of the carrier in preparing other cars for like shipments, if irrelevant, is without prejudice to defendant.

Carrier — horses — delay in shipment — action — jury.

5. Where the evidence tends to establish that a shipment of horses was materially delayed while the stock was in the carrier's possession, and that the stock was in good condition when received by the carrier, and injured and damaged when delivered to the consignee,—it is not error to submit the question of unreasonable delay to the jury.

Trial — instructions — construction.

6. An instruction which, if standing alone, might be erroneous, may not be so

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mules were negligently loaded in cars which were not bedded, and the evidence showed that such cars were not bedded, evidence that it was usual and customary for railroads to bed cars in which cattle are shipped was admissible to prove the alleged negligence, since the same reason for bedding cars for the transportation of cattle obtains when they are used for carrying horses or mules.

In Houston & T. C. R. Co. v. Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318, it was held that a railway company, having undertaken to bed a car, whether bound to do so or not, was required to exercise at least ordinary care to see that the car was properly bedded.

In East Tennessee, V. & G. R. Co. v. Johnston, supra, the court took a contrary view to that taken in ALLEN v. CHICAGO, B. & Q. R. Co., and held that the carrier was relieved of its duty of properly bedding the car, by the agreement of the shipper to load and unload his stock, and to feed, water, and care for it in transit.

This Alabama case, contrary to the rule of the Nebraska case, also held that the carrier could defend on the ground that the shipper, or his agent, accepted the car without proper bedding.

In Texas C. R. Co. v. O'Laughlin (Tex. Civ. App.) 72 S. W. 610, it was held that, even though the duty of properly bedding cars devolved primarily upon the carrier, it was a good defense that the shipper was present when the cars were bedded, and, knowing the extent of the bedding, accepted the same and expressed satisfaction therewith.

In Galveston, H. & S. A. R. Co. v. Silegman (Tex. Civ. App.) 23 S. W. 298, it was held that a common carrier is bound to furnish suitable and safe cars for transporting live stock, and, although a shipper stipulated in the bill of lading, that he accepted the cars, he could show that bedded cars were the only suitable and safe kind, under his allegation that the carrier failed to furnish suitable and safe cars, since the carrier could not, by contract limit its duty as a common carrier.

In Powell v. Pennsylvania R. Co. 32 Pa. 414, 75 Am. Dec. 564, where a shipper asked for tan for bedding for his mare, it was held to be flagrant negligence for the carrier's shipping agent, not only to stand by and suffer straw to be used for bedding, but to suggest and encourage its use, contrary to a rule of the carrier which forbade it, and, the straw having caught fire from sparks from the locomotive and injured the mare, the carrier was liable, although the shipper signed a release from any and all claims for damage or injury to his mare while in the carrier's cars.

But, in St. Louis Southwestern R. Co. v. Butler, 82 Ark. 469, 102 S. W. 378, it was held that a stipulation based upon a valuable consideration, exempting the carrier from liability for loss or damage arising from want of bedding, was valid and binding.

And, in Gilleland v. Louisville & N. R. Co. 119 Ga. 789, 47 S. E. 336, it was held that the duty of providing proper bedding could be made to devolve entirely upon the shipper by contract based upon the ground of a reduced rate of freight and free transportation to the shipper.

In Texas C. R. Co. v. O'Laughlin, 37 Tex. Civ. App. 640, 84 S. W. 1104, it was held that, although a common carrier, under its bill of lading, would not be liable for damages growing out of the negligence of its connecting carriers, it might and would be liable for damages resulting from its own negligence in failing properly to bed the cars in the first place, even though the injuries causing such damages did not develop until after the cattle had left its line, and were in the hands of the connecting carriers.

In Alabama G. S. R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119, 7 So. 762, it was held that a railroad company, having received cattle to be delivered to a point on a connecting road, and at the connecting point having transferred them to cars furnished by the connecting carrier, was bound to permit the shipper to provide suitable bedding for the cars, as he had agreed to do, or itself to provide the bedding with reasonable care and diligence.

In McDaniel v. Chicago & N. W. R. Co.

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when considered with other instructions upon the same subject, given in connection therewith.

(November 19, 1908.)

APPEAL by defendant from a judgment of the District Court for York County in plaintiff's favor in an action brought to recover damages for injury to live stock while in defendant's possession for transportation. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. **J. E. Kelby, George M. Spurlock, F. E. Bishop, Fred M. Dewecse,** and **Halleck F. Rose** for appellant.

Messrs. **Gilbert Brothers,** for appellee:

Proper bedding is an incident of a suitable car.

5 Am. & Eng. Enc. Law, 2d ed. p. 433; Powell v. Pennsylvania R. Co. 32 Pa. 414, 75 Am. Dec. 564; McDaniel v. Chicago & N. W. R. Co. 24 Iowa, 412; Texas & P. R. Co. v. Dishman, 41 Tex. Civ. App. 250, 91 S. W. 828.

The company is not released from duty to bed, by the fact that the shipper's agent, after he got there and found the car was not bedded, proceeded under the direction of the station agent to have the car bedded himself in the best manner he could.

Loomer v. Thomas, 38 Neb. 277, 56 N. W. 973.

Evidence of a usage or custom by which the carrier is to bed the car, known to it, and upon which it had acted in making previous shipments, is admissible.

East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; 27 Am. & Eng. Enc. Law, p. 816.

Root, C., filed the following opinion:

In December, 1905, plaintiff shipped over defendant's railway a car load of horses from Venango to York, Nebraska. In transit three of the animals were so injured as to cause their death, and the remaining twenty-one were, it is claimed, also damaged. Plaintiff recovered judgment for defendant's alleged negligence, and defendant appeals.

1. Exception is taken to the instructions of the court that the alleged negligence of defendant in not properly bedding the car wherein the horses were shipped was an element in plaintiff's cause of action. The horses were transported by virtue of a stock shipper's contract, which provided, among other things: "And in consideration of free transportation for ——— persons, designated by the first party, who have indorsed their names hereon in the presence of the agent, hereby given by said railway company such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of said animals, and that the said railway company shall not be responsible for such attention and care. It is agreed that said animals are to be loaded, unloaded, watered, and fed by the owner or his agents in charge; that the second party shall not be

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24 Iowa, 412, the carrier was held liable for injury to cattle, it appearing that they were put in a car properly bedded by the owners; that a journal of the car was found to be hot, and, at a station where no bedding could be procured, the cattle were put into another car, which contained no bedding, after which they were injured because of the want of bedding.

In Atchison v. Chicago, R. I. & P. R. Co. 80 Mo. 213, in which it appeared that the shipper of cattle expressly contracted "to load and unload said stock at his own risk," and alleged in his petition that the stock was damaged "by reason of the defendant, its agents, servants, and employees negligently furnishing and causing said cattle to be loaded on and in a defective and unsound car,"—it was held that testimony respecting the bedding of the car was improperly admitted, since, if bedding the cattle was embraced in the term "loading," the risk of their being improperly bedded was incident to, and included within, the risk assumed by the shipper; and, if, on the other hand, bedding the cattle was not within that term, then such evidence was outside the allegations of the petition.

In Burgher v. Wabash R. Co. (Mo. App.) 120 S. W. 673, it was held that where the cause of action relied upon in the petition did not count upon a breach of contract to furnish bedded cars, but proceeded entirely upon the carrier's common-law liability to transport the cattle within a reasonable time after it received them, and there was no issue whatever joined between the parties in respect of any obligation on the part of the carrier to bed the cars, proof relative thereto was wholly foreign to the issue, and inadmissible.

In Gulf, C. & S. F. R. Co. v. Wright (Tex. Civ. App.) 87 S. W. 191, it was held that where plaintiff specifically averred the causes to which the alleged injuries were due, and did not include improper bedding, evidence relative thereto should have been excluded.

In Texas & P. R. Co. v. Dishman, 41 Tex. Civ. App. 250, 91 S. W. 828, it was held that there was no error in refusing a carrier's instruction which sought to have the jury find against the shipper if the car in which his horses were shipped was improperly bedded, when it had neither pleaded nor proved that he had undertaken to bed the car for such shipment.

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liable for loss from theft, heat or cold, jumping from car or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals, and that the railway company does not agree to deliver the stock at destination at any specified time, nor for any particular market." Bearing in mind that the verdict for plaintiff resolves all disputed questions of fact in his favor, it may be said that Venango is situated in the western part of the state; that plaintiff maintains a stock ranch in the vicinity of said town, but resides in York, some 300 miles distant. Plaintiff's son, who was in charge of the ranch, telephoned defendant's agent at Venango that he wanted a 30-foot stock car, well bedded, next Sunday night, to ship a load of horses to York, and the agent later informed the young man that the car was ready. The horses were driven to the station Sunday afternoon, and plaintiff's son then learned that the car was not bedded, and that the floor thereof was new construction, and very hard and smooth. Defendant's agent stated that they were out of bedding, and suggested that Allen had better procure and spread over the car floor some manure, which he could secure at a livery stable. Two such loads were thus placed in the car. The evidence is uncontradicted that the car, unless bedded with sand, cinders, hay, or straw, was not safe for the transportation of horses, and that the addition of the manure furnished little, if any, additional security.

It is patent from an inspection of the bill of exceptions that a considerable part of plaintiff's loss can be traced directly to a lack of bedding in the car. Defendant argues that, by reason of the contract, and independent of it, the duty rested on plaintiff to bed the car. That, especially in the matter of shipping horses, because of the opinions of different shippers, it is impossible to adopt any method of bedding that would be uniformly satisfactory, and that when defendant furnished the shipper a sound, properly constructed car for the transportation of his stock, its duty as a common carrier, so far as the car was concerned, was discharged. We are of opinion, however, that it was the defendant's duty to furnish plaintiff a reasonably suitable and safe car for the transportation of his horses. That if the car furnished could only be made reasonably suitable and safe by bedding it with sand, cinders, hay, straw, or some like substance, it was defendant's duty to provide that bedding, and that it could not relieve itself of such liability by suggesting that plaintiff use some other and insufficient article for said purpose. The railway's obligation is implied from the nature of its business as a common carrier, and the fact that it undertook, in that capacity, to transport plaintiff's horses; and it was not essential that the bill of lading should recite that the company had agreed to bed the car so as to make it safe for the shipment of his horses. Galveston, H. & S. A. R. Co. v. Silegman (Tex. Civ. App.) 23 S. W. 298. Nor was defendant relieved of that liability by the fact that plaintiff's agent accepted the car without proper bedding. Peters v. New Orleans, J. & G. N. R. Co. 16 La. Ann. 222, 79 Am. Dec. 578; Hunt v. Nutt (Tex. Civ. App.) 27 S. W. 1031; St. Louis & S. F. R. Co. v. Brosius (Tex. Civ. App.) 105 S. W. 1131. Nor did the written contract exempt defendant from such liability. It nowhere purports to place the burden on the shipper of bedding or otherwise preparing the car, and we are not inclined to extend defendant's exemption beyond the strict letter of the agreement. Nor will the fact that captious shippers might prefer bedding other than that furnished by the carrier excuse it from discharging its obligation. If the car is bedded so as to be reasonably safe, the shipper can ask no more from the carrier, and, if he indulges his whim or judgment to change conditions, he takes his own risk so far as the alteration may be concerned. Instruction No. 3, requested by the defendant, was properly refused.

2. Complaint is made that the court instructed the jury that the burden was on defendant to prove that plaintiff was guilty of negligence which contributed to his loss. The instruction was correct. Defendant had pleaded certain facts as constituting contributory negligence on the part of plaintiff. The pleadings establish the burden of proof; and, if defendant pleads that plaintiff was guilty of contributory negligence, he assumes the laboring oar in that respect. Rapp v. Sarpy County, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242.

3. It is urged that the evidence does not tend to establish that the shipment was delayed, but, on the contrary, that the horses were transported in due course of carriage. The freight train left Venango about 10 o'clock at night, remained several hours in Hastings, and arrived in Aurora about 9 o'clock the following night. It was necessary to switch the car from one train to another at the last-named place. At Allen's request the conductor of the Hastings train had telegraphed in the afternoon to Aurora, to hold the Aurora-York train so as to include defendant's car of stock therein. It was dark when the train arrived in Aurora, and some twenty or thirty minutes elapsed between the arrival of the Hastings and the

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departure of the Aurora train; and Allen presuming that his car of stock had been switched into and made a part of said train, went into the caboose thereof, although his car of stock was left in the Aurora yards. It is also in evidence that the horses, other than those crippled, were unloaded at Aurora that night, and fed and watered the next day, and then reloaded about noon, so that they were on the track in the car for one-half a day, and not delivered in York for twenty-four hours later than they could have been if promptly transferred at Aurora. The evidence further tends to prove that the horses were in good condition when shipped at Venango, and gaunt and considerably bruised and marked up when unloaded at York. There was sufficient evidence, in our judgment, to warrant submitting this issue to the jury. Nelson v. Chicago, B. & Q. R. Co. 78 Neb. 57, 110 N. W. 742.

Instruction numbered 5, tendered by defendant, was properly refused because there was no evidence to sustain the assumption or proposition that plaintiff abandoned the horses at Aurora, and for that reason the cars were not transferred at said point. The following day, when plaintiff learned that his horses were still in Aurora, he notified defendant that he would not accept the stock, but later recanted and did receive it.

4. It is contended that the court improperly overruled defendant's objections to testimony tending to prove the custom of defendant in bedding cars for the use of stock. Plaintiff's right to recover on the cause of action set forth in the petition did not depend upon any custom or usage, but upon defendant's obligation to furnish him a car reasonably safe for the shipment of his horses. We are of opinion, however, that the evidence might be received as interpreting the intention and meaning of the parties in entering into the written contract, which was silent on this point. The testimony was undisputed that the car was unsafe for the shipment of horses in the condition in which it was delivered to plaintiff, and the evidence as to said custom was not prejudicially erroneous to defendant, even if it were irrelevant. Code Civ. Proc. § 145.

5. Exception is taken to instruction numbered 4, given by the court, which is as follows: "The court instructs the jury that, although they may believe from the evidence that there was a caretaker in charge of the stock transported by the defendant, still, if you further believe from the evidence that the injuries to said stock, if any, were the result of the negligence of the defendant, and that said injuries were not occasioned or contributed to by the negligence of said caretaker, then the verdict should be for the plaintiff." The instruction is not perfect, and the court should have qualified the reference to defendant's negligence by restricting it to the allegations contained in the petition, but, when this instruction is read in connection with the other instructions of the court on the same subject, it is not misleading, or prejudicially erroneous. Lincoln Traction Co. v. Brookover, 77 Neb. 217, 109 N. W. 168, 111 N. W. 357. The verdict is not excessive, nor for the amount of plaintiff's demand. The trial court was fair in its ulings and charge, and we are of opinion that defendant has had a fair trial, and is not in position to complain.

We therefore recommend that the judgment of the district court be affirmed.

Fawcett and Calkins, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

NEBRASKA SUPREME COUR .

LYDIA A. TEWKSBURY
v.
CITY OF LINCOLN, Appt.

(— Neb. —, 121 N. W. 94.)

Municipal corporation — defective sidewalk — negligence of agent — liability.

1. The making, improving, repairing, keeping in repair and in a safe condition, of streets and sidewalks by a municipal corporation, relate to its corporate interests only, and it is liable for the wrongful or negligent acts of its agents in performing such duties.

Same — injury — notice.

2. Where a sidewalk is rendered temporarily dangerous by the positive, negligent act of a city of the first class, and a er-

Headnotes by REESE, Ch. J.

Case Note. — Necessity of written notice as to defect as condition of liability of municipal corporation for injuries due to the positive act of its officers or servants.

Where an injury results from a defect in a street, due to the negligent act of an officer or servant of a city no written notice is required in order to render the city liable in damages, under a char-

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son in passing over it, immediately or within less than five days thereafter, and in the absence of contributory negligence, receives a personal injury, the provisions of § 110 of the charter (Comp. Stat. 1907, chap. 13, art. 1, § 110), requiring five days' notice of the dangerous condition of the walk to be given the city before the accident, cannot be implied, and the city will be held liable for damages sustained by the person injured.

Same — contributory negligence — jury.

3. Evidence examined, and it is not found, as a matter of law, that plaintiff was guilty of contributory negligence.

Appeal — instructions — objection — affirmance.

4. There being no specific objections offered to instructions given, nor to the refusal of the trial court to give an instruction asked, and, upon an examination of the whole record, it appearing that the case was fairly submitted to the jury, and no prejudicial error is found to have been committed, the judgment of the district court will be affirmed.

(June 11, 1909.)

APPEAL by defendant from a judgment of the District Court for Lancaster County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

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ter provision exempting a city from liability for injuries caused from streets, crossings, bridges, or sidewalks being out of repair, unless so remaining for ten days after special notice in writing is given the mayor or street commissioner. Houston v. Isaacks, 68 Tex. 116, 3 S. W. 693; Houston v. Owen (Tex. Civ. App.) 67 S. W. 788; Dallas v. McAllister (Tex. Civ. App.) 39 S. W. 173; Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407.

This doctrine was applied in Hughes v. Fond du Lac, supra, where the injury was occasioned by a large wooden roller left in a city street by the agents and servants of the city, as such injury was due to malfeasance, and not to misfeasance.

And this doctrine was applied in Houston v. Isaacks, supra, where an injury was received in consequence of an excavation in a street, made by one who had contracted to gravel it, and the city authorities, having become dissatisfied with the manner in which the work was being performed, had stopped the work, and left the excavation as the contractor had made it.

So, such a charter provision does not exempt a city from liability for ordinary negligence in failing to repair a broken grating near the corner of two of the principle streets and adjacent to the sidewalk, upon which a person stepped, and was injured. Peacock v. Dallas, 89 Tex. 438, 35 S. W. 8.

A charter provision that no action shall be maintained against a city for injuries caused from streets, sewers, etc., being out of repair due to the gross negligence of the city, unless the same shall have remained so for ten days after special notice in writing to the mayor or city engineer, does not apply to an injury caused by the caving in of the sewer in a city street near another break which had existed for two months. Dallas v. McAllister, supra.

And such notice is unnecessary where a city sold the fences on the property through which a street was opened, and authorized the purchaser to remove them, which he did without filling a hole close beside the walk, where a fence post had been removed, and a pedestrian stepped into the hole and was injured, as the act of the purchaser must be considered that of the city. Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76.

So, in Houston v. Owen, supra, this doctrine was applied where a city drawbridge was defectively constructed, and an employee whose duty it was to operate it thereby received an injury, as such charter provision has no reference to defects growing out of the manner of construction of streets, bridges, or sidewalks.

A statutory requirement of written notice to a city of the dangerous condition of a street, for the purpose of making the adjoining lots chargeable with the expense of repairing the street, has no application to the liability of the city for permitting a nuisance to remain in its street by means of which persons or property are injured. Harper v. Milwaukee, 30 Wis. 365.

But, the failure of a city to construct a crossing in the most substantial manner, which only remotely contributed to an injury to a traveler using it, the proximate cause being the failure to keep the same in repair, and the fact that the crossing had been out of repair for more than ten days prior to the injury, will not render the city liable in the absence of such written notice. Houston v. Vatter, 32 Tex. Civ. App. 298, 74 S. W. 806.

For cases holding that the positive act of a public contractor, or the officers or servants of a municipal corporation, in creating a defect which causes an injury to another, relieves the injured person from establishing either actual or constructive notice of the existence of such defect, see the subject note appended to Elam v. Mt. Sterling, 20 L.R.A.(N.S.) 689.

And for cases determining what is sufficient constructive or implied notice of defects, see 20 L.R.A.(N.S.) 705.

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Messrs. **John M. Stewart and T. F. A. Williams,** for appellant:

The city is not liable for the negligent acts of its officers and employees.

Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; Dodge v. Granger, 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420; Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377.

Mr. **Wilmer B. Comstock,** for appellee:

It is the duty of the city to keep its streets and sidewalks in repair and safe for public use.

Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113; Omaha v. Jensen, 35 Neb. 72, 37 Am. St. Rep. 432, 52 N. W. 833; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; Omaha v. Olmstead, 5 Neb. 446; Lincoln v. Calvert, 39 Neb. 305, 58 N. W. 115; Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76; Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41; Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846.

In relieving the stoppage in the sewer, the city was acting in its private, corporate, rather than in its public or governmental, capacity, and therefore became liable for the negligent acts of its agents and servants in the prosecution of the work.

Chicago v. Johnson, 53 Ill. 91; Burke v. South Omaha, 79 Neb. 793, 113 N. W. 241; Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811; Murray v. Omaha, 66 Neb. 279, 103 Am. St. Rep. 702, 92 N. W. 299; Barree v. Cape Girardeau, 197 Mo. 382, 6 L.R.A.(N.S.) 1090, 114 Am. St. Rep. 763, 95 S. W. 330; Omaha v. Croft, 60 Neb. 57, 82 N. W. 120; Shinnick v. Marshalltown, 137 Iowa, 72, 114 N. W. 542; Hitchins Bros. v. Frostburg, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; Carson v. Genesee, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862; Magaha v. Hagerstown, 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832; Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326; Decker v. Scranton City, 151 Pa. 241, 31 Am. St. Rep. 757, 25 Atl. 36; Chicago v. Seben, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; Bowden v. Kansas City, 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 A. & E. Ann. Cas. 955; Pettengill v. Yonkers, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; Pace v. Webster City, 138 Iowa, 107, 115 N. W. 888; Davis v. Adrain, 147 Mich. 300, 110 N. W. 1084; Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908; New Orleans v. Kerr, 50 La. Ann. 413, 69 Am. St. Rep. 442, 23 So. 384.

The city having, by its affirmative acts of negligence, created the slippery and dangerous condition of the sidewalk, the giving of the statutory five days' notice of such dangerous condition was not decisive of a right to recover.

Lincoln v. Calvert, supra; Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; Bemis v. Omaha, 81 Neb. 352, 116 N. W. 31; Adams v. Oshkosh, 71 Wis. 49, 36 N. W. 614; Springfield v. Le Claire, 49 Ill. 476; Houston v. Isaacks, 68 Tex. 116, 3 S. W. 693; Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76.

Mr. **Halleck F. Rose** also for appellee.

Reese, Ch. J., delivered the opinion of the court:

This was an action against the city of Lincoln for personal injuries resulting from a fall upon the sidewalk crossing, occasioned by the accumulation of ice caused by the leaking of water from the hydrant and hose in use in flushing out a sewer. There is scarcely any dispute as to the facts, either as to the condition of the crossing caused by defendant, or the injury resulting from the fall. On Saturday, the 8th day of December, 1906, a sewer drain became clogged or dammed, and a hose was attached to a hydrant on the corner of Twelfth and O streets, and the water was carried through it to the opening in the sewer, for the purpose of flushing said sewer. At the point of the union of the hose with the hydrant, there was a leak, and the water was driven out upon the sidewalk and upon the bridge connecting the sidewalk with the street crossing; the bridge having a descent from the sidewalk to the street crossing of about 3 inches in 2 or 3 feet. During the night the water thus thrown upon the sidewalk and bridge froze, forming a thin, smooth coating of ice. On the afternoon of Sunday the 9th, while the men were still at work, plaintiff with another lady was passing over the sidewalk and bridge, on their way to church, when plaintiff stepped upon the ice, fell, and broke her arm near the wrist, probably permanently injuring the arm. The negligence charged against the city was that of causing the dangerous condition, which it is claimed might have been avoided by the exercise of ordinary care. It appears that during Saturday night the officers and employees of the city, observing the flow of water upon the sidewalk and bridge, caused a cloth to be wrapped upon the part where the water escaped, to prevent it from being thrown upon the walk and bridge; but no precaution was taken to prevent accidents to persons passing over the freezing water; and the testimony on the part of plaintiff is that the

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spraying and freezing continued on Sunday. On that day it was quite cold, and there was ice upon that part of the bridge over which plaintiff passed, which was not noticed by her, and she fell, inflicting the injury. The sidewalks and streets elsewhere were dry. Damages were laid in the petition at $5,000. A trial was had which resulted in a verdict in favor of plaintiff for $550, upon which judgment was rendered. Defendant appeals. There is no contention that the judgment is for too great an amount, assuming that defendant is liable at all; but it is contended, first, that, under § 110 of the city charter, there is no liability, and, second, that the city cannot be held responsible in any event for the negligent acts of its officers and employees.

1. The section of the charter above referred to is as follows: "Cities of the first class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice so filed, the city shall not be liable, and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made." Comp. Stat. 1907, chap. 13, art. 1, § 110. It is contended by defendant: That, in the absence of a compliance with this section, no action can be maintained, and that the court erred in refusing to direct the jury to return a verdict in favor of defendant; that, if defendant is "absolutely exempt" from liability for damages by reason of defective sidewalks unless actual notice thereof be given in writing five days before the occurrence of the accident, the court should have so directed the jury. As no notice was given, and, confessedly, none could have been given, five days before the accident, it is claimed that defendant is not liable. Upon the other hand, it is contended by plaintiff, and we think with the better reason, that defendant cannot shield itself from liability for a negligent act of which it is of itself guilty, and which is immediately followed by the injury; that the statute does not contemplate exemption from such negligent act; and, further, that all the knowledge that could possibly result from the giving of the notice, were it possible to give it, was already possessed by the city officers.

We have not been cited to any adjudications under an exactly similar statute, but think many of the cases cited by plaintiff are in point in principle, and that their logic must be applied to this case. The line of demarcation between plaintiff and defendant appears to be the distinction between cases which involve the governmental function of municipal corporations, and those of corporate duties and obligations of a semi-private character imposed by law. It has been repeatedly held by this court that it is the duty of cities to keep and maintain its streets and sidewalks in repair, and safe for public use. Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113; Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; and others which need not be here cited. The case of Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811, was where the plaintiff in the action was struck and injured by a wagon of the fire department, and the city was held not liable on the ground that the duties of that department were not municipal or corporate duties, with which the corporation is charged in consideration of charter privileges, but are police or governmental functions, which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body; but we said, on page 45 of 35 Neb.: "The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by Judge Folger in Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; 'It is a duty with which the city is charged for its corporate benefit, to be performed by its own agents as its own corporate act.' This distinction is made also in Ehrgott v. New York, 96 N. Y. 274, 48 Am. Rep. 622, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated affects the general rule of liability for obstruction of the streets of the city, it must be held to be an exception thereto,—an exception based upon a public policy which subordinates mere private interests to the welfare of the general public." Burke v. South Omaha, 79 Neb. 793, 113 N. W. 241, did not involve the exact question presented in this case; but the distinction between the two classes of cases is clearly pointed out and discussed, and a mere reference to it must be sufficient. We quoted with approval the following from a note to McMahon v. Dubuque, found in 70 Am. St. Rep. 149: "Municipal corporations, acting within the purview of

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their authority and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, are impliedly liable for damage caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers, or keeping wharves in safe condition, from which a profit is derived, are duties of this character." See also Shinnick v. Marshalltown, 137 Iowa, 72, 114 N. W. 542; Hitchins Bros. v. Frostburg, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; Carson v. Genesee, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862. Further discussion would seem to be unnecessary.

2. Is the five days' notice required in the section above quoted necessary? In other words, can the provisions of the section be applied to cases of this kind? We think not. To hold that five days' notice should be given for a wrong committed by the city itself one hour or one day before the occurrence of the accident, and of which the city already has absolute knowledge, would be in the highest degree ludicrous and attribute to the lawmaker a want of foresight, insight, and comprehension, which we cannot do. It is true that the statute provides that the city shall be "absolutely exempt from liability" unless such notice be given, but we must give a reasonable construction to the language of the act. The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days; otherwise the notice would be impossible. But, even if the notice should be held necessary where the defect is caused by the elements, or the unauthorized act of third parties, it could not with any degree of reason be said that it could be required where the danger was created by the negligent act of the city itself. Suppose a deep water or sewer way trench was excavated across the street just before dark, and no lights or other signals of danger were placed to warn those using the street of its condition, and a person in passing over the street in the dark night, two hours later, with no knowledge of what had been done, should receive any injury by driving or falling into the opening, could one say that the legislature had in mind such a circumstance, and require the five days' notice of the condition of the street? We think not. In Lincoln v. Calvert, 39 Neb. 305, 58 N. W. 115, it is said in the syllabus: "While a city is liable only for injuries resulting from defects brought to its notice or existing under such circumstances that ignorance of the defect amounts in itself to negligence, still, when the defect is caused by the direct act, order, or authority of the city, notice is necessarily implied." In Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833, we said (quoting from the syllabus): "Where a city causes an excavation to be made in a public street, it cannot plead want of notice of the failure to erect barriers to prevent accidents by falling into the excavation. It is its duty to see that such barriers are erected and kept up." In the body of the opinion it is said: "It is claimed the city is not liable because it had no notice, either actual or constructive. In a case of this kind no notice is necessary. The city had authorized the excavation in question, and it was its duty to see that the proper guards were placed around it." See also: Adams v. Oshkosh, 71 Wis. 49, 36 N. W. 614; Springfield v. Le Claire, 49 Ill. 476; Barton v. Syracuse, 36 N. Y. 54; Houston v. Isaacks, 68 Tex. 116, 3 S. W. 693; Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; note 9 to 28 Cyc. Law & Proc. p. 1389.

3. It is suggested that plaintiff was guilty of contributory negligence in stepping on the icy sidewalk and bridge. We find nothing in the evidence by which we can say, as a matter of law, that plaintiff was guilty of contributory negligence. That question was submitted to the jury under proper instructions, and their finding will have to stand.

4. Complaint is made of two instructions given, and one asked by defendant and refused. They are too long to be here copied, nor is it necessary to do so, as there is no specific criticism, and the instructions given fairly covered the whole case, as well as the one refused, and we find no error in them.

The judgment of the District Court is affirmed.

WASHINGTON SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.,
v.
PIERCE COUNTY et al., Respts.

(51 Wash. 12, 97 Pac. 1099.)

Drainage district — land included.

1. Land not benefited may be included in a drainage district the organization of

Note. — The above case seems to be one of first impression upon the right to assess land for the preliminary expenses incident to an unsuccessful attempt to form a drainage district, as an extensive search has failed to disclose any other case involving that particular question.

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which is authorized by a statute permitting it, where the improvement would be of special benefit to a majority of the lands included within the boundaries of the district.

Same — preliminary expenses — land not benefited.

2. That land included in a drainage district has been found not to be subject to benefit by the proposed improvement will not prevent its assessment for the preliminary expenses of the enterprise, where it is abandoned because the cost is found to exceed the benefit.

Judgment — estoppel — drainage proceedings.

3. One who fails to object to the formation of a drainage district, or the inclusion of his lands therein, or to the proceedings under which the indebtedness of the district for preliminary expenses is determined, is estopped in a proceeding to enforce an assessment against his property for a share of such expenses, to object to anything but the constitutionality of the law under which the proceedings were had.

Drainage — failure of enterprise — costs.

4. The failure of an attempt to organize a drainage district under a valid statute does not prevent the assessment upon the property within its proposed boundaries, of the cost of the preliminary proceedings which resulted in such failure.

Tax — levy — constitutional limitation.

5. Statutory authority to levy a tax to pay the preliminary expenses of organizing a drainage district which fails does not violate a constitutional provision depriving the legislature of power to impose taxes upon the inhabitants of municipal corporations for municipal purposes, since the organization of the district is voluntarily entered into and the burden of paying the expenses necessary to effectuate its object voluntarily assumed.

Statute — amendment — reference to title.

6. A statute complete within itself, providing the procedure for raising the cost of the preliminary expenses of an attempt to organize a drainage district which failed, is not an amendment of the statute authorizing the organization of the district, so as to come within the operation of a constitutional requirement that no statute shall be amended by mere reference to its title.

(November 7, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County sustaining a demurrer to the complaint in a suit to enjoin the collection of a tax. Affirmed.

The facts are stated in the opinion.

Messrs. **B. S. Grosscup and W. C. Morrow**, for appellant:

The imposition of a tax or assessment to defray expenses of the improvement district, which failed, is illegal and void as violating the 14th Amendment of the Constitution of the United States, as well as the Constitution of the state of Washington.

1 Desty, Taxn. §§ 355 et seq.; 2 Smith, Mun. Corp. §§ 1448, 1469, 1477; Re Westlake Ave. 40 Wash. 144, 82 Pac. 279.

A drainage district is not a municipal corporation.

Middle Kittitas Irrig. Dist. v. Peterson, 4 Wash, 147, 29 Pac. 995.

If the purpose of the burden cannot be considered a public purpose, the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is, therefore, unconstitutional and void.

Cooley, Const. Lim. 6th ed. 606; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

Messrs. **Emmett N. Parker** and **R. J. Burglehaus**, with Messrs. **H. G. Rowland** and **Robert M. Davis**, for respondents:

Local assessment burdens do not come within that class of public tax which are limited by the constitutional provision relating to debt limitation upon municipal corporations.

Potter v. Whatcom, 25 Wash. 212, 65 Pac. 197.

The drainage district is such a municipal corporation, or public organization, as the legislature had ample power to create with the powers conferred.

1 Cooley, Taxn. 3d ed. 234.

The act was not an interference of the legislature in local taxation in violation of the constitutional provision.

State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428.

Dunbar, J., delivered the opinion of the court:

This case came up on appeal by the plaintiff from an order and judgment entered by the superior court of Pierce county, sustaining a demurrer to the complaint and dismissing the action. The complaint was addressed to the equity side of the court, and set up substantially the following facts: That the plaintiff is the Northern Pacific Railway Company; that Pierce county is a municipal corporation, and E. M. Lakin is treasurer of the same; that about the 10th day of September, 1904, drainage district No. 4 of the county of Pierce was established; that thereafter the

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said commissioners commenced a proceeding in the superior court of Pierce county, entitled "Frank R. Spinning, Charles A. Stewart, and T. S. Pierce, as the board of Drainage Commissioners of Drainage District No. 4 of Pierce County, Washington, Plaintiffs, and H. M. Anderson et al., Defendants," for the purpose of prosecuting the construction of a system of drainage within said district; that the plaintiff was joined as defendant in said proceeding, and filed its answer, denying that any benefit would accrue to it or its property by reason of the construction of said drainage ditch; that, upon a trial of the cause, verdict was entered by the jury exempting plaintiff and its property from any assessment on account of the construction of said ditch, on the ground that no benefit would accrue to plaintiff or its property by reason of such construction; that thereafter, on the 13th day of January 1906, said action was ordered to be dismissed by the superior court, for the reason that the estimated cost of the construction of the proposed improvement by said district, including damages to be paid, would exceed the benefit which would be assessed; that thereafter, to wit, on the 10th day of September, 1906, an order and decree was entered in this cause ascertaining the indebtedness, and directing a tax levy, wherein the total amount of warrants or evidences of indebtedness, with accruing interest, was ascertained to be $3,339.75, and the county commissioners were directed to levy a tax on the real estate within said district, exclusive of improvements, sufficient to pay said outstanding warrants and evidences of indebtedness; that thereafter the said county commissioners proceeded to and did levy a pretended tax upon the property of plaintiff in said district, amounting to the sum of $1,388.75; that the tax rolls and records of the defendant Pierce county, Washington, show such taxes levied against plaintiff's main line and side track; that defendants and each of them were threatening to enforce the collection of said pretended taxes by the sale, or attempted sale or conveyance, of said property; that plaintiff is greatly annoyed, injured, and hindered by the said pretended taxes and tax liens, and the assertion of the same by the defendants against plaintiff's property; that said pretended levy of taxes was assumed to be made by virtue of § 6, chap. 67, p. 90, of the Laws of the State of Washington for the Year 1903,—wherefore plaintiff prays that an injunction issue against defendants, and each of them, forever enjoining and restraining them from in any way attempting to enforce the collection of said pretended taxes. Other statements appear in the complaint, which are conclusions of law, and which it is not necessary to set forth. The defendants, through the prosecuting attorney H. G. Rowland, filed a demurrer to the complaint, which demurrer was sustained by the court.

It is the contention of the appellant that an examination of the various provisions of chapter 115, p. 271, Laws 1895, shows that the legislature had in mind but two classes of land to be included within the drainage district; to wit, those receiving benefit by reason of the proposed improvement, and those necessary to be condemned in carrying out the work; and, as it affirmatively appears that the appellant's lands were not benefited by reason of the judgment in that respect, and that the improvement was abandoned, it follows that its lands should not be taxed to pay the expenses of ascertaining whether or not the improvements should be made. This contention is not consistent with the provisions of § 4, chap. 115, p. 274, Laws 1895, for the reason that that section provides for the organization of a district where an improvement would be of special benefit to a majority of the lands included in the proposed boundaries, thereby especially negativing the idea suggested by the appellant that the law contemplated the inclusion only of such lands as were benefited; and the constitutionality of this law was determined by this court in Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779, and subsequent cases. There is nothing in the complaint indicating that the proceedings leading up to the formation of the district were not in strict compliance with the law, nor that there was any objection to the incorporation of appellant's lands into the district. The essential complaint is only that the proceedings for the purpose of raising money to pay the preliminary expenses of the proposed improvement, which failed, were illegal, and that its lands should not be taxed, because it had been determined that they would not have been benefited by the improvement if it had been carried out. It is possible that an investigation to determine the benefits flowing from a proposed improvement might develop the fact that none of the lands in the district would be benefited by the improvement. In such case every owner could put forth the same objection to the payment of his share of the preliminary expenses as does the appellant here, and for the same reason. The improvement not having been made, there seems to be no reason in equity why all the lands in the district should not proportionately pay the expenses which were nec-

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essarily incurred in determining the question whether the improvement should be made, it being borne in mind that those expenses were not incurred in making an improvement which failed to benefit certain lands, but were expenses preliminary to determining the question above stated, —a question entirely foreign to any question of assessment of damages or benefits from or by the construction of the improvement. So that, no objection having been made by the appellant, at any stage of the proceedings, to the formation of the district and the inclusion of its lands in said district, nor to the petition and proceedings under which the decree determined the amount of the indebtedness of the district, the right of appeal from all of such proceedings existing, it is estopped to object to anything but the constitutionality of the law under which the assessment is sought to be made and the tax collected, for it seems plain that the provisions of the law have been complied with.

The constitutionality of the original act having been determined, the power complained of here, *viz.*, the power to tax for the purpose of carrying out the provisions of the act, it seems to us, is necessarily incident to the main power conferred, and is not affected by the fact that the contemplated improvement has failed; for it became necessary, in order to carry out the original scheme contemplated and to determine facts which had to be determined in order to make the scheme effective, to incur the expenses complained of. The legislature in this instance has not violated § 12, article 11, of the State Constitution by imposing any tax upon it.

Nor is it necessary to determine whether this drainage district is a municipal corporation within the meaning of said § 12,* under which the power to assess and collect taxes is especially conferred. The state Constitution is a limitation, and not a grant, of power, and the legislature has supreme authority in the absence of constitutional limitations expressed or necessarily implied. This is an organization voluntarily entered into under powers, regulations, and forms prescribed by the legislature, and the burden of paying the expenses necessary to effectuate the object of the organization was voluntarily assumed by a vote of the people. As we said in State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428: "So long, therefore, as the tax is imposed by the corporate authorities, the evil sought to be avoided by the constitutional provisions is not incurred." In this case the burden being self-imposed, there is no room to exclaim against legislative power. Nor do we think that chapter 67, p. 87, Laws 1903, falls under the ban of § 37, article 2, of the Constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length," for the reason that an examination of the act plainly shows that it is a law of procedure complete within itself.

There appearing to be no valid constitutional objections to the law under which the tax is sought to be collected, and it not apppearing that there has been any violation or misconstruction of the law, the judgment is affirmed.

Mount, Rudkin, Fullerton, and Root, JJ., concur. Hadley, Ch. J., and Crow, J., took no part.

*That provision is as follows: Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES J. McKAIN, Plff. in Err.,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(—W. Va. —, 64 S. E. 18.)

Carrier — police — injury to passenger — liability.

1. A special officer appointed and commissioned by the governor at the instance of a railroad company, under the provisions of § 31, chap. 145, Code 1899 (Code 1906, § 4281), and paid by such company for his services, is prima facie a public officer, for

Headnotes by POFFENBARGER, J.

Case Note. — Liability of private person or corporation for acts of special police officer appointed by public authority.

The doctrine of McKAIN v. BALTIMORE & O. R. Co. represents the great weight of authority on the question of the liability of an employer for the acts of a special policeman. In some cases ordinary watchmen, at the request of their employer, have been sworn in as deputy sheriffs, in order to enable them to make arrests; and in those cases the employer has generally been held

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whose wrongful acts such company is not liable.

Same — authorized acts — liability.

2. If such an officer is engaged in special service for the company, such as guarding its property or enforcing obedience to its rules and regulations, and does a wrongful act for which the injured party is entitled to damages, and such act was within the scope of such service or employment, the company is liable as in the case of its regular employees, such as conductors and station masters.

Same — unauthorized acts.

3. But the company is not liable for a false arrest, assault and battery, and malicious prosecution, not directed nor instigated by it, and founded upon an alleged breach of the peace at one of its stations, in no way affecting or involving, so far as the evidence discloses, any of its property, rights, or servants, nor growing out of any transaction between the plaintiff and the company, although the plaintiff was rightfully in the station, having a ticket and awaiting the arrival of a train, and the alleged breach of the peace, arrest, and assault and battery, occurred on the premises of the company.

Trial — verdict — evidence — sufficiency.

4. Evidence disclosing the facts and circumstances above stated, and nothing more, is insufficient to sustain a verdict against the railway company, at whose instance the special officer was appointed, and by whom he was paid for his public services, and the trial court properly set it aside.

(March 2, 1909.)

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responsible for false arrests by such watchmen.

In Hershey v. O'Neill, 36 Fed. 168, the owner of a store was held not liable for the malicious prosecution and false imprisonment of plaintiff, who was arrested on a charge of the larceny of an umbrella, where it appeared that plaintiff was discovered taking an umbrella from the store and was arrested by a special police officer, appointed by virtue of a state statute to guard the store. It was contended that, as the officer was in the pay and sole employment of defendant, the latter was liable for the arrest and false imprisonment, but the court held that, notwithstanding the fact that the officer was paid by the defendant, he was still a public officer, and acted in his official capacity in making the arrest.

In Wells v. Washington Market Co. 8 Mackey, 385, a person who was employed by the defendant company to collect rents and keep order in the markets, but without authority from the company to make arrests, was also appointed a special policeman to guard the market and make arrests when necessary; and it was held that the company was not liable for an arrest made by such person, since he acted in a dual capacity, being both a private servant and a public officer, and was acting in the capacity of a public officer in making the arrest.

In Hardy v. Chicago, M. & St. P. R. Co. 58 Ill. App. 278, it was held that the mere fact that a special policeman, commissioned at the request of the railroad company for the guarding of its property, and paid by it, caused the arrest and imprisonment of plaintiffs, who were found picking up potatoes which had been thrown from the cars, did not render the railroad company liable in an action for arrest and false imprisonment, for, while the special policeman testified that he was instructed to arrest people whom he found picking up stuff on the company's grounds, it was not disclosed who gave such instruction.

In Sullivan v. Old Colony R. Co. 148 Mass. 119, 1 L.R.A. 513, 18 N. E. 678, a railroad company was held not liable for the acts of its conductor, who was also a police officer, where he, without making an arrest, removed a drunken passenger from the passenger car to the baggage car, using no more force than was necessary, the court saying the statute making conductors police officers, with power to arrest in certain cases, did not do away with their common-law right to remove drunken or disorderly passengers.

In Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540, the keeper of an amusement hall had procured the appointment of a special policeman to keep order on his premises, for whose services he paid, but whose official conduct was governed by the police commissioners and his own sense of public duty. Such keeper was required by statute to give bond to the city treasurer, "to be liable to parties aggrieved by any official misconduct of such police officer, to the same extent as for the torts of agents and servants in their employment," there being a provision for proceedings upon such bond in the same manner as upon bonds of constables. The keeper was held not responsible for the assault and battery on his premises committed by such special police officer, because whatever was done, was done in the capacity of police officer; the court saying that, "had the statute meant to make the officer the servant of the person who applies for his appointment, . . . it would have said so."

In Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188, it was held that a policeman appointed on the application of a corporation, which is required by law to pay his salary, is an officer of the state; and the corporation is not responsible for his acts as such officer in making an arrest, especially if it is not done on the premises of the corporation, since he does not act in the matter as its agent, but as an officer of the state.

In Cordner v. Boston & M. R. Co. 72 N. H. 413, 57 Atl. 234, defendant's conductor had been sworn in as special policeman under a statute providing that "railroad police officers may preserve order within and about the premises and upon the cars of the corporation upon whose petition they were ap-

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ERROR to the Circuit Court for Marion County to review an order setting aside a verdict for plaintiff and granting a new trial in an action brought to recover damages for false arrest and assault and battery. Affirmed.

The facts are stated in the opinion.

Mr. **Harry Shaw** for plaintiff in error.

Messrs. **U. N. Arnett, Jr., and John Bassel** for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

Charles J. McKain complains of an order made by the circuit court of Marion county, setting aside a verdict in his favor for $300, and awarding the defendant, the Baltimore & Ohio Railroad Company, a new trial in the case. The action is for damages for false arrest and imprisonment, and assault and battery, alleged to have been committed by the defendant through its agents, and refusal to carry and transport the plaintiff, as it had contracted to do by selling him a ticket. The arrest was predicated on an alleged assault committed at the Fairmont station of the defendant upon Mrs. J. H. Downey, wife of the special officer who made the arrest. The evidence bearing on the question of probable cause therefor is highly conflicting, and renders it one clearly proper for jury determination. The plaintiff denies having molested the lady in any way, and she, her husband, and another man, stoutly assert the contrary, saying he rudely pushed or shoved her as he passed

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pointed; they may arrest without a warrant all idle, intoxicated, or disorderly persons frequenting such premises or cars, and obstructing or annoying, by their presence or conduct, the traveling public using the same, and all persons committing thereon any offense known to the laws of the state, and may take the persons so arrested to the nearest police station, or other place of lawful detention in the county where the offense was committed." The defendant was held not liable in an action for false imprisonment where such conductor arrested plaintiff for a suspected larceny committed previously to the arrest, especially as the conductor was off duty at the time, and made the arrest at the direction of the city marshal, and there was some question as to the legality of his appointment.

In Tucker v. Erie R. Co. 69 N. J. L. 19, 54 Atl. 557, it was held that railway policemen commissioned by the governor under the act respecting railroads and canals, although appointed on the application of the railway company, receiving their compensation from it, and subject to be divested of their powers by its acts, are nevertheless state officers, charged with the performance of public duties, and, for the proper discharge of their duties and exercise of their official power, are responsible not to the company, but to the state, so that the railroad company was held not liable for the false arrest of plaintiff by such special policemen, on a charge of stealing journals from the cars, since it was not shown that the officers acted at the instigation of the company.

In Tyson v. Joseph H. Bauland Co. 186 N. Y. 397, 9 L.R.A.(N.S.) 267, 79 N. E. 3, it was held that a shopkeeper was not responsible for the arrest, by a special officer appointed at his request and paid by him, of a person who, under suspicious circumstances, had possession of a satchel stolen from a counter where it had been placed by a customer.

And the same rule is laid down in Samuel v. Wanamaker, 107 App. Div. 433, 95 N. Y. Supp. 270, where the arrest was made by the special policeman outside the store, and the company's clerks advised plaintiff's release on the ground that there was insufficient evidence to show that she was guilty of larceny.

And in Thomas v. Canadian P. R. Co. 14 Ont. L. Rep. 55, 8 A. & E. Ann. Cas. 324, the railroad company was held not liable for an arrest by its watchman, who had also, at the company's request, been appointed a constable under a statute empowering him to "act as a constable for the preservation of the peace, and for the security of persons and property against unlawful acts on such railway, and on any other works belonging thereto," etc., where the arrest was made off the company's property, and without its authority, express or implied.

And the same rule was laid in Dennison v. Canadian P. R. Co. 36 N. B. 250, where the arrest was made by one of the company's constables, employed and paid by it, and appointed by the governor, at its request, to do special duty on its line.

And, in Allen v. London & S. W. R. Co. L. R. 6 Q. B. 65, a railroad company was held not liable for a false arrest made by its station policeman at the command of its clerk, whose duty it was to issue tickets and keep the till.

So, in Edwards v. Midland R. Co. L. R. 6 Q. B. Div. 287, it was held that a corporation was not liable for a wrongful arrest and malicious prosecution by a detective policeman employed by it to protect its property.

In Illinois Steel Co. v. Novak, 84 Ill. App. 641, affirmed in 184 Ill. 501, 56 N. E. 966, a railroad company was held liable for an assault and battery inflicted on a trespasser on the company's grounds by the company's servant, who had been sworn in by the police department of the city to act as special policeman to protect the property of the railroad company, to eject trespassers, etc., and who reported to the foreman of the railroad company for his instructions.

In American Exp. Co. v. Patterson, 73 Ind. 430, an express company was held liable for the false imprisonment of plaintiff, who was arrested and fined by its special

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them, while they were standing and engaged in conversation. It is hardly necessary to say this made a case proper for jury determination, if the railway company is responsible for the acts done by Downey; the arrest, assault and battery, and imprisonment being regarded, agreeably to the finding of the jury, as having been inflicted without probable cause or justification. Downey was a special policeman, commissioned by the governor of the state by virtue of the authority vested in him by § 31 of chapter 145 of the Code of 1899 (Code 1906, § 4281), upon the application of the defendant, and employed and paid by it. He had qualified as such officer, and filed a copy of his oath of office in the clerk's office of the county court of the county in which he made the arrest. His powers are thus defined in the section of the statute above named: "Every police officer appointed under the provisions of this act shall be a conservator of the peace within each county in which any part of said railroad may be situated, and in which such oath or a certified copy thereof shall have been filed with the clerk of the county court or other tribunal established in lieu thereof; and, in addition thereto, he shall possess and may exercise all the powers and authority, and shall be

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constable on a charge of larceny. In this case the servant was held to have acted within the scope of his employment, as the company had expressly authorized the making of arrests in case of embezzlement or larceny.

So, in Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the proprietor of a theater was held liable for the acts of its janitor and ticket seller, who had also been appointed special policeman for the theater, and who received his instruction and pay from the manager of the theater, where the special policeman, before making the arrest, assaulted the plaintiff several times. The court here held that the policeman's acts in assaulting plaintiff were committed in the course of his employment as servant, and not as police officer, but expressly refused to pass upon the manager's liability for the arrest itself.

In Krulevitz v. Eastern R. Co. 143 Mass. 228, 9 N. E. 613, a finding against the railroad company in an action for arrest, false imprisonment, and malicious prosecution, was sustained where it appeared that the company's conductor, who was also a police officer by virtue of a state statute, with power to arrest in certain cases, informed plaintiff, who had no money to pay for his ride, and whose ticket had expired, that he must get off or be arrested when he reached his destination, but allowed him to ride until the destination was reached, when the conductor had plaintiff arrested by the local authorities, the court saying it was proper for the jury to find from the facts that the conductor, in causing the arrest, acted in his capacity of conductor, and not as officer.

In Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, a street railway company was held liable in an action for damages for assault and battery, where a special deputy sheriff, who was paid by the street railway company, and whose duty it was to preserve order at a resort owned by the company, and ride upon the cars and prevent disturbances, assaulted a passenger on a car, in assisting the conductor to eject him for nonpayment of fare, since the officer in so doing represented not the public, but his employer.

In Brill v. Eddy, 115 Mo. 596, 22 S. W. 488, a railroad company was held liable in an action for personal injuries received by plaintiff while stealing a ride on defendant's train, where the defendant's watchman, who was also a special policeman appointed at the instance of the railroad company, in whose pay and employment as such special policeman as well as watchman he had been for eight years past, caught hold of the boy as he was clinging to a moving car, and negligently pulled him off, not for the purpose of arresting him, but to get the boy away from the car and drive him off the company's grounds.

In King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42, under a statute empowering railroad station agents to arrest and deliver to the sheriff or other proper officer any person guilty of disorderly conduct about the station, such agent was held not to be an officer of the state, so as to relieve his employer from liability for the false arrest made by him, although the agent supposed he was acting as a conservator of the peace in making the arrest.

In Missouri, K. & T. R. Co. v. Warner, 19 Tex. Civ. App. 463, 49 S. W. 254, a jury finding against the railroad company in an action for false imprisonment was upheld where plaintiff was arrested by defendant's station master, who also, at defendant's request, had been appointed a special policeman, for selling tickets on the station platform in violation of a city ordinance, the undisputed evidence being that, at the time of making the arrest, the special policeman was in the employ and pay of the railroad company, and that the arrest was made by him upon its platform while so employed.

In Texas & P. R. Co. v. Bowlin (Tex. Civ. App.) 32 S. W. 918, a railroad company was held liable for the injury to a passenger caused by an assault by its depot policeman, where the passenger, who was slightly intoxicated, turned to re-enter the station after having been started toward his train, whereupon the policeman hit him in the eye with his billy.

In Higby v. Pennsylvania R. Co. 209 Pa. 452, 58 Atl. 858, it was held that under a statute authorizing the arrest, without a warrant, of a person trespassing on cars or

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entitled to all the rights, privileges, and immunities, within such counties, as are now, or may hereafter be, vested in or conferred upon the regularly elected or appointed constables of said county." The statute also authorizes any railroad company at whose instance such an appointment has been made to dispense with the services of the officer by filing a notice to that effect, and thereupon his powers "cease and determine."

The reported decisions indicate that statutes similar to ours, providing for the appointment of special police officers at the instance of corporations and payment by them for their services, have been passed in many of the states and construed by several of the courts. While no decision of this court deals with the identical questions presented, namely, the status of such an officer and the extent to which his employer is liable for his acts, the numerous decisions of other courts having persuasive authority with us render it comparatively easy to solve these questions. Such officers act, in the opinion of the courts, sometimes as servants of the company employing them, and sometimes as officers of the state. Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650; Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380; Brill v. Eddy,

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locomotives, a special police officer in the service of the railroad company acted within the scope of his authority in arresting, without a warrant, a person who had been a trespasser on the railroad company, but who had jumped off the car and was in the act of escaping at the time of the arrest.

It has been held to be a question of fact for the jury whether, when the special policeman performed the acts, he was acting in his capacity as servant or as public officer.

Where the officer was in the pay and employment of a railroad company, being authorized by them to protect its property against trespassers, and shot the plaintiff while he was stealing a ride on one of the trains. Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650.

Where the company's watchman, who was paid $50 a month by it to protect its interests on the right of way, to keep tramps from trains, and look after robberies that might occur at stations and on freight cars, to look after persons in an intoxicated condition about the stations, and generally to look after crimes committed against the railroad company on its right of way, but who was at the same time a police officer,—pursued a boy who had been stealing a ride on one of defendant's trains, along the right of way and onto an adjoining field, where a bullet from the officer's pistol killed the boy. Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 A. & E. Ann. Cas. 250.

In St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881, a railroad company was held liable for the malicious injury of plaintiff, who was injured by the company's night watchman, who had also been made a deputy sheriff so that he might arrest trespassers, but who was not under the control of the sheriff, but in the exclusive employ of the company. The court here holds that a sheriff or deputy cannot engage to guard the private property of a railroad, and hence that he was not acting as an officer in the matter, but as a servant within the scope of his employment, while the case of Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188, is distinguished on the ground that in the Steinmeier Case the officer was acting outside the scope of his employment.

In Texas & N. O. R. Co. v. Parsons (Tex.) 113 S. W. 914, it appeared that the railroad company had procured the county sheriff to appoint two deputies, whose duty it was to guard the company's property and to prevent trespass and depredation by tramps, the officers' services to be paid for by the railroad company. One of the deputies, in accordance with his instructions, was compelling some tramps to leave the company's yard when he fired upon plaintiff, injuring him, and the company was held liable, the court saying that the deputy was acting in the course of his employment as watchman, and not as a public officer; but in this case also there seems to have been no authority for the sheriff to appoint a deputy to guard private property.

And in Kastner v. Long Island R. Co. 76 App. Div. 323, 78 N. Y. Supp. 469, a railroad company was held liable for an unlawful arrest by a special officer who had been set to watch people suspected of stealing coal, and instructed, if any of them were caught, to lock them up, although the arrest was made several blocks distant from the premises of the railroad company, and his instructions limited his authority to the premises.

And so, where a mayor, having no legal authority to do so, has appointed a special policeman for the railroad company, which pays his salary, the company is liable for a wrongful arrest made by him. Union Depot & R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329, and Norfolk & W. R. Co. v. Gallihor, 89 Va. 639, 16 S. E. 935.

But, in O'Donnell v. Canada Foundry Co. 5 Ont. Week. Rep. 215, it was held where the defendant company made application to the high constable of the county for police protection, and two officers of the force were delegated to protect the company's property, for whose services the company paid, but whose instructions were received from the chief constable, that the company was not liable for the false arrest by such officers, since they were not servants, but were public officers.

For cases dealing with the liability of a master for arrest or false imprisonment by a servant employed as detective, policeman, or watchman, generally, see note to Milton v. Missouri P. R. Co. 4 L.R.A.(N.S.) 282.

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115 Mo. 596, 22 S. W. 488; Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 A. & E. Ann. Cas. 250; Tyson v. Joseph H. Bauland Co. 186 N. Y. 397, 9 L.R.A. (N.S.) 267, 79 N. E. 3; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540; Tucker v. Erie R. Co. 69 N. J. L. 19, 54 Atl. 557; Cordner v. Boston & M. R. Co. 72 N. H. 413, 57 Atl. 234; Thomas v. Canadian P. R. Co. 14 Ont. L. Rep. 55, 8 A. & E. Ann. Cas. 324; Daniel v. Atlantic Coast Line R. Co. 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 A. & E. Ann. Cas. 718. The import of these decisions is that such appointees, although paid for all their services by the persons at whose instances they are appointed, are not servants of such persons in respect to all the acts they perform by virtue of their offices; but only in respect to services rendered the company, such as defending or preserving its property. The line of distinction, sometimes hard to recognize under the circumstances of the particular case, marks the point at which the act ceases to be one of service to the employer, and becomes one of vindication of public right or justice, the apprehension or punishment of a wrongdoer, not for the injury done to the employer, but to the public at large. Perhaps the clearest and best statement of it is that given by the eminent English Jurist Blackburn in Allen v. London & S. W. R. Co. L. R. 6 Q. B. 65, as frequently quoted by the American courts: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who, he supposes, has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual. If the law were that the defendants are responsible for the act of their booking clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." In order to make the employer liable, he must have directed the injurious and wrongful act to be done Thus, in Tolchester Beach Improv. Co. v Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188, one of the earliest cases on the subject in this country, the court held as follows: "(1) That the defendant was not bound for the policeman's acts simply because he was appointed by the governor at its nomination or request, and because it paid his salary. (2) That the act of the policeman was that of a state officer in the exercise of his common-law powers as such officer, and not executing the orders of the defendant. (3) That the act of arrest, to be effectually ratified by the defendant, must have been the act of its agent authorized to commit it." In Tucker v. Erie R. Co. 69 N. J. L. 19, 54 Atl. 557, the court held as follows: "In order to render a company responsible for an unwarranted arrest made by one of such policemen, and a subsequent malicious criminal prosecution by him, it is necessary to show that his action was instigated by the company or some of its officers or employees." In Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, the following proposition is asserted: "Where a special deputy sheriff paid by a street railway company acts solely in his capacity as an officer in assaulting a passenger, and not by the direction of the conductor in charge of the car, the street railway company is not responsible for the act."

But the direction or instigation need not be in express terms. It suffices that the officer in the employment of a private person or corporation had implied authority or direction from the employer to do the act. In other words, if the act done was within the scope of the duty imposed upon him in favor of the employer by his contract of service, the principle of *respondeat superior* applies. "In an action against a corporation for a malicious prosecution instituted by one of its servants, where it is not shown that the servant had any express authority to institute the prosecution, the burden is upon the plaintiff to show that the servant, from the nature of his duties, had implied authority to prosecute the plaintiff." Thomas v. Canadian P. R. Co. cited supra. This principle is recognized in nearly, if not quite, all of the cases above cited. Others, further illustrating it, may be found in the valuable notes to Sharp v. Erie R. Co. 6 A. & E. Ann. Cas. 250, and Thomas v. Canadian P. R. Co. 8 A. & E. Ann. Cas. 324. No such implication arises from the fact that the officer is paid by the person at whose instance he was appointed. Although so paid, he is prima facie a public officer, and not a private servant. Healey v. Lothrop; Tucker v. Erie R. Co.; Cordner v. Boston & M. R. Co.; Foster v. Grand Rapids R. Co.; and Tyson v.

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Joseph H. Bauland Co.,—supra. But such officers frequently perform acts or services directly, immediately, and primarily beneficial to their employers, and at their instance, and under their direction. Such special employment may include an express direction to arrest or prosecute all persons whom the officer may suspect of offenses against the property or rights of his employer. If there is no such express direction, it may be inferred from the nature of the duties imposed or the services to be rendered, and, if so, the authorization or instigation is established by way of implication. In such cases the relation of master and servant is made out, and then the question is whether the act done was within the scope or course of the servant's or agent's employment, and the principles enunciated in Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243, and Davis v. Chesapeake & O. R. Co. 61 W. Va. 246, 9 L.R.A.(N.S.) 993, 56 S. E. 400, in which the acts were done by railway conductors, apply. In Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 A. & E. Ann. Cas. 250, the plaintiff's decedent, caught in the act of stealing a ride on a train, had been pursued by a detective employed by the railway company out of the railway yards on to adjacent lands, and there shot by the latter. There was evidence tending to show that the railway company had employed the detective to protect its track and property, and look after crimes committed against it and its right of way; and the court held that it was for the jury to say, under all the facts and circumstances shown in evidence, whether the detective acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone. Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650, developed facts very similar to those shown in Sharp v. Erie R. Co. supra, and the court held the case one proper for jury determination. The plaintiff had been stealing a ride on a freight train, and a special policeman, employed by the company, ordered him off, and then shot him when he was a few feet distant from the track. In Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the plaintiff had been assaulted and beaten in a theater by a special officer, at the time, on duty there. The assault and battery grew out of a controversy between the plaintiff and the ticket seller. It was a part of the special officer's duty to maintain order in the establishment, and the ticket seller had demanded the arrest of the plaintiff. The court held the proprietor of the establishment liable for the act of the officer. Speaking of the character of the act, the judge who delivered the opinion of the court said: "Even if he were a regular patrol man, called in off the street by appellants or their agents to aid in enforcing the regulations of the theater, he would for such purpose be only an agent of appellants, and, for his conduct as such agent, within the scope of his employment, appellants would be responsible." This view, or process of reasoning, resulted in the following conclusion in Foster v. Grand Rapids R. Co. cited: "Where a special deputy sheriff who was paid by a street railway company, and whose duty it was to preserve order at a resort owned by the company, and ride upon the cars and prevent disturbances, assaulted a passenger on a car in assisting the conductor to eject him for nonpayment of fare, the officer in so doing represented not the public, but his employer, and the street railway company was liable."

If, however, it does not appear that the act done was within the scope of the servant's employment, or that there was any employment or contract of service beyond that by which the person or corporation at whose instance the appointment to the office was made bound himself to pay the officer for his services as a policeman, or that the arrest was made or the person prosecuted at the instance or by the direction of the person who has the appointment made, there is no liability upon such person for the act. In Healey v. Lothrop, cited, Mr. Justice Holmes, delivering the opinion of the court, said: "If the statute had meant to make the officer the servant of the person who applies for his appointment and gives bond for his conduct, presumably it would have said so. But, if it had said so, it would have insisted upon a fiction being treated as a fact. It is true that the defendant asked to have an officer appointed, perhaps asked to have Mead appointed, and that he paid him. But he did not appoint him, could not remove him, and could not control his official conduct, which was governed by the regulations of the police commissioners and his own sense of duty as a public officer. The statute does not call the relation that of master and servant, and goes no further than to make the defendant liable upon his bond 'to the same extent' as for a servant. The words quoted imply that the officer is not one. They mean to the same extent as in another case which does not exist." In Tyson v. Joseph H. Bauland Co. cited supra, the arrest was made in the store of a company that had requested the appointment of the officer, and paid him for his services, on a charge of theft in the store by a customer, and, it not appearing that the company had directed the arrest

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to be made or the plaintiff to be prosecuted, although a floor walker had brought the loss to the attention of the officer, the court held that the trial court should have directed a verdict for the defendant. The subject of the alleged theft was not goods or property of the store, but money of another customer who happened to be in the store at the time. In Smith v. South Eastern R. Co. L. R. 5 C. P. 640, there had been a controversy between railway servants and the plaintiff. Incidentally a special officer employed and paid by the company assaulted the plaintiff and others. After the struggle was over, the special officer gave the plaintiff into custody. The court held the company not liable, because the act of giving him into custody was beyond the scope of the servant's employment. One of the rules of the company said any officer or servant sworn as a constable for the district or place where he was on duty might take into custody anyone whom he saw commit an assault upon another at any of its stations, for the purpose of putting an end to any fight or affray, but not if the affray had come to an end. It appeared from the evidence of the plaintiff that he was not given into custody until after the fight had ended, and the court said: "We are disposed to draw the inference in fact that Antonio, in giving the plaintiff into custody, was not acting within the scope of his employment by the company, or on behalf of or for the benefit of the company." Agreeably to this, the court said in Dickson v. Waldron, cited supra: "If, however, after entering the theater, he [the officer] should discover appellee in the act of violating a criminal law of the state or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And, if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible."

In view of these precedents and principles, we are of the opinion that the railway company is not liable to the plaintiff for the injuries inflicted upon him. He was not arrested or prosecuted for any act respecting the railway company or its property. The offense with which he was charged was an act done respecting the wife of the prosecuting officer, and did not in anyway involve any right of the company. That it was done upon the premises of the railway company is, in our opinion, immaterial. The motive of the arrest, assault, and prosecution clearly appears to have been either vindication of the law, or a desire on the part of the officer to avenge the insult to his wife or to comply with her wishes; and in none of these aspects of the case would the company be responsible for the acts, however unjustifiable they may have been. Nor is it material that the plaintiff had a return ticket, was lawfully at the station awaiting a train, and was not carried by the railway company. According to the evidence, his losses and injuries were all caused by Downey, not the railway company.

Perceiving no error in the judgment, we affirm it, with costs and damages.

WISCONSIN SUPREME COURT.

FRANK RAHLES, Respt.,
v.
J. THOMPSON & SONS MANUFACTURING COMPANY, Appt.

(137 Wis. 506, 118 N. W. 350.)

Pleading — amendment — conditions.

1. It is not error to permit an amendment at the trial of a complaint, which brings about no radical change of issues, without granting a continuance, and to limit the costs to be paid by the plaintiff as a condition to receiving the relief demanded.

Master — instructions — foreigner.

2. The duty of a master to warn of the dangers incident to machinery an adult foreigner who has been in the country only a few years, and cannot speak English, and is illiterate, is only such as he owes to any ordinarily intelligent but inexperienced adult servant.

Same — drop hammer.

3. A master is not required to warn an ordinarily intelligent but inexperienced adult employed about a drop hammer that the pressing down of the treadle when the hammer is uplifted will cause the hammer to fall, and the danger of injury therefrom to his hands should they be under it.

On Rehearing.

Appeal — finding of jury — conclusiveness.

4. The appellate court will not permit a jury to give damages to one person and withhold them from another upon the same evidence in an action for damages for personal injuries upon their conclusion as to his intelligence from his personal appearance, on the theory that the jury having the witness before them, their finding is binding upon the appellate court.

(November 10, 1908.)

Case Note. — Duty of master as to instructing and warning servant unable to understand English.

In Valente v. American Bridge Co. (Del.) 73 Atl. 395, it was contended that the duty of the master to instruct and warn his

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APPEAL by defendant from a judgment of the Circuit Court for Rock County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by **Timlin, J.:**

Among other references upon the part of the appellant were the following: Vorbrich v. Geuder & P. Co. 96 Wis. 277, 71 N. W. 434; Odegard v. North Wisconsin Lumber Co. 130 Wis. 659, 110 N. W. 809; Malloy v. Chicago & N. W. R. Co. 109 Wis. 29, 85 N. W. 130; Meisenheimer v. Kellogg, 106 Wis. 30, 81 N. W. 1033; Cole v. Chicago & N. W. R. Co. 71 Wis. 114, 5 Am. St. Rep. 201, 37 N. W. 84; Wagner v. Plano Mfg. Co. 110 Wis. 48, 85 N. W. 643; Dougherty v. West Superior Iron & Steel Co. 88 Wis. 343, 60 N. W. 274; Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362; Gereg v. Milwaukee Gaslight Co. 128 Wis. 35, 7 L.R.A.(N.S.) 367, 107 N. W. 289; Grams v. C. Reiss Coal Co. 125 Wis. 1, 102 N. W. 586; Stutz v. Armour, 84 Wis. 623, 54 N. W. 1000; Ralph v. Chicago & N. W. R. Co. 32 Wis. 177, 14 Am. Rep. 725; Sobey v. Thomas, 39 Wis. 317; Hinton v. Cream City R. Co. 65 Wis. 323, 27 N. W. 147; Smith v. Milwaukee Builders' & T. Exchange, 91 Wis. 360, 30 L.R.A. 504 51 Am. St. Rep. 912, 64 N. W. 1041.

Among other references upon the part of the respondent were the following: Stat. 1898, § 2669; Hopkins v. Chicago, M. & St. P. R. Co. 128 Wis. 403, 107 N. W. 330; Stat. 1898, § 2830; Laws 1899, chap. 307; McIlquham v. Barber, 83 Wis. 500, 53 N. W. 902; Johnson v. Ashland Water Co. 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823; Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; Wolski v. Knapp-Stout & Co. Co. 90 Wis. 178, 63 N. W. 87; Neilon v. Marinette & M. Paper Co. 75 Wis. 579, 44 N. W. 772; Nadau v. White River Lumber Co. 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; Yess v. Chicago Brass Co. 124 Wis. 406, 102 N. W. 932; Gussart v. Greenleaf Stone Co. 134 Wis. 418, 114 N. W. 799; Dwyer v. American Exp. Co. 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; Wysocki v. Wisconsin Lakes Ice & Cartage Co. 121 Wis. 96, 98 N. W. 950; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; Thompson v. Chicago, M. & St. P. R. Co. 4 McCrary, 629, 14 Fed. 564; Walker v. Simmons Mfg. Co. 131 Wis. 542, 111 N. W. 694; Friemark v. Rosenkrans, 81 Wis. 359, 51 N. W. 557.

Mr. **Robert N. McMynn**, with Mr. **Charles A. Vilas**, for appellant.

Mr. **O. A. Oestreich**, with Mr. **John L. Fisher**, for respondent.

Timlin, J., delivered the opinion of the court:

The original complaint was quite inartistic, but, after setting forth the age, nationality, and occupation of the plaintiff and his lack of knowledge of the English language, and the corporate character and the business of the defendant, it averred: Lack of knowledge of machinery and of the dangers attending its operation, and lack of experience on the part of the plaintiff. Defendant had and used a described drop hammer, out of repair and defective. Defendant, knowing the plaintiff's want of experience, and without instructing the plaintiff concerning his duties, except as specified, and

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Italian servant was imposed because of the servant's ignorance of the English language and his unfamiliarity with the work he was directed to do. The court instructed the jury that the master, in giving instructions and warnings, may, in the absence of knowledge to the contrary, assume that the servant has the knowledge and discernment which a person of his age and intelligence ordinarily possesses, and directed the jury to determine from the evidence whether the servant, by reason of inexperience, inability to speak or understand the English language, and want of proper instructions, was in fact without knowledge of the danger attending his work. On writ of error in (Del.) 73 Atl. 400, the court said that, while it appeared that the servant could neither speak nor understand the English language, it also appeared that he was not entirely unfamiliar with the work he was directed to do, and it was not shown that he was not a man of at least ordinary intelligence, from which it was concluded that the testimony did not tend to show that it was the duty of the master to instruct such servant respecting the work he was ordered to do, and warn him of the dangers incident thereto.

In Lobstein v. Sajatovich, 111 Ill. App. 654, the court stated that, "in the case at bar, the evidence does not, by any means, satisfy us that appellee did not understand English sufficiently to comprehend fully what was said to him in that language;" nevertheless, it laid down the *dictum* that, in ordinary cases, unless the master's attention is called to the fact that one or more of his employees do not understand the language of the country sufficiently to comprehend his order or warning, it may well be doubted whether he is guilty of negligence or want of ordinary care if he assumes that his employees all understand an order or warning plainly given in the vernacular.

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to be made or the plaintiff to be prosecuted, although a floor walker had brought the loss to the attention of the officer, the court held that the trial court should have directed a verdict for the defendant. The subject of the alleged theft was not goods or property of the store, but money of another customer who happened to be in the store at the time. In Smith v. South Eastern R. Co. L. R. 5 C. P. 640, there had been a controversy between railway servants and the plaintiff. Incidentally a special officer employed and paid by the company assaulted the plaintiff and others. After the struggle was over, the special officer gave the plaintiff into custody. The court held the company not liable, because the act of giving him into custody was beyond the scope of the servant's employment. One of the rules of the company said any officer or servant sworn as a constable for the district or place where he was on duty might take into custody anyone whom he saw commit an assault upon another at any of its stations, for the purpose of putting an end to any fight or affray, but not if the affray had come to an end. It appeared from the evidence of the plaintiff that he was not given into custody until after the fight had ended, and the court said: "We are disposed to draw the inference in fact that Antonio, in giving the plaintiff into custody, was not acting within the scope of his employment by the company, or on behalf of or for the benefit of the company." Agreeably to this, the court said in Dickson v. Waldron, cited supra: "If, however, after entering the theater, he [the officer] should discover appellee in the act of violating a criminal law of the state or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And, if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible."

In view of these precedents and principles, we are of the opinion that the railway company is not liable to the plaintiff for the injuries inflicted upon him. He was not arrested or prosecuted for any act respecting the railway company or its property. The offense with which he was charged was an act done respecting the wife of the prosecuting officer, and did not in anyway involve any right of the company. That it was done upon the premises of the railway company is, in our opinion, immaterial. The motive of the arrest, assault, and prosecution clearly appears to have been either vindication of the law, or a desire on the part of the officer to avenge the insult to his wife or to comply with her wishes; and in none of these aspects of the case would the company be responsible for the acts, however unjustifiable they may have been. Nor is it material that the plaintiff had a return ticket, was lawfully at the station awaiting a train, and was not carried by the railway company. According to the evidence, his losses and injuries were all caused by Downey, not the railway company.

Perceiving no error in the judgment, we affirm it, with costs and damages.

WISCONSIN SUPREME COURT.

FRANK RAHLES, Respt.,
v.
J. THOMPSON & SONS MANUFACTURING COMPANY, Appt.

(137 Wis. 506, 118 N. W. 350.)

Pleading — amendment — conditions.

1. It is not error to permit an amendment at the trial of a complaint, which brings about no radical change of issues, without granting a continuance, and to limit the costs to be paid by the plaintiff as a condition to receiving the relief demanded.

Master — instructions — foreigner.

2. The duty of a master to warn of the dangers incident to machinery an adult foreigner who has been in the country only a few years, and cannot speak English, and is illiterate, is only such as he owes to any ordinarily intelligent but inexperienced adult servant.

Same — drop hammer.

3. A master is not required to warn an ordinarily intelligent but inexperienced adult employed about a drop hammer that the pressing down of the treadle when the hammer is uplifted will cause the hammer to fall, and the danger of injury therefrom to his hands should they be under it.

On Rehearing.

Appeal — finding of jury — conclusiveness.

4. The appellate court will not permit a jury to give damages to one person and withhold them from another upon the same evidence in an action for damages for personal injuries upon their conclusion as to his intelligence from his personal appearance, on the theory that the jury having the witness before them, their finding is binding upon the appellate court.

(November 10, 1908.)

Case Note. — Duty of master as to instructing and warning servant unable to understand English.

In Valente v. American Bridge Co. (Del.) 73 Atl. 395, it was contended that the duty of the master to instruct and warn his

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APPEAL by defendant from a judgment of the Circuit Court for Rock County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

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Among other references upon the part of the respondent were the following: Stat. 1898, § 2669; Hopkins v. Chicago, M. & St. P. R. Co. 128 Wis. 403, 107 N. W. 330; Stat. 1898, § 2830; Laws 1899, chap. 307; McIlquham v. Barber, 83 Wis. 500, 53 N. W. 902; Johnson v. Ashland Water Co. 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823; Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; Wolski v. Knapp-Stout & Co. Co. 90 Wis. 178, 63 N. W. 87; Neilon v. Marinette & M. Paper Co. 75 Wis. 579, 44 N. W. 772; Nadau v. White River Lumber Co. 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; Yess v. Chicago Brass Co. 124 Wis. 406, 102 N. W. 932; Gussart v. Greenleaf Stone Co. 134 Wis. 418, 114 N. W. 799; Dwyer v. American Exp. Co. 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; Wysocki v. Wisconsin Lakes Ice & Cartage Co. 121 Wis. 96, 98 N. W. 950; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; Thompson v. Chicago, M. & St. P. R. Co. 4 McCrary, 629, 14 Fed. 564; Walker v. Simmons Mfg. Co. 131 Wis. 542, 111 N. W. 694; Friemark v. Rosenkrans, 81 Wis. 359, 51 N. W. 557.

Mr. **Robert N. McMynn**, with Mr. **Charles A. Vilas**, for appellant.

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Timlin, J., delivered the opinion of the court:

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Italian servant was imposed because of the servant's ignorance of the English language and his unfamiliarity with the work he was directed to do. The court instructed the jury that the master, in giving instructions and warnings, may, in the absence of knowledge to the contrary, assume that the servant has the knowledge and discernment which a person of his age and intelligence ordinarily possesses, and directed the jury to determine from the evidence whether the servant, by reason of inexperience, inability to speak or understand the English language, and want of proper instructions, was in fact without knowledge of the danger attending his work. On writ of error in (Del.) 73 Atl. 400, the court said that, while it appeared that the servant could neither speak nor understand the English language, it also appeared that he was not entirely unfamiliar with the work he was directed to do, and it was not shown that he was not a man of at least ordinary intelligence, from which it was concluded that the testimony did not tend to show the it was the duty of the master to instruct such servant respecting the work he was ordered to do, and warn him of the dangers incident thereto.

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without warning the plaintiff that there was any danger in working about the drop hammer, or that it was liable to fall, ordered the plaintiff to assist the operator of the drop hammer. Plaintiff, assisting without knowledge of the danger, was injured by the hammer dropping upon his hand, which, in consequence of this injury, was amputated. That if the said defendant, by its officers or agents, its superintendent and foreman acting as vice principals, had warned or in any manner instructed the plaintiff as to the dangers and the use of the said hammer, the precautions to be taken about the same, plaintiff would not have been injured in any manner and would have avoided the said injury. Again: "That the cause of the injury to this plaintiff was the neglect of the said defendant . . . to warn the said plaintiff of the dangers and of the dangerous condition of the said machine." No defect in the machine having been shown, but the evidence on the part of the plaintiff tending to show that the plaintiff accidentally stepped on the treadle of the drop hammer while having his hand in the path of the descending hammer, the defendant, at the close of the plaintiff's evidence, moved that the plaintiff be nonsuited. Plaintiff then asked leave to amend his complaint, presenting an amended complaint, which is the same as the original complaint, except that therein the negligence of the defendant was predicated not upon any defect in the machine, but upon the ignorance and inexperience of the plaintiff, known to the defendant, and the failure of the defendant to instruct or warn the plaintiff before or at the time of placing plaintiff to work upon the drop hammer. The court allowed this amended complaint to be filed, whereupon counsel for the defendant asked for the "continuance of the case over the term, the immediate taxing by the clerk of this court of the taxable disbursements of the defendant down to this time, and the usuual attorney fee of $25. By the court: The motion is granted upon the sole ground that $10 costs be paid forthwith." Exception to this ruling was taken, and error is assigned on this ruling.

We perceive no error in the ruling. It was proper to allow the amendment on the trial. Gates v. Paul, 117 Wis. 170, 94 N. W. 55. Where the complaint is amended on the trial, in order to entitle the defendant to a continuance, he must make a showing, if not by affidavit, at least by a statement to the court, based on the pleadings apparently supporting such statement, that he is unprepared to meet, and cannot, with the evidence at hand or available, meet, the issues raised by the amended complaint. Withee v. Simon, 104 Wis. 116, 80 N. W. 77. The amendment here brought about no radical change of the issues, and the terms were in the discretion of the court. Illinois Steel Co. v. Budzisz, 106 Wis. 499, 48 L.R.A. 830, 80 Am. St. Rep. 54, 81 N. W. 1027, 82 N. W. 534; McIlquham v. Barber, 83 Wis. 500, 53 N. W. 902; Pellage v. Pellage, 32 Wis. 136, 141; Schaller v. Chicago & N. W. R. Co. 97 Wis. 31, 71 N. W. 1042. Neither do we think there was error in the rulings relative to the argument made to the jury by plaintiff's attorney. The attorneys for defendant seem to have been quite critical in this regard. It is too much to expect that, in extemporaneous argument to a jury, rules of law will always be accurately understood and precisely stated by the speaker, and it is much easier to be critical of, than to be correct in, such statements. All the other errors assigned go to one point, namely: Was there a duty resting upon defendant to warn the plaintiff of the danger of stepping upon or coming in contact with the treadle, or pointing out to the plaintiff the treadle and its function and the consequence of pressing down thereon?

The plaintiff was a man grown, twenty-four or twenty-five years of age, a Lithuanian by birth, having little or no knowledge of the English language, and had resided in this country four years, and worked at trucking in the shop in question for about a month prior to his injury. This work included bringing material to this drop hammer, and leaving it there to be pressed into shape by the operator of the drop hammer. He had also worked at the back of the drop hammer, cleaning up the dies, on the afternoon of Saturday and for an hour or two on Monday morning, up to the time he was hurt. His place of work was at the back of the drop hammer, and, had he remained there, he would not have come in contract with the treadle; but he testifies that he was directed to also do such work as he might be directed to do by the operator; that a small piece of iron used in wedging or adjusting the die fell out, as it had done several times before, and that, at request of the operator, he went around from the back to the front of the drop hammer, put his hand under the upraised hammer to insert this small piece of iron, and, while so engaged, with his hand in this position, his foot probably came in contact with the treadle, which caused the hammer to drop on his hand. The treadle was a long bar, about 4 inches from the floor, extending in front of the anvil, and about 3 inches beyond at each end, and, of course, was very conspicuous.

The plaintiff was entitled to the rights and subject to the duties of any other adult man. We cannot presume that, because he

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was born in a foreign country, resided in this country only four years, and could not speak English, and was illiterate, he did not possess ordinary common sense and shrewdness, or that he falls within the legal rules applicable to children. The employer was therefore justified in presuming the plaintiff to be an inexperienced adult of ordinary intelligence. The duty of the employer to instruct or warn such person was only that which the rules of law impose upon him with respect to any ordinarily intelligent but inexperienced adult servant. This rule has been stated affirmatively as follows: "The duty of informing the inexperienced employee of the dangers ordinarily incident to the service is upon the employer." Wolski v. Knapp-Stout & Co. Co. 90 Wis. 178, 63 N. W. 87. "If a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet, if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them and do his work safely, with proper care on his part." Jones v. Florence Min. Co. 66 Wis. 268 57 Am. Rep. 269, 28 N. W. 207.

The rule as laid down broadly for this state in the foregoing cases is much more favorable to the injured employee than the rule on the subject derived from decisions elsewhere. Labatt, Mast. & S. chap. 16. Negatively it has been said: "Warning is not required against obvious dangers in ordinary operations which are matters of common knowledge to all." Wagner v. Plano Mfg. Co. 110 Wis. 48, 85 N. W. 643. "The duty to instruct, as between master and servant, does not exist as to dangers which are so obvious that the servant must be held, as a matter of law, to be as familiar with them as the master." Groth v. Thomann, 110 Wis. 488, 86 N. W. 178. The master, in order to charge him with this duty, must have known, or ought, in the exercise of reasonable care, to have known, of the inexperience or lack of knowledge of the servant, and also of the dangerous character of the work. Klochinski v. Shores Lumber Co. 93 Wis. 417, 67 N. W. 934; Sherman v. Menominee River Lumber Co. 77 Wis. 14, 45 N. W. 1079. The adult employee is presumed to understand the ordinary risks of his employment. Nash v. Chicago, M. & St. P. R. Co. 95 Wis. 327, 70 N. W. 293. "Failure to instruct or warn an employee as to the risks and hazards attending the employment is not negligence, unless the employer knew, or ought to have known, that such warning and instruction was necessary." Sladky v. Marinette Lumber Co. 107 Wis. 250, 83 N. W. 514. Again: "The duty to instruct does not go so far as to require the master to acquaint the employee with every possible danger to which he may be subjected in the course of his employment. The master has a right to assume that the servant will see and appreciate those dangers which are open and obvious to a person of ordinary comprehension." Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362. To the same effect, Thompson v. Edward P. Allis Co. 89 Wis. 523, 62 N. W. 527.

Applying these rules to the case in hand, it is apparent that the defendant had a right to believe that the plaintiff needed no more instruction than any other adult inexperienced person of ordinary intelligence. In the employment and setting to work of such person, it would be impossible for the employer to forecast all that might thereafter happen by reason of accidental contact with machinery which the employee might be occasionally required to approach. Neither can the employer be expected to take the employee through the shop, and explain to him the name and obvious function of every piece of machinery like a treadle. Even in agricultural labor, which is by many considered the simplest form of employment, it would require days of tuition to thus explain and instruct regarding every implement and device used or with which the employee might occasionally come in contact, from a cream separator to a threshing machine. The fact that a certain device attached to a drop hammer was a treadle, and that, when passed downward, it would release the uplifted hammer, was so obvious and apparent to any person of ordinary intelligence that the omission to instruct, warn, or explain to one not expected to operate that machine or employed for that purpose could not be considered negligence. If this were an omission of duty on the part of the master, it would be hard to say where instruction should stop and what it should include.

The instant case, in its aspect most favorable to the plaintiff, is that the employer directed an adult, an ordinarily intelligent but inexperienced man to work at the back of the drop hammer, cleaning off the dies and anvil, and also to obey the orders of the operator in front of the drop hammer when requested by the latter. The employer failed to instruct the plaintiff as to the identity or the function of the treadle, or as to the danger of pressing down upon or coming in

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contact with the treadle. The plaintiff was called to the front of the drop hammer by the operator of the drop hammer, and, while there, accidentally touched the treadle with his foot while his hand was under the uplifted hammer, and in this way was injured. The employer was not by law required to explain or instruct against such obvious danger, nor with reference to such obvious function of the treadle, nor to anticipate that the servant was ignorant of the existence or of the function of the treadle of such a machine, which the servant could plainly see in operation, nor was the employer bound to forecast the possibility of the servant coming around to the front of the machine, and accidentally pressing upon the treadle with his foot while his hand was under the uplifted hammer, and warn against the consequences. We are convinced that, under well-settled rules of law, no negligence of the master causing the injury complained of was shown by his omission to caution or instruct the plaintiff in any of the foregoing particulars, and that consequently the judgment should be reversed.

Judgment reversed, and the cause remanded, with directions to dismiss the complaint.

A petition for rehearing having been filed, **Timlin, J.**, on January 26, 1909, handed down the following response:

The respondent moves for a rehearing, on the ground that this court erred in holding that, upon the issues made by the pleadings, and evidence in support thereof, the respondent was a person of ordinary intelligence, and also in holding that the appellant was authorized to treat the respondent as such person. Excerpts from the testimony of the respondent, given through an interpreter, are presented, together with the fact that the respondent worked for the appellant at common labor for two months before he was set to work at the back of the drop hammer, and we are reminded that the trial court and the jury had the advantage of seeing the respondent and hearing him testify.

We have considered these points and find no reason to alter the former decision. Taking the testimony of the respondent all together, there is, to our minds, nothing in it to indicate that he was not of ordinary intelligence. He stumbled in some answers, whether by reason of the difficulty of rapid and extemporaneous translation into English by the interpreter, or otherwise, we cannot say; but, in any event, not more than hundreds of witnesses of ordinary intelligence do in the numerous records which it is part of our duty to examine. The fact that the trial court heard and saw the witness cannot in such case change our view of the legal effect of the testimony, for we are unwilling to establish a rule that would permit the jury upon the same evidence to give damages to one man and withhold damages from another upon their conclusion from his personal appearance. The appearance and manner of the witness is of importance in the consideration of questions of fact, taken in connection with other evidence affecting his credibility or his physical or mental condition; but, standing alone, or existing in connection with evidence which prima facie shows ordinary intelligence, this consideration cannot be invoked to uphold a verdict; but, with reference to those persons who require instruction concerning the dangers incident to their work, we notice that there is appended to this brief the name of the same counsel who signed the brief for rehearing in Lynch v. Ryan, 132 Wis. 271, 111 N. W. 707, 112 N. W. 427, referred to in the opinion upon rehearing, found on pages 277 and 280 of 132 Wis.

In the brief of the respondent for rehearing in the instant case, we find such expressions as: "The court deals with the plaintiff as a man made on paper, and, in so doing, ignores his own positive testimony that he knew nothing of the operation of the machine or the function of the treadle." "There is no escape from the decision that the finding of the jury of this fact is supported by some credible evidence, except as a preconceived notion of the general merits of the litigation be permitted to control the decision." "This court must determine the question under an entirely different rule. It should not utterly disregard the jury's findings, and, by assuming the existence of a fact, substitute one of its own, as appears to have been done in this case." "We submit that this decision is unwarranted usurpation by the court of the function of the jury. This court should not, through a process of designating questions of fact as questions of law, under the guise of correcting errors of law, practically abolish trial by jury in personal-injury cases, where the gist of the action is negligence." The counsel for respondent is instructed that this language is in violation of rule 51 of this court (108 N. W. viii.), and that further violations of this rule on his part will not be overlooked. Every person who aspires to practise law should be able to distinguish between argument and mere scolding. "Argument" is a connected discourse based upon reason; a course of reasoning tending and intended to establish a position and to induce belief. "Scolding" is mere clamor, railing, personal reproof. Argument dignifies the orator and instructs and convinces the auditor. Scolding relieves somewhat the hysteria of the scolder, but only amuses or irritates the

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hearer. Argument is the professional weapon of the lawyer; scolding that of the *communis rixatrix*. Argument is enjoyed and welcomed in a brief for rehearing; scolding has no proper place therein.

The motion for rehearing is denied, with $25 costs.

ARKANSAS SUPREME COURT.

PATRICK McGRORY, Appt.,
v.
ULTIMA THULE, ARKADELPHIA, & MISSISSIPPI RAILWAY COMPANY.

(— Ark. —, 118 S. W. 710.)

Master — injury to vice principal — liability.

1. A master is not liable for injury to a vice principal due to the negligence of his subordinate, whom the master has exercised ordinary care in selecting.

Same — negligence — proximate cause.

2. The negligence of a railroad company in permitting the drawheads of cars to become defective, so as to allow too much space or play between the cars, is not the proximate cause of injury to the foot of an employee which is caught between them by the negligent starting of the train while he is attempting to make his way along it, for which purpose he steps upon the drawheads.

(April 19, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Clark County in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. **Wood & Henderson**, for appellant:

The employees of defendant who caused the moving of the trains were not fellow servants of plaintiff, who was a vice principal.

St. Louis, I. M. & S. R. Co. v. Rickman, 65 Ark. 138, 45 S. W. 56; Kansas City, Ft. S. & M. R. Co. v. Becker, 67 Ark. 1,

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Case Note. — Liability of master for injury to vice principal by negligence of servant.

There are doubtless numerous cases in which a recovery has been had by a vice principal where the question suggested by the title has not been discussed and apparently has no effect upon the decision, but the case has turned upon other points, or upon the general rules of master and servant. No attempt has been made to gather cases of that character, but this note is confined to cases in which the fact that the injured person was a vice principal has been expressly discussed.

It may be well to call attention to the fact that the term "fellow servant" is applied to a servant in two senses: first, to distinguish him from another servant who is a vice principal; second, to assert that he is in the same common employment as some other servant. In some cases, as in Gulf, C. & S. F. R. Co. v. Howard, infra, the term is used in both senses.

The reported cases are not numerous, and in but few of them is there any extended discussion of the question. In a few cases, which will be noted later, it has been held that the vice principal or superior servant was, under the facts, expressly given a cause of action by a statute. But in the absence of a statute, the general rule seems to be that, although the superior servant is a vice principal as to the subordinate servants, they are, as to him, fellow servants, and the master is not liable for any injuries received by him through their negligence, under the general rule that a master is not liable for injuries caused by the negligence of a fellow servant. The exemption from the application of the fellow servant rule, in favor of subordinates injured by the negligence of a vice principal, is intended for the benefit of the subordinates only, and does not affect the relationship which the subordinate bears to the vice principal, nor exempt the latter from the application of the general rule.

Thus, in Moore v. Jones, 15 Tex. Civ. App. 391, 39 S. W. 593, it was held that, whether a conductor in charge of a train and his engineer were fellow servants, or the conductor was a vice principal, the latter could not recover from the railroad company for injuries caused by the negligence of the engineer.

And a car hostler, who, under the statute, is a vice principal of his assistants, who was injured while not engaged in such work as to be within the protection of the statute, cannot recover from the railroad company for injuries which were caused by the negligence of his assistants in performing their work, for, while he was not as to that work a fellow servant to them, they were fellow servants to him. Gulf, C. & S. F. R. Co. v. Howard, 97 Tex. 513, 80 S. W. 229.

So, in Linck v. Louisville & N. R. Co. 107 Ky. 370, 54 S. W. 184, it was held that a railroad company was not liable for injuries to a conductor caused by the negligence of the engineer, though the former was acting at the time as brakeman. The court said: "The fact that decedent at the time was performing the duties of brakeman did not change his character or position as conductor. Although the brakeman, if injured under the same conditions, might have recovered of appellee, yet decedent cannot because as to him there was no agent of the company guilty, or charged to be guilty, of negligence."

In a few cases it has been held that a superior servant cannot recover for injuries

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16 L.R.A. 814, 27 Am. St. Rep. 78, 53 S. W. 406; St. Louis, I. M. & S. R. Co. v. McCain, 67 Ark. 377, 55 S. W. 165; St. Louis, I. M. & S. R. Co. v. Thurmond, 70 Ark. 411, 68 S. W. 448; St. Louis & S. F. R. Co. v. McFall, 75 Ark. 30, 69 L.R.A. 217, 86 S. W. 824, 5 A. & E. Ann. Cas. 161.

Messrs T. D. Wynne, J. H. Crawford, and T. D. Crawford, for appellee:

The defendant's employees were fellow servants of plaintiff.

Bloyd v. St. Louis & S. F. R. Co. 58 Ark. 70, 41 Am. St. Rep. 85, 22 S. W. 1089; 2 Labatt, Mast. & S. § 470; Cincinnati, N. O. & T. P. R. Co. v. Gray, 50 L.R.A. 47, 41 C. C. A. 535, 101 Fed. 623.

McCulloch, Ch. J., delivered the opinion of the court:

The plaintiff, Patrick McGrory, sues his employer, the Ultima Thule, Arkadelphia, & Mississippi Railway Company, for damages resulting from physical injuries received while performing his duties, and alleged to be due to the negligence of other servants for whom the employer is claimed to be responsible. After all the testimony had been introduced, the trial court gave the jury a peremptory instruction to return a verdict in favor of the defendant, and judgment was entered accordingly. Thus, the only question presented here is whether the testimony was sufficient to warrant a verdict in favor of the plaintiff, giving it the strongest probative force which the jury might have accorded to it.

There is little, if any, conflict in the testimony on the material points. The defendant owned a railroad, which it operated as a common carrier through Clark and Dallas counties in Arkansas, and plaintiff was employed as roadmaster and superintendent of construction. He had no authority to employ or discharge train men; but, in the event of accident or wreck of a train on the line, it was his duty to take charge of the train or trains for the purpose of clearing up the wreck and restoring the

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caused by the negligence of a subordinate, but it does not appear from the cases whether, if the conditions were reversed, and the negligence of the superior caused injuries to the subordinate, the latter would be entitled to recover; and of course if the subordinate would not be entitled to recover, the question discussed in this note would not be presented.

Thus, in Edmonson v. Kentucky C. R. Co. 105 Ky. 479, 49 S. W. 200, 448, reversing on rehearing (Ky.) 46 S. W. 679, it was held that a conductor, who was the chief officer of a train, was not entitled to recover for injuries caused by the negligence of his engineer, as the engineer was his fellow servant.

On the same ground, it was held, in Ragsdale v. Memphis & C. R. Co. 3 Baxt. 426, that a conductor could not recover for injuries due to the negligence of his engineer in failing to obey his orders.

An engineer in a hotel and an elevator boy, where both are subject to the orders of superiors, are fellow servants, so that the former cannot recover for the negligence of the elevator boy, who was to a certain extent under the engineer's orders. McCarty v. Rood Hotel Co. 144 Mo. 397, 46 S. W. 172.

In Texas & N. O. R. Co. v. Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073, it was held that, if the foreman of a gang of men engaged in the work of constructing and extending the defendant's road was free from negligence, and was injured by the concurring negligence of the men operating the car and of the defendant, it would be no defense that the men were under the plaintiff's charge. It will be noticed in this case that it is assumed that defendant itself was negligent as well as the servants, and this fact serves to distinguish the case from the other cases.

As was said above, in a few cases it has been held that the vice principal was clearly within the protection of the statute, and a recovery has been allowed for that reason.

Thus, a railroad company is liable for injuries to an engineer while at work in oiling the engine, caused by the negligence of his fireman, as they were then operating an engine within the meaning of the statute exempting operatives of a railway engine from the fellow servant rule while they are engaged in their work. Texas & N. O. R. Co. v. Walton (Tex. Civ. App.) 104 S. W. 415.

And in Galveston, H. & S. A. R. Co. v. Perry, 38 Tex. Civ. App. 81, 85 S. W. 62, it was held that a foreman of a track gang, injured while riding on a hand car, could recover from the company for injuries caused by the negligence of members of the crew, notwithstanding the fact that he was their superior servant, for the injuries were incurred while "operating a railroad" within the meaning of the statute.

So, under a statute making the railroad company liable to a person injured while in the line of his duties to the company, by the negligence of one in charge of an engine upon the railway, it was held, in Pittsburgh, C. C. & St. L. R. Co. v. Collins, 168 Ind. 467, 80 N. E. 415, that the company was liable for injuries to a conductor caused by the negligence of his engineer, notwithstanding a rule of the company making the conductor in some respects the superior servant. An earlier decision in the same case reported in 163 Ind. 569, 71 N. E. 661, was virtually to the same effect.

Upon the general question of vice principalship considered with reference to rank of superior servant, see note to Stevens v. Chamberlin, 51 L.R.A. 513.

As to vice principalship as determined with reference to character of the act causing the injury, see note to Lafayette Bridge Co. v. Olsen, 54 L.R.A. 33.

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trains to proper service. On such occasions, he had charge of the trains, and his authority was supreme, the conductors and other train men being under his immediate supervision and subject to his orders. The evidence shows, however, that the conductors were left in charge of their trains subject to his orders, and that they were expected to give orders according to their judgment, except when otherwise directed by the plaintiff as superintendent. The latter's orders to train men were given through the conductors. On the occasion of the plaintiff's injury, one of the engines, No. 12, got off the track, and it was necessary to procure the assistance of another engine in getting it back, and plaintiff was notified. He got another engine, No. 14, and, after coupling two flat cars to it, proceeded to the scene of the wreck of engine No. 12. Night fell while the work was going on, and plaintiff went over to engine No. 14 to give an order to the engineer, and, water being up to the track on either side, he undertook to climb upon a flat car attached to the engine, in order to pass over to the engine, and, while doing so, the engine and cars were moved, and his foot was caught between the drawheads. The signal to the engineer to move his engine was given by the conductor in response to the request of the section foreman for the engine to be moved, so that he could repair the track. This was after engine No. 12 had been gotten back on the track. Neither the conductor who gave the signal, nor the engineer of No. 14, knew of the situation of plaintiff when the signal to move the engine was given and acted upon. It was dark, and neither of the train men knew where the plaintiff was, or that he had started over to engine No. 14.

It is contended that the act of the conductor in giving the signal to move the train constituted negligence for which the defendant would be liable. According to the undisputed facts, the plaintiff was a vice principal of the defendant at the time of the injury, and the negligence of the employee, if any, which caused the injury, was that of one of his subordinates. Is the master responsible to a vice principal on account of the negligence of another of its servants, who is a subordinate of the vice principal and under the latter's control? It is plain that the master is not responsible, for that is one of the ordinary risks which the servant assumes when he takes service and assumes control over his subordinates. The master is not bound, under the doctrine of *respondeat superior*, to indemnify one servant for an injury caused by the negligence of another servant in the same common employment, unless the negligent servant is at the time acting as the master's representative; in other words, the vice principal of the master. 2 Labatt, Mast. & S. § 470; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397. The subordinates of the vice principal, over whom he exercises control, are his fellow servants in a common employment, so far as the responsibility of the master to him for their acts is concerned, and the master discharges his full duty to his vice principal by exercising ordinary care in selecting competent subordinate servants.

It is contended that a contrary doctrine is announced in the case of St. Louis & S. F. R. Co. v. McFall, 75 Ark. 30, 69 L.R.A. 217, 86 S. W. 824, 5 A. & E. Ann. Cas. 161. We think, however, that that case announced a principle altogether different from the one applicable here. There, the injured party was a conductor on a train, and his injury was caused by the concurring negligence of Adams, the engineer of his train, and the servants in charge of another train. The question there was whether the negligence of Adams, the engineer, which contributed to the injury, should be imputed to McFall so as to deny him the right of recovery; and we held that, inasmuch as Adams was not under the immediate control of McFall, the negligence of the one could not be imputed to the other. The controlling principle in that case was announced in the following language: "It follows, then, that in cases where the injured and negligent do not sustain to each other the relations of master and servant, or principal and agent, or other relation by which alone one is responsible for the act of the other, the contributory negligence of a third person will not be imputed to the party thereby affected, unless he was at the time subject to the control of the injured person, and the wrong, the negligence, was committed at a time when it was within the power of such person to prevent it, and it was his duty to do so, and under circumstances which indicated that he assented to or acquiesced in the wrong by his failure to interfere, or directed it to be done; and that, when the conditions are reversed, the reverse is true,—it will be imputed." Now in the present case, there is no question of imputed negligence involved. The sole question, as before stated, is whether the master is responsible to his representative, or vice principal, for the acts of another servant in the common employment, but who is a subordinate of the former.

There is another allegation of negligence in the complaint, to the effect that the master was guilty of negligence in permitting the drawheads of the flat car to become out of repair, so that too much space or play was allowed between the cars when coupled together. It is contended that but for this

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negligence there would not have been enough space between the two drawheads for the plaintiff's foot to have gotten down between them, and therefore no injury would have occurred. We are of the opinion, however, that this could not be made the basis of a charge of negligence as the proximate cause of the injury. It could not have been anticipated by the master, in furnishing reasonably safe appliances, that a danger of this sort should be guarded against. It could not have been reasonably anticipated that a servant would place his foot between the drawheads, or, in the discharge of his duties, would permit his foot to get in that position. We can see no causal relation between the alleged act of negligence and the injury, and therefore it could not be made the basis of a recovery.

We do not undertake to decide whether or not, under the facts in this case, the plaintiff himself was, as a matter of law, guilty of contributory negligence in climbing on the car in the darkness without apprising the train men of his presence. It is unnecessary to do so. Upon the whole, we are of the opinion that the undisputed evidence shows affirmatively that the plaintiff is not entitled to recover, and the peremptory instruction to the jury was correct.

Affirmed.

INDIANA SUPREME COURT.

ELLEN M. CAYWOOD, Appt.,
v.
SUPREME LODGE KNIGHTS & LADIES OF HONOR.

(— Ind. —, 86 N. E. 482.)

Insurance — time of suit.

1. A provision requiring suit on a mutual benefit certificate to be brought within a year from the time of death is valid.

Pleading — statutory benefit.

2. To entitle one suing on a mutual benefit certificate to the benefit of a statute rendering void a provision in a policy issued by a foreign life insurance company which limits the time for bringing action on the policy to less than three years from the time of death, he must plead and prove that the insurer is a foreign company.

Insurance — forfeiture — application of credit.

3. The mere fact that a mutual benefit association owes a member for services an amount in excess of an assessment against him for premium on his certificate does not require an application of it upon the assessment, so as to prevent a forfeiture of the certificate for nonpayment of dues.

Pleading — insurance — application of credit — duty.

4. To show default on the part of a mutual benefit company in failing to apply money due a member for services upon an assessment of dues, it is not sufficient to state merely refusal to make the application, but a direction, request, or other authorization to make it should be alleged.

Same — demurrer — admission — conclusion of law.

5. Demurring to a complaint alleging a duty on the part of a mutual benefit company to apply money due a member for services in satisfaction of an assessment of dues does not admit the duty, in the absence of any allegation of facts showing its existence.

Insurance — benefit certificate — defective execution — validity.

6. A mutual benefit certificate, not countersigned as required by its provisions, is not valid in the hands of the beneficiary, in the absence of anything to show a waiver on the part of the association of the defective execution.

(December 15, 1908.)

Case Note. — Does existence of indebtedness from insurer to insured in an amount sufficient to pay premium or assessment prevent forfeiture of policy for nonpayment of premium.

It may be laid down as the general rule, gathered from the cases reviewed in this note, though subject to some exceptions, as will be hereafter seen, that, if an insurer has in its hands sufficient funds presently due the insured to pay an assessment or premium upon his policy when due, it is the former's duty to apply the same so as to prevent a forfeiture of the policy.

Thus, in Supreme Lodge O. M. P. v. Meister, 204 Ill. 527, 68 N. E. 454, it was held that a benefit certificate could not be forfeited while the local lodge to which the assured belonged held sufficient funds of his to pay the assessment for the nonpayment of which the certificate was alleged to be forfeited, it appearing that a former assessment had been paid twice by the assured, so that there remained in the treasury of the local lodge a sufficient amount at the time the assessment in question was made to meet the same.

And in Supreme Lodge, P. A. v. Welsch, 60 Kan. 858 Appx., 57 Pac. 115, it was held that a benefit certificate could not be forfeited upon the ground that the assured had failed to pay an assessment within the time required, where it appeared that he had paid two assessments for which he was not liable.

And the result was the same in Fraternal Aid Asso. v. Powers, 67 Kan. 420, 73 Pac. 65, in which it was shown that, at different times, the assured had made excess payments for dues and assessments. It was contended that these payments should not be credited, because they had been paid before the assessments or dues had accrued. It was held,

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APPEAL by plaintiff from a judgment of the Circuit Court for Hancock County in defendant's favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. George Young, John M. Bailey, and William Ward Cook, for appellant:

An insurance company cannot, by contract, limit the time in which a suit on a policy may be commenced.

Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Burns's Rev. Stat. 1901, § 4923; Insurance Co. of N. A. v. Brim, 111 Ind. 281, 12 N. E. 315; Develin v. Wood, 2 Ind. 102; French v. Lafayette Ins. Co. 5 McLean, 461, Fed. Cas. No. 5,102; Ætna L. Ins. Co. v. Fitzgerald, 165 Ind. 317, 1 L.R.A.(N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 A. & E. Ann. Cas. 551; Grant v. Lexington F. L. & M. Ins. Co. 5 Ind. 23, 61 Am. Dec. 74.

The clause, "that no suit against the Supreme Lodge shall be commenced after one year from the death of the member herein assured," is so uncertain, indefinite, and vague, that it is void.

Bauer v. Samson Lodge, K. P. 102 Ind. 262, 1 N. E. 571; Supreme Council, O. C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Clark, Contr. pp. 10, 63, 64, 185.

An insurance company cannot forfeit a policy for nonpayment of premiums or assessments when it has in its possession money belonging to the assured, from which it could have paid the assessment or pre-

however, that such excess should be applied on subsequent and accruing dues and assessments, and that the member would not be deemed to be in default so long as such excess was sufficient to meet the accruing claims against him.

And in Demings v. Supreme Lodge K. P. 20 App. Div. 622, 48 N. Y. Supp. 649, appeal dismissed without opinion in 161 N. Y. 662, 57 N. E. 1108, there was held to be no forfeiture where it appeared that the assured, at the time of his admission into the lodge, paid the first assessment for which he would be liable, in advance, and thereafter, as each assessment was made, the secretary of his lodge was notified to forward his assessment to the supreme lodge secretary, which he did by using the funds received from the advance assessment, and then the section secretary notified the assured to pay that assessment within thirty days to provide for the next assessment, which method of paying assessments continued until the deceased's death, so that each succeeding assessment, including the one upon the nonpayment of which the defendant relied, was paid from the proceeds of the one next preceding.

And in Younghoe v. Grain Shippers' Mut. F. Ins. Asso. 126 Iowa, 374, 102 N. W. 137, it was held that no forfeiture of an insurance policy could be declared because of the assured's failure to pay an assessment, where it appeared that the assured, upon taking out his policy, paid therefor more than he was called upon to pay, and the insurer received the same, and such excess was sufficient to discharge the assessment in question.

So, it was held that there was no forfeiture in Elliot v. Grand Lodge A. O. U. W. 2 Kan. App. 430, 42 Pac. 1009; Knight v. Supreme Court, O. C. F. 2 Silv. Sup. Ct. 453, 6 N. Y. Supp. 427; Evarts v. United States Mut. Acci. Asso. 40 N. Y. S. R. 878, 16 N. Y. Supp. 27; Logsdon v. Supreme Lodge, F. U. 34 Wash. 666, 76 Pac. 292, in all of which it appeared that the assured had paid an assessment for which he was not liable, by reason of the fact that he did not become a full member until after such assessment was made, and he paid thereafter all assessments, except the one in question, and the sum paid in for which he was not liable was sufficient to cover such assessment.

And, in McNaughton v. Des Moines L. Ins. Co. (Wis.) 122 N. W. 764, it was said to be the well-established rule that it is the duty of an insurance company to apply dues from it to an assured (in this case, commissions due the insured for insurance written), presently payable, upon his premium, likewise payable, if necessary to prevent a forfeiture, especially where, from previous transactions between the parties, the assured has a right to rely upon such applications being made.

But, in Leffingwell v. Grand Lodge A. O. U. W. 86 Iowa, 279, 53 N. W. 243, it was held that the fact that the defendant was indebted to a holder of one of its certificates of membership for wages due as a member of one of its committees did not entitle such member to an equitable application of an amount so due him to the payment of his dues and assessments, in order to avoid a forfeiture of his certificate, where it appeared that the collection of such dues and assessments was made by a subordinate lodge under the rules of the order, and the defendant had no authority to receive assessments direct from the member, or apply any money in its hands, belonging to him, to the payment of such assessment.

And in Pister v. Keystone Mut. Ben. Asso. 3 Pa. Super. Ct. 50, it was held that the insurer was not bound to apply to the payment of an assessment a sum in excess of such assessment, earned by the assured as its agent, where it appeared that the assured was employed at a monthly salary, payable at the end of the month, and that, at the time the premium was due, no part of such salary was due.

Attention may here be called to Leonhard v. Provident Sav. Life Assur. Soc. 64 C. C. A. 533, 130 Fed. 287, in which it appeared that a policy was surrendered without the knowledge or the authority of the beneficiary, but without fraud or negligence on the part of the insurer, and other policies were issued in the place of the one sur-

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mium, and which it has the right to apply to such payment.

Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co. 97 Pa. 15, 100 Pa. 172; 19 Am. & Eng. Enc. Law, 2d ed. p. 509; Rogers v. Union Benev. Soc. No. 2, 111 Ky. 598, 55 L.R.A. 605, 64 S. W. 444; Brady v. Coachman's Ben. Asso. 39 N. Y. S. R. 181, 14 N. Y. Supp. 272; Jennings v. Chelsea Div. Ben. Fund Soc. 28 Misc. 556, 59 N. Y. Supp. 862; Columbian Relief Fund Asso. v. Hopper, 24 Ind. App. 169, 53 N. E. 1051; Bulger v. Washington L. Ins. Co. 63 Ga. 328; Hull v. Northwestern Mut. L. Ins. Co. 39 Wis. 397; Franklin L. Ins. Co. v. Wallace, 93 Ind. 7; Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 360.

Messrs. **William A. Hough** and **Taylor, Woods,** and **Willson,** for appellee:

A stipulation in a policy that no action shall be sustained unless commenced within a certain period after loss is valid.

Bacon, Ben. Soc. § 443; Riddlesbarger v. Hartford F. Ins. Co. 7 Wall. 386, 19 L. ed. 257; Insurance Co. of N. A. v. Brim, 111 Ind. 281, 12 N. E. 315; O'Laughlin v. Union Cent. L. Ins. Co. 3 McCrary, 543, 11 Fed. 280; Underwriters' Agency v. Sutherlin, 55 Ga. 266; Andes Ins. Co. v. Fish, 71 Ill. 620, Glass v. Walker, 66 Mo. 32; Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; Merchants' Mut. Ins. Co. v. Lacroix, 35 Tex. 249, 14 Am. Rep. 370; Wilson v. Ætna Ins. Co. 27 Vt. 99.

Such a provision is not against the policy of the statute of limitations.

Riddlesbarger v. Hartford F. Ins. Co. supra; Niblack, Ben. Soc. §§ 370, 371; May, Ins. § 478; Thompson v. Phœnix Ins. Co. 11

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rendered. It was held that the beneficiary was not, on repudiating the surrender, entitled to have the premiums paid on the subsequent policies applied in satisfaction of premiums accruing on the original policy after its surrender, in order to prevent its forfeiture for nonpayment of premiums.

The same rules of law have been applied where the insurer has in its hands dividends earned by the assured's policy. Thus, in Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co. 97 Pa. 15, it was held that an insurer was bound to apply dividends belonging to a policy holder sufficient to pay an accruing premium, if the premium was not paid, and could not declare the policy forfeited for failure to pay the premium under such circumstances, especially if the insured had been in the habit of applying his dividends to the payment of premiums. The court said that it was inequitable and against the policy of the law to permit an insurance company to forfeit a policy for nonpayment of a premium, when it had in its possession money of the assured to an amount covering the premium, and which it had the power to apply to its payment.

And in Manhattan L. Ins. Co. v. Hoelzle, Fed. Cas. No. 9,025, it was held that where it was the custom of the insurer to apply dividends, if a policy holder so requested, to the payment of the next premium, the failure to pay a premium would be no defense to the right of recovery, where the assured requested that such application be made, and such a request was refused.

Such dividends, however, must be sufficient to discharge in full the premium or premiums due, otherwise a forfeiture will not be prevented. Bulger v. Washington L. Ins. Co. 63 Ga. 328; Hollister v. Quincy Mut. F. Ins. Co. 118 Mass. 478; Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 37 Am. Rep. 594.

And in Mutual L. Ins. Co. v. Girard L. Ins. Annuity & T. Co. 100 Pa. 172, reversing 38 Phila. Leg. Int. 469, it was held that, in order to bind an insurer to apply dividends to the payment of a premium to save the forfeiture of a policy for the nonpayment thereof, the dividends must have been declared before the premium was due. The court said that it would be carrying the rule beyond any recognized principle to hold that profits earned, but not declared as dividends or otherwise, could be treated as funds in the hands of the insurer, applicable to the payment of a premium. "*Non constat* that such dividends ever will be made."

So, in Bryant v. Mutual Ben. L. Ins. Co. 109 Fed. 748, and Petrie v. Mutual Ben. L. Ins. Co. 92 Minn. 489, 100 N. W. 236, a policy which the insurer claimed had lapsed because of the nonpayment of a premium was held not to be entitled to have dividends applied to extend the insurance, where it appeared that, after the premium in question became due, the insurer's directors declared a dividend to participating policies, conditioned upon the payment of the annual premiums, and providing that no such dividend should be payable to policies upon which premiums due had not been paid.

A different rule, however, seems to prevail in Kentucky, since, in Ætna L. Ins. Co. v. Hartley, 24 Ky. L. Rep. 57, 67 S. W. 19, and in Mutual Ben. L. Ins. Co. v. Davis, 115 Ky. 404, 73 S. W. 1020, the insurer was held to have no right to declare dividends conditioned upon the payment of the premium next due.

In Wheeler v. Connecticut Mut. L. Ins. Co. supra, it was held that the insurer was not bound to apply or pay the dividends on account of the premiums, unless requested by the assured to do so.

In Straube v. Pacific Mut. L. Ins. Co. 123 Cal. 677, 56 Pac. 546, which was an action brought by the beneficiary in a policy which she had surrendered to the insurer for a cash consideration some time subsequent to a failure to pay the annual premium, the policy having been in force for several years, and the plaintiff alleging fraud by the insurer in procuring the policy from her, the court

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Sawy. 276, 25 Fed. 296; Underwriters' Agency v. Sutherlin, supra; Fullam v. New York Union Ins. Co. 7 Gray, 61, 66 Am. Dec. 462; De Grove v. Metropolitan Ins. Co. 61 N. Y. 594, 19 Am. Rep. 305; Farmers' Mut. F. Ins. Co. v. Barr, 94 Pa. 345; Peoria M. & F. Ins. Co. v. Whitehill, 25 Ill. 466.

A provision in an insurance policy limiting the time for suit to less than the statute of limitations is valid.

Cray v. Hartford F. Ins. Co. Fed. Cas. No. 3,374; Virginia F. & M. Ins. Co. v. Aiken, 82 Va. 424; Virginia F. & M. Ins. Co. v. Wells, 83 Va. 736, 3 S. E. 349.

Monks, J., delivered the opinion of the court:

This action was brought by appellant on a benefit certificate issued by appellee, a mutual benefit association, to appellant's son, in which she was named as the beneficiary. The amended complaint is in two paragraphs. A demurrer for want of facts was sustained to the complaint, and judgment rendered on demurrer against appellant.

The errors assigned call in question the action of the court in sustaining said demurrer. The benefit certificate sued on contains the following provision: "No suit shall be commenced against the Supreme Lodge after one year from the date of the death of the member." It appears from each paragraph of the complaint that the member to whom the certificate was issued died in the month of September, 1902. This action was commenced June 30, 1905, more than two years after the death of the member named in said certificate. Appellant insists that said provision limiting the time in which

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without further discussion of the question, said there was "no merit in the appellant's final contention to the effect that the accumulated dividends should have been applied to the payment of premiums upon the policy."

So, it will be the duty of the insurer to apply dividends to the payment of the interest on notes of the assured given for premiums or loans, if it is stipulated between the parties that a failure to pay the interest thereon would forfeit the policy.

Thus, in Smith v. St. Louis Mut. L. Ins. Co. 2 Tenn. Ch. 727, under a policy expressly providing that, if the assured failed to pay annually in advance the interest on any unpaid note due the insurer, the policy should cease and determine, it was held that such interest became practically a premium, payable annually in advance, and its nonpayment would cause the policy to lapse; but that the company would be bound to apply any dividends to which the policy holder might be then entitled in such manner as to save a forfeiture; that is, first to the payment of the interest.

And in Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 355, it was held that, in the absence of any stipulation in the policy, and of any direction otherwise by the assured, as to the application of dividends which had been declared, it was the duty of a mutual insurance company to apply such dividends to the payment of interest on loans made on the policy, when by so doing a forfeiture of all rights and benefits under the policy would be prevented. The court said that this doctrine did not arise out of the peculiar facts of any particular case, and that it did not depend upon contract, custom, or course of dealing for its existence and potency, but that it had its origin in that fundamental principle of justice which compelled one who had funds in his hands belonging to another to use such funds, if at all, for the benefit, and not to the injury, of the owner.

And in Hull v. Northwestern Mut. L. Ins. Co. 39 Wis. 397, it was held, under a contract of insurance requiring interest on outstanding notes due the insurer to be paid in cash, that the insurer was bound to apply dividends to the payment of such interest so as to prevent a forfeiture of the policy, though it had been the uniform practice of the insurer to insist upon cash payments of such interest, and to have the dividends applied to the discharge of the principal. The court said that the dividends due the insured were cash, and if the practice of the company had been to refuse to apply them to the payment of interest on such notes, it had simply violated its agreement.

To the same effect are Franklin L. Ins. Co. v. Wallace, 93 Ind. 7; Northwestern Mut. L. Ins. Co. v. Fort, 82 Ky. 269; Russum v. St. Louis Mut. L. Ins. Co. 1 Mo. App. 228.

But, in Anderson v. St. Louis Mut. L. Ins. Co. 1 Flipp. 559, Fed. Cas. No. 362, it was held that the insurer was not required to credit the assured's dividends in accordance with the general rule of law, that is, first upon the interest, and then upon the principal, so as to prevent a forfeiture of a policy which made no special provision for dividend credits, and which required payment annually in advance of the interest on unpaid premium notes, it appearing that the assured had been in the habit of paying the interest on his notes in cash, while his dividends were credited to him upon the principal.

And in Mutual F. Ins. Co. v. Miller Lodge, I. O. O. F. 58 Md. 463, it was held that, even where a dividend had been declared, unless expressly made applicable to the payment of the annual interest on the premium note of the policy holder, the insurer would neither be bound nor justified, in the absence of the assent or request of the insured, so to apply the dividend, even though such application would prevent the forfeiture of the policy.

The general rule was also applied to the disposal of a surplus or guaranty fund in

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suit must be commenced is void, citing Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443. The case cited followed French v. Lafayette Ins. Co. 5 McLean, 461, Fed. Cas. No. 5,102, which last-named case was disapproved by the Supreme Court of the United States in Riddlesbarger v. Hartford F. Ins. Co. 7 Wall. 386, 19 L. ed. 257. This court, in Insurance Co. of N. A. v. Brim, 111 Ind. 281, 12 N. E. 315, held that such a provision was not void, citing Riddlesbarger v. Hartford F. Ins. Co., supra, and thereby overruled the holding in Engle Ins. Co. v. Lafayette Ins. Co. supra, that such a provision was invalid. It is settled by the great weight of the authorities that a provision in an insurance policy limiting the time in which suit may be brought thereon to a period less than that fixed by statute of limitations is binding, unless it contravenes a statute. Riddlesbarger v. Hartford F. Ins. Co. supra, and cases cited; Lewis v. Metropolitan L. Ins. Co. 180 Mass. 317, 62 N. E. 369, and cases cited; Sullivan v. Prudential Ins. Co. 172 N. Y. 482, 65 N. E. 268; Fey v. I. O. O. F. Mut. L. Ins. Co. 120 Wis. 358, 98 N. W. 206; Mead v. Phœnix Ins. Co. 68 Kan. 432, 64 L.R.A. 79, 104 Am. St. Rep. 412, 75 Pac. 475, and cases cited; McFarland v. Railway Officials & E. Acci. Asso. 5 Wyo. 126, 27 L.R.A. 48, 63 Am. St. Rep. 29, 38 Pac. 347, 677; Insurance Co. of N. A. v. Brim, supra; 29 Cyc. Law & Proc. p. 216; 25 Cyc. Law & Proc. p. 910; 19 Am. & Eng. Enc. Law, 2d ed. pp. 103, 104; Cooley, Briefs on Insurance, 3964–3967; Bacon, Ben. Soc. § 443; Niblack, Ben. Soc. §§ 370, 371; May, Ins. § 478; Kerr, Ins. p. 423.

We have, however, in this state, a statute (§ 4803, Burns's Anno. Stat. 1908; § 4923, Burns's Anno. Stat. 1901, in force since 1865) which this court has held renders any provision, in the policy of a foreign insurance company doing business in this state,

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which the assured had a share, in Knights Templars & M. Life Indemnity Co. v. Vail, 206 Ill. 404, 68 N. E. 1103, in which it appeared that the defendant's constitution provided that, after a certain period of membership, each member should receive a bond for his proportion of the surplus or guaranty fund, which bond, without notice, could be used at any time in payment of assessments. It was held that such application of the bond must be made, though the bond was not surrendered in accordance with a stipulation therein, and the constitution of the association further provided that a failure of a member to pay an assessment should, "*ipso facto*, work a forfeiture and termination of his membership and all benefits arising therefrom."

But, in Mee v. Bankers' Life Asso. 69 Minn. 210, 72 N. W. 74, in which it appeared that the articles of the defendant provided that, in the case of a default on the part of any member, the amount of the assessment on account of such loss should be paid out of his guaranty deposit, but there was no provision made for replacing the fund when used, it was held that such provision did not operate to keep alive and in force a lapsed certificate or to continue a membership, as such provision was for the benefit of the beneficiaries of those who did not default, and not for the benefit of a defaulting member.

In Kelly v. Fidelity Mut. Life Asso. 198 Pa. 147, 47 Atl. 958, reversing 30 Pittsb. L. J. N. S. 429, it was held, under a policy of life insurance providing that, after a certain period, the advance insurance fund might be withdrawn, or exchanged for a paid-up policy, or for extended insurance, provided it was legally surrendered at an anniversary of the date of its issue, such surrender was a prerequisite to the exercise of the option to receive extended insurance.

One branch of the subject here offered for discussion, that is, the application by the insurer of benefits to meet assessments due on benefit certificates will be found discussed in the note to Rogers v. Union Benev. Soc. 55 L.R.A. 605. Since the publication of that note, that phase of the question was considered in Albrecht v. People's Life & Annuity Asso. 129 Mich. 444, 89 N. W. 44, in which it appeared that the holder of a benefit certificate providing for the payment of a certain sum monthly in case of total disability, and further stipulating that the nonpayment of an assessment should operate to suspend him from all benefits of the association, became totally disabled while in good standing, and that such disability continued until his death. It was held that, if the contract of insurance entitled the association to demand payment of membership dues or assessments after total disability, it was not contemplated that a forfeiture should be enforced for nonpayment during the period of disability, when, at the same time, there was money in the hands of the association due the assured on account of such disability, which exceeded the sum due from him.

And in Horgan v. Metropolitan Mut. Aid. Asso. 202 Mass. 524, 88 N. E. 890, the bylaws of the association specifically provided that a member being, at any time, sick or disabled, and receiving benefits, could not be debarred from receiving a continuation of such benefits because of his inability to pay his assessment, the president being authorized to deduct from the sums paid him for benefits such amounts as would keep the member in good standing.

In North American Acci. Ins. Co. v. Bowen (Tex. Civ. App.) 102 S. W. 163, it was held to be the duty of the insurer to apply what it owed the insured, under an accident policy, to the payment of premium notes, so as to save the policy from forfeiture, though the exact amount of what was due the assured was undetermined at the date of the maturity of the notes, if the minimum amount for which it was liable was sufficient to pay such notes.

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limiting the time within which suit can be brought thereon to less than three years, void. Insurance Co. of N. A. v. Brim, 111 Ind. 281, 288, 289, 12 N. E. 315. It does not appear, from either paragraph of the amended complaint, that appellee is a foreign corporation. There is nothing, therefore, in the complaint, showing that appellant is entitled to the benefit of said § 4803 (4923) supra, in regard to foreign corporations, in this action. It is well settled that, to entitle appellant to the benefit of said § 4803 (4923), supra, she must allege and prove facts which will bring the certificate sued on within its provisions. Weir v. State, 161 Ind. 435, 438, 68 N. E. 1023, and cases cited; Indianapolis & G. Rapid Transit Co. v. Foreman, 162 Ind. 85, 96, 102 Am. St. Rep. 185, 69 N. E. 669, and cases cited. A stipulation limiting the time within which an action may be brought on an insurance policy or certificate, being for the benefit of the company, may be waived by it. 4 Cooley, Briefs on Insurance, 3989–4000; Bacon, Ben. Soc. § 445; Grant v. Lexington F. L. & M. Ins. Co. 5 Ind. 23, 61 Am. Dec. 74; Thompson v. Phenix Ins. Co. 136 U. S. 287, 297–299, 34 L. ed. 408, 413, 414, 10 Sup. Ct. Rep. 1019; Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. 9 L.R.A. (N.S.) 654, and note (79 C. C A. 464, 149 Fed. 954).

Appellant claims that, if said clause limiting the time within which suit must be brought on said certificate is valid, the allegations of the first paragraph are sufficient to prevent appellee from taking advantage thereof It is not necessary for us to determine this question, because said paragraph is insufficient for other reasons. It appears from said first paragraph that the certificate was issued in consideration of the premium paid and the payment of $1.05 each month during the life of said John C. Caywood; that the monthly assessment of $1.05 for August, 1902, was not paid, and, on the 30th of said month, appellee forfeited said certificate for the nonpayment of said assessment. Appellant attempts to avoid the effect of the failure to pay said August assessment of $1.05, and said forfeiture of the certificate on that account, for the reason alleged that, during the month of August, appellee owed said Caywood, for services rendered by him for appellee, "the sum of $2, which sum the defendant had the right to apply on the payment of the August assessment of $1.05, and should have applied on the August assessment levied on said policy, but wholly failed to do so; that said defendant refused to apply said sum of $2 on said payment, and, on the 30th day of August, 1902, forfeited said policy, and still retained, and has ever since retained, said $2; that the September assessment of $1.05 was tendered to said defendant, and was refused by it, and said amount was paid into court for the benefit and use of defendant." It has been held that a life insurance policy cannot be forfeited for the nonpayment of a premium or assessment when the company has in its possession dividends declared under said policy sufficient to pay the same, which it has the right to apply to such payment. Franklin F. Ins. Co. v. Wallace, 93 Ind. 7; Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co. 97 Pa. 15; Mutual L. Ins. Co. v. Girard L. Ins. Annuity & T. Co. 100 Pa. 172; 3 Cooley, Briefs on Insurance, pp. 2324, 2325, note. The mere allegation that appellee, during the month of August, owed said Caywood $2 for services rendered by him for appellee, did not show any right or duty, on the part of appellee, to apply the same, or any part thereof, to the payment of said August assessment. Willcuts v. Northwestern Mut. L. Ins. Co. 81 Ind. 300; Butler v. American Popular L. Ins. Co. 10 Jones & S. 342; Pister v. Keystone Mut. Ben. Asso. 3 Pa. Super. Ct. 50, 57–59; Smith v. Penn Mut. L. Ins. Co. (1882) 11 W. N. C. 295; 1 Am. & Eng. Enc. Law, 2d ed. p. 291; 3 Cooley, Briefs on Insurance, 2324, 2325, note. See also Leffingwell v. Grand Lodge A. O. U. W. 86 Iowa, 279, 53 N. W. 213; Petrie v. Mutual Ben. L. Ins. Co. 92 Minn. 489, 100 N. W. 236; Irvin v. Rushville Coöperative Teleph. Co. 161 Ind. 524, 69 N. E. 258, and cases cited.

It is said in 21 Am. & Eng. Enc. Law, 2d ed. p. 291: "Where the insured is in the employ of the company, the fact that there were wages due him, at the time of his default in the payment of an assessment, sufficient to pay the assessment, will not prevent a forfeiture for nonpayment, as the company is under no duty to apply such wages to the payment of the assessment." And this was the theory of said paragraph, for it averred, as above set out, that "the defendant had the right to apply said $2 on the payment of the August assessment of $1.05, and should have applied it;" and "that the defendant refused to apply said sum of $2 on said payment." It is not sufficient, however, to allege that it was the right or duty of the appellee to apply said $2, or any part thereof, to the payment of the August assessment, the same being the mere conclusion of the pleader, but the facts from which such right or duty arises must be clearly and positively alleged. Chicago, I. & L. R. Co. v. Barker, 169 Ind. 680, 681, 17 L.R.A. (N.S.) 542, 83 N. E. 369; Chicago & E. R. Co. v. Lain, 170 Ind. 84, 83 N. E. 632–634, and cases cited; Chicago, I. & L. R. Co. v. McCandish, 167 Ind. 648, 651–653, 79 N. E. 903, and cases cited; Buffalo v. Holloway, 5 Am. Dec. 550, 552, and note, p. 554 (7 N.

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Y. 493); Wabash R. Co. v. Hassett, 170 Ind. 370, 83 N. E. 705, 708, and authorities cited; Southern Indiana R. Co. v. Fine, 163 Ind. 617, 621, 72 N. E. 589; Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 163 Ind. 247, 251, 252, 71 N. E. 218, 660, and cases cited. "That said defendant refused to apply said sum of $2 on said payment" involves the assumption that appellee had been directed, requested, or otherwise empowered to apply said $2 in payment of said August assessment by said Caywood or his authorized agent,—a fact which was not alleged in said paragraph, and without which it was insufficient. Lake Erie & W. R. Co. v. McFall, 165 Ind. 574, 581, 76 N. E. 400; Aiken v. Columbus, 167 Ind. 139, 150, 12 L.R.A.(N.S.) 416, 78 N. E. 657; Malott v. Sample, 164 Ind. 645, 647-652, 74 N. E. 245, and cases cited; Riley v. State, 168 Ind. 657, 660, 81 N. E. 726; Bliss, Code Pl. 3d ed. § 318.

It is well settled that a demurrer admits only such facts as are sufficiently pleaded. Moreover, the benefit certificate sued upon calls for the "protector and secretary of Gage Lodge No. 1663" to countersign said "certificate, and impress the seal" of said subordinate lodge "hereto, rendering the same valid and in full force." Said benefit certificate appears to have been impressed with the seal of said subordinate lodge, but it was not countersigned by the protector and secretary of said subordinate lodge. It cannot be said, therefore, to have been completely executed according to its own provisions. It has been held that an insurance policy is not executed by attaching the insurer's corporate seal, when the names of the president and secretary, called for by the attestation clause, are not signed thereto, nor when the same is not countersigned as required by its provisions. Peoria M. & F. Ins. Co. v. Walser, 22 Ind. 73; Globe Acci. Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291, and cases cited; Badger v. American Popular L. Ins. Co. 103 Mass. 244, 4 Am. Rep. 547; McCully v. Phœnix Mut. L. Ins. Co. 18 W. Va. 782; Prall v. Mutual Protection Life Assur. Soc. 5 Daly, 298; Kerr, Ins. pp. 85, 86. It may be the requirement that the same be countersigned by some person or persons named may be waived by the company, but there can be no such presumption from the mere possession thereof, when it has not been countersigned in the manner provided for.

There are no facts alleged in the amended complaint showing that said requirement has in any way been waived by appellee. It follows that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

23 L.R.A.(N.S.)

NEBRASKA SUPREME COURT.

JAMES THOMPSON
v.
CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Appt.

(— Neb. —, 121 N. W. 447.)

Damages — crops — destruction — alfalfa.

Ordinarily the measure of damages for the destruction of growing crops is their value at the time and place of destruction, but, in case of the destruction of a permanent or perennial crop, such as alfalfa, the measure of damages is the difference between the value of the land before and after the destruction of the crop.

(May 21, 1909.)

Headnote by LETTON, J.

Case Note. — Measure of damages for the destruction of perennial crops.

The question as to the measure of damages for the destruction of a perennial crop is one presenting so many various phases and conditions which may affect the result one way or another, that, even aside from the conflict of opinion among the decisions, it is practically impossible to formulate a general rule by which all cases may be governed.

Evidently on the theory that, although grass or other perennials are a part of the realty, yet their value can be measured and ascertained without reference to the value of the soil on which they stand, it has been held in a number of cases that, where grass or other perennial plants of that nature have been destroyed, the measure of damages recoverable is the value of the grass or crop at the time of its destruction.

Among such cases are Atlanta & B. Air Line R. Co. v. Brown (Ala.) 48 So. 73 (destruction of grass by cattle resulting from unrepaired cattle guards); Risse v. Collins, 12 Idaho, 689, 87 Pac. 1006 (destruction of pasture by sheep); Flynt v. Chicago, B. & Q. R. Co. 38 Mo. App. 94 (grass and soil carried away by railroad); Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540 (destruction of timothy and clover pasture by flood caused by embankment); Richardson v. Northrup, 66 Barb. 85 (destruction of grass in meadow by cattle); Lester v. Highland Boy Gold Min. Co. 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 A. & E. Ann. Cas. 761 (destruction of lucerne among other crops by poisonous gases); Evans v. Highland Boy Gold Min. Co. 27 Utah, 475, 76 Pac. 1135 (the same).

The same measure of damages was adopted in Byrne v. Minneapolis & St. L. R. Co. 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339, where land was overflown, preventing the harvesting of the grass. The court, however, said: "We see no reason to doubt

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APPEAL by defendant from a judgment of the District Court for Franklin County in plaintiff's favor in an action brought to recover damages for injury to certain crops. Reversed.

The facts are stated in the opinion.

Mr. **J. E. Kelby**, with Messrs. **Byron Clark and Frank E. Bishop**, for appellant:

The value of a growing crop in the condition in which it exists at the time of its destruction is the measure of damages.

Fremont, E. & M. Valley R. Co. v. Crum, 30 Neb. 70, 46 N. W. 217; Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263; Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540; Berard v. Atchison & N. R. Co. 79 Neb. 830, 113 N. W. 537; Morse v. Chicago, B. & Q. R. Co. 81 Neb. 745, 116 N. W. 859.

Mr. **George W. Prather** for appellee.

Letton, J., delivered the opinion of the court:

This is an action for negligence. Three causes of action are set forth in the petition. The first is for damages caused by fire negligently started by an engine on defendant's right of way, which burned about 10 acres of alfalfa belonging to the plaintiff. The second is for similarly burning some hay and fence, and the third cause of action is for damages to certain fields of corn in the years 1903, 1904, and 1905, respectively, which it is alleged were occasioned by suc-

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that the actual loss of the perennial crop of grass was susceptible of being proved and measured with reasonable certainty. Whether the damages might have been measured also by the diminution in the rental value, if the case had been presented upon that theory, we need not determine."

In Catlin Consol. Canal Co. v. Euster, 19 Colo. App. 117, 73 Pac. 846, where a crop of alfalfa and oats was submerged by water coming from a canal, the court adopted a rule given by the trial court to the effect that the measure of damage is the value of the crop destroyed, taking into consideration its market value after being harvested, and the cost of seeding, caring for, harvesting, and marketing the crop; and the value of the crop is measured by the amount of crop produced on like and similar lands in the neighborhood in which the land is located, taking into consideration all elements as to the probable yield of the land in controversy.

In Anonymous, 4 Dall. 147, 1 L. ed. 778, where a meadow was watered as the result of the obstruction of a stream, upon it being stipulated by the plaintiff's counsel that their client would release any damages that the jury might give in case the defendant should execute a deed whereby the plaintiff was granted the enjoyment of the water course, the court advised the jury on this condition to find the full value of the meadow as damages.

In Atlanta & B. Air Line R. Co. v. Brown, supra, it was held that where, in an action for injuries to a crop of grass by stock, there was no evidence what the land would have brought for hay and pasturage, and plaintiff proved what the grass destroyed was worth, it is error to instruct the jury that he could recover what the land would have brought for hay and pasturage.

In Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254, for the failure to furnish water for irrigation, resulting in a partial failure of a crop of hops, the measure of damages adopted was the market value of the crop alleged to be lost over the cost of production, harvesting, and marketing.

In I. & G. N. R. Co. v. Saul, 2 Tex. App. Civ. Cas. (Willson) 612, the damages recovered for destruction of pasturage by fire were based on the amount the pasturage was worth per day per head of cattle, and how much pasturage it required for one cow.

Where the meadow is only injured, and not totally destroyed, it naturally follows that the owner can recover only corresponding damages.

Thus, in Belch v. Missouri P. R. Co. 18 Mo. App. 80, it was said that the true measure of damages as to the meadow injured is the difference between the value of the meadow before the fire and its value after the fire. If the meadow was utterly destroyed by the fire, the measure of damages would be its value at the time of the fire.

To the same effect is Hamilton v. Des Moines & K. C. R. Co. 84 Iowa, 131, 50 N. W. 567.

In Folsom v. Apple River Log Driving Co. 41 Wis. 602, it was held that, for the destruction of a meadow caused by the flowing of land, the measure of the damages recoverable is the value of so much of the grass as was wholly destroyed and the depreciation in value of the remainder, and not the difference in rental value of the land before and after the injury.

Although a reading of the majority of the above cases would possibly warrant the conclusion that the destruction was limited only to the grass as such, and that the roots were not damaged, it is difficult to say whether the court would apply that measure in case something more was done than the mere destruction of the grass, which is the loss of only one season or part thereof.

This distinction is indicated by the following cases from Texas where, although the measure of damages was held to be the value of the grass at the time of its destruction, yet is was clearly indicated that there was no damage done, or at least asked for, to the realty. Galveston, H. & S. A. R. Co. v. Rheiner (Tex. Civ. App.) 25 S. W. 971; Galveston, H. & S. A. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440; International & G. N. R. Co. v. Searight, 8 Tex. Civ. App. 593, 28 S. W. 39; Missouri, K. & T. R. Co. v. Couch (Tex. Civ. App.) 122 S. W. 67 (grass

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cessive floods caused by the negligent manner of construction of the railroad embankment, by which flood waters were held back and caused to overflow the land.

1. There seems to be no contention as to the second cause of action, so it will be unnecessary to give it consideration. As to the first cause of action, complaint is made that there was no proof that the engine caused the fire complained of. This objection does not appear to be very seriously argued in the brief. Two witnesses testified that they saw the fire just after it started and before it was off the right of way, that a freight train had just passed, and that it spread from the right of way to the alfalfa field. Other evidence clearly identifies the fire which burned the alfalfa as that which started on the right of way.

2. It is next urged that the court erred in permitting the plaintiff to prove the damages on account of the destruction of the alfalfa crop, by showing the value of the land before the crop was burned and its value after the crop was destroyed, and in instructing the jury that the measure of damages for the loss of the alfalfa would be "the difference in the value of the land with the stand of alfalfa as proved immediately prior to its destruction and the value

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destroyed by fire). And see the other Texas cases, infra.

In Larson v. Lammers, 81 Minn. 239, 83 N. W. 981, where growing grass and crops were destroyed by the overflow of land, it was held that the damages recoverable were the value of the growing crops at the time they were destroyed, or, if it was impracticable to show such value, the diminution in the rental value of the land by reason of the injury thereto, but the owner was not entitled to both.

It is to be observed that, although the measure of damages in the above cases is stated to be the value of the grass or meadow, or whatever it may be, at the time of its destruction, the courts possibly thereby do not mean that only its value as a severed article can be recovered, but rather its quantum of value as a part of the whole.

In cases concerning measure of damages, the real difficulty often is not so much in stating what is the measure of damages, but rather what evidence is admissible to prove the loss.

In Risse v. Collins, 12 Idaho, 689, 87 Pac. 1006, supra, the court said: "In establishing the damage done, it would have been proper to inquire into the ease or difficulty in securing other pasture near by, and the market price of similar pasture, or the price of such feed stuffs as would have been necessary to keep and feed plaintiffs' live stock, or to have shown the price the plaintiffs could have secured for their pasture, or the number of live stock they could have pastured thereon, and the value per month for the pasturage of each head of such live stock, and such other evidence of kindred and similar import, which would have enabled the jury to intelligently fix the value of the property destroyed at the time of its destruction. Any evidence tending to show what the grass was worth when put to any of the uses for which it was valuable should be admitted. Growing grass that is to be used for grazing purposes differs from other growing crops, in that there is no further expense necessary for cultivation and harvesting in order for the owner to enjoy the full benefits of the crop. In such case the crop is marketable and has a market value whenever it is fit for grazing purposes."

In San Antonio & A. P. R. Co. v. Stone (Tex. Civ. App.) 60 S. W. 461, it was held that, where grass destroyed by fire was especially valuable at the time for grazing cattle, and there was no evidence of a market value, in ascertaining the damages the jury should consider the value of the grass so destroyed for the purpose of its use by the owner at the time of its burning.

So, in Missouri, K. & T. R. Co. v. Couch, supra, it was held that the value of the grass burned could not be based on the value of the hay he was thereby compelled to feed to his stock. And see the other Texas cases, infra.

In Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534, where a meadow which had been sown four years and upon which three crops had been raised was destroyed by fire from an engine, it was objected by the railroad company that, in order to ascertain the damages, the owner of the meadow should not be permitted to state the relative value of the meadow from the first to the second year, but the court, however, said: "The claim of the appellee was that the meadow had been entirely destroyed. If this was true, the jury, in order to arrive at the approximate amount of the injury, would be entitled to know the probable quantity and quality of hay that could have been made from the meadow but for the fire. It was therefore proper to show, if true, that, as the meadow becomes older the quantity and quality of the hay becomes better on the kind of land upon which this meadow was located, and how long the meadow continues to improve until it begins to deteriorate. This was the nature of the testimony the appellee was permitted to give. It furnished the jury some basis for estimating the value of the meadow before and after the fire, and there was no error in overruling the objection to the testimony."

There are, however, many cases which consider grass or other perennial crops a part of the realty, and therefore these cases hold that, for the destruction of such grass or other perennial crop, the person damaged should recover the difference in value of the realty before and after the destruction.

The following cases so holding were all instances of where a meadow was destroyed by fire: Chicago & A. R. Co. v. Davis, 74 Ill. App. 595; Baltimore & O. S. W. R. Co. v. Irwin, 97 Ill. App. 337; Illinois C. R. Co. v. Almon, 100 Ill. App. 530; Atchison,

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of the land at and immediately after the destruction of the alfalfa." The court was within the rule approved in Morse v. Chicago, B. & Q. R. Co. 81 Neb. 745, 116 N. W. 859. There is a difference in conditions between an ordinary annual crop and a permanent crop, such as alfalfa, which justifies and requires a different rule in the measurement of damages; and we are of the opinion that a fair criterion of the damage suffered by the destruction of a good stand of alfalfa would be the difference between the value of the land with such crop standing and growing upon it and the same land without such crop. We see no error in this instruction. This case is very similar to Anderson v. Chicago, B. & Q. R. Co. (Neb.) 120 N. W. 1114, and several points argued by defendant as to the qualifications of witnesses and the competency of proof are covered by the opinion in that case.

3. As to the third cause of action, we are inclined to think that the complaint of defendant with reference to the manner of proving the damage to the corn crop is well founded. The plaintiff was permitted to show how much a matured crop of corn was worth per acre upon similar land in that locality in each year. In 1903 the corn was destroyed just as it was coming

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T. & S. F. R. Co. v. Arthurs, 63 Kan. 404, 65 Pac. 651; Atchison, T. & S. F. R. Co. v. Owens, 6 Kan. App. 515, 50 Pac. 962; Texas & P. R. Co. v. Land, 3 Tex. App. Civ. Cas. (Willson) 74.

In Ward v. Chicago, M. & St. P. R. Co. 61 Minn. 449, 63 N. W. 1104, where growing grass was destroyed by fire, the court, in disposing of the question of the measure of damages, said: "An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. The proof in an action to recover for trees destroyed is all directed to an ascertainment of the difference in the market value of the real property immediately before the injury and immediately after its infliction, this difference being the measure of damages. The proof in a case to recover for injuries to a growing crop is, or should be, confined to estimating the value of the crop destroyed, such value being the measure of damages. There is no substantial distinction or difference between the damages a plaintiff is entitled to recover for the destruction of trees and for the loss of a crop, and the same method of determining those damages should be adopted. The measure of damages in this case must be ascertained by inquiring into the difference in the market value of the real property immediately before the injury and its value immediately after its infliction, and, in ascertaining this difference, evidence that another crop of some character and value may be grown on the land in the same growing period, of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the farm, may be considered. But evidence of matters occurring subsequently to the injury is not competent."

In Gates v. Chicago & A. R. Co. 44 Mo. App. 488, it was recognized that the destruction of a meadow by fire is an injury to the inheritance.

In Morse v. Chicago, B. & Q. R. Co. 81 Neb. 745, 116 N. W. 859, it was held that, since the seeding of alfalfa is a hazardous process and often results in failure, the measure of damages for its destruction, in this case by an overflow of water, should be the difference in value of the land before and after the destruction, the court saying that this would be a much safer value of the stand than would the cost of again seeding to alfalfa.

This rule would seem to be especially applicable in case it affirmatively appears that, aside from the grass above the ground, the roots or turf is also destroyed or injured. Black v. Highland Solar Salt Co. 98 App. Div. 409, 90 N. Y. Supp. 338 (destruction of roots of willow slips by salt water); Baker v. Mims, 14 Tex. Civ. App. 413, 37 S. W. 190 (destruction of grass and injury to turf by trespassing cattle); Texas & P. R. Co. v. Tippit, 2 Tex. App. Civ. Cas. (Willson) 710 (injury to turf as well as grass which in this case was "common Texas free grass"); Missouri P. R. Co. v. Raibb, 3 Tex. App. Civ. Cas. (Willson) 63 (destruction of grass by fire); Missouri P. R. Co. v. Patterson, 2 Tex. App. Civ. Cas. (Willson) 713 (the same).

In Missouri, K. & T. R. Co. v. Fulmore (Tex. Civ. App.) 29 S. W. 688, it was held that the measure of damages for the destruction of sod by fire is the difference in the market value of the land immediately before and after the fire, excluding the value of the grass.

In Jackson v. Missouri, K. & T. R. Co. (Tex. Civ. App.) 78 S. W. 724, it was held that, in an action against a railroad for damages from fire originating from sparks from an engine, causing the destruction of grass, roots, turf, and sod, it is not error to sustain an objection to testimony concerning the value of the use of the land, and how long it would require the land to return to its former condition, since, as the court said, the true measure of damages for the burning of the grass, roots, turf, and sod was the difference in the market value of the land before and after the burning.

In Wiggins v. St. Louis, M. & S. E. R.

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up, in 1904 it was destroyed before it had been cultivated, and the third year it had been cultivated once before the flood. The proper measure of damages in such case is the value of the growing crop in the condition in which it exists at the time of its destruction. Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263; Fremont, E. & M. Valley R. Co. v. Cram, 30 Neb. 76, 46 N. W. 217. No proof was offered to show the value of the crop at such time, the only evidence being as to the value of a matured crop of corn. The inquiry should have been directed to the value of the crop as it then stood. Under the rule stated in Berard v. Atchison & N. R. Co. 79 Neb. 830, 113 N. W. 537, there was not sufficient competent evidence before the jury as to the value of the crop at the time of its destruction, upon which to base a verdict. The value of a matured crop under like conditions on similar soil in the immediate locality might perhaps, in case the market value of the immature crop was difficult to prove properly, have been shown to the jury with other facts as a means of aiding them to reach a conclusion as to the value at the time of destruction, but this was the only evidence of value before the jury, and was, therefore, misleading in its tendency.

A number of objections were made and overruled to questions relating to the manner in which the flood was caused, several of which were leading in their nature and seem objectionable. The answers to most of them were rambling and discursive in their nature, and neither questions nor answers are models of clearness and perspicuity in the use of language. They should not have been asked or answered in such form, and, while we would not reverse the case if these were the only errors, at another trial the rules of evidence should be more strictly followed.

The jury made special findings as to the amount of damages upon each cause of action. The evidence being sufficient to sustain the verdict as to the first and second causes of action, the judgment of the District Court is reversed and cause remanded, with direction to render judgment on the special findings, as of the date of such findings, in the first and second causes of action, with interest, and for further proceedings as to the third cause of action.

Co. 119 Mo. App. 492, 95 S. W. 311, it was held that, where a meadow is destroyed by fire to the extent that the roots are killed, the measure of damages is the injury done to the inheritance, ascertained by the difference between its value before and after the fire.

In Gulf, C. & S. F. R. Co. v. Jagoe (Tex. Civ. App.) 32 S. W. 717, it was held that, in an action for the burning of a meadow, it is not error to charge the jury to find such sum as will compensate for injury done the turf and roots, taking into consideration the purposes to which the land was appropriated or adopted, instead of declaring the damages to be the difference in the market value of the land immediately before and after the injury, it appearing, in this case, that the evidence of damage relied on all tended to show the depreciation in value of the land as meadow land.

As was also pointed out in the note to Louisville & N. R. Co. v. Beeler, 11 L.R.A. (N.S.) 930, which discusses the measure of damages for the destruction of fruit trees, and other trees or shrubbery not valuable for their timber or firewood, practically at least, these two methods of measuring the damages, as above discussed, will often lead to the same amount of damages, for at least in those cases where the turf or roots were not injured, and possibly these cases also, the value of the grass as it stood will practically be equivalent to the difference between the land before and after its destruction. And, as was the case in the above-named note, some cases which hold to the rule that the substantive measure of damages is the value of the land before and after the destruction of the grass admit evidence of its value, or the value of the meadow as it stood, to aid the jury in applying that rule.

Cases of this nature are Chicago & A. R. Co. v. Davis; Atchison, T. & S. F. R. Co. v. Arthurs; and Atchison, T. & S. F. R. Co. v. Owens,—supra.

So, in Wiggins v. St. Louis & S. F. R. Co. 129 Mo. App. 369, 108 S. W. 574, it was held that, although the burning of a timothy meadow, destroying the roots, is held to be an injury to the inheritance (see Wiggins v. St. Louis, M. & S. E. R. Co. supra) evidence as to the amount of hay that could be produced on the land prior to the fire, the color of the soil, and the price of hay, was admissible as throwing light on the amount of damages according to the rule of measurement prescribed.

The Texas courts have practically reached the same results as those courts which hold that, for the destruction of grass or a meadow, the measure of damages is the difference in value of the realty before and after the destruction, by holding that, in case a meadow is destroyed, both as to the grass as such and the turf or roots, the measure of damages is the value of the grass as it stood upon the ground, and the difference in the value of the land before and after the destruction not taking into consideration the value of the grass.

Cases of this nature, all of which concerned the burning of grass or meadow as the result of negligence by a railroad company, are the following: Ft. Worth & D. C. R. Co. v. Hogsett, 67 Tex. 685, 4 S. W. 365; Ft. Worth & N. O. R. Co. v. Wallace,

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74 Tex. 581, 12 S. W. 227; Gulf, C. & S. F. R. Co. v. Matthews, 3 Tex. Civ. App. 493, 23 S. W. 90; Gulf, C. & S. F. R. Co. v. Hendricks (Tex. Civ. App.) 25 S. W. 433; Missouri, K. & T. R. Co. v. Pfluger (Tex. Civ. App.) 25 S. W. 792; Missouri, K. & T. R. Co. v. Goode, 7 Tex. Civ. App. 245, 26 S. W. 441; Gulf, C. & S. F. R. Co. v. Reagan (Tex. Civ. App.) 32 S. W. 846; International & G. N. R. Co. v. McIver (Tex. Civ. App.) 40 S. W. 438; Texas & P. R. Co. v. Rice Bros. 24 Tex. Civ. App. 374, 59 S. W. 833; Galveston, H. & S. A. R. Co. v. Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294; Texas & P. R. Co. v. Prude, 39 Tex. Civ. App. 144, 86 S. W. 1046; Missouri, K. & T. R. Co. v. Neiser (Tex. Civ. App.) 118 S. W. 166. This rule was also recognized in Missouri P. R. Co. v. Ayers (Tex.) 8 S. W. 538.

It will be observed that these cases, in finding the measure of damages to the grass separate and apart from the measure of damages to the realty, and holding that the measure of damages to the grass as such is its value as it stood upon the ground, are practically in line with the cases first set out in the note. Indeed these cases here set out, as in the Texas cases set out in the fore part of the note, take, as the criterion of the value of the grass, the market value if it possesses a market value; otherwise, that is, if the market value is not ascertainable, its value for pasturage, hay, or other purposes.

For the evident reason that many persons value a farm as high without a meadow as with it, in several cases the measure of damages for the destruction of a meadow has been stated to be the cost of reseeding or restoration to its condition before the fire, together with the rental value of land for the purpose for which it was used during the time it was rendered unproductive. St. Louis & S. F. R. Co. v. Jones, 59 Ark. 105, 26 S. W. 595; Black v. Minneapolis & St. L. R. Co. 122 Iowa, 32, 96 N. W. 984 (grass sown among wheat stubble destroyed).

In Pittsburgh, C. & St. L. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285, where a fire was communicated to land valuable only as meadow land, destroying the roots of the grass growing thereon, it was held that evidence of the cost of reseeding, and of its rental value during the time it would not produce a crop of grass, is admissible upon the question of damages.

In Mattis v. St. Louis & S. F. R. Co. (Mo. App.) 119 S. W. 998, the court draws a distinction between timothy, meadow, and blue grass,—grasses with which land may be seeded and made to produce annual crops,—and grasses which are not produced from seed sown, and which, when once destroyed, cannot be restored in a season by the agency of man, and holds that, where the roots of the former are destroyed by fire, the measure of damages is the cost of reseeding and loss of rental value, and not the difference in the value of the land before and after the fire, which applies only in case of the latter.

In Vermilya v. Chicago, M. & St. P. R. Co. 66 Iowa, 606, 55 Am. Rep. 279, 24 N. W. 234, for the destruction of a meadow by fire to the extent that the roots of the grass were so burned that the meadow would not produce grass for mowing, the owner was held to be entitled to recover as damages the cost of restoring the meadow to as good condition as it was before the fire. The court said that it was evident that plaintiff could not be fully compensated for his loss unless allowed for the value of the meadow, and no more just or reasonable way of determining that value could be suggested than by inquiring as to the cost of restoring it.

In Bradley v. Iowa C. R. Co. 111 Iowa, 562, 82 N. W. 996, the court, after saying that, in St. Louis & S. F. R. Co. v. Jones, supra, it was held that, where a meadow is destroyed by fire, the measure of damages is the cost of reseeding it, and its rental value until it is restored, said: "This we regard as a more accurate statement of the rule than merely to say that the measure is the cost of restoration. While this might result in giving plaintiff a better meadow than he lost, defendant cannot complain. It must make good the loss it has occasioned. If it cannot do this without doing something more, the plaintiff should not suffer."

In addition to the cost of restoring the meadow and its rental value during the time it is unproductive, it has been held that where, in addition to the roots, it is shown that grass has been destroyed, its value may be recovered also, since by the restoring of a meadow evidently is meant putting the grass roots in the condition they were before the fire. Bradley v. Iowa C. R. Co. supra; Krejci v. Chicago & N. W. R. Co. 117 Iowa, 344, 90 N. W. 708.

In Knight Bros. v. Chicago, R. I. & P. R. Co. 122 Mo. App. 38, 98 S. W. 81, it was held that, for the burning of a meadow destroying both the grass and the roots, the true measure of damages is the rental value of the land.

In Broussard v. Sabine & E. T. R. Co. 80 Tex. 329, 16 S. W. 30, it was held that, although ordinarily the measure of damages for the destruction of grass is the value at the time of destruction, yet where, as in this case, the destruction was the result of an overflow, the effect of which was to destroy the use of the land for a considerable time, the measure of damages is the reasonable value of the use of the land for pasturage in the condition it would have been in had it not been overflowed during the time its use was destroyed.

To the same effect is Sabine & E. T. R. Co. v. Brousard, 69 Tex. 617, 7 S. W. 374.

In Horres v. Berkeley Chemical Co. 57 S. C. 189, 52 L.R.A. 36, 35 S. E. 500, where immature cucumber plants and strawberry plants were destroyed by poisonous gases, the court seems to recognize that the damages recoverable are the rental value of the land, the cost of the seeds planted in such

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land, the cost of the manure and fertilizers, and the cost of the labor employed in their cultivation, it being held in this case that it was error to introduce evidence of the probable yield and net profits of such plants.

In Black v. Minneapolis & St. L. R. Co. 122 Iowa, 32, 96 N. W. 984, it was held competent and proper to show the rental value by evidence of what portions of the land not burned actually produced, and by rental value was not meant the general rental value.

Damages recoverable by tenant.

In St. Louis, I. M. & S. R. Co. v. Hall, 71 Ark. 302, 74 S. W. 293, it was held that the measure of damages recoverable by a tenant of a meadow, for the destruction of the grass by fire, was the difference between the usable value of the land before and after the grass was burned, down to the time of the trial.

In Blunck v. Chicago & N. W. R. Co. (Iowa) 115 N. W. 1013, where a tenant sought to recover damages for the flooding of his hay land, preventing him from having it cut, the court held it to be no error for the trial court to instruct the jury that the measure of damages would be the fair and reasonable market value of the hay on the premises in question, that plaintiff was unable to cut at the time of the alleged injury. In this case this value was fixed by estimating the yield in tons per acre, then taking the market value prevailing at the time in the vicinity after deducting therefrom the cost of cutting and stacking.

In Carter v. Wabash R. Co. 128 Mo. App. 57, 106 S. W. 611, where a lessee of a tract of land, whose right as such was restricted to pasturing and cutting hay on the premises, was damaged because of a fire burning the meadow, the jury were instructed by the trial court that the measure of damages was the difference in value at harvest time between the stand of grass actually produced on the land burned over and the stand of grass which, from the evidence, the jury should find said land would have produced at harvest time had the land not burned over, such value to be estimated by the jury at the fair and reasonable market value of the stand of grass at harvest time prior to the actual beginning of the cutting of said grass. Presiding Judge Bland, in an elaborate opinion, approved of this instruction, and took occasion to say: "The difference in the rental value of the land just before and immediately after the fire would not afford plaintiff adequate compensation for the loss, for the reason he was restricted by the terms of his lease from cultivating the land; nor could he sublet it, and, as he had no interest in the soil, he was not entitled to damages for injury to the inheritance, if any. The fire did not interfere with his rights in the property as lessee; therefore his damages cannot be measured by the difference in the rental value of the land burned over and what he agreed to pay per acre as rent. In ordinary cases, the measure of damages for the destruction of a growing crop by fire, as the destruction of a crop of grass, is its value at the time of the fire. . . . Plaintiff's evidence tends to show that, with the exception of about three acres, the portion of the meadow burned over was practically destroyed, and grew up in weeds and wild grass, and was not worth anything as a meadow at harvest time; it also tends to show that in previous years the yield of hay per acre from the burned portion had equalled or exceeded that of the unburned portion of the meadow. At the times the fires occurred, plaintiff could not pasture the meadow without damaging it, and hence the short green grass, in the condition it was then in, had no appreciable value to him, and it seems to us that nothing less than what the value of the grass would have been, standing on the meadow at harvest time, had it been permitted to mature, will fully compensate plaintiff for his loss, and the most rational and satisfactory way of proving that value was by showing the average product per acre of the portion of the meadow not burned, and . . . it seems to us that proof of what it would have produced the year in which it was burned ought to be admissible where, as in this case, the proof is such as to make it reasonably certain what the land would have produced. . . . If, to prove the damages, it was competent to hear evidence of what the land would have produced but for the fire, it was proper to instruct the jury that the measure of damages was the market value of the crop of hay the land would have produced, less the expense of harvesting and marketing the same; in substance, this is what the court directed the jury to do in estimating the damages, and I can see no substantial objection to the instruction."

The majority of the court, however, considered the instruction given erroneous, and adhered to the doctrine announced in Hunt v. St. Louis, I. M. & S. R. Co. 126 Mo. App. 261, 103 S. W. 133, to the effect that the measure of damages for the destruction of a growing crop of corn is the value of the crop in the field at the time of destruction. The court in the Hunt Case, however, in determining the value of the growing crop, permitted the introduction of evidence of the yield of that part of the crop of corn not damaged, and the market value of the corn in the autumn when matured, in connection with evidence of the cost of cultivation, gathering, and marketing the crop.

Conversion.

In Acrea v. Brayton, 75 Iowa, 719, 38 N. W. 171, it was held that one who without right goes upon another's land, and cuts the grass, and makes it into hay, and converts it to his own use, is liable for the value of the hay at the final act of conversion, and the owner's damages are not limited to the value of the grass as it stood upon the ground before the trespass.

In Hosli v. Yokel, 57 Mo. App. 622, it was

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held that, for wrongfully taking and cutting timothy, the owner was entitled to recover the value of the timothy in the meadow at the time it was cut.

In Hinman v. Heyderstadt, 32 Minn. 250, 20 N. W. 155, it was held that, where one peaceably enters on the premises of another, under a bona fide claim of title, and cuts and removes the grass growing thereon, the owner, in an action by him for the conversion of the hay, can recover only the value of the standing grass, and not the value of the hay after it was removed.

Cases in which a person was permitted to recover according to a certain measure of damages, but which was not recognized as the true measure of damages, although permitted to stand because no prejudicial error was thereby committed, have been expressly excluded from this note.

For measure of damages for injury to, or destruction of, trees or shrubbery not valuable for their timber or firewood, see case note to Louisville & N. R. Co. v. Beeler, 11 L.R.A.(N.S.)930.

Measure of damages for injury to, or destruction of, growing crop, see case note to Teller v. Bay & River Dredging Co. 12 L.R.A.(N.S.) 267.

CALIFORNIA SUPREME COURT.

CITY STREET IMPROVEMENT COMPANY, Appt.,
v.
CITY OF MARYSVILLE, Respt.

(— Cal. —, 101 Pac. 308.)

Public improvement — defects — inspection — estoppel.

1. The approval of the work by the city engineer under whose supervision a contract for public improvement is to be performed will, in the absence of fraud or concealment which prevents a discovery of imperfections, estop the municipality from contesting the contractor's right to the contract price because of failure to perform the work according to the specifications, so far as defects are concerned which were discoverable by reasonable attention to the duties of inspection.

Pleading — public contract — engineer's certificate.

2. The engineer's certificate of completion of the work need not be pleaded in a suit for the contract price of public work, where the statute provides that, in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance.

(Beatty, Ch. J., and Angellotti and Shaw, JJ., dissent.)

(March 31, 1909.)

APPEAL by plaintiff from a judgment of the Superior Court for Yuba County in defendant's favor, and from an order denying a new trial in an action brought to recover the amount alleged to be due plaintiff for work done in the construction of a sewer for defendant. Reversed.

The facts are stated in the opinion.

Messrs. **William Rix, Bishop, Wheeler, & Hoefler, and Richard Belcher,** for appellant:

The certificate of an engineer to whose satisfaction and approval work is to be done is conclusive, in the absence of a showing of fraud, collusion, or mistake, upon the question as to whether the work has been so done.

Omaha v. Hammond, 94 U. S. 98, 24 L. ed. 32; Moore v. Kerr, 65 Cal. 519, 4 Pac. 542; Washington Bridge Co. v. Land & River Improv. Co. 12 Wash. 273, 40 Pac. 982; Kingsley v. Brooklyn, 78 N. Y. 211; Brady v. New York, 132 N. Y. 418, 30 N. E. 757; People ex rel. Ready v. Syracuse, 144 N. Y. 65, 38 N. E. 1006; Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 34 Am. St. Rep. 418, 20 S. W. 631; Baltimore, O. & C. R. Co. v. Scholes, 14 Ind. App. 524, 56 Am. St. Rep. 308, 43 N. E. 156; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; Chism v. Schipper, 51 N. J. L. 1, 2 L.R.A. 544, 14

Case Note. — Conclusiveness, as between municipality and contractor, of decision of engineer or other empowered officers as to matters concerning contract for public improvement.

It will be noticed that this note is confined strictly to the question of conclusiveness as between municipality and contractor, and does not cover the right of property owners to attack such decisions when it is sought to enforce an assessment or tax against them. Neither are cases dealing with the question as to counties within the scope of the note.

Conclusiveness as against city.

In the absence of fraud or bad faith, the decision of such officers is conclusive on the city, where the contract between the parties shows such to have been their intention. Each case, therefore, necessarily depends upon the construction to be given the provisions of the contract.

The decisions of the officers in the following cases were held to be conclusive on the cities, no fraud or bad faith being shown: McGuire v. Rapid City, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706 (work in straightening stream to be done to engineer's satisfaction); Com. ex rel. Mercantile Trust Co. v. Pittsburg, 204 Pa. 219, 53 Atl. 769 (decision of director of public works as to estimates of work on reservoir to be final); Whiteman v. New York, 21 Hun, 117 (decision of engineer as to kind or quantity of work on dam to be conclusive); James-

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Am. St. Rep. 668, 16 Atl. 316; Grube v. Schultheiss, 57 N. Y. 669; Sheffield & B. Coal, Iron, & R. Co. v. Gordon, 151 U. S. 291, 38 L. ed. 166, 14 Sup. Ct. Rep. 343; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 264; McCauley v. Keller, 130 Pa. 53, 17 Am. St. Rep. 762, 18 Atl. 607; Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078; McGuire v. Rapid City, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 708; Rusling v. Union Pipe & Constr. Co. 5 App. Div. 448, 39 N. Y. Supp. 217; Wildey v. Fractional School Dist. No. 1, 25 Mich. 424.

There was a substantial compliance by plaintiff, and this is all that is required.

Harlan v. Stufflebeem, 87 Cal. 510, 25 Pac. 686; Washington Bridge Co. v. Land & River Improv. Co. 12 Wash. 273, 40 Pac. 982; Kingsley v. Brooklyn, 78 N. Y. 207; Ricketts v. Sisson, 9 Dana, 359, 35 Am. Dec. 142.

The contractor did not warrant that the sewer would be sufficient for the purpose for which it was intended, and, unless there was such a warranty, would not be liable for its failure to fulfil its purpose.

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town v. Arter, 55 Misc. 629, 106 N. Y. Supp. 1027 (contract price for constructing sidewalk, to be paid when work and material approved by sidewalk committee and street commissioner); People ex rel. Ready v. Syracuse, 65 Hun, 321, 20 N. Y. Supp. 236, affirmed in 144 N. Y. 63, 38 N. E. 1006 (engineer's stipulated account by which amount of work done and materials furnished to be computed); Nuttall v. Philadelphia, 15 W. N. C. 439 (streets to be cleaned to commissioner's satisfaction); Wyckoff v. Meyers, 44 N. Y. 143 (payment to be made when work finished and certified by architects); Leverich v. New York, 66 Barb. 623 (compensation for keeping streets in condition to be fixed by street commissioners, or any two of them); Omaha v. Hammond, 94 U. S. 98, 24 L. ed. 70 (wells to be completed under engineer's supervision and to his satisfaction); Johnathan Clark & Sons Co. v. Pittsburgh, 217 Pa. 46, 66 Atl. 154 (decision of director of public works as to the amount due for extra work to be final); Smith v. City, 13 Phila. 177 (finding of board of health as to remuneration for extra work to be final and conclusive upon the parties).

So, the measurements of the city's general superintendent of sewers are conclusive, in the absence of fraud or bad faith, where the contract for constructing a sewer provides that he shall finally decide disputes involving the character of the work, its quantity, and the compensation therefor. Shea v. Sewerage & Water Board (La.) 50 So. 166.

Where, to prevent all disputes and litigation, it is agreed that the engineer's decision as to the performance of a paving contract shall be final and conclusive, the city is bound thereby, in the absence of fraud and collusion, although the engineer is negligent and careless, and makes mistakes in reaching his decision. Bowman v. Stewart, 165 Pa. 394, 30 Atl. 988.

So, the certificate of the city's engineer is conclusive as to the amount of work done, where the contract provides that it shall be final, but is not conclusive as to whether such work was authorized to be done by the terms of the contract. Re Morris & C. Dredging Co. 116 App. Div. 257, 101 N. Y. Supp. 726.

And evidence on behalf of the city to contradict certificates of its engineer and surveyor as to the quality and amount of work done during a certain period is properly excluded where the contract provides for part payment monthly upon acceptance and approval by the engineer and surveyor. Malone v. Philadelphia, 12 Phila. 270.

So, the city is precluded by the certificates and acceptance of work on streets by the commissioner of public works from showing that the work is not according to specifications, where the contract provides that the work shall be performed to the satisfaction of the commissioner, and in substantial accordance with the specifications. Brady v. New York, 132 N. Y. 415, 30 N. E. 757.

And a clause which was separated from the foregoing one, providing that the city should not be precluded or estopped by any return or certificate made or given by any of its officers from at any time showing the true and correct amount and character of the work done and the materials furnished, was held not to prevent the estoppel of the city by the acceptance and certificates of its officers. Ibid. The court said: "The clause which we have quoted is entirely separated from the concluding portion of the contract, which undertakes to provide how performance shall be ascertained and bindingly declared, and was not intended to trespass on its provisions. It does not provide that such certificates shall not estop the defendant from showing failure of performance, but it shall not estop it from showing the true and correct amount and character of the work done and materials furnished. Not that the city can prevent a contractor from receiving what has been earned under a contract when the certificates shall have been given, but that it may prevent a recovery for a greater amount than the work was worth."

Under a like provision in Quinn v. New York, 16 App. Div. 408, 45 N. Y. Supp. 7, evidence that the amount of concrete required by the contract had not been furnished was held admissible, but evidence that paving blocks were not properly fitted or that they were of improper size, and that joints were not cemented, that the pavement was disintegrated, and that bridge stones were not properly beveled, was held properly excluded. The court said: "The proof excluded amounted simply to showing that the work was not properly done. It was not denied that the pavement was laid, and that it was of the kind contracted for, but

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Bancroft v. San Francisco Tool Co. 120 Cal. 228, 52 Pac. 496; Sheffield & B. Coal, Iron, & R. Co. v. Gordon, supra; MacKnight Flintic Stone Co. v. New York, 160 N. Y. 73, 54 N. E. 661; Ricketts v. Sisson, supra; Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 41 Am. St. Rep. 34, 58 N. W. 232.

Messrs. W. H. Carlin, Arthur H. Reddington, and Waldo S. Johnson, for respondent:

The portions of the specifications requiring the proper cementing of the joints and the keeping of the water out of the trenches until the cement had set are clearly and unequivocally specified in and made mandatory by the contract; and, such being the case, it could not, in the nature of things, be within the power of the engineer to permit the plaintiff to vary or depart from them.

McVerry v. Kidwell, 63 Cal. 246; Madison v. American Sanitary Engineering Co. 118 Wis. 480, 95 N. W. 1097; Adlard v. Muldoon, 45 Ill. 193; Sanitary Dist. v. McMahon & M. Co. 110 Ill. App. 524; Lamson v. Marshall, 133 Mich. 250, 95 N. W.

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it was said that it was not good of its kind. This, we think, was not within the estoppel clause. The word 'character' which is there used is not, perhaps, an entirely accurate word to express the meaning the parties intended; but a fair construction of the word, as used in this connection, is that the defendant might show the true and correct kind of the work that had been done; that is to say, that the work done was not of the general kind required by the contract. That, we think, is as far as this clause allows the defendant to go in that connection. The certificate of the engineer and the acceptance of the commissioner of public works are the criteria by which it must be judged whether the work was good of its kind; and if that certificate has been given and the work has been accepted, then, in the absence of fraud or palpable mistake, the plaintiff may insist upon the certificate and the defendant cannot question it. There is left then to the defendant, under the estoppel clause, only the right to say that the work accepted was not the work that was agreed to be done by the contract, and that the materials put into it were different from those required by the contract, or were less in amount than the defendant was apparently entitled to under the certificate. It is not at liberty to show, in spite of the certificate, that the materials which were put into the work and accepted were not proper because of some defect in them, or in the way in which the work was done, for they comply in description and kind with those called for under the contract."

To the same effect is People ex rel. Cranford v. Coler, 26 Misc. 509, 57 N. Y. Supp. 461.

Where a paving contract incorporates an ordinance which authorizes the highway committee to appoint inspectors of the work, and directs the city engineer to supervise the work, but expressly provides that no waiver or acceptance of performance by the inspectors or engineers shall bind the city unless their decision is ratified by the highway committee, and it is further provided that the committee and engineer are empowered to determine the amount due, and settle all disputes and make their decision final and conclusive, the acceptance of the work by the engineer and highway committee is conclusive against the city. Sicilian Asphalt Paving Co. v. Williamsport, 186 Pa. 256, 40 Atl. 471.

23 L.R.A.(N.S.)

Where a contract obligates the contractors to follow the instructions of an engineer in constructing a reservoir in respect to any alterations in the plans, and, by direction of the engineer, piles are driven to a less depth than that named in the contract, the contractor is entitled to the price fixed by the contract. Kingsley v. Brooklyn, 78 N. Y. 200.

And recovery may be had by a contractor although the engineer refuses to make the certificate provided for, where a defect in a sewer results from the pipes being laid in water, under such engineer's direction, the contract stipulating that the work was to be done to the satisfaction of the engineer. Lamson v. Marshall, 133 Mich. 250, 95 N. W. 78.

And this is true notwithstanding a provision that, "although the engineer may assent to special means of prosecuting the work in difficult cases, this will not relieve the contractor of the responsibility of the result," since, in this case, it is not an assent, but a positive direction. Ibid.

So, evidence on behalf of the city, tending to show that a sewer is not located at the contract depth, is inadmissible where its engineer had constantly superintended and inspected it and accepted it upon completion, the common council ratified his act, and the sewer was thereafter used. People v. Syracuse, 144 N. Y. 63, 38 N. E. 1006.

And the action of the city council in adopting the report of the surveyor accepting a pavement precludes the city from claiming damages for delay, where the contract provides that such damages shall be paid before the acceptance. Central Bitulithic Paving Co. v. Mt. Clemens, 143 Mich. 259, 106 N. W. 888.

A city which has for many years recognized and accepted a waterworks system as fully complying with a contract cannot afterwards repudiate such recognition, and claim damages for failure to comply with the contract. National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

And it has been held that, after the superintendent of construction of a road gives a certificate of final estimate on the entire work, and his findings are approved, he has no power subsequently to change his finding as to the proper performance of the work. Mercer Bd. of Internal Improvement v. Dougherty, 3 B. Mon. 446. After review-

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78; Dyer v. Middle Kittitas Irrig. Dist. 40 Wash. 238, 82 Pac. 301; Burke v. Kansas City, 34 Mo. App. 570.

On petition for rehearing.

Mr. E. B. Stanwood, also for respondent:

The city is not estopped from contesting the contractor's right to the contract price.

2 Pom. Eq. Jur. 2d ed. §§ 804, 805; Boggs v. Merced Min. Co. 14 Cal. 279; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; McCormick v. Orient Ins. Co. 86 Cal. 260, 24 Pac. 1003; First Nat. Bank v. Maxwell, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; Blood v. LaSerena Land & Water Co. 113 Cal. 227, 41 Pac. 1017, 45 Pac. 252; Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743; Henshaw v. Bissell, 18 Wall. 255, 21 L. ed. 835; Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927.

Per Curiam:

This action was brought to recover the sum of $4,000.07, the balance alleged to be due plaintiff from defendant for labor done and materials furnished in the construction of a portion of a sewer system for the city, under a written contract, a portion of the

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ing the facts, the court said: "This being the case, we are of opinion that this final estimate was the last judgment which the superintendent was, by the terms of the contract, authorized to give; that the absolute authority vested in him to direct alterations, repairs, and reconstructions, and to determine finally upon the existence and value of deficiencies, and of the entire subordination of the contractors to his will and judgment, all provided for, and probably essential during the progress of the work, are terminated by final estimate or certificate showing, as this one does, that, in his opinion, the work has been completed according to contract. After this act, his future opinions are no longer the decisions of a judge, chosen by the parties, but the mere opinions of a well-informed witness, the weight of which is diminished by being in opposition to his own final estimate, presumptively made after a minute inspection of the work as it proceeded, and an examination satisfactory to himself, to ascertain its completion according to contract; and the board itself, having no more right to withhold payment from a contractor who has completed his work to the satisfaction of the superintendent, than a private individual has to refuse payment of a just debt, cannot itself go behind the acts of its officer, evidencing the satisfactory completion of the road, and its actual adoption for its intended use; but upon proof, not only of actual deficiency in the construction, but of such fraud on the part of the contractors as prevented the superintendent from discovering the defect by the use of such vigilance as belongs to his office."

The engineer's acceptance, however, is not conclusive unless the contract plainly provides that it shall have this effect; and where authority is given the engineer to accept the work as it progresses, providing it is performed according to contract, his approval is not conclusive when the work does not comply therewith. Sterling v. Hurd, 44 Colo. 436, 98 Pac. 174.

And where a contract for constructing a sewer provides that the work shall be according to such directions as the engineer may, from time to time, give in superintending the construction, and according to the plans and specifications, the contractor cannot recover for relaying work which he is required to take up on account of its not being laid to the depth stipulated in the contract, although there is evidence that the pipe was laid at the depth required by the engineer. Burke v. Kansas City, 34 Mo. App. 570.

So, when the terms of a contract provide that the contractor for a sewer purification plant shall operate it for three months, and, if the plant is then working to the satisfaction of the city engineers, the city shall assume control, the engineers' certificate will not bind the city, where the degree of purification clearly provided for by the contract is not produced, since the engineers are not empowered by the contract to declare themselves satisfied with a plant that does not purify the sewage in the manner guaranteed. Madison v. American Sanitary Engineering Co. 118 Wis. 480, 95 N. W. 1097.

And a city engineer's approval of a substitution of material in paving a street will not bind the city and warrant a recovery by the contractor, since the determination of what material shall be used is a legislative function, and cannot be delegated. King Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App. 120.

Where a contract for tunnel excavation provides that the engineer shall determine the quantity of the work, and also all questions relative to the excavation thereof, and that his estimates and conclusion shall be conclusive upon the contractors, but that the city shall not be precluded or estopped from showing the correct amount and character of the work done, the engineer's opinion that certain work is included in and provided for by the contract is not conclusive on the city, although several payments have been made on estimates based on his opinion. O'Brien v. New York, 139 N. Y. 543, 35 N. E. 323.

So, where the certificate of the engineer or superintendent is not made conclusive as

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demand being for extra work. The total contract price, including extra work amounting to $2,940.16, was $33,731.29, of which defendant had paid plaintiff $29,731.22. Defendant claimed that plaintiff had not performed and had refused to perform the contract according to its terms, and on this ground resisted payment of the alleged balance, and by counterclaim sought to recover the amount alleged to be necessary to complete the work. The trial court sustained this contention of defendant, finding that defendant had already necessarily expended $10,452.69 in completing certain portions of the work according to the contract, and would be required to expend the further sum of $21,525 to fully complete the same, making in all $31,977.69 so to be expended by the city in completing the work. It, therefore, gave judgment in favor of defendant against plaintiff for the difference between said $31,977.69 and the balance due on the contract, $4,000.07, *viz.*, $27,977.62. From this judgment and from an order denying its motion for a new trial, the plaintiff appeals.

The sewer system contemplated was to consist of sewers laid in the city, a receiving reservoir or sump, an outfall sewer extending from the sump to and beyond the corporate limits of the city, a pumping plant to pump the sewage from the sump to the place of outfall, an irrigation farm on which to discharge the sewage, and flush tanks. The undertaking of plaintiff was to furnish all the labor and material necessary

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to the performance of the work in a proper manner, nor as to the fact that the materials were according to contract, but merely makes such certificate a condition precedent to the contractor's obtaining payments, the obtaining of the certificate does not bar an action for damages founded upon the alleged breaches of the conditions of a bond to indemnify the city against defective workmanship or use of improper materials. Newark v. New Jersey Asphalt Co. 68 N. J. L. 458, 53 Atl. 294.

And where the contract under which street grading is dore requires the obtaining of the certificate of the city engineer before the contractor can recover, but provides that it shall not preclude the city from proving the true and correct amount and character of the work done, the city is not estopped to show the amount of filling actually furnished. Dean v. New York, 45 App. Div. 605, 61 N. Y. Supp. 374.

And the certificate of the city surveyor, that work in making wooden curbs and gutters is done in accordance with the specifications, is not conclusive upon the city, where there is no provision in the contract showing such intention. Rooney v. May, 23 La. Ann. 30.

So, where an act requires the city engineer to file a report with the city council upon completion of work on streets, and this is made part of the contract, such report is not conclusive on the city council, but the duty devolves upon that body to determine whether the work is completed according to contract. Auburn v. State, 170 Ind. 511, 83 N. E. 997, rehearing denied in 170 Ind. 534, 84 N. E. 990.

And the city is not estopped from showing that the performance is not according to contract by the certificate of its engineer that sufficient work has been performed to entitle the contractor to the amount of a warrant, where the contract stipulates that such certificate shall be conclusive only upon the contractor. People ex rel. Rolf v. Coler, 58 App. Div. 131, 68 N. Y. Supp. 448.

Neither does the acceptance of a street by a committee and the city council, for the purpose of assessment, entitle a contractor to recover for the amount of grading estimated in the contract from an established grade, where the city reserves the right to change the grade of the street so as to increase or diminish the amount to be paid, and the answer avers that the city did diminish the amount of grading. Ryan v. Dubuque, 106 Iowa, 312, 76 N. W. 703.

Where a contract provides that the general superintendent shall finally decide all matters of dispute involving the character of work on a sewer, and that when, in the opinion of the engineer, the contract shall be performed, he shall make estimates, the decision of these officers is not absolutely conclusive, but the provisions mean that the engineer has the right to judge the manner in which the work shall be done in order that it comply with the specifications, and that he shall have the right to condemn all work not coming up to that standard; but where it appears that the cause of failure of the sewer to work properly is not defective workmanship, but instability of soil, the judgment of the representatives named, if contrary to the proven facts, is not conclusive against the city. Shea v. Sewerage & Water Board (La.) 50 So. 166.

Where a contract for the construction of a harbor contains a provision that, if the materials mentioned fall short of completing the work according to the plan, the contractor shall have extra compensation, and if they exceed the amount required, a deduction shall be made, stipulating that the excess or deficiency shall be conclusively determined by the engineer, and the contract also contains another clause providing that, if any material alterations in the work are desired, the appraisal of the difference in cost shall be determined by three disinterested persons. The engineer's estimate of the value of the extra work and materials is not conclusive against the city, where a material change of plan is made and no arbitrators have been appointed. Hasbrouck v. Milwaukee, 17 Wis. 266.

And where the decision is arbitrarily made, or bad faith and fraud appear, the decision is not conclusive.

Thus, a sewer district is not concluded by

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to construct all of the work on such sewage system as was specified in "division A" of the specifications, in strict compliance with the specifications therefor, which were attached to and made a part of the contract. The work specified in that division was the furnishing and laying of some 42,000 feet of sewer pipe (8-inch, 10-inch, 12-inch, and 15-inch) at a specified price per lineal foot according to the size of pipe, and the furnishing of materials and labor in constructing 29 flush tanks, 109 manholes, and 1 overflow, at a specified price for each. Much of the sewer pipe was to be laid several feet below the water level, and it was important that it should be laid so as to prevent, so far as practicable, leakage or seepage from the ground into the pipe. The specifications provided for the best quality of vitrified, salt-glazed, ironstone pipe, which so far as appears, was in fact used. They further provided that the contractor shall pump out or otherwise remove any water or sewage which may be found or may tend to accumulate in the trench, "and the trench is to be kept entirely clear of water until all the mortar is set." They also provided that special care must be taken to properly fill with cement mortar the annular space at the bottom and sides as well as the top of the joints, a neat finish to be given to the joints by a further application of similar mortar to the face of the hub, so as to form a continuous and even-beveled surface from the exterior of said hub to the exterior of the spigot all around. Other pro-

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the acts and mistakes of its inspectors, where they act in bad faith. Guild v. Andrews, 70 C. C. A. 49, 137 Fed. 369.

Good faith, however, on the part of the city's engineer, is presumed in the absence of clear and convincing proof to the contrary. Ibid.

And gross mistakes imply bad faith only when, all the circumstances considered, they cannot be reconciled with good faith. Ibid.

But numerous serious mistakes, readily observable, and uniformly favorable to the contractor, imply bad faith on the part of the engineer in superintending and accepting a sewer. Ibid.

And failure on his part to consider the character and effect of the completed work of a sewer is such a gross departure from duty as to imply bad faith, and render his acceptance of the work inconclusive on the city. Ibid.

Conclusiveness as against contractor.

It is also well settled that, in the absence of fraud or bad faith, contractors with municipalities are concluded by the decisions of engineers and like officers, where the contract contains such a stipulation.

And this rule was applied in the following cases: McCormick v. St. Louis, 166 Mo. 315, 65 S. W. 1038 (commissioner's decision as to amount and kind of work to be paid for to be final); Burnham v. Milwaukee, 69 Wis. 379, 34 N. W. 389 (question of amount due for constructing sewer submitted to arbitrament of board of public works); Green v. Jackson, 66 Ga. 250 (engineer's estimate as to amount and quantity of work to be final and conclusive); Rens v. Grand Rapids, 73 Mich. 237, 41 N. W. 263 (city surveyor to decide additions and deductions to be made or taken from price in consequence of changes); Devlin v. New York, 124 App. Div. 184, 108 N. Y. Supp. 742 (engineer to decide whether sufficient work had been performed to warrant issuance of certificate which was condition precedent to part payment); Mobile v. Shea, 62 C. C. A. 319, 127 Fed. 521 (differences and disputes arising from construction of sewer to be referred to engineer, and his decision to be final).

In McCormick v. St. Louis, supra, the court, in passing upon its power to set aside such findings, said: "Without going into a discussion of the question as to the conditions under which the courts have power and authority to set aside awards or estimates made by a chosen third party under the terms of a contract (such as is found in the agreement between plaintiff and defendant herein), suffice it to say, the court's authority is exercised in such cases only when it is shown that the arbitrator, in the exercise of the authority conferred upon him by the contract, has acted corruptly, grossly impartial, or in ignorance of, or in misapprehension of, facts; and unless one of these conditions is alleged and shown, under a petition properly framed to raise that issue, the courts will not interfere to nullify the action of the arbitrator, done in obedience to the mutual agreement of the contracting parties; or, what will amount to the same, act in disregard of the estimates."

So, the contractor is bound by the decision of the engineer as to the payment to which the former is entitled, where the contract provides that all disputes shall be referred to the engineer, and that his decision shall be final and conclusive, although it appears that the engineer was negligent and ignorant of the facts upon which he based his decision. McManus v. Philadelphia, 201 Pa. 632, 51 Atl. 322.

And the certificate of an engineer as to the quantity of filling done is conclusive on the contractor, where the contract provides that he shall be bound by such certificate, and he cannot show that the engineer adopted an erroneous method of determining the level, by reason of which extra filling was required. Smith v. New York, 12 App. Div. 391, 42 N. Y. Supp. 522.

To the same effect is Thilemann v. New York, 66 App. Div. 455, 73 N. Y. Supp. 352.

Likewise, the decision of a city engineer that material excavated shall not be classed as rock is conclusive on the contractor, where the contract provides that the engi-

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visions as to the manner of laying need not be mentioned, as they are not material here.

The work was to be done, according to the contract, "in obedience to such directions as may, from time to time, be given by the engineer in charge, appointed by the said city of Marysville, or his authorized agent or agents." It was provided in the specifications that, after the sewers and their appurtenances "have been properly constructed and inspected," clay or fine earth shall be carefully deposited in the trench so as not to disturb the work, and the trench then refilled; that, in case of doubt as to the correct interpretation of the specifications, the matter may be submitted to the engineer in charge, whose decision shall be final; that all materials for work must be satisfactory to the engineer in charge, "and all work, and the order and methods of work, will be under the direction and must be to the satisfaction of the engineer in charge;" that the representatives of the engineer in charge are to be given all desired facilities for the inspection of materials and processes used or to be used in connection with the work; that all rejected material is to be removed from the work at once; that any workman or tools that shall not meet the approval of the engineer in charge shall be ordered from the work at the request of said engineer, and such workmen and tools as shall meet the approval of such engineer in charge must be immediately substituted. They further provided: "Progress payments will be made upon es-

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neer shall, in all cases, determine the quality of all materials, and that his decision shall be final. Atchison v. Rackliffe, 78 Kan. 320, 96 Pac. 477.

And the decision of the mechanical engineer of the city is conclusive on the contractor as to the work done, payments made, and amount due the city as damages for breach of a contract to construct engines for waterworks, where it is provided that such engineer's decision shall be final and conclusive. Hostetter v. Pittsburgh, 107 Pa. 419.

So, recovery by a contractor cannot be had where the obtaining of an engineer's certificate is made a condition precedent, and the certificate is refused without fraud, malice, or capriciousness, because the work does not comply with the terms of the contract. Schmidt v. North Yakima, 12 Wash. 121, 40 Pac. 790.

And the decision of the superintendent of school buildings is conclusive upon the contractor as to whether the work on a schoolhouse is being performed according to contract, where there is a provision that such superintendent shall be the final arbiter. Jones v. New York, 60 App. Div. 161, 70 N. Y. Supp. 46, affirmed in 174 N. Y. 517, 66 N. E. 1113.

Where a contract for constructing a bridge provides that the return of the engineer shall be the account by which the contractor's compensation shall be calculated, and that, in case of dispute, his decision shall be final, his decision is conclusive on the contractor as to the value of stone taken from the old bridge and used in the new. Dillon v. Syracuse, 29 N. Y. S. R. 912.

But, where there is no provision that the decision shall be final, it does not have this effect.

Thus, under a contract providing that payments for work on sidewalks shall be made upon estimates made by the engineer of the park commissioners, the contractor is not bound by the final estimate of such engineer, which states the amount of work done incorrectly, and the error may be corrected by a subsequent estimate made by another engineer, who is the successor of the first. West Chicago Park v. Schillinger, 117 Ill. App. 525.

And it is competent for a contractor, in an action against a city, to prove the number of yards excavated by other evidence than the final estimate of the city engineer, although the contract provides that the engineer, shall make estimates of the work as it progresses, and also that he shall make a final estimate of all work done. Sherman v. New York, 1 N. Y. 316.

And an engineer whose decision is agreed upon as final between the parties as to differences arising as to matters included in the contract cannot bind the contractor by his decision as to work and material not covered by the contract. Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 457. The court said: "The stipulation in such contracts that all questions, differences, or controversies which may arise between the corporation and the contractor under or in reference to the agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to the engineer, and his decision thereof shall be final and conclusive upon both parties, does not give the engineer jurisdiction to determine that work which is not done under the contract or specifications, and which is not governed by them, was performed under the agreement, and is controlled by it, and his decision to that effect is not conclusive upon the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it upon himself by erroneously deciding that he has it."

So, the engineer's final estimate, made under a contract containing a provision that his decision should be final and conclusive, is conclusive so far as the finding is made according to the terms of the submission, but his finding allowing a less rate of compensation than was plainly agreed upon is *ultra vires*, and not conclusive on the contractor. Drhew v. Altoona, 121 Pa. 401, 15 Atl. 636.

To the same effect is Fisher v. South Williamsport, 1 Pa. Super. Ct. 386.

And the decision of the street commis-

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timates of the value of work done during each month to the extent of seventy-five (75) per cent of the work done during such month. These payments will be made by warrants on the city treasurer, as provided by law. The estimates to be made by the engineer in charge. Final payment, including deferred payments, will be made in the same manner upon the completion of the work to the satisfaction and approval of the engineer in charge."

Plaintiff commenced work under the contract in September, 1903, and proceeded steadily therewith, making the necessary excavations, laying the pipe and doing the other work, and refilling the trenches, until April, 1904, when the work was apparently supposed by all parties to be completed. Mr. Marsden Manson was the engineer in charge, and had furnished the specifications. He was assisted by Mr. Edward F. Haas, his associate. The work was done under the more immediate supervision of a superintendent for the city, employed by the city at the suggestion of Mr. Manson,—one Cyrus Dam, who had under him four inspectors appointed by the city, there being at all times an inspector for the city supervising each gang of plaintiff's men employed on the work. There was also an engineer employed by the city at the suggestion of Manson to give the lines and grades,—one H. G. Butler. No complaint was made as to the manner of work or kind of materials during the progress of the work, except in one or two instances, where the matter was at once remedied, and the work progressed to completion to the apparent satisfaction and approval of everybody engaged in supervising the work.

Each month a progress estimate was furnished by the engineer to the common council, certifying the amount and value of the work done up to the 1st day of the month, with a statement of the amount due the plaintiff. These were similar in form, that of December 4, 1903, which may be taken as a sample, being as follows:

San Francisco, Cal., Dec. 4, 1903.

To the Mayor and Common Council of the city of Marysville,

Gentlemen:—

This is to certify that the following work has been done up to December 1, 1903, by the various contractors for sewer work now under construction in the city of Marysville, and that an estimate of the reasonable value of said work, in accordance with the various contracts, is as follows:

City Street Improvement Co.

[Here follows itemized statement of number of feet of pipe laid and other work.]

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sioner upon the question of law as to the effect which the failure of a city to have bridge piers completed within a certain time has upon its right to demand liquidated damages under a contract to complete the bridge at a certain time is outside the authority of such commissioner, who is empowered by the contract finally to determine the amount or quantity of the work, and decide all questions arising relative to the execution of the contract, and his decision upon the question is not binding upon the contractor. King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826, 43 Fed. 768.

And a contractor is not precluded by the engineer's certificate given under a provision that the certificate and return of such engineer shall be conclusive as to the amount of materials furnished and work done, where the certificate is based upon an erroneous construction of the contract, and deliberately excludes work done by the contractor, although it may have been made with an honest purpose. Burke v. New York, 7 App. Div. 128, 40 N. Y. Supp. 81.

So, where a contract for constructing a sewer provides that, if the city becomes dissatisfied, it may finish the work, and the expense shall be allowed in accordance with the decision of the city engineer, whose decision shall be final, the engineer's report covering only the work done and material used by the contractor to whom the city relet the contract upon becoming dissatisfied, and which shows that it refers only to the matters between the city and the last contractor, is not a decision which concludes the first contractor. San Antonio v. Marshall (Tex. Civ. App.) 85 S. W. 315.

And where a contract for constructing a sewer provides that, upon default, the city may proceed with the work, and that the expenses shall be paid by the contractor to the city under the decision of the city engineer, the engineer's decision is not binding on the contractor in the absence of evidence that the contract under which the work was completed was reasonable or the best that could be obtained. Marshall v. San Antonio (Tex. Civ. App.) 63 S. W. 138.

And where bad faith appears or the decision is arbitrary, the contractor is not concluded.

Thus, where the refusal of sewer commissioners to certify the completion of a contract is unreasonable, recovery can be had although the contract provides that payment shall not be made until the certificates have been obtained. Ross v. New York, 85 App. Div. 611, 82 N. Y. Supp. 920.

So, a contractor is not concluded by the decision of the commissioners and engineer of the municipality, where the power is exercised in an arbitrary manner, and he may recover for breach of contract where the city unreasonably compels him to relay a pavement. Gearty v. New York, 171 N. Y. 61, 63 N. E. 804.

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Total	$13,603	57
Less 25 per cent	3,400	89
75 per cent of total	$10,202	68
Amount due on main contract ($7,399.28 having already been paid)	2,803	40
Extra work ordered and completed	58	75
Total amount due	$ 2,862	15

Respectfully submitted,
Edw. F. Haas,
Associate Engineer.
Approved: Marsden Manson.

On receipt of each of these certificates the amount stated therein to be due was paid to plaintiff.

On March 31, 1904, a certificate signed by Mr. Haas, and approved by Mr. Manson, was presented to the common council, which covered all the work done by plaintiff. It stated that all the work specified therein, valued at $32,064.29, had been done, that 75 per cent of the total thereof was $24,798.22, of which $22,951.46 had been paid, and that there was due on the main contract $1,846.76. It further stated that extras ordered and completed were of the value of $630, of which $225.50 had been paid, leaving $404.50 due. Mr. Manson was present at this meeting, and orally reported that the work was practically completed; all, in fact, except three joints of pipe and one manhole, which were not laid and completed by reason of the request of the city to defer the work, and that he thought the plaintiff might be safely paid all but about $1,000 of the amount. Thereupon the city paid the amount certified as due, together with $4,266 of the 25 per cent deferred payments, leaving $4,000.07 unpaid. The unfinished work was completed within a few days thereafter.

Almost immediately thereafter, the sewers having been connected, the engineer and his associate caused a test to be made to ascertain the amount of leakage of water into the pipes laid by plaintiff. It was found that, from the whole system, there was flowing through the main pipe leading to the sump 1,100 gallons of water a minute, which reached that point and could only reach it by reason of leakage into the sewer pipe laid by plaintiff. This flow was three fourths of the carrying capacity of the pipe. The test was also made by districts, and it was found that the leakage into the pipes was not confined to any particular section, but existed all over that portion of the system laid under the water level. It had been estimated by the engineers that, with the

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And the contractor is not deprived of his right of recovery where the city engineer and committee arbitrarily refuse to issue the certificate provided for by the contract as a condition precedent to payment, it appearing that the work is in substantial conformity with the contract. Elizabeth v. Fitzgerald, 52 C. C. A. 321, 114 Fed. 547. The court said: "Had, then, the defendant's officers the right to arbitrarily refuse the certificates and approval called for by the contract? Both in reason and upon authority it is clear that they had not. 'When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant.'"

So, arbitrarily driving a contractor who is complying with his contract, from the work, will not prevent recovery by him, although the contract provides for a reservation of a part of the money until the contract is certified as completed and the work accepted. Kingsley v. Brooklyn, 78 N. Y. 200.

And where a contract provides that a garbage furnace is not to be paid for until it is "completed and tested according to the satisfaction of the committee," the committee cannot defeat the contractor's right of recovery by capriciously and unreasonably refusing to express its satisfaction with the work. Parlin & O. Co. v. Greenville, 61 C. C. A. 591, 127 Fed. 55. The court said: "The courts have had frequent occasion to construe contracts for the rendition of services, the manufacture of articles, and the construction or improvement of works, wherein it was agreed as a condition precedent to payment, that the services, articles, construction, or improvement should be satisfactory to the promisor. Such contracts are of two kinds: First, where the right of decision is completely reserved to the promisor, without his being required to disclose the reasons for his determination, and all right to inquire into the grounds of his decision or to examine and overhaul his determination by the promisee or the courts is absolutely excluded. The law regards the parties as competent to contract in that manner, and, if the contract is to that effect, it is the law of the case. Second, where the promisor is held to have undertaken to act reasonably and fairly, and to found his determination on grounds which are reasonable, just, and sensible. Where the construction of the contract puts it in the second class, it follows, as a necessary implication, that the promisor's decision, in point of correctness and the adequacy of his grounds, is open to judicial determination."

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timates of the value of work done during each month to the extent of seventy-five (75) per cent of the work done during such month. These payments will be made by warrants on the city treasurer, as provided by law. The estimates to be made by the engineer in charge. Final payment, including deferred payments, will be made in the same manner upon the completion of the work to the satisfaction and approval of the engineer in charge."

Plaintiff commenced work under the contract in September, 1903, and proceeded steadily therewith, making the necessary excavations, laying the pipe and doing the other work, and refilling the trenches, until April, 1904, when the work was apparently supposed by all parties to be completed. Mr. Marsden Manson was the engineer in charge, and had furnished the specifications. He was assisted by Mr. Edward F. Haas, his associate. The work was done under the more immediate supervision of a superintendent for the city, employed by the city at the suggestion of Mr. Manson,—one Cyrus Dam, who had under him four inspectors appointed by the city, there being at all times an inspector for the city supervising each gang of plaintiff's men employed on the work. There was also an engineer employed by the city at the suggestion of Manson to give the lines and grades,—one H. G. Butler. No complaint was made as to the manner of work or kind of materials during the progress of the work, except in one or two instances, where the matter was at once remedied, and the work progressed to completion to the apparent satisfaction and approval of everybody engaged in supervising the work.

Each month a progress estimate was furnished by the engineer to the common council, certifying the amount and value of the work done up to the 1st day of the month, with a statement of the amount due the plaintiff. These were similar in form, that of December 4, 1903, which may be taken as a sample, being as follows:

San Francisco, Cal., Dec. 4, 1903.

To the Mayor and Common Council of the city of Marysville,

Gentlemen:—

This is to certify that the following work has been done up to December 1, 1903, by the various contractors for sewer work now under construction in the city of Marysville, and that an estimate of the reasonable value of said work, in accordance with the various contracts, is as follows:

City Street Improvement Co.

[Here follows itemized statement of number of feet of pipe laid and other work.]

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sioner upon the question of law as to the effect which the failure of a city to have bridge piers completed within a certain time has upon its right to demand liquidated damages under a contract to complete the bridge at a certain time is outside the authority of such commissioner, who is empowered by the contract finally to determine the amount or quantity of the work, and decide all questions arising relative to the execution of the contract, and his decision upon the question is not binding upon the contractor. King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826, 43 Fed. 768.

And a contractor is not precluded by the engineer's certificate given under a provision that the certificate and return of such engineer shall be conclusive as to the amount of materials furnished and work done, where the certificate is based upon an erroneous construction of the contract, and deliberately excludes work done by the contractor, although it may have been made with an honest purpose. Burke v. New York, 7 App. Div. 128, 40 N. Y. Supp. 81.

So, where a contract for constructing a sewer provides that, if the city becomes dissatisfied, it may finish the work, and the expense shall be allowed in accordance with the decision of the city engineer, whose decision shall be final, the engineer's report covering only the work done and material used by the contractor to whom the city relet the contract upon becoming dissatisfied, and which shows that it refers only to the matters between the city and the last contractor, is not a decision which concludes the first contractor. San Antonio v. Marshall (Tex. Civ. App.) 85 S. W. 315.

And where a contract for constructing a sewer provides that, upon default, the city may proceed with the work, and that the expenses shall be paid by the contractor to the city under the decision of the city engineer, the engineer's decision is not binding on the contractor in the absence of evidence that the contract under which the work was completed was reasonable or the best that could be obtained. Marshall v. San Antonio (Tex. Civ. App.) 63 S. W. 138.

And where bad faith appears or the decision is arbitrary, the contractor is not concluded.

Thus, where the refusal of sewer commissioners to certify the completion of a contract is unreasonable, recovery can be had although the contract provides that payment shall not be made until the certificates have been obtained. Ross v. New York, 85 App. Div. 611, 82 N. Y. Supp. 920.

So, a contractor is not concluded by the decision of the commissioners and engineer of the municipality, where the power is exercised in an arbitrary manner, and he may recover for breach of contract where the city unreasonably compels him to relay a pavement. Cearty v. New York, 171 N. Y. 61, 63 N. E. 804.

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Total	$13,603 57
Less 25 per cent	3,400 89
75 per cent of total	$10,202 68
Amount due on main contract ($7,399.28 having already been paid)	2,803 40
Extra work ordered and completed	58 75
Total amount due	$ 2,862 15

Respectfully submitted,
Edw. F. Haas,
Associate Engineer.
Approved: Marsden Manson.

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sewer laid in strict accord with the plans and specifications, the total flow from leakage would be approximately only 45 gallons a minute, and their testimony, with that of Mr. Connick, sufficiently supported the conclusion that such would have been the case. The test made it evident that somebody had blundered. Mr. Manson thereupon, on April 23, 1904, notified the common council that the seepage was far in excess of any reasonable amount, and that it would be necessary radically to correct the work before any use could be made of the sewer system. He stated that it was not possible to determine the exact cause of this without a critical examination of the joints, but that, from what had been brought to his notice, he was satisfied that most of it was due, either to the washing out of the mortar before it had had time to set, or to the fact that the joints were not adequately filled with mortar. Three sections were specified as especially defective, and it was recommended that these sections, an aggregate of thirteen blocks, be uncovered, and the leakage remedied. The common council notified plaintiff in writing of this recommendation, and directed it to proceed to comply therewith. Plaintiff claimed it had completed its contract, and did nothing. A subsequent general notice to complete its contract was ordered on May 13, 1904, and was sent to the president and secretary of plaintiff by registered mail. The common council thereupon advertised for bids for doing said work of uncovering, cleaning, and remortaring the joints and refilling the trenches on the thirteen blocks, and received no bids, whereupon they resolved that the city should do the work. They proceeded with such work by day labor under superintendents for the city, and, at the time of the trial, had expended $10,452.69 in doing such work on some of the blocks specified, as well as on other blocks not specified. The evidence was sufficient to support the conclusion that, for the work done, the amount expended was not unreasonable. The evidence is also sufficient to support the conclusion that the pipes and the cement thereon were not materially disturbed by the work of uncovering. After the first portion of the work had been uncovered, which was where the most leakage had been apparent, and the pipes and joints washed off, a careful inspection thereof was made, and it was found that on by far the greater portion of the joints there was either no cement at all on the lower half, or there were holes therein, while the cement on the upper half was all right. The same thing appeared in the other sections of pipe subsequently uncovered by the city for the purpose of repair. There was evidence sufficient to support the conclusion that the work of repairing these joints was substantially in accord with the original specifications, and, where this work has been done, the leakage has been so far reduced as to come within the original estimate of the engineers. The inference is irresistible that the trouble was due to a failure on the part of the employees of the contractor to conform to the specifications, either in failing to properly apply the cement on the lower half of the joints, or in failing to keep the trenches free from water during the laying of the pipe and until the cement mortar was set. The latter was apparently the principal cause. The testimony shows that, owing to heavy rains and the ordinary seepage of water in the ground, it was an exceedingly difficult matter to keep the trenches free of water, but that it was possible. Plaintiff used a pump for this purpose, and when in operation this pump ordinarily sufficed. When the work of repair was done it was found possible by the employees of the city to keep the water away from the joints for the requisite time. There was much testimony as to the original work, which showed a constant and reckless disregard by plaintiff's employees of the requirement as to water in the trenches, and that this was so was practically demonstrated by the condition in which the joints were found on being uncovered. Not only was there much evidence to show that much of the pipe was laid by the employees when there was water in the trenches to such an extent that the lower portions of the pipe and joints were in the water, but it also appeared that it was of frequent occurrence for the pump to break down, or for the man operating it to stop work during the night, with the result that water would rise in the trenches and reach the newly laid pipe, much of which had been partially covered with earth. As we have said, the condition of the work when uncovered was such as to practically demonstrate that there had been almost uniform disregard by plaintiff's employees of this important provision of the specifications. Mr. Manson and his associate, Mr. Haas, saw the work only occasionally, and had no knowledge of any failure on the part of the contractor in regard to this matter, no information being given them by the contractor or by any person engaged in superintending or inspecting the work.

The estimate as to necessary future work is based upon the fact of excessive leakage still apparent in various sections, where the old work has not as yet been uncovered, and the cost thereof estimated by experts, who calculated in the light of the knowledge afforded by the cost of the work already done.

The trial court held that plaintiff did not

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perform, and has not performed, all or any of the terms or conditions of its contract on its part provided to be done and performed; "that, among other material matters in which it failed and neglected to perform the contract, it did not lay and cement the joints of the pipe therein referred to according to said contract and specifications." It is contended by plaintiff that these findings are unsupported by the evidence, and this contention presents the real question in the case. For the purpose of considering it, we have made a statement of the evidence that we deem material.

It is earnestly contended that the city is estopped to deny the completion of the work by reason of its failure to object as the work progressed, and by reason of the signing of certificates by the engineer from month to month, and, upon the supposed completion of the work, evidencing his approval thereof. Contracts of the kind here considered are not new to the law. The stipulation in such contracts that the engineers' estimate should be final has been held valid and binding by the courts of England, by those of the various states of the Union, and by the Federal tribunals. The superior court of Missouri has this to say of such stipulations: "By such a stipulation, the parties constitute the engineer an arbitrator, and the provision is held, if anything, more binding than an ordinary submission, for the reason that it enters into and becomes a part of the consideration of the contract, without which it would not, in all probability, have been made. It has its origin in contracts for the building of important and extensive government works, and was designed to avoid harassing litigation over questions that can only be determined honestly by those possessed of scientific knowledge." Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 487, 34 Am. St. Rep. 403, 20 S. W. 631.

It would be difficult to find a case where the contract more clearly contemplated that the work of plaintiff should be done under the constant immediate supervision and direction of the engineer in charge and his subordinates, and inspected and rejected or approved as it progressed and before the trenches were refilled with earth. This, we think, is amply evident from the contract itself, which includes the specifications, and was certainly the practical construction given it by the parties throughout. As we have seen, the work was all done under the supervision of the subordinates appointed by the city at the engineer's request, and who were his representatives upon the ground, and were there for no other purpose than to see that the materials furnished and the work done by plaintiff's employees were, in all respects, as required by the contract, and to require compliance with the contract as the work progressed, whenever any departure therefrom was observed. The defects now alleged in regard to the work, *viz.*, that water was allowed to be in the trenches to such an extent as to injure the cement before it had set, and the failure on the part of workmen properly to apply the cement to the lower half of many of the joints, were matters which, assuming that they did occur, should have been observed by the engineer, through his representatives, at the time the work was being done, and when they could have easily been remedied. No portion of the work could be properly covered with earth until it had been inspected and found in proper shape, and there is no pretense that any of it was so covered prior to such inspection as was desired or requested by the inspectors. When it was allowed to be so covered, there was a practical approval and acceptance of the work by the engineer, through his representatives, and this acceptance was affirmed and approved from month to month by his own certificates to the common council of the city, stating the amount of work done by plaintiff to the first of the current month and the amount due therefor. These certificates necessarily implied that the work so certified was done according to the specifications and to his approval. The final certificate showed all the agreed work to be done, necessarily to the approval and satisfaction of the engineer, and this certificate was re-enforced by the oral statement of the engineer to the same effect, made to the council at the meeting at which it was received, except that it appeared from such oral statement that a few joints of pipe and a manhole certified completed had not been completed because of a request of the city that they should be deferred for a few days. Under these circumstances, we think that the city is clearly estopped to urge that plaintiff has not performed its contract.

Authorities upon this point are not wanting. It must be borne in mind that we are speaking of a case where there was no fraud on the part of the contractor operating to prevent a discovery of any imperfection, for there was not the slightest basis in the evidence for a conclusion to that effect. The most that could be contended is that there was evidence tending to show lack of care on the part of certain employees of plaintiff to comply fully at all times with the specifications in doing the work, and such a lack of care as should have been observed and remedied before the work was finally covered. In the case of Schliess v. Grand Rapids, 131 Mich. 52, 90 N. W. 700, the supreme

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court of Michigan said: "The conduct of the defendant, through its inspector and architect and board of public works, estops it from now claiming that the contract was not fulfilled. Its authorized agents were there during the entire progress of the work, charged with the duty to see that it was properly done. The city, through its board of public works, acted weekly upon the reports made, and paid the amounts due for the estimates. The law would not permit defendant to see this work go on, to ratify it day after day and week by week, to see plaintiff putting in stone not in exact accord with the contract, and then say, when the work is done, 'You have not complied with the contract.' Its time to accept or reject was when the work was being done. It could not lull the plaintiff into the belief that this work was satisfactory, and, when completed, reject it."

In Wildey v. Fractional School Dist. No. 1, 25 Mich. 419, the work was to be done under the direction of the architect and to his entire satisfaction, and an overseer was to supervise the work for the district. The court said: "Whatever passed under his [the owner's] inspection as the work progressed, and was, in good faith, approved by him, expressly or by implication, was not open to objection on the part of the defendant afterward."

In Laycock v. Moon, 97 Wis. 59, 72 N. W. 372, the action was for the balance alleged to be due for the stone and brick work of a barn, and the defense was that the work had not been fully performed, in that the walls had not been slushed or pointed with mortar, and improper stones had been used. The contract provided that the plaintiff should make a complete and workmanlike job to the entire satisfaction of the proprietor and architect, the whole of the work to be inspected as it went on. It was held that the defendant and his architect were bound to make inspection of the work and materials as the work progressed, that the contract implied that the work and materials were to be accepted or rejected at the time of inspection, and during the progress of the work, and that, as the alleged defects were obvious to the stipulated inspection, they could not avail defendant after the completion of the work.

In Ashland Lime, Salt, & Cement Co. v. Shores, 105 Wis. 122, 81 N. W. 136, where the contract provided that a building should be constructed according to certain plans and specifications, to the satisfaction of the architect, "who shall inspect all material and work as the building is constructed," and who was invested with power to reject any material or work not deemed by him to be in compliance with the contract, it was held that the manifest intent was that unsatisfactory material or construction should be promptly rejected; that the architect should not, by silence, allow unsatisfactory construction to proceed to a point where its removal from the building would be attended with serious loss to the builder, and that a failure to reject seasonably operated as a waiver.

See also Beswick v. Platt, 140 Pa. 28, 21 Atl. 306; Carroll County v. O'Connor, 137 Ind. 622, 37 N. E. 16, 35 N. E. 1006, 1012; Laycock v. Parker, 103 Wis. 161, 79 N. W. 330, 331; Potomac S. B. Co. v. Harlan & H. Co. 66 Md. 42, 4 Atl. 903; Lamson v. Marshall, 133 Mich. 250, 95 N. W. 78; Standard Stamping Co. v. Hemminghaus, 157 Mo. 23, 57 S. W. 746.

In Ashland Lime, Salt, & Cement Co. v. Shores, supra, this rule was declared to state a reasonable and just doctrine in cases of this nature. The court, through Marshall, J., said that where the owner stipulated for inspection and approval as the building is constructed, and for a representative of his own to compel compliance with the contract at every step, if such representative failed to perform his duty, the loss should fall on the owner, and not be shifted to the builder, who may have been lured into the belief that his work and material were satisfactory till too late to remedy defects therein without serious loss; that the owner should look to his architects; that he should be and is bound the same as if he were upon the ground himself, charged with the duty of accepting or rejecting material or construction as soon as there is a reasonable opportunity for the inspection of it. It was said that this is but an application of the elementary principle that, where property is delivered by one person to another, as fulfilling an executory contract between them requiring such delivery, and the latter neglects to notify the former that the property is not accepted as complying with the contract within a reasonable time after a fair opportunity to inspect it, an acceptance will be inferred; and that "any considerable delay in that regard must operate, by all equitable considerations, as an acceptance, except as to defects not discoverable by reasonable attention to the duties of inspection."

There is no basis in the record for the conclusion that the alleged defects were such as were not discoverable by reasonable attention to the duties of inspection. So far as the water being at times in the trenches before the mortar had time to set is concerned, that fact and the resultant damage, if any, to the cement, were as discoverable by a reasonable inspection prior to the filling in of the trenches as they ever

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could be. The same is true as to any carelessness of the workmen employed in putting cement on the lower portion of the joints.

It is urged that to allow the acceptance by the engineer and his subordinates thus to operate as an estoppel on the city would be to allow them to vary plain and unambiguous terms of the contract between plaintiff and defendant, to the detriment of defendant. But, as was said in Standard Stamping Co. v. Hemminghaus, supra, where a similar contract was made, it was entirely competent for the city, through its engineer and his subordinates, to determine that the sewer, as laid in the open trench and ready to be covered with earth, was just what the contract required. Having seen it, and having had the fullest opportunity of inspecting it, all of those defects which were visible, or could have been ascertained by a reasonable inspection, were waived. In other words, the question whether the work was in accord with the contract was thus finally determined so far as such defects were concerned, in the absence of bad faith or fraud on the part of the contractor. The contractor could not be held responsible for any mere negligence or mistake on the part of the city's agent in the matter of such inspection.

The cases cited by learned counsel for defendant on this point, other than Lamson v. Marshall, supra, and Burke v. Kansas City, 34 Mo. App. 570, do not appear applicable under the facts of this case. Lamson v. Marshall, supra, has already been cited herein as supporting the views we have stated. If there is anything in Burke v. Kansas City, supra (a decision of the court of appeals for Kansas City), in conflict with that view, it must be disregarded, in view of the later decision of the supreme court of Missouri in Standard Stamping Co. v. Hemminghaus, supra. The case of Schmidt v. North Yakima, 12 Wash. 121, 40 Pac. 790, a case much relied on by counsel, was one where the evidence showed that the contractor deliberately planned to escape the responsibilities of his contract by furnishing inferior materials and inferior workmen to place the materials on the ground, and tried over and over to secretly work in rejected material, to such an extent that the city refused to allow him to finish the work, and the engineer refused to give any certificate as to the work done. It was held that he had been guilty of such fraud that he could not recover in any form of action.

As we have said, there was nothing here to indicate any lack of good faith on the part of the contractor, or the slightest indisposition to conform to any direction of the engineer and his subordinates,—nothing to serve as a basis for the conclusion that there was any fraud. Nor was there anything to indicate any effort by it or any of its employees to hamper or restrict the engineer or any of his subordinates in the matter of inspection.

Respondent's counsel contend that the plaintiff should not be permitted to show anything indicating an estoppel, because the certificates of the engineer were not set forth, either in substance or otherwise, in the complaint. We do not think it was necessary to plead the certificates specially. Section 457 of the Code of Civil Procedure is as follows: "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and, if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance." The complaint did plead the contract in terms. Under that contract, one of the conditions precedent to demand by and payment to plaintiff of progress and final instalments of the contract price was the approval of the engineer. Under the statute just quoted, this condition precedent was not necessarily the subject of a special plea. The ultimate fact to be alleged was the performance of the work under the contract. The certificates, although, in the absence of fraud, conclusive as to that fact, are nevertheless but evidence of it.

There are no other alleged errors requiring special notice.

The judgment is reversed, and the cause remanded for new trial in accordance with the suggestions set forth above.

Angellotti, J., dissenting:

I dissent. It is not possible under the evidence to escape the conclusion that the plaintiff did not substantially perform the terms of its contract. The evidence shows an almost uniform and utter disregard by plaintiff's employees of one or the other of two plain and unambiguous provisions of the contract, absolutely essential to protection against excessive leakage of sewer pipe laid below the water level, and inserted for the purpose of such protection, the result being that the work, as turned over to defendant, could not have served the purpose for which it was intended.

So far as the claim that the certificates of the engineer constituted an estoppel is concerned, the question presented is a simple one. It may be assumed, as was held by the trial court and the district court of appeal, that the engineer was, by the terms of the contract, made the arbiter, whose

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decision upon the question of performance should bind the respective parties. But it is recognized by all the authorities, and is admitted by learned counsel for plaintiff, that such a decision is conclusive only in the absence of a showing of fraud, collusion, or mistake of fact. Where it is shown that the decision was obtained through fraud, collusion, or such mistake of fact as is ground for relief in equity, the effect of the approval is overcome. 3 Page, Contr. § 1469. The trial court was amply warranted in concluding that Mr. Manson had given these certificates in absolute ignorance of the manner in which the work certified had been done,—a matter as to which plaintiff must be held to have had full knowledge, and upon the assumption, warranted under the circumstances, that plaintiff had, in doing it, complied with these all-important provisions in the specifications.

As to the claim that the city is estopped from denying that the work was performed in accordance with the contract by reason of the fact that it was done under the supervision of a superintendent, an assistant engineer to give the lines and grades, and inspectors, all appointed by it for the purpose, who failed to make objection thereto, and allowed plaintiff, by their silence, to believe that it was satisfactory until it was too late to remedy it except at great expense, there is a line of authorities holding that, where it is the evident intention of the contract that the work shall be inspected as it progresses, and unsatisfactory material or labor rejected at once, and the owner has a representative on the ground to oversee the work as it is done, and to guard against defective material or labor, defects which were observed by the owner's representative, or which would have been discovered by him by reasonable inspection, are waived by the owner, in the absence of fraud on the part of the contractor. See Schliess v. Grand Rapids, 131 Mich. 52, 90 N. W. 700; Wildey v. Fractional School Dist. No. 1, 25 Mich. 419; Laycock v. Moon, 97 Wis. 59, 72 N. W. 372; Ashland Lime, Salt, & Cement Co. v. Shores, 105 Wis. 122, 81 N. W. 136. It has been said that it is a reasonable and just doctrine that, in such cases the loss should fall on the owner, and not be shifted to the builder, who may have been lured into the belief that his work and material were satisfactory until too late to remedy defects therein without serious loss, and that any considerable delay in manifesting disapproval will operate, by equitable considerations, as an acceptance, except as to defects not discoverable by reasonable attention to the duties of inspection. Ashland Lime, Salt, & Cement Co. v. Shores, supra. The rule is, of course, based entirely on equitable considerations, and we have not found any case where it has been applied to such a substantial departure by the contractor from plain and unambiguous terms of his contract as is found to exist here,—a departure which must be held to have been knowingly made, and which, as the contractor must have known, would necessarily have the effect of materially impairing the efficacy of the new sewer system, of which its work was an essential and important part. In the case at bar, it was, of course, the duty of the superintendent and inspectors employed by the city to notice such failure to comply with the specifications on the part of the contractor as were obvious, or could be ascertained by the exercise of reasonable care on their part, and to require such compliance; or, at least, to bring the matter to the attention of the engineer, Mr. Manson. But if, through ignorance or carelessness, they failed to perform their duty in this regard, plaintiff would not be warranted in assuming from their silence that the city was willing to waive a plain requirement so important to the success of the work. It knew that the inspectors were there simply for the purpose of requiring conformity on its part to the terms of the contract, and were without authority to waive any material provisions thereof; it knew that it was essential to the protection of the pipe against excessive leakage that the cement mortar put on the joints should be protected against water until it had time to set; and it knew that, for this purpose, the contract imposed upon it the obligation of keeping the trenches entirely clear of water until the mortar on the pipes therein had set. Unless we are to hold that the knowledge of its representatives in charge of the work as to the manner in which the work was being done was not the knowledge of plaintiff itself, which, of course, cannot be held, the evidence was sufficient to support the conclusion that plaintiff knew that this substantial provision as to water in the trenches was being almost constantly disregarded by its agents, and that the work being done could not be satisfactory to the engineer in charge when ultimately put to a proper test, and the failure to comply actually discovered by him. As to such a failure under such circumstances, no equitable consideration exists in favor of the contractor which will serve as the basis for an application of the doctrine as to waiver and estoppel. See, generally, Wait, Engineering & A. Jur. §§ 388, 446, 467, 468.

It should be stated in this connection that there was sufficient support in the evidence for the conclusion that the inspectors and superintendent for the city, actually super-

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vising the doing of the work, could not, by the exercise of all reasonable care, have known of the extent to which the provision of the specifications as to keeping the trenches clear of water was violated, inasmuch as the evidence tended to show that the failure to operate the pump, and the consequent flooding of the trenches, generally occurred during the night hours, when they were off duty; the result being that new work, on which the mortar had not set, and which had in some cases been already partially covered with earth, was washed to such an extent as to remove the cement therefrom.

Beatty, Ch. J., dissenting:

I dissent. In addition to what is said by Justice Angellotti, I desire to emphasize the point that the condition of the sewer pipe when uncovered shows conclusively that many of the joints had never been cemented on the lower half, or that the water had been allowed to rise in the trenches where they were laid before the cement had time to set. If this fact could have been known by the inspectors appointed by the city to watch the work as it progressed, it must have been known by the representatives of the contractor in charge of the work. They must have known, in other words, that the contract was being violated, and that the sewer, as constructed, would be practically valueless when turned over to the city. They must have known that the reports of the city's inspectors, to the effect that the work was being done according to the contract, were false and deceptive. This knowledge on the part of its agents in charge of the work, knowledge which must be imputed to the plaintiff, deprives it of any claim to the estoppel upon which it relies.

Shaw, J.:

I concur in both of the foregoing dissenting opinions.

Petition for rehearing denied April 29, 1909.

CALIFORNIA SUPREME COURT.

JOHN H. BARTON et al. Appts.,
v.
RIVERSIDE WATER COMPANY et al., Respts.

(— Cal. —, 101 Pac. 790.)

Subterranean water — diversion — estoppel.

1. Owners of land over a subterranean basin, who have been accustomed to use the water therefrom, will not be granted an injunction to restrain the taking of water from the basin by a public-service corporation to supply people beyond its limits, through wells which it sinks to maintain the amount of its original appropriation during periods of drought, where, with full knowledge of the facts, they stand by until large amounts of money have been expended upon the wells, and they have been in operation for at least two years.

Same — diversion — change.

2. A public-service corporation which has acquired the right to take water from a common basin for public use, by means of artesian wells, may change the place of diversion within the basin so long as it takes no more water than the amount to which it has acquired the right.

Same — cuts — wells.

3. One who, by long-continued use by means of cuts and trenches, acquires a right to take water from a saturated stratum where the water of a subterranean basin flows therefrom, may, in seasons of drought, as against persons having rights subsequently acquired, sink wells in the stratum, and pump water therefrom, so long as he takes no more than the quantity of water to which he is entitled.

(April 21, 1909.)

APPEAL by plaintiffs from a judgment of the Superior Court for San Bernardino County in defendants' favor in an action to enjoin alleged wrongful diversions of water from a subterranean basin. Affirmed.

The facts are stated in the opinion.

Messrs. **Byron Waters and C. C. Haskell** for appellants.

Messrs. **Collier & Carnahan,** for respondent West Riverside 350-Inch Water Company:

A party may lawfully appropriate waters within the bed or channel of a stream and

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Case Note. — Correlative rights in percolating water.

The earlier cases and a full discussion of the question of the correlative rights in percolating water are found in notes to Southern P. R. Co. v. Dufour, 19 L.R.A. 92; Katz v. Walkinshaw, 64 L.R.A. 236; and Erickson v. Crookston Waterworks, Power, & Light Co. 17 L.R.A.(N.S.) 650. An examination of those notes will reveal that while the earlier decisions laid down the general rule of absolute right in percolating waters, the great majority of the recent cases have receded from that view, and favor the doctrine of confining each landowner to a reasonable use of such water.

An application of this doctrine is especially well illustrated by the recent case of Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, post, 436, 87 N. E. 504.

A recent case of importance on this question is Meeker v. East Orange (N. J.) 74 Atl. 379, where it was held that a city which, for the purpose of supplying its inhabitants at a distance with water, sank on its land artesian wells, through which it drew out percolating water, was liable in

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from its subsurface flow by proper works and development, providing such appropriation does not impair the rights of others superior to his own.

Vineland Irrig. Dist. v. Azusa Irrigating Co. 126 Cal. 486, 46 L.R.A. 820, 58 Pac. 1057; Charnock v. Higuerra, 111 Cal. 481, 32 L.R.A. 190, 52 Am. St. Rep. 195, 44 Pac. 171.

Messrs. **Houghton & Houghton, John S. Chapman, Henry Goodsell,** and **Charles R. Gray** for other respondents.

Shaw, J., delivered the opinion of the court:

This is an appeal by the plaintiffs from a judgment of nonsuit in favor of said defendants.

The action is to enjoin alleged diversions of water from an artesian basin alleged to exist in the San Bernardino valley. Each plaintiff is the owner of a tract of farming land situated over the said basin, on which he has been accustomed to use the waters of the basin. Some of them obtain the water by means of pumps, or artesian wells, and others by diversions from natural streams forced to the surface from subterranean strata within the basin by the pressure of the water from the higher lands surrounding it. The respective tracts of land owned by the several plaintiffs are not contiguous, but are situated in different parts of the basin and several miles apart. The basin is extensive, embracing something over 30 square miles. It is of irregular outline, and somewhat circular in shape. The city of San Bernardino is situated near the center of it. It is alleged that the defendants, without right or authority, by means of artesian wells naturally flowing, and other wells operated by pumps, are diverting from the basin, and carrying to lands not situated therein, or in the watershed contributing thereto, large quantities of water from the said basin, to be used for irrigation and other purposes on said outside lands; that, by reason of these diversions, the waters of said basin are depleted, the level thereof lowered, and the common supply of plaintiffs diminished and exhausted to such an extent that the plaintiff's lands are deprived of the use of the waters of the basin, to the great damage of the respective plaintiffs. By the term "basin" we do not mean to imply that its floor is level. The central part of it slopes slightly toward the outlet at the southwest corner. During some extraordinary floods the Santa Ana river flows on the surface through the basin and over its outlet. The lands of several of the plaintiffs do not lie within the limits of the basin as the same is claimed to exist by the plaintiffs themselves. These lands are situated below the outlet of the basin, in a sandy formation, which it is claimed is saturated with water overflowing from the basin. As to these lands, the claim of the plaintiffs is that the depletion of the waters in the basin, by the alleged unlawful diversions of the defendants, diminishes the overflow to such an extent that the plaintiffs owning these lands are unable to obtain from such overflow sufficient water to irrigate their lands as they have heretofore done.

The plaintiffs allege that the water is confined in the basin by a dike of impervious material, which by some convulsion of nature has been thrown across the southwest and lower corner of the basin, extending from bed rock upward to about 40 feet below the surface of the ground. This vertical space of 40 feet it is claimed is occupied by a deposit of sandy material, similar to that within the basin, through which the water passes underground, over the dike, into the lands below, except in

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damages for injuries caused thereby to an adjoining owner. It will be noticed that this case reverses the decision of the supreme court fully set out in the note in 17 L.R.A.(N.S.) 650, and places New Jersey in line with the other jurisdictions applying the rule of correlative rights to percolating water.

Another case illustrative of the development of the doctrine of reasonable use is Burr v. Maclay Rancho Water Co. 154 Cal. 428, 98 Pac. 260. In this case the owner of three blocks of land, all of them situated over a subterranean basin, sought to enjoin an adjoining landowner from pumping water from wells and transporting such water to distant lands; it appeared that the complainant had wells on only one block of land, and, until a recent time before the bringing of the suit, had not irrigated his other land from that well. In regard to the relative rights in the use of the water, it was held (1) following Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 74 Pac. 766, 70 Pac. 663, that the right of the landowner to a quantity of percolating water necessary for use on the tract on which the well was located was paramount to that of the adjoining landowner, who sought to take the water to distant land; and (2) that the adjoining landowner's appropriation of the water for distant lands was also subject to the reasonable use of the water upon the other overlying land, but upon which theretofore the water had not been used; especially where it appeared that the land had been acquired because of its natural advantages respecting the water.

But see BARTON v. RIVERSIDE WATER CO.

For cases on constitutionality of statutes to prevent waste of subterranean water, natural gas, or oil, see case note to Hathorn v. Natural Carbonic Gas Co. post, 436.

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unusual floods, during which there is a surface stream there flowing. This so-called outlet is 1 mile or more in width. The diversions of water complained of are, for the most part, made above this alleged dike and within the artesian basin proper, but some of them are made from the sandy formation below the alleged dike. The complaint alleges, in effect, that the artesian basin and the land immediately surrounding it are composed of a mass of sand, gravel, and other porous material, and that the water therein forms a common supply for the plaintiffs, so connected, because of the character of the material in which it lies and its free movement therein, that a diversion of water from one part of the basin is practically a diversion from the whole, and decreases the common supply of all of them, though not affecting them all to the same extent. It is upon this theory that they all unite in one action, claiming that the injury to be enjoined is a common injury to all. These allegations are denied, and the answers pleaded misjoinder of causes of action and of plaintiffs and defendants, respectively. It is earnestly insisted, particularly by the attorney for the Riverside Highlands Water Company, in a very able and elaborate brief, that there is no common supply, and that there is consequently a misjoinder. We think that there is some evidence in support of the allegations of the complaint on this point, and, at all events, we will assume, for the purposes of this decision, that these allegations are sufficiently established, and will not discuss the question of misjoinder. We think that the motion for a nonsuit was properly granted upon other grounds.

1. The Riverside Water Company is engaged in the business of taking water from this basin, and carrying it to Riverside for sale and distribution in that community, for irrigation and other purposes. It is a public-service corporation, and the water it obtains from this basin is devoted by it to the use of the community at Riverside. It has been in charge of this public use for many years. The exact time does not appear, but the evidence shows that it began some time prior to 1887, and that it has continued ever since. Originally the water was all taken from Warm creek,—a stream rising within the basin by reason of hydraulic pressure in the underlying strata. Under natural conditions this stream carried from 3,500 to 4,000 miners' inches of water, all of which was taken by said company and appropriated to said public use. From 1893 to 1900 there was a series of very dry years, the average annual rainfall being only 11.19 inches. The average for the decade from 1883 to 1893 was 20.10 inches, and the general average since records have been kept is 15.62. The three seasons of 1897-98, 1898-99, and 1899-1900 were excessively dry, giving an average of only 8.12 inches. This prolonged drought combined with the effect of large additional diversions of the waters of the basin by other persons, for whom none of the defendants were in any wise responsible, caused the natural flow of Warm creek to decrease gradually to about one half its former quantity. This decrease made it necessary for the Riverside Water Company, in order to supply those dependent upon it, to find means of obtaining more water. For that purpose, and soon after the decrease became apparent, it began putting down artesian wells in the basin, and it has ever since continued to do so as its needs required, not with the intent to increase its diversion from the basin, but to keep it up to the original quantity. The evidence shows that this new method of securing the water was in use at least as far back as the year 1895. In 1899 and 1900, owing to the excessive drought aforesaid, and additional diversions by others, additional wells were bored by this company, and it is these wells against which the chief complaint is made, as against this defendant. The wells are deep, and the expense of boring them must have been considerable. There was an absolute necessity for more water to serve the public use. The fact that the wells were being bored, and that the water obtained thereby was taken to Riverside to supply the previous use, was notorious. The fact that these diversions would decrease the common supply of all the plaintiffs was obvious, and must have been known to each of them. The complaint alleges that the diversions of all the defendants by means of wells had been going on continuously for at least two years before the action was begun. The complaint was filed on June 4, 1904. It is not seriously claimed that any of the plaintiffs were ignorant of these facts. Most of them, as witnesses, testified to knowledge thereof; many of them declaring that the wells of this company, bored in the years 1899 and 1900, immediately affected their own wells. No objection or protest against the boring of these wells by the Riverside Water Company was ever made by any of the plaintiffs. The first hint of any claim that these diversions were made without right on the part of the respective defendants was manifested by the beginning of this action.

So far as this company is concerned, the case comes within the rule established in

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Fresno Street R. Co. v. Southern P. R. Co. 135 Cal. 207, 67 Pac. 773, and followed in Southern California R. Co. v. Slauson (Cal.) 68 Pac. 107, and Crescent Canal Co. v. Montgomery, 143 Cal. 252, 65 L.R.A. 940, 76 Pac. 1032. This rule, briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the public use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions, and avail themselves of the conveniences and advantages thereby afforded, he cannot thereafter maintain an action to enjoin the continuance of such public use, or to recover possession of the property so taken, but will be relegated to an action for damages. The rule was mentioned in Katz v. Walkinshaw, 141 Cal. 136, 64 L.R.A. 236, 99 Am. St. Rep. 35, 74 Pac. 772, 70 Pac. 663, a case involving the waters of this basin, where the court, evidently referring to cases such as that here presented, and avowedly intending to suggest a rule of decision in such cases, said: "Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused."

We may concede, for the purposes of this case only, that the more recent diversions of the company by means of wells are not a continuance of its ancient right to divert the waters naturally flowing in Warm creek, and that the wells do not constitute a mere change of the means and place of diversion of the water to which the said company's right had been established. We may assume that the company is in the same position, with respect to these wells, as it would be if the boring thereof had been the inception of its operations. So assuming, it still remains true that the plaintiffs knew of these diversions of water from the basin, and either knew, or had good cause to believe, that the water was being taken from their own source of supply, and that such taking tended to exhaust the supply; that it was carried away for use outside the basin in a community depending thereon, and which, we may presume, had settled and established itself there in reliance upon the continuance of that supply (Crescent Canal Co. v. Montgomery, supra); that great expense in the meantime had been incurred in maintaining the supply and the works necessary for its distribution; and that, so knowing, they stood by for at least nine years after the well boring had begun, and, by their own admission, two years after it was completed, and uttered no word of complaint or protest. The injunction against this defendant was properly refused on this ground.

The decision in Katz v. Walkinshaw was rendered, and the previous cases on the subject of percolating waters thereby overruled, because of our conviction that the doctrine that the owner of the soil was the absolute owner of the waters percolating therein, and could extract the same at will, regardless of the effect on other lands, is unsuited to our conditions, and would constantly tend to produce injustice and render insecure the title to water supplies devoted to beneficial use. The doctrine of correlative rights in such waters, declared in that case, was adopted because it was deemed necessary for the protection of present and future uses of such waters against the unreasonable and remediless invasions that would be allowable under the doctrine of absolute and irresponsible ownership. It was perceived that the decision would be regarded as an innovation, and that it might cause suits to be begun to prevent the continuance of uses of such waters previously made. While adhering to, and fully approving, the doctrine announced in Katz v. Walkinshaw, especially in respect to uses of percolating water having their beginning after that decision was made, we desire to say that a clear case must be made to justify an injunction to prevent a continuance of the beneficial use of such waters, begun in good faith before that decision, and which was in full operation at that time, which is the condition presented by the case at bar. This action was begun only a few months after that decision became final.

2. The wells of the Riverside Highland Water Company are of more recent construction, and perhaps, as to some of them, there may be no laches or estoppel against the plaintiffs. But the injunction against this company was properly refused on still another ground. It is established by the evidence that the said defendant had originally obtained the water solely by means of artesian wells; that, for ten years or more before the action was begun, it had been maintaining such wells in the northwestern part of the basin, several miles distant from the new wells here complained of, and that from said wells defendant had obtained a flow of about 400 inches of water, which it had been continuously transporting to places of use outside the basin, distributing the same to its customers, and that by this means large and valuable improvements had been

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made in the territory to which this water had been conducted. It had gained the undisputed right to take the water by this means and to this place. From the causes heretofore mentioned its wells began to fail, and the new wells complained of were thereupon sunk in the same basin, solely for the purpose of obtaining enough water, in connection with its old wells, to keep up its former supply to its former customers. The new wells take from the same supply as the old ones, and the total amount taken has not been and is not to be increased. They constitute a mere change of the place of diversion, without injury to others. In the case of running streams, the right to make such a change is well settled, and it is clearly just. Ramelli v. Irish, 96 Cal. 217, 31 Pac. 41; Davis v. Gale, 32 Cal. 34, 91 Am. Dec. 554; Jacobs v. Lorenz, 98 Cal. 340, 33 Pac. 119; Smith v. Corbit, 116 Cal. 592, 48 Pac. 725. The rule is the same with regard to underground streams. Vineland Irrig. Dist. v. Azusa Irrigating Co. 126 Cal. 495, 46 L.R.A. 820, 58 Pac. 1057. We think the reasons of the rule apply with equal, if not greater, force to one having a right to take a definite quantity of water from a basin of permeable material saturated with water, and not composing part of any stream, conceding this basin to be of that character, as plaintiffs claim, and that said defendant is accordingly acting within its established rights in maintaining these new wells.

3. The same observations apply to the West Riverside 350-Inch Water Company. This company is not, strictly speaking, a public-service corporation, delivering water to a public use. It is engaged in procuring 350 inches of water for its stockholders, and delivering it only to stockholders, in proportion to their respective amounts of stock, for use on their respective tracts of land. See McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. 397, and Hildreth v. Montecito Creek Water Co. 139 Cal. 29, 72 Pac. 395. It obtains the 350 inches of water from the region immediately below the dike above mentioned, where, as plaintiffs claim, the overflow from the basin saturates the sandy soil composing what is really the bed or wash of the Santa Ana river. Originally this company obtained the water by means of open cuts in the wash, beginning at the surface and running up stream on a less grade than the surface of the ground, reaching a depth of some 10 or 12 feet at the upper ends; the waters in the soil being thereby collected and conducted into its canal. Because of the prolonged drought and diversions from the water supply, above mentioned, the water level lowered so that the cuts no longer collected the amount of 350 inches required by its stockholders. Thereupon the company sunk wells in the wash, and inserted therein pumps, by means whereof it obtained the requisite quantity of water, obviously from the same source of supply. There is no pressure upon the water in these wells. During the dry season the pumping lowers the water level at the pumps about 25 feet below the natural level. How far the cones of depression extend in the sandy soil at such times does not appear, but during the rainy season the former level is restored. The land of the nearest plaintiff is over a mile away, and not directly in the course of the wash. It is at least doubtful if the wells of this defendant affect the water in his land, but, conceding that they do diminish his supply, and that of some other of the plaintiffs, they cannot complain of the action of this defendant in simply adopting different means of collecting the water to which it had, by means of long use, acquired an undoubted right. The evidence shows that it had been diverting the water from this wash continuously for a period of at least fifteen years before the beginning of the action, and that its right to do so by means of its cuts and trenches was not disputed. Its right to the water being thus established, it had a clear right, upon the principles heretofore stated, to continue to divert the water by changing its method of obtaining it.

The judgment is affirmed.

We concur: Angellotti, J.; Sloss, J.; Henshaw, J.; Melvin, J.; Lorigan, J.

SOUTH DAKOTA SUPREME COURT.

PATRICK B. McCARTHY, Appt.,
v.
FIRST NATIONAL BANK OF RAPID CITY, Respt.

(— S. D. —, 121 N. W. 853.)

Usury — national bank — penalty.

Under the provision in the Federal statutes for recovery of a penalty against a national bank to which usury is paid if the action is brought within two years from the time the usurious transaction occurs, the limitation period begins to run from the time money is applied with the knowledge and consent of the borrower, in satisfaction of usurious interest; and it is not necessary that the payments should have been sufficient to satisfy the original loan, with legal interest.

(May 21, 1909.)

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APPEAL by plaintiff from a judgment of the Circuit Court for Pennington County in defendant's favor and from an order denying a new trial in an action brought to recover statutory penalties for the acceptance of usurious interest. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles W. Brown** and **Schrader & Lewis** for appellant.

Messrs. **Buell & Gardner** for respondent.

Whiting, J., delivered the opinion of the court:

This cause comes before this court upon an appeal from the judgment of the circuit court and from the order of said court denying a new trial. The action was one brought by the plaintiff and appellant, Patrick B. McCarthy, against the defendant and respondent, First National Bank of Rapid City, to recover penalties in the sum of $7,605.48, being twice the amount of usurious interest which plaintiff claims he paid to the defendant, and that defendant received, in violation of §§ 5197 and 5198 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 3493). For the purposes of this appeal, the following facts may be taken as established: In August, 1887, plaintiff borrowed of defendant $4,000, evidenced by four promissory notes of $1,000 each, payable three, six, nine, and twelve months after date, with interest on each note at 18 per cent per annum until paid. These notes were extended until August 7, 1888, when a new note in the sum of $4,000 was given by plaintiff, his wife, and one other party. This note was due in ninety days, with interest at 18 per cent per annum. Considerable interest upon this note was paid, but no part of the principal, and on May 22, 1889, a new note was given, signed by plaintiff, his wife, and a third party, which said note was for $5,000, due in one year, bearing interest at 12 per cent per annum. Nine hundred dollars was paid and indorsed as interest upon this note, and on July 22, 1891, a new note of $5,000 was given by plaintiff and his wife, the same due in six months, bearing interest at 12 per cent per annum. This last note was secured by a mortgage upon real estate belonging to the makers. It is admitted that the only consideration for this last note was the original $4,000 loaned to plaintiff, together with certain usurious interest upon such original loan. It is admitted that the plaintiff made a large number of payments, dating from February 8, 1892, down to January 2, 1896, upon this note, all of which payments were indorsed upon said note as interest, and upon February 17, 1896, the plaintiff and his wife gave to defendant two notes in renewal, one for $5,000, due in four months, with 12 per cent interest, the other for $675.50, due in thirty days, with 12 per cent interest; this last note purporting to be interest upon the note of July 22, 1891. Payments as and for interest were made upon the last $5,000 note; the last payment being made on or before January 1, 1897. It is alleged and admitted that the total payments by way of interest, and which were by the defendants applied as interest, upon the several notes, aggregated the sum of $3,802.74, for twice which the plaintiff brought this action. On January 25, 1897, the defendant in this action commenced an action against the plaintiff and his wife for the foreclosure of the mortgage securing the above-mentioned notes, and to recover the amount due by the terms of said mortgage and notes thereby secured. The plaintiff herein appeared as defendant in said action, set up the facts hereinbefore stated in regard to the usurious interest on the original notes, and prayed that said mortgage and notes be adjudged to be usurious and be purged of the usury therein. Such proceedings were afterwards had that, in May, 1901, judgment was rendered in the trial court in favor of the defendant in this action, and against the plaintiff herein and his wife, whereby it was held that the said bank could recover the full amount apparently due under said notes. From this judgment the present plaintiff appealed, and this court, in the case of First Nat. Bank v. McCarthy, 18 S. D. 218, 100 N. W. 14, modified the judgment of the trial court, holding that, under said evidence, it appeared that the said indebtedness

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Note. — The authorities passing upon the question as to when the statute of limitations begins to run against an action to recover the penalty from a national bank for taking usury are gathered in a subdivision of the subject note to Citizens' Nat. Bank v. Gentry, 56 L.R.A. 673. A search shows that this note, supplemented by the exhaustive treatment of the cases by the court in McCARTHY v. FIRST NAT. BANK, disposes of all but one of the cases passing upon the question.

The case of Daingerfield Nat. Bank v. Ragland, 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536, included in the note in 56 L.R.A., was followed in Lasater v. First Nat. Bank (Tex. Civ. App.) 72 S. W. 1054, reversed upon other grounds in 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. Rep. 206. The entire principal and interest had been paid in this case, and it was held that the "usurious transaction occurred," in contemplation of the statute, when the interest was paid; and as it appeared that the first instalment had been paid more than two years prior to the commencement of suit, the right to recover on this payment was held to be barred.

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evidenced by the notes sued upon was usurious in all sums exceeding the original $4,000, and ordered that judgment be entered for said $4,000, together with certain sums which the bank had paid for and on account of taxes on the land described in the mortgage. Judgment in conformity with the opinion of this court having been entered, it was alleged in the complaint in this action that, on January 21, 1905, the plaintiff paid to the clerk of the circuit court the said judgment in full, and on said day said judgment was duly satisfied and discharged of record. This action was commenced January 25, 1905. Prior to the trial below, upon motion of the defendant, the paragraph relating to the payment of said judgment was stricken out, and, upon trial, the plaintiff sought to offer proof of the fact of the payment of such judgment, which proof was rejected, and also asked to have the allegations concerning payment of the said judgment reinstated in the complaint, so that proof of the same might be received, and this request to amend was refused. It is the theory of the plaintiff and appellant that, inasmuch as the total amount of payments prior to the rendition of the judgment above referred to did not amount to the original loan of $4,000, until such judgment was paid, no cause of action arose in plaintiff's favor against the defendant for the penalties provided by § 5198, above referred to. It is the theory and claim of the defense that, at the time any payment was made by plaintiff on any of said notes as interest, and so appropriated and applied by the defendant, that immediately a cause of action for the penalty provided by said § 5198 accrued, and that the statute of limitations provided by said section commenced to run. In fact, in their briefs, both parties admitted, there being no dispute as to the facts, the sole question was whether or not the plaintiff's cause of action to recover the penalty claimed in his complaint is barred under and by virtue of the provisions of § 5198 of the Revised Statutes of the United States.

The Revised Statutes of the United States provide: Section 5197: "Any association may take, receive, reserve, and charge on any loan or discount made or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more. . . ." Section 5198: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. . . . " This cause has been very fully briefed on behalf of each party, and a large number of authorities have been cited, and the briefs contain extensive quotations from the holdings of the several courts, both Federal and state; and, while a reading of the two sections of the Federal statute above referred to might not at first awaken any doubt as to the meaning of the several parts thereof, yet a reading of the cases cited apparently presents for consideration an irreconcilable conflict of opinion as to the legal effect of such sections. We believe, however, that a thorough study of these cases, together with the facts in each case, will show, with possibly one or two exceptions, that there is no real conflict upon the construction which should be given to these sections as applied to the facts in this case. In reviewing and analyzing many of the decisions, as we shall do herein, it will be found that many of the cases cited in support of appellant's contention are based upon some previous rulings in these or other cases, which rulings will be found not to support the position claimed for them. In view of the importance of the question herein involved, and the apparent conflict between the opinions of courts of very highest rank, we deem ourselves justified in a somewhat extended consideration of this case.

It will be noticed that there are two entirely different parts to § 5198, supra,—the first provides for forfeiture of all interest unpaid when usury has been contracted for and such usury enters into the note or the consideration for such note; the second provides for an action to recover as a penalty double all interest paid, whenever such interest so paid is in part usurious. The courts uniformly hold that, under the first, a debtor can defend against the paying of any interest, either legal or usurious; while, on the other hand, if, in fact, he has made any payment or payments on interest, even to the extent of paying usurious interest, he cannot plead such payment either as a credit on the principal or as an offset or counterclaim to the principal, but his only remedy for such usury paid is found in the second part of said section, and consists solely in his right, in a separate suit brought under the second part of said section, to recover the penalty therein provided for. In

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other words, that the common-law remedy by a suit or counterclaim for money had and received will not lie. Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129; Haseltine v. Central Nat. Bank, 183 U. S. 132, 46 L. ed. 118, 22 Sup. Ct. Rep. 50; Driesbach v. National Bank, 104 U. S. 52, 26 L. ed. 658; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Walsh v. Mayer, 111 U. S. 31, 28 L. ed. 338, 4 Sup. Ct. Rep. 260; Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336. We call particular attention to the above propositions, as they seem to us very material upon the construction to be placed on this question of when the statute of limitations begins to run, and these holdings will be hereinafter referred to. The courts also uniformly hold that the including of interest in a renewal note is not a payment of such interest, so as to entitle maker to sue for the penalty provided for payment. Neither is the deduction of a discount from the amount of the note, taken at the time of giving the note, a payment of such discount, so as to authorize a suit for the penalty providing the amount of the discount is usurious. Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; Driesbach v. National Bank, supra; Louisville Trust Co. v. Kentucky Nat. Bank (C. C.) 102 Fed. 442; McBroom v. Scottish Mortg. & Land Invest. Co. 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852; Harvey v. National L. Ins. Co. 60 Vt. 209, 14 Ati. 7; First Nat. Bank v. McInturff, 3 Kan. App. 536, 43 Pac. 839. These cases are based upon the theory that the mere reserving of a discount or the including of accrued usurious interest in a renewal note, while it may be the "reserving or charging" of usury, it is not the "paying" of same.

Where the authorities divide is upon the question of whether, when the maker of a note has paid money thereon which the payee, with maker's knowledge and consent, has applied in payment of usurious interest, a cause of action at once arises for the penalty provided by § 5198, regardless of whether the principal debt has been paid, or whether, on the other hand, no such action arises on behalf of the maker of such note until he has made payment thereon in excess of the original debt and legal interest thereon. The respondents take the first position and the appellants the latter, and a determination of this point determines this cause. We think that many of the cases upholding the latter position have erred through not making a careful distinction between cases where payments had been made, which payments had been applied upon usurious interest with the knowledge and consent of the debtor, and cases where such application had been made or attempted to have been made by the creditor without the consent of the debtor. A distinction between the two classes of cases will be noted as running throughout many of the decisions hereinafter referred to. Those cases which uphold the appellant's contention are founded upon the theory that, although the payee may have applied money upon usurious interest, yet, no matter how long the indebtedness may have run, and no matter how many such applications there may have been, and no matter how many renewals had been made by the giving of new notes for amounts greater than would be due if only legal interest had been charged on the prior notes during all this time, which may extend one or even ten years, the doctrine of *locus pœnitentiæ* will be held to apply on behalf of the payee up to such time as he takes a payment which, with all other payments received, exceeds the amount of the original debt and legal interest; the courts holding that, up to that time, the payee had an election,—he might repent and reapply all the payments, charging only legal interest. The cases supporting respondent's position hold that, while the payee, after contracting to take, receive, or charge an usurious interest, has, at all times, before applying a payment, the benefit of the doctrine of *locus pœnitentiæ*, yet, if he does actually make the application of a payment to the payment of usurious interest, his election, as against him, is final, and he becomes at once liable for the penalty. And, furthermore, if, when such payment is made and applied, such application is with the consent of the debtor, the maker of the note, then, as against his right of action to recover, the statute immediately commences to run.

It is true there are some early cases brought for the recovery of usurious interest under different statutes, which have held that an equitable rule should apply, and the debtor should not be entitled to recover a penalty until he has done equity by paying the debt with legal interest in full; but we fail to see wherein any equitable question can arise in this class of cases. These statutes were enacted for the purpose of preventing the taking of usurious interest, and to punish the creditor for contracting for the receiving of usury. There certainly is no question of equity, as ordinarily understood, in any statute providing for penalty, forfeiture, or punishment. On the other hand, what the debtor is entitled to recover by way of penalty or to avoid by way of forfeiture is nothing to which he is equitably entitled, but is based more on the principle underlying the rule of punitive damages.

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It is not to recover simply what he has suffered, but, at the same time, to punish the creditor for wrongdoing. Neither does it seem to us that there is either reason or logic in attempting to apply the rule of *locus pœnitentiæ* to any case where a party has made an absolute application of money received by him, and continued his business transactions with the party making the payment, upon the basis of such application. Of course, all laws against usury are based upon the idea that the contracting for or taking of the same is a wrong. It might as well be said that the embezzler, after converting the thing embezzled, or the thief, after taking the thing stolen, when the converting and taking had been with criminal intent, still has the *locus pœnitentiæ*, and can purge his soul of the crime. As we have noted above, the courts are unanimous in holding that, under this statute, the maker of a note, when sued thereon, cannot plead the payments of usury either as a credit on the note or as a counterclaim or offset. So in the case at bar; when the plaintiffs were sued on the notes herein, they could not plead in any manner, as a defense to the principal of said note, any part of the large sum which they had paid as interest. Why was this? Because they were payments which had, by the act of both parties, already been applied on usury. It may well then be asked, Can these payments be held to have been such payments for one purpose, to wit, to prevent the debtor from receiving a credit therefor, while, on the other hand, the law be allowed to step in and relieve the payee who has made this application, and say to him, "You have done no wrong for which you can be holden, because, perchance, the debtor has been unable to pay the debt." In considering any interpretation to be put on the section in question, it is well to bear in mind two other propositions sustained by the courts. The penalty to be recovered is twice all the interest that has been paid, not merely twice the excess which has been paid above legal interest. First Nat. Bank v. Watt, 184 U. S. 151, 46 L. ed. 475, 22 Sup. Ct. Rep. 457; Louisville Trust Co. v. Kentucky Nat. Bank (C. C.) 87 Fed. 143. The action for the penalty can only be brought by the party who made the payment or by his representatives. Lealos v. Union Nat. Bank, 9 N. D. 60, 81 N. W. 56.

Let us consider briefly the results which might flow from the enforcement of the rule contended for by the appellants. A party giving a note makes numerous payments, which have been applied upon usurious interest with his consent. This note is secured on real estate. He sells the land, and the purchaser assumes the indebtedness, and then pays the note. Who would have a right to recover for the penalty? A debtor and creditor, having had usurious dealings for several years, reach an adjustment of the balance which they consider should be paid by the debtor, and which balance could only be reached by crediting some other previous payment upon usurious interest. A new note is given upon this settlement, which new note draws legal interest. The debtor pays this conventional interest for more than two years, but no part of the principal. The conventional interest is the extreme legal interest allowed by statute. The debtor sues to recover the penalty provided by the Federal statute. Under appellant's contention he cannot recover; but, while the result reached is just and right, the reason upon which the same is based is not because whatever wrong has been done by the creditor is barred by the statute, but rather upon the ground that the creditor has yet a chance to repent of the wrong done years before, and the appellants would hold that if, on repenting, he afterwards receives the principal of this new note, he will render himself liable to an action for the penalty; though perchance, if, at the time he took the usury, he had stolen debtor's horse or committed any other crime except murder, not only the limitations as to time for criminal prosecutions would have run, but the regular six-year statute fixing the time within which actions for damages might be brought may have run. A party gives a note under exactly the same conditions as last above mentioned, and, after paying conventional interest for one or more years to his creditor, a national bank, such bank then assigns the note to a party, not a national bank, and the debtor continues to pay the conventional rate of interest, but no part of the principal. Under appellant's theory no recovery could be had. Neither could there be under respondent's theory. But, suppose debtor finally pays the principal; then, under appellant's theory, if the note had not been assigned, the payee would be liable for the penalty. Under the facts as stated, where there had been an assignment of the note, who would be liable? Instead of the above case, where a settlement had been attempted to be made so that the new contract should be fair and without usury, take a case where a note is given for $1,000, and $100 discount is deducted, $900 being paid to the debtor, and such note drawing 12 per cent interest. Here we have usury in the new contract. Then, letting the facts as to the payment of interest and principal and as to the assignment of the note be as in the illustrations above given, it will be found that the results will be exactly the same on appellant's theory while

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the moral wrong is entirely different; but under respondent's theory, the remedy would in each case fit the wrong. Suppose a case where the note is given for the exact amount loaned, but the note provides for a usurious rate of interest; such interest is paid from year to year with the knowledge and consent of the debtor, and settlement made on that basis, but such payments never amounted to the principal of the note. This is practically the case at bar, except that we will suppose the payments of interest as made were part, at least, within two years of the time debtor seeks to recover. The debtor, under appellant's theory, cannot recover, and there will never come a time within which he can recover unless he shall pay enough to amount to the principal, together with perhaps hundreds of dollars of legal interest. He has absolutely no remedy against the party who has crushed him, but who still perchance holds a debt against him as large as the original loan; but, if he can raise enough money to pay even one dollar more, and this, with what he did pay before, should exceed such principal and legal interest, then immediately he shall have a cause of action, not for this excess over the principal and legal interest, which, in this case, would be less than a dollar, but for twice all the interest he has ever paid, no matter whether for two or twenty years in the past, which penalty might amount to more than the principal of the debt. Many further illustrations might be given, but the above we think are sufficient to show, not only the injustice of appellant's position, but the unsoundness from a legal point of view.

Nevertheless there are authorities that apparently hold squarely to the theory contended for by appellants, and other authorities which have been so construed by some courts and are so construed by the appellants. We will call attention to each and every one of the cases cited by appellant. An examination of the four cases below will show that neither of them is in any manner in point as sustaining appellant's position. First Nat. Bank v. Childs, 130 Mass. 519, 39 Am. Rep. 474; Hall v. First Nat. Bank, 30 Neb. 99, 46 N. W. 151; Talbot v. First Nat. Bank, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; Wheaton v. Hibbard, 20 Johns. 290, 11 Am. Dec. 284. The case of Smith v. Robinson, 10 Allen, 130, was based upon a state statute, and was a suit in equity to redeem land from foreclosure. The party seeking to redeem had asked credit for three times the amount of usury included in the face of the note secured by the mortgage. There was no evidence that this usurious interest had ever in fact been paid. It will thus be seen that that case has no application to the facts in the case at bar, where payments had actually been made, and, by mutual consent, applied in settlement of the usurious interest. In Saunders v. Lambert, 7 Gray, 484, there was no application of the money paid to any usurious interest. Stevens v. Lincoln, 7 Met. 525, merely decided that including usury in the note or check is not a payment of such usury. Harvey v. National L. Ins. Co. 60 Vt. 209, 14 Atl. 7, virtually held that the taking of usury as a discount at the time the note is given is not a payment of usury. Kendall v. Crouch, 88 Ky. 199, 11 S. W. 587, was a case in which usury was included in a renewal note, and it was held not to be a payment of usury. Cotton States Bldg. Co. v. Peightal, 28 Tex. Civ. App. 575, 67 S. W. 524, is not a national bank case, and is controlled by rulings of the state court, whereby all usurious interest is applied on principal, and the penalty is only imposed where amount paid exceeds principal and interest. Louisville Trust Co. v. Kentucky Nat. Bank (C. C.) 87 Fed. 143, holds the same as Kendall v. Crouch, supra, and this holding is approved in the same case in 102 Fed. 442, in which case the court hold flatly with the contention of respondent herein. After reciting the facts, which are very similar to the facts in this case, wherein it is shown that there had been a long course of usurious transactions between the parties, and which at last finally culminated in the giving of $30,000 in settlement, and after referring to the statutes of Kentucky under which the court held the money which had been paid prior to the giving of this note would have necessarily been applied on the interest even if usurious, the court says: "All interest, whether excessive or otherwise, which had been charged by the defendant up to the giving of that note, under the stress of the statutory provisions last referred to, must probably be considered as having been 'extinguished' by the payment then made; and, if this be so, the statute of limitations as to this phase of the case began to run as of that date, which was more than two years before this action was brought. But, apart from the provision of the Kentucky statute just quoted, and whatever weight it may be entitled to, it would be difficult either to reach or to sustain any other conclusion than that it was intended, alike by the defendant and by Thomas & Son, that everything, including interest, usury, as such, and a large amount of principal, was settled at that date, except the $30,000 note then given. Thomas & Son were always in need of money. They borrowed it. They voluntarily paid the excessive interest. They manifested no elec-

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tion to reclaim it at the time of the settlement of July 8, 1893, and no other conclusion could be fair than that it was meant upon that occasion to extinguish every obligation of the defendant and of Thomas & Son, respectively, except that of the latter to pay to the bank $30,000, as provided for in the note of that date."

The case of First Nat. Bank v. McInturff, 3 Kan. App. 536, 43 Pac. 839, holds directly with the appellant in this case, and bases its holding, not upon the doctrine of *locus pœnitentiæ*, but the court says: "It is contended by the defendant in error that the record discloses that the bank treated each of the renewal notes as a payment of the note formerly given, and that, therefore, he was entitled to recover upon each of said notes so treated by the bank as having been paid. This position is not well taken. Each of the notes given after the maturity of the original note of this series was simply a renewal, and was so treated by all parties. Any payment which may have been made upon either the original or either of the renewals of this series would, in an action brought upon said note, be credited as payment upon the principal sum; all interest being forfeited in the event that it was shown that the transaction was tainted with usury. But a cause of action would not arise for the penalty prescribed by statute until a sufficient amount had been paid to cover the principal sum represented by said series of notes. First Nat. Bank v. Turner, 3 Kan. App. 352, 42 Pac. 936." There is no other discussion as to the reason for this holding, and upon examination of the case cited (3 Kan. App. 352, 42 Pac. 936) there is the bare holding that the statute does not run until the principal debt is paid. There is no discussion whatever as to the reasons for this holding, and the only authority cited in support is the case of First Nat. Bank v. Grimes, also a Kansas case, found in 49 Kan. 219, 30 Pac. 474. Upon an examination of First Nat. Bank v. Grimes, it will be found that the only question involved in the determination of that case was whether the following charge of the trial court to the jury was correct: "If you should find from the evidence in this case that the original note was renewed from time to time without making a new and separate contract, and that usurious interest was embraced in such renewal notes, then you are instructed that the mere renewal of the original note would not purge the transaction of usury if you should in fact find that there was usury in the original note." This instruction was certainly correct law, and in no way inconsistent with respondent's contention in this case. We therefore find upon analysis that the Kansas cases have neither weight in reasoning nor from the authorities which they cite. In passing, we would state that this case of First Nat. Bank v. Grimes refers extensively to the case of Driesbach v. National Bank, supra, as holding that the penalty provided for the taking of usury cannot extinguish or affect the principal, but that the remedy for same must be enforced as the statute prescribed. As we have before noted, this is the uniform holding of the courts, and it is readily seen that it is entirely inconsistent with the theory that, regardless of the acts of the parties, the courts can apply all payments to legal interest and principal, although the parties have agreed upon a usurious interest. If, in any case, the court, regardless of the acts of the parties, has a right to so apply the payments, then it should apply them at all times, in that manner crediting all payments above legal interest upon the principal of the note wherever the facts are as in the Driesbach Case.

Appellant cites the case of Scottish Mortg. & Land Invest. Co. v. McBroom, 6 N. M. 573, 30 Pac. 859, as well as the same case in 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852, and, inasmuch as it is the different constructions put upon this last case which have led to the apparent doubt as to what the law of the Federal courts is, it is well to consider the same to some length. In the territorial court the statement of facts shows that a loan was made and note given for $65,000, but a discount of $6,500 was taken out and the balance paid over to the maker of the note. The real question involved in this case was whether or not the reservation of such $6,500 was a payment of usury when so reserved, under which the maker of the note could sue and recover penalty provided by the statutes of the territory. It appears that such statutes provided as a penalty the recovery of three times the excess of the money paid over the legal interest. It will thus be seen that the real question involved in the case at bar was not to be found in the McBroom Case. There can be no question under the authorities that the reservation of this discount did not amount to a payment, but the trouble which has arisen over this case is from the fact that the court went into a long review of the history of the laws against usury, referring to the doctrine of *locus pœnitentiæ*, and concluding that there can be no recovery of penalty until more than the principal and legal interest have been paid, although, as is readily seen, this question was in no manner before the court, and that, therefore, what was said by the court on that point was mere *obiter dictum* in the McBroom Case.

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In this case, both in the territorial and Federal courts, there will be found cited as authority the following cases: Stevens v. Lincoln, 7 Met. 525; Saunders v. Lambert, 7 Gray, 484; Harvey v. National L. Ins. Co. 60 Vt. 209, 14 Atl. 7; Hall v. First Nat. Bank, 30 Neb. 99, 46 N. W. 151; Brown v. Second Nat. Bank, 72 Pa. 209; Kearney v. First Nat. Bank, 129 Pa. 577, 18 Atl. 598; Neal v. Rouse, 93 Ky. 151, 19 S. W. 171. We have already reviewed the first three cases above mentioned; and, as regards the others, we can only say that, if there is anything in any of one of them that seems capable of such a construction as would uphold the *dictum* in the McBroom Case, it will be found that every one of such cases, if susceptible of such construction, has been reversed by the later decisions of the same courts, holding flatly with the respondent herein. First Nat. Bank v. Smith, 36 Neb. 199, 54 N. W. 255; Monongahela Nat. Bank v. Overholt, 96 Pa. 327; Louisville Trust Co. v. Kentucky Nat. Bank (C. C.) 102 Fed. 442; Second Nat. Bank v. Fitzpatrick, 111 Ky. 228, 62 L.R.A. 599, 63 S. W. 459. It will thus be seen that there is no support in the authorities cited for the *obiter dictum* found in the McBroom Case in both courts. In the Federal court in the McBroom Case, the court cites the case of Wright v. Laing, 3 Barn. & C. 165–168, and it would seem that a careful consideration of this authority, accepting its reasoning as sound, would be sufficient to destroy the contention of appellant, even if, in the McBroom decision, there can be found anything which would indicate that the court rendering it would have held with the appellant under the facts in this case. The following is from such quotation: "None of the payments were appropriated by either party at the times of payment. If the law ought now to make such an appropriation as the pleader has supposed in this count, the count will be sustained by the proof; otherwise not. . . . Because, peradventure, the lender might repent the illegal bargain, and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of usurious interest without clear evidence that he had not only bargained to receive, but had actually received, such interest." These two quotations contain exactly the legal propositions contended for by respondent herein as we understand its position. We cannot therefore see wherein it can be claimed that the McBroom Case in any way supports the appellant. The case of Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895, holds directly with the appellant, but bases its holding solely upon the interpretation which it claims the United States Supreme Court had put upon the statute in the McBroom Case, and the court also claims that, in their view, the case of Brown v. Marion Nat. Bank, to which we will hereafter refer, is in no manner conflicting with their interpretation of the McBroom Case, and it concludes by saying that its consideration of the statute is based upon the position taken by courts of equity under the statute of 12 Anne. In the case of First Nat. Bank v. Denson, 115 Ala. 650, 22 So. 518, we have facts exactly similar to those in the case at bar, and the court holds flatly with the appellant. This case also cites for its authority the McBroom Case and the case of Duncan v. First Nat. Bank, Fed. Cas. No. 4,135, to which latter case we do not have access, and cannot ascertain the facts therein except as they appear in the quotation from the judge's charge, found in appellant's brief. From this quotation it would appear that the legal proposition laid down is as contended for by appellants, but it does not appear that the facts were such as to require the court to go to the extent it did. The only usurious transaction clearly shown to have occurred over two years before the action was brought was the reserving of a discount when the loan was originally made, which we have already seen was not a payment of usury. The facts, as stated, do not show whether or not there was any payment of usury more than two years before such action was brought.

We have now reviewed every authority cited by the appellants, and we think that an analysis of the same will show either a decision given when the matter passed upon was not in issue, or else a decision which was based upon some other authority that does not support the position taken by the court citing same.

We will now consider the cases in support of the respondent's position. First of these, the case of Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390, in which the decision was rendered by Justice Harlan, who also wrote the decision in the McBroom Case. This case of Brown v. Marion Nat. Bank we find frequently referred to, and the courts seem in great conflict as to what Justice Harlan meant by what he said. It would seem that there is no chance for quibble. In one place he says: "The words, 'in case the greater rate of interest has been paid,' in § 5198, refer to interest actually paid, as distinguished from interest included in the note and only 'agreed to be paid.' If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount, to be paid in one year, at 10

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per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower, each renewal note including past interest, legal and usurious, the sum included in the last note in excess of the sum originally loaned would be interest which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid. It is difficult to tell from the record when there were actual payments of usurious interest as such. Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. . . . If at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter." From the above quotation it seems clear that Justice Harlan could not have had in mind the fact that the statute of limitations would not commence to run until more than the principal debt had been paid, and that he did have in mind the fact that there was such a thing as the payment of interest which would become a payment for all purposes, including the creating of a cause of action in favor of the debtor, and which would start the running of the statute. In the case of Smith v. First Nat. Bank, 70 App. Div. 376, 75 N. Y. Supp. 131, the court says: "The confusion which has arisen over the question as to when the statute of limitations commences to run upon payments of excessive interest in contravention of the section referred to is attributable in a large measure in failing to distinguish between an actual payment and one that is carried along with the principal indebtedness." It then refers to the McBroom Case and analyzes it must as we have above, showing that the question before them was not in the McBroom Case, that that was a case of money paid by the plaintiff, and, in referring to the facts in the case before them, the New York court says: "When the payment of interest or discount was made, that transaction was completed, and the defendant had no election after that to apply this in reduction of the note. That principle only applies where the discount is added to the note." And the New York case refers to the case of Brown v. Marion Nat. Bank, supra, stating that Justice Harlan, in such case, recognized the distinction that they have made, and shows that to be true by quoting from the Brown Case the two quotations we have given above.

In the case of Lynch v. Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520, the court quotes an instruction that was asked for by the defendant in the trial court, and states that the following was the correct rule of law: "If the jury believe from the evidence that a greater rate of interest than the rate of 6 per centum per annum was paid by the plaintiff to the defendant on the several loans described in the declaration, and that such greater rate of interest was knowingly received by the defendant upon such loans and discounts, the plaintiff in this action is entitled to recover twice the amount of such interest so paid by the plaintiff to the defendant within two years prior to the commencement of this suit. The jury cannot find for the plaintiff the amount of any interest or twice the amount of any interest which was not so paid within two years from the bringing of this suit upon the notes or renewals executed more than two years prior to the bringing of this suit." In the case of Monongahela Nat. Bank v. Overholt, 96 Pa. 327, the court says: "Upon the actual payment by the borrower and receipt of the illegal interest by the bank, the right of action accrues, and can be maintained, whether the debt has been paid or not. This cannot be more clearly expressed than in the words of the statute, and decisions under other statutes having little similarity to this do not warrant departure from the plain meaning of the remedial and punitory provision." And, again, the court says, in speaking of the remedy of the debtor: "He may recover back twice the amount of interest thus paid by action in the nature of debt, and this is akin to double or treble damages for injuries, allowed by certain statutes for the twofold purpose of compensation and example." In Lebanon Nat. Bank v. Karmany, 98 Pa. 65, the court, in referring to the question of election, or what we have termed the *locus pœnitentiæ*, says: "If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intendment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest when sued for the penalty to chop round and call it a credit on the principal would vitiate the vindicatory clause of the statute. In such case the taking would amount to nothing more than a contracting to receive. The statute inflicts twice the penalty for taking that it does for contracting." In the case of Citizens' Nat. Bank v. Forman (Citizens' Nat. Bank v. Gentry) 111 Ky. 206, 56 L.R.A. 673, 63 S. W. 454, 757, we have a divided court; four sustaining the majority opinion and three dissenting. In the majority opinion are found these suggestive

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statements: "There being no appropriation of any part of this payment by the debtor to the payment of interest as such, the law will not presume an application of it to an illegal and void obligation; nor will it permit the creditor to make such an application." And, in construing the Federal decisions, this court uses these words: "In the Supreme Court decisions it seems to be recognized that usurious interest may be paid as such without the discharge of the entire obligation, including principal and interest, and that, if so paid, a cause of action will then arise for the penalty imposed for the actual taking of interest at the illegal rate." And the court cites Brown v. Marion Nat. Bank, supra, in support of the above proposition, and further cites the McBroom Case in support of the proposition that the creditor alone cannot make an application of payments of interest binding upon the debtor, and, in determining the cause before them, which was decided by the Kentucky court on the ground that no cause of action had yet arisen, they based their decision upon the following fact alone: "A careful examination of the evidence in this case shows that none of the payments were appropriated by the debtor to the discharge of the interest." In the dissenting opinion in this same case, found at page 224 of 111 Ky., the court, in speaking of the fact as shown, that payments had been made upon notes, and the new notes given in renewal for the balance due, wherein the amount of the new notes showed that usurious interest had been taken out of the payments that had been made, although there was no direct testimony by word of mouth that the debtor and creditor had in words agreed to such application of payments, the court says: "If Forman had walked into the bank on September 4th and said, 'I cannot pay you all of my note, but will pay the interest and all of the principal, except $2,431.66, and for that will execute a new note,' the effect of the transaction would have been just the same; for what is tacitly understood need never be expressed in words, and, where men by their conduct unmistakably say a thing, it is unnecessary that they should also go through the idle form of saying it in words. The interest that was included in the original note was charged, but not paid, when that note was given. It was paid, however, when that note was discharged and taken up, and a new note for a smaller amount executed." So in the case at bar, when we find the indorsements which appear on the back of the old notes showing the indorsement of interest paid at usurious rates, and these old notes taken up and new notes given in renewal, which new notes were for the amount remaining unpaid after allowing such usurious rates, it is certainly unnecessary to require any further proof that there was an application of the payments to usurious interest not only by the creditor, but also by the debtor. As was so well said by this same court: "The amount had been charged to Forman's account. It represented the interest on this money, and, if this was not a payment of interest, how can one ever be shown, unless the debtor puts the money in an envelop and indorses it, 'This money is paid on interest as such?'" And again: "Each usurious transaction is distinct, and must stand or fall alone. The purpose in limiting the action to two years from the time of each separate transaction complained of is to secure a speedy settlement of such matters while the facts are fresh or capable of proof, and to enable the banks to know their liabilities, so that they may intelligently declare dividends and carry on their other business. Whether usurious interest has been paid in any transaction is simply a question of fact, to be determined, like other similar questions of fact, according to the real intention of the parties, as shown by the evidence. The court is not to follow an abstract principle, and shut its eyes to the facts, when, under the evidence, there can be no difference of opinion as to what the parties actually intended among men of common intelligence acquainted with the business." The Kentucky court reiterated their views to the effect that, under the authorities, there can be such an application of payments of usurious interest by the parties thereto as to create a cause of action, in the case of Second Nat. Bank v. Fitzpatrick, 111 Ky. 228, 62 L.R.A. 599, 63 S. W. 459.

In the case of Citizens' Nat. Bank v. Donnell, 172 Mo. 384, 72 S. W. 925, the court holds that, as against the debtor, applications must be made upon the principal debt rather than on the unlawful interest, and that the burden is upon the bank in a case wherein it is contended that payments were applied upon interest, to show such application by the parties. In discussing the doctrine of *locus pœnitentiæ*, after referring at some considerable extent to different cases, all of which are cited by the appellants in their brief as supporting their doctrine of this case, they say: "Any such ruling would be in the face of the express provisions of the statute, and thwart its very purposes. It would be an inducement to national banks to charge usurious interest, and when compelled to sue upon its paper containing usury, and that defense is pleaded, simply say to the debtor, 'We will credit the amount of the usurious interest paid by

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you on the principal of your debt,' and thereby escape the penalty of the law. Certainly no such consequences were intended by it." This same case was appealed to the United States Supreme Court, opinion being found in 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49, wherein, in speaking of this same question of right of election, or, as otherwise termed, *locus pœnitentiæ*, the court says: "We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. Stat. § 5198, in absolute terms, by then declaring an election to remit the excessive interest." And certainly this proposition should not only apply to an action by a bank to collect on the note, but, on the other hand, it should also apply in theory against the creditor whenever he has made an application of payment on usurious interest and suit is brought for the penalty, and should apply also on behalf of the creditor as against the debtor whenever the debtor was a party to such application.

In closing we would cite First Nat. Bank v. Smith, 36 Neb. 199, 54 N. W. 254. In this case the plaintiff was contending the same as the plaintiff in the case at bar, that the cause of action did not arise until the principal debt was paid, and the court says: "If the interpretation for which plaintiff contends should be adopted, then it would follow that a suit to recover the penalty for taking usurious interest by a national bank cannot be maintained until the loan is fully paid off. Stated differently, one who has paid large sums of money as illegal interest on a loan, and is unable to pay the entire debt, is not entitled to the benefit of the section. Such was not the intention of Congress, nor is it the fair and reasonable import of the language of the section."

We are therefore satisfied that, under the facts in the case, there was a mutual application of many payments in satisfaction of usurious interest; that such mutual application was a usurious transaction as contemplated by the last part of § 5198, which transaction was complete the moment of such mutual application, whether it be at the time the payment was made or at the time of the renewal, when such payment was figured on interest; that, upon such mutual joint application, there arose a situation that does not admit of the doctrine of *locus pœnitentiæ;* and that, therefore, there is no election on behalf of either party, authorizing them to afterwards insist that the payments be applied to that part of the note which was legal; that, for the above reasons, the cause of action arises immediately when such mutual application is made, and the statute of limitations commences then to run.

The judgment of the Circuit Court and the order denying a new trial are affirmed.

KENTUCKY COURT OF APPEALS.

BIG SANDY & CUMBERLAND RAILROAD COMPANY, Appt.,
v.
SPICY BLANKENSHIP.

(— Ky. —, 118 S. W. 316,)

Damages — miscarriage — amount.

1. Five hundred dollars are not excessive damages to award a woman who suffers a miscarriage through the negligence of a carrier.

Same — pain and suffering.

2. The physical pain and distress of mind suffered by a woman who is caused to miscarry by a bodily injury inflicted by the negligence of another may properly be considered by the jury in awarding damages for the injury.

(April 21, 1909.)

Case Note. — Miscarriage as an element of damages.

The earlier cases upon this subject are collected and discussed in a note to Tunnicliffe v. Bay Cities Consol. R. Co. 32 L.R.A. 142, and this note is supplemental thereto. As is there stated, it has become fully established that damages for miscarriage resulting from any wrongful or negligent injury to a pregnant woman may be included in the recovery for the injury if the miscarriage was a direct effect of such injury. Many of the cases, without discussing the question whether a miscarriage is a proper element of damages, allow a recovery and treat it as merely a part of the personal injury. In many cases the fact that the injury did result in a miscarriage is mentioned as a part of the injuries merely in discussing the question whether the verdict was excessive or adequate. No attempt has been made to gather all of the cases in which a recovery was allowed for a miscarriage, but the note will be confined to those cases which expressly hold that it is a proper element of damages or in which it appears from the language of the court that a miscarriage must be considered as an element of damage, either by itself or in connection with other personal injuries. Cases in which a recovery for injuries resulting in a miscarriage caused by fright alone is denied have been excluded where the decision is based upon the doctrine that no recovery is allowable for any injuries due to fright alone. As to right to recover for physical injury resulting from fright caused by a wrongful act,

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APPEAL by defendant from a judgment of the Circuit Court for Pike County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Sheppard, Goodykoontz, & Scheu** and **A. E. Auxier**, for appellant:

Loss of child is not a recoverable damage.

Tunnicliffe v. Bay Cities Consol. R. Co. 102 Mich. 624, 32 L.R.A. 142, 61 N. W. 11; Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021.

No recovery can be had for impairment of health and suffering growing out of the death and premature birth of the child of a pregnant woman, by reason of injuries negligently inflicted.

Hawkins v. Front Street Cable R. Co. supra.

The miscarriage could not have been anticipated, and is the remote, and not proximate, result of defendant's negligence.

Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 783, 56 Am. St. Rep. 604, 45 N. E. 354.

Messrs. **P. B. Stratton, W. A. Daugherty**, and **Roscoe Vanover** for appellee.

O'Rear, J., delivered the opinion of the court:

Appellant is a common carrier, operating a railroad extending through Pike county,

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see notes to Huston v. Freemansburg, 3 L.R.A.(N.S.) 49, and Chittick v. Philadelphia Rapid Transit Co. 22 L.R.A.(N.S.) 1073.

In none of the recent cases has it been held that damages are not recoverable for a miscarriage, and in but few cases has the court apparently deemed it necessary to discuss the right.

Thus, in Witrak v. Nassau Electric R. Co. 52 App. Div. 234, 65 N. Y. Supp. 257, it was held that so far as a miscarriage or the delayed delivery of a stillborn child augments the mother's physical injury, pain, or suffering, so far is it proper to be considered on the question of damages.

And in Colorado Springs & I. R. Co. v. Nichols, 41 Colo. 272, 20 L.R.A.(N.S.) 215, 92 Pac. 691, it was held that a carrier by whose negligence a pregnant woman, who is its passenger, is thrown violently to the floor and injured, so that she suffers a miscarriage, cannot escape liability to her in damages for her injuries because they would not have occurred had she not been pregnant.

So, in St. Louis Southwestern R. Co. v. Ferguson, 26 Tex. Civ. App. 460, 64 S. W. 797, it was insisted that, without knowledge of the delicate condition of the woman, the degree of care imposed by law upon the railroad company was that due to all persons in the usual and ordinary physical condition, and not such as might have been due to one "in the light of attending circumstances;" but the court said: "Humanity is heir to many ills and distinctive conditions requiring notice and peculiar care, and those commonly and constantly engaged in their transportation for hire ought not to be heard to say, in excuse for their negligence, 'We were without notice of the fact.'"

As to whether the defendant ought to have anticipated the condition of the female plaintiff, the court said, in Kimberly v. Howland, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778: "It is true defendant did not know at the time he fired the blast, that the *feme* plaintiff was lying in bed in her home in a pregnant condition, but he or his agents knew it was a dwelling house and that in well-regulated families such conditions occasionally exist. While the defendant could not foresee the exact consequences of his act, he ought, in the exercise of ordinary care, to have known that he was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it."

So, in the following cases, a miscarriage was considered a proper element of damages, although in some of the cases it was so considered without discussion: Engle v. Simmons, 148 Ala. 92, 7 L.R.A.(N.S.) 96, 121 Am. St. Rep. 59, 41 So. 1023, 12 A. & E. Ann. Cas. 740; Thomas v. Gates, 126 Cal 1, 58 Pac. 315; Loomis v. Hollister, 75 Conn. 275, 53 Atl. 579; North Chicago Street R. Co. v. Shreve, 171 Ill. 438, 49 N. E. 534; Chicago v. Ogden, 227 Ill. 595, 81 N. E. 698; Chicago Union Traction Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816; Chicago v. Wieland, 139 Ill. App. 197; North Chicago Street R. Co. v. Smadraff, 89 Ill. App. 411, affirmed in 189 Ill. 155, 59 N. E. 527; Etzkorn v. Oelwein (Iowa) 120 N. W. 636; Louisville R. Co. v. Oppenheimer, 31 Ky. L. Rep. 1141, 104 S. W. 720; Berger v. St. Paul City R. Co. 95 Minn. 84, 103 N. W. 724; Finer v. Nichols, 122 Mo. App. 497, 99 S. W. 808; Hosty v. Moulton Water Co. (Mont.) 102 Pac. 568; Sparks v. North Tonawanda, 106 N. Y. Supp. 44; Vester v. Rhode Island Co. (R. I.) 67 Atl. 444; St. Louis Southwestern R. Co. v. Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891; El Paso Electric R. Co. v. Sierra (Tex. Civ. App.) 109 S. W. 986; Citizens' R. Co. v. Griffin (Tex. Civ. App.) 109 S. W. 999; Durham v. Spokane, 27 Wash. 615, 68 Pac. 383; McKeon v. Chicago, M. & St. P. R. Co. 94 Wis. 477, 35 L.R.A. 252, 59 Am. St. Rep. 909, 69 N. W. 175.

The following cases present somewhat unusual features:

In Birmingham R. Light & P. Co. v. Hinton (Ala.) 48 So. 546, where the plaintiff's intestate died from blood poisoning following a miscarriage, it was held that the railroad company was liable for the death if the miscarriage was the proximate result of its negligence.

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Kentucky. Appellee was a passenger on a train on appellant's road, and claims to have sustained injuries in a collision between its train and a log train being operated on the same road by a lessee or licensee of appellant. It was the same collision under consideration in the appeal of this appellant against Harriett Blankenship (this day decided), 118 S. W. 315. It was there held that appellant was liable for the negligence of the lessee where injury was thereby inflicted upon appellant's passenger. The additional questions presented in this case are: Did appellee receive the injuries for which she sues as the result of that collision, and did the trial court correctly submit to the jury elements of her injury for which the law allows a recovery?

Appellee claims that she was *enceinté*, being about four months advanced with child; that in the collision she was thrown upon her side and bruised and stunned, so that she was made sick and caused to abort. The evidence on her behalf was that in the collision she was thrown violently upon her side, causing her great pain, following the temporary stunning; that within a half hour afterward her menstruation reappeared, and for the first time since she had conceived, and that that evening she had violent pains in her abdomen, which she describes as "bearing down pains;" that these pains continued intermittently for some days, and she consulted a midwife with reference to them. Acting upon her advice, she remained as quiet as she could, hoping that the trouble

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In Sullivan v. Old Colony Street R. Co. 197 Mass. 512, 125 Am. St. Rep. 378, 83 N. E. 1091, it was held that the defendant's negligent act resulting in injuries to the plaintiff might be the proximate cause of a miscarriage, notwithstanding the fact that the child was conceived seven months after the injuries. The plaintiff's intervening act could not be deemed a voluntary intervening act, as the perpetuation of the human race cannot be termed a voluntary act, but it rests upon instincts and desires which are fundamentally imperative.

Where the evidence showed that the plaintiff had suffered a miscarriage immediately after the injury, and subsequently suffered a second, it was held, in Rapid Transit R. Co. v. Smith, 98 Tex. 553, 86 S. W. 322, that the court should have instructed the jury that evidence of the second miscarriage should be considered in determining the extent of the injury only, and not for the purpose of allowing specific damages for that miscarriage itself.

In Prescott v. Robinson, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. Rep. 987, 69 Atl. 522, it was held that damages for personal injuries to a pregnant woman may include compensation for mental suffering because of probable deformity of the child resulting from the injury, as well as for her disappointment at the birth of a deformed child, but not for regret because of the child's suffering on account of the deformity. In regard to allowing a recovery because of the probable deformity of the child, the court said: "If a fetus is deemed to constitute a part of the mother's person, an injury to it is plainly an injury to her, as much as an injury to her hand or arm would be. And it would seem to follow that she has as much right not to be harmed in the one respect as in the other."

Upon the general subject of mental anguish as an element of damages for personal injuries to a pregnant woman, see case note to Prescott v. Robinson, 17 L.R.A.(N.S.) 594.

Additional suffering caused by miscarriage.

In some cases the question has arisen whether all of the suffering caused by miscarriage is to be considered in assessing the damages, or whether the jury are to take into consideration the fact that a certain amount of suffering would have ensued in the natural course of events.

Thus, in Morris v. St. Paul City R. Co. 105 Minn. 276, 17 L.R.A.(N.S.) 598, 117 N. W. 500, it was held that the pain and suffering which would naturally have come to the mother cannot be deducted from the pain and suffering occasioned by a miscarriage which resulted from the defendant's negligence.

But, in Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021, it was held that only the increased pain and suffering caused by the miscarriage, over what would naturally have been, was to be considered by the jury, as it was not just to impose upon a merely careless tort feasor liability for more of the plaintiff's trouble that he had caused.

On the trial of a civil action for the recovery of damages for an alleged assault upon a woman pregnant with child, an alleged result being miscarriage, it was held, in Plonty v. Murphy, 82 Minn. 268, 84 N. W. 1005, that it is not necessary, in order for the plaintiff to recover substantial damages for this particular injury, that she show by testimony that she suffered more pain or increased illness or greater impairment of health than she would if the delivery of the child had been at the proper time and in the natural way.

As to offset against damages for suffering for miscarriage, of suffering which would have resulted from natural parturition, see case note to Morris v. St. Paul City R. Co. 17 L.R.A.(N.S.) 598.

Loss of offspring.

The loss of offspring is generally held not to be a proper element of damage.

Thus, in Witrak v. Nassau Electric R. Co. 52 App. Div. 234, 65 N. Y. Supp. 257,

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was merely threatened and would pass; but it continued for a week or so, becoming worse, when she was delivered of a child stillborn. She claims, also, that she continued to suffer from the effects of the injury by reason of a displacement of her womb, and had not finally recovered from the effects at the time of the trial. It may be that the latter claim was not supported by the evidence, and was, in fact, shown not to be true. But what view the jury took of that particular feature of the case we cannot tell, nor does it appear to be material now, as there was clearly enough in the case to sustain the very modest verdict returned in appellee's behalf,—$500.

The trial court, in instructing the jury, after defining care and negligence, gave this as the law of the case: "If the jury should believe and find from the evidence that, while the plaintiff was a passenger upon defendant's train, the defendant company, by its agents or servants in control of said train, knew, or by the exercise of ordinary care could have known, that the log train of the Hurricane Lumber Company was upon its tracks, and ran its passenger train into and collided with said log train, and that by reason of said collision the plaintiff sustained any injury causing plaintiff to miscarry or give premature birth to her child, or caused plaintiff womb trouble, they will find for the plaintiff such sum in damages as they may believe from the evidence she has sustained, so the sum so found, if anything, does not exceed $10,000; and, if the jury should not so believe and find, they will find for the defendant. If the jury should find for the plaintiff, they will only take into consideration in estimating the damages the mental and physical suffering, if any, and the permanent reduction in plaintiff's power to earn money, if any, caused by said injuries." Appellant insists that "there is little doubt that the jury awarded this verdict against appellant, not because of believing her health was to any extent impaired by reason of this miscarriage, but for the loss of the child." Tunnicliffe v. Bay Cities Consol. R. Co. 102 Mich. 624, 32 L.R.A. 142, 61 N. W. 11; and Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021, are cited as holding that a recovery by the mother against one negligently causing the death of the child in her womb and its premature birth is not allowed. The question decided in the first-named case was that the loss of the society and prospective earnings of the child is not a proper element of damages in an action by a married woman for injuries which resulted in a miscarriage. The trial court in that case had charged the jury that, "if the plaintiff lost a child by reason of the liability of the defendant in this case, you may give damage for it. The society, enjoyment, and prospective services of the child is a recognized element in that regard, and you may give what it is reasonably worth." In commenting upon that charge the supreme court of Michigan wrote: "This charge was clearly erroneous. There was, of course, no proof in the case as to the prospective earnings

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it was held that the effect of a miscarriage in depriving the mother of offspring cannot be taken into account at all as an element of damage, as the injury is too remote and speculative.

So, in Sullivan v. Old Colony Street R. Co. supra, it was held proper to exclude the death of the child as an element of damage.

And in Prescott v. Robinson, supra, it was said that the death of the child and the mother's loss of the comfort and enjoyment of the company of a living child are too remote consequences of her injury to be considered by a jury in assessing her damages.

So, in Morris v. St. Paul City R. Co. supra, it was held that, when an injury to a woman results in a miscarriage, she is entitled to recover such damages as will fairly compensate her for the pain and suffering occasioned by the miscarriage, but not for the pain and suffering occasioned by the loss of the child. And to the same effect was the decision in Hosty v. Moulton Water Co. (Mont.) 102 Pac. 568.

Pleading the miscarriage.

In a few cases it has been held that, in order to entitle the plaintiff to a recovery for miscarriage, it must be expressly pleaded.

Thus, in Florence v. Snook, 20 Colo. App. 356, 78 Pac. 994, the court said: "Pregnancy is not the usual and natural condition of women. It is an unusual or peculiar condition or state of health. A miscarriage can only result from an injury to a woman when in this unusual and peculiar condition, and, when relied upon to increase the damages claimed, must be pleaded."

So, in Louisville & N. R. Co. v. Roney, 32 Ky. L. Rep. 1326, 108 S. W. 343, the court said that, where the result of an accident is so unusual as the miscarriage of a pregnant woman, they thought that the defendant should be notified by the pleadings that such a result will be complained of.

But, in Clukey v. Seattle Electric Co. 27 Wash. 70, 67 Pac. 379, where the complaint alleged merely that the plaintiff was "hurt and injured in and about the breast, waist, and abdomen," and that she had unnatural internal bleeding, the court said that certainly a miscarriage would naturally result from the state of facts alleged; and evidence relating to a miscarriage was held to have been properly admitted.

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of the child, even if the mother would be the proper person to recover for such loss. Nor would the loss of the child's society be a proper element of damages. While the jury are allowed to consider the case with all its facts, and to take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while of necessity this involves to some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother, by reason of such an injury, would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for the sorrow and grieving of the mother." That court did allow a recovery for the injury done the plaintiff, and its consequences in causing her to abort her child, including the physical and mental suffering she endured in the travail which was the result of the injury. What was denied was that element of mental distress which is characterized as sentimental, and which followed after, or may have followed after, the physical pain caused by the injury had subsided. This is shown by the quotation by the court with approval of this excerpt from the opinion in Bovee v. Danville, 53 Vt. 183: "If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no further. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children, and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented." In the case at bar the instruction of the trial court did not allow a recovery for any sentimental suffering not involved in, and attendant upon, the physical pain endured by the plaintiff and accompanying the injury and the miscarriage caused by it. While it may be true that no scales have yet been invented by the law for weighing purely sentimental grief, it is also true that none are known to the law which separates mental suffering caused by physical injury into its various elements, and apportions some as actionable and others as nonactionable. Distress of mind caused by and accompanying a physical injury is an element of damage which the law compensates. It is no more true that all minds do not suffer alike than that all bodies are not equally susceptible to pain. While physiologically all pain may be said to be mental as the law uses the term, it is recognized that pain is physical when a nerve is impinged. But there is always some mental pain. The latter grows out of the former, is produced by it, and is the former extended as a physiological consequence. It would be as impossible in speculation as in fact to say how much of the mental suffering was the cooperation of the nerves of the brain with those of the body, and how much was psychological. Hence the law attempts no separation, but allows recovery for all the suffering, both bodily and mental, which is the direct result of and accompanies a physical injury. If the injury inflicted is continuing, or develops in stages, as from a fracture to septicemia, and thence amputation, it is deemed one injury, and all pain caused by and accompanying it throughout its several stages is an element of the damages which may be recovered. So, if a bodily injury is inflicted upon a pregnant woman, which directly or in natural consequence results in a miscarriage, the latter event is deemed a part of the original injury.

The other case cited and relied upon by appellant (Hawkins v. Front Street Cable R. Co.) goes further than we understand the authorities to justify, and further than we are willing to follow. It was there held that proof that an unborn child died, and was prematurely delivered, because of negligent injuries to its mother, is not sufficient to establish her right to recover substantial damages for the injury. The court held that, if the plaintiff showed "impairment of health and suffering growing out of the death and premature birth of her child, which would not have attended its birth at the usual time, either alive or dead, and also that the child's death is attributable to a negligent injury which she received," she could recover for her suffering and impaired health. "But," the court added, "she must show the injury by appropriate evidence, and the mere proof that the child died, and was prematurely delivered, as a result of the accident, would not be sufficient to presume substantial damage therefrom." The reasoning of the Washington supreme court is that the pregnant woman must in time have delivered the child, and that, as the pain of its birth was inevitable, that it was prematurely brought about could not alone be actionable; that, in order to allow the woman to re-

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cover for the miscarriage caused her, she must have suffered pain or ill health which would not have followed at the usual time of the birth of the child, dead or alive. Whether the pain of childbirth is greater in the one instance than in the other is not shown. Whether the mother would have suffered more pain at a subsequent time, or whether her health would then have been impaired, we fail to see how it could have been shown. But it is our opinion of the law that the woman has the right to bear her child in nature's way and time. When, by negligent violence to her person, she is caused to give it premature birth, whether it be dead or alive, or whether the pain attending its birth be greater or less than at the ordinary season, she is damaged. She is made to suffer physically and mentally at a time when she otherwise would not have to suffer. The great function of her sex has been interfered with. We all know that nature penalizes heavily infractions of its laws on this score. Such an event cannot be unimportant to the woman, either as it affects her body or her mental equilibrium. If one enters my house tortiously and disturbs my peace, the law gives compensation. If by noises, odors, or unsightly objects, he tortiously interferes with my free enjoyment of my premises, he is liable to me. If he negligently causes my cow to abort her calf, he is liable for the injury to the cow and the loss of the calf. 1 Thomp. Neg. § 156. If, then, he negligently injures the body of a woman, disturbing and deranging nature's functions, so that the fetus of her child is destroyed, and she caused to abort it, why may not she have legal complaint against the wrongdoer for her bodily suffering and her mental suffering accompanying and growing out of it? If, in the collision, she had had a tooth knocked out, there would be no doubt of her right of action, although had she lived she would have lost the tooth in every probability, and maybe have suffered as much or more pain from it, and in having it pulled, than she experienced in having it knocked out by the defendant's negligence.

We hold that a negligent act inflicting bodily injury upon the plaintiff, a woman *enceinté*, whereby her child dies and is caused to be born prematurely, gives the woman the right of action against the wrongdoer for her injury, including the mental and physical suffering endured as a natural and proximate result of the injury to her person. That is as far as the instructions in this case allowed the jury to go, and is the only feature of that question presented for our review. There was evidence to take the case to the jury and to support its finding.

Judgment affirmed.

Petition for rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS
v.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

(Two cases.)

(202 Mass. 394, 88 N. E. 764.)

Highway — obstruction — railroad cars — intent.

A railroad company cannot escape liability under a statute providing that it shall not in any case, obstruct, use, or occupy a highway with cars or engines for more than five minutes at one time, by the fact that the cars could not be moved because the valves of the air brakes were maliciously opened by strangers, without defendant's knowledge.

(May 25, 1909.)

Case Note.* — *Act of third person as excuse to railroad for blocking street crossing.

In Cleveland, C. C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118, it was held that if a car was placed by a railroad company at a point so as not to obstruct the highway, and was afterwards moved across the highway by the unauthorized interference of boys, over whom the company had no control, it was not liable, unless it negligently permitted the car to remain upon the highway an unreasonable length of time.

In Lake Shore & M. S. R. Co. v. Kaste, 11 Ill. App. 536, it was held that a railroad company which had only a temporary right to run its engine and cars over tracks which were the exclusive property of another company was not liable for the act of the latter company in obstructing a street crossing with its own cars.

The question as to the liability of a railroad company for acts done while the property was in the hands of a receiver is, of course, much broader than the subject of this note. It may not, however, be improper to refer to State v. Minneapolis & St. L. R. Co. 88 Iowa, 689, 56 N. W. 400, holding that a railroad company cannot be convicted for erecting or maintaining an obstruction over or upon a highway during the time the property was in the hands of a receiver, over whose acts the company had no control; and State v. Vermont C. R. Co. 30 Vt. 108, to the same effect with respect to blocking a street crossing with freight trains while the road was in the hands of a receiver.

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EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County, made during the trial of an action brought to recover penalties for obstructing a public street in violation of a statute, which resulted in a verdict of guilty. Overruled.

The facts are stated in the opinion.

Mr. George L. Mayberry for defendant.

Mr. John J. Higgins for the Commonwealth.

Braley, J., delivered the opinion of the court:

By Stat. 1906, chap. 463, pt. 2, § 155, chapter 111, § 196, of the Revised Laws, is incorporated without change; and by § 159 of part 3, the provisions being the same as those of existing statutes, § 155 is to be construed as a continuation of § 196, and not as a new enactment. Accordingly these complaints may be properly described as brought under § 196, which, so far as material, provides that "no railroad corporation . . . or its . . . servants or agents, shall wilfully or negligently obstruct, or unnecessarily or unreasonably use or occupy, a highway, town way, or street, nor in any case obstruct, use, or occupy it with cars or engines for more than five minutes at one time," without incurring a prescribed penalty for each violation. It was undisputed that, on two separate days, the defendant's cars obstructed, or occupied for more than the time permitted, a street which presumably was a public way, although not so described. The defendant does not question that, under the decision in Com. v. New York, N. H. & H. R. Co. 112 Mass. 412, where an earlier act, of which the present statute is substantially a re-enactment, was considered, it would be no excuse if the obstruction was accidental, or could not have been avoided by the exercise of reasonable diligence. But, the valves to the air brakes having been maliciously opened by strangers, without the knowledge of the defendant or its servants, so that the train could not be operated within the period, owing to the delay required not only to find and close the valves, but also to furnish a fresh supply of air, it contends that their interference constitutes a full defense. See Stat. 1906, pt. 2, chap. 463, § 239; Rev. Laws, chap. 111, § 255. Or, as defined in Com. v. Elwell, 2 Met. 190, 192, 35 Am. Dec. 398, "if a man does an act which would be otherwise criminal, through mistake or accident, or by force, or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is matter of defense." If, at common law, crime when committed by the individual consists of acts done with an evil intent, in statutory offenses created in the exercise of the police power, unless a wrongful intent or guilty knowledge, commonly designated by the use of the words "wilfully" or "maliciously," is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law. Com. v. Bradford, 9 Met. 268; Com. v. Wentworth, 118 Mass. 441; Com. v. Connelly, 163 Mass. 539, 40 N. E. 862; Com. v. Lavery, 188 Mass. 13, 16, 73 N. E. 884. It is because of this familiar doctrine, inherent in the construction of statutes which prohibit, under a penalty, acts and conduct which otherwise are not generally deemed immoral or criminal, that convictions for the sale of liquor, where the seller had no just ground to believe it was intoxicating, or of imitation butter by the defendant's agent without a descriptive wrapper, which, though furnished, he failed, from mere carelessness, to use, or an inadvertent sale by the defendant's servant of milk not of standard quality, and the admission of a minor to a pool room, where the defendant neither knew, nor had any reason to believe, he was under age, have been sustained. Com. v. Savery, 145 Mass. 212, 13 N. E. 611; Com. v. Daly, 148 Mass. 428, 19 N. E. 209; Com. v. Warren, 160 Mass. 533, 36 N. E. 308; Com. v. Gray, 150 Mass. 327, 329, 23 N. E. 47; Com. v. Emmons, 98 Mass. 6. In other jurisdictions, in the construction of similar statutes, proof of moral turpitude, or a guilty mind, has never been deemed necessary to sustain a conviction. Barnes v. State, 19 Conn. 398; State v. Smith, 10 R. I. 258; People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; Com. v. Zelt, 138 Pa. 615, 11 L.R.A. 602, 21 Atl. 7; Farmer v. People, 77 Ill. 322; Humpeler v. People, 92 Ill. 400; Jamison v. Burton, 43 Iowa, 282; State v. Hartfiel, 24 Wis. 60; R. v. Woodrow, 15 Mees. & W. 404; R. v. Payne, 10 Cox, C. C. 231.

If we turn to the language of the statute, the acts for which the defendant has been convicted are positively forbidden. It was within legislative authority to have extended the qualifying words of "wilfully" or "negligently," which describe the offense defined in the first clause of the sentence in § 196, to the unlawful acts with which the defendant is charged. The history of this legislation, from its origin to the latest revision, however, indicates clearly a public policy which, in the language employed to define the offense, recognizes no extenuating circumstances of the nature relied on by the defendant. Stat. 1854, chap. 378, p. 280; Gen. Stat. 1860, chap. 63, § 68; Stat. 1871, chap. 83, p. 485, § 1; Stat. 1874, chap. 372, p. 389, § 129; Stat. 1895, chap.

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173, p. 178; Rev. Laws, chap. 111, § 196; Stat. 1906, chap. 463, pt. 2, § 155; Com. v. New York, N. H. & H. R. Co. ubi supra. By common law as well as under Rev. Laws, chap. 53, the unlawful obstruction of a public way, by whomsoever caused, is an indictable offense. Com. v. King, 13 Met. 115; Com. v. Old Colony & F. River R. Co. 14 Gray, 93. And under Rev. Laws, chap. 111, § 124, the rights of the community are recognized as paramount, for a railroad which is laid out across a public way must be so constructed as not to obstruct it. Holliston v. New York C. & H. R. R. Co. 195 Mass. 299, 81 N. E. 204. If this section is read with § 196, the reason for the unqualified language of the last section is unmistakable. The accommodation of public travel, for which the ways have been provided and are maintained, requires that at grade crossings travelers shall not be subjected to prolonged delays arising from their occupancy by the cars or engines of a railroad company. It was within the province of the legislature to fix the time during which a grade crossing could be encumbered, and this adjustment between its use by the public and by the railroad must be treated as not only reasonable, but final, until the statute is either modified or repealed. In the practical control of movements of its cars or trains, no claim has been advanced, nor was there any proof at the trial, that, by competent supervision, even if necessarily required to be more or less constant, the defendant would not have been able to have prevented the mischief caused by intermeddlers. Whatever its ignorance of the facts may have been, the defendant was bound, at its peril, to know and obey the law, and its failure to adopt such precautions as might be necessary to enable it to comply with the statute furnishes no ground of justification or defense. Com. v. Mash, 7 Met. 472; Com. v. Curtis, 9 Allen, 266; Parker v. Alder [1899] L. R. 1 Q. B. 20.

Exceptions overruled.

NEBRASKA SUPREME COURT.

HATTIE KEITH, Admrx., etc., of Gant Keith, Deceased,
v.
CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY et al., Appts.

(82 Neb. 12, 116 N. W. 957.)

Benefit contract — "physical inability to work"—construction.

1. Railway employees only were permitted to join the relief department of the defendant company, an institution organized to pay disability benefits to members. The contract for benefits provided: "The word 'disability' shall be held to mean physical inability to work." Held, that the words "physical inability to work" mean inability to perform such labor as the injured member was engaged in at the time of his injury, or similar labor which would enable him to earn wages equally as remunerative.

Same — partial recovery — effect.

2. Under the provisions of such contract, if an injured member of the relief department recovers so that he is able to perform such work as is contemplated in the contract, or similar work equally as desirable and remunerative, then the obligation of the defendants to pay disability benefits ceases. But recovery sufficient to enable him to earn much smaller wages at some other employment, or employment procured through the charity or indulgence of friends or relatives, when, in fact, he has not recovered from his disabilities, is insufficient to release defendants.

(June 4, 1908.)

Case Note. — What constitutes disability within meaning of accident or health policy.

The early cases upon this question are gathered in the note to Turner v. Fidelity & C. Co. 38 L.R.A. 529, and this note includes only the decisions which have considered the point since that time.

Cases passing merely on the question of what constitutes an immediate or continuous disability are not included, and decisions passing only on the point of what amounts to a loss of different members of the body are not within the scope of the note.

For cases involving provisions making confinement to the house a condition of the disability warranting a recovery of benefits, see note to Breil v. Claus Groth Plattsdutschen Vereen, post, 359.

Inability to do anything.

As stated in the note to Turner v. Fidelity & C. Co. supra, where the insured is injured in such a way as to prevent his doing anything, he is plainly disabled, and entitled to receive the benefits stipulated for.

Thus, recovery, under a clause in an accident policy insuring against injuries which are immediately, continuously, and wholly disabling, may be had by a traveling salesman where his arm is broken, by reason of which, and ill health resulting therefrom, he is totally prevented from carrying on his usual business. Gordon v. United States Casualty Co. (Tenn. Ch. App.) 54 S. W. 98.

And one who is a farmer, and a part of the time operates a portable sawmill, is entitled to benefits in an association providing therefor on a member's becoming unable to direct or perform the kind of business or labor which he has always followed, and by which alone he can thereafter earn

Headnotes by EPPERSON, C.

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APPEAL by defendants from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover the amount alleged to be due on a relief fund certificate. Affirmed.

The facts are stated in the commissioner's opinion.

Messrs. **Greene, Breckinridge, & Matters** and **W. H. Hatteroth** for appellants.

Messrs. **Smyth & Smith**, for appellee:

The fact that the injured employee was not able to earn as much, and that this inability was due to the injury received, prove conclusively that he was still disabled.

Chicago, B. & Q. R. Co. v. Olsen, 70 Neb. 569, 97 N. W. 831, 99 N. W. 847.

Epperson, C., filed the following opinion:

This action was instituted by Gant Keith in his lifetime, and later prosecuted by the administratrix of his estate, against the Chicago, Burlington, & Quincy Railroad Company and the Chicago, Burlington, & Quincy Railway Company, to recover $638.70, alleged to be due upon a certificate of membership in the relief fund of the Burlington Voluntary Relief Department, for disability benefits at the rate of 75 cents a day from December 10, 1901, to April 4, 1904, at which time the said Gant Keith died. On September 11, 1900, the deceased entered the employ of the railway company as a switchman, and became a member of the relief department. Three days later, while thus employed, he received an injury from which it appears he never fully recovered. He was entitled to receive from the relief fund $1.50 a day for fifty-two weeks, and thereafter 75 cents a day during the continuance of his disability. He received such relief until December 10, 1901, at which time the defendants refused further payment, claiming that his disability had then

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a livelihood, where it appears that his right arm was almost severed by a saw and is practically useless. Beach v. Supreme Tent, K. M. 177 N. Y. 100, 69 N. E. 281.

So, where an accident policy allows benefits when an injury shall "wholly and continuously disable him from transacting any and every kind of business," total disability within the meaning of the provision is shown by evidence that a supervising builder received an injury which he thought slight; that ten days later he became lame; that, although he remained at the mill where he was working, he was unable to supervise the work and employed another; that he traveled unattended in search of medical aid, gave some time to correspondence, and was in possession of his mental faculties, but substantially his entire time was given to trying to obtain relief from the injury, and, from suffering, anxiety, and time devoted to his efforts to obtain relief, he was entirely incapacitated for business. United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176.

Ability to do some small act.

And generally insured's ability to do some small act will not prevent recovery.

Thus, it is held that the "total disability" contemplated by a benefit certificate does not mean a state of absolute helplessness, and the fact that insured walked to his physician's office was held not to prevent recovery where he was entirely incapacitated for work or business. Mutual Ben. Asso. v. Nancarrow, 18 Colo. App. 274, 71 Pac. 423.

And where a benefit certificate entitles the member to benefits in case he is totally and permanently incapacitated from performing manual labor, the term "manual labor" implies the ability for such sustained exercise and use of the hands at labor as will enable the insured thereby to earn, or assist in earning, a livelihood, and the fact that he can use his hands for a brief period will not prevent recovery as for "total incapacity," where he is not able to sustain his efforts a sufficient time to enable him to make a living. Grand Lodge, B. L. F. v. Orrell, 206 Ill. 208, 59 N. E. 68.

So, where an accident policy provides for payment in case insured is wholly disabled from doing any work, or any part thereof, from the date of the accident, a brakeman is not precluded from recovering by the fact that he made two runs after the accident, but was obliged to employ a substitute on each, or by the fact that he did trivial work on his farm, which was shown to be work which he would have done had he been following his usual occupation. Wall v. Continental Casualty Co. 111 Mo. App. 504, 86 S. W. 491.

And, the fact that a physician, from a sense of professional duty, attends a nearby patient after his knee is injured, is not sufficient to show that he was not continuously and wholly disabled, where he could scarcely move at all the next day and, the following day, the knee was put in splints, and he was forced to remain in bed three weeks. Brendon v. Traders & Travelers' Acci. Co. 84 App. Div. 530, 82 N. Y. Supp. 860.

Ability to attend to part of usual business.

Where ability to perform part of insured's usual occupation exists, the right of recovery depends largely upon the facts and the particular provisions of the contract, but the cases on the question cannot be said to be entirely in harmony.

Thus, it has been held that an instruction in an action on an accident policy, to find for the plaintiff if the insured, a cattle buyer, was rendered insane to such a degree that he was prevented from performing any and every kind of duty essential to his business in a manner "reasonably as effective" as he could have performed it if

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ceased. At one time Keith attempted to resume his duties as a switchman, but was unable to do so. It is undisputed that he was disabled until December 10, 1901. At that time he reported for work to his employing officer, who tendered him some position as a utility man at the rate of $35 a month. This employment Keith refused, either because he was unable to do the work or because the wages offered were unsatisfactory. He then obtained employment as a bartender in his brother's saloon until April, 1902, and thereafter, until his death, was in the employ of one Dwyer, who succeeded his brother in the saloon business. While in the employ of his brother and for the first year of his employment by Dwyer, he received $50 a month wages, and thereafter $60 a month. During all this time Keith could not place the injured foot upon the ground naturally. He was required to use a crutch or a cane. The toes of the foot stood upright. Every night the foot was swollen. But as bartender he was able to spare his foot, not being required to stand upon it during all the time he was on duty. The evidence shows that he kept a chair behind the bar, which he used whenever he could; that he was enabled a part of the time at least to use a foot rest. By reason of the injury he was required to quit work occasionally, sometimes one day and sometimes more, and some days he would have to quit for a short time only. His employer testified, in substance, that he was not a good man so far as his work was concerned,

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not injured, is erroneous where the policy provides for benefit in case the insured is wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation. Fidelity & C. Co. v. Getzendanner, 93 Tex. 487, 53 S. W. 838, 55 S. W. 179, 56 S. W. 326. The court said: "To say that one who is disabled by an injury is wholly disabled to do a thing merely because he cannot do it 'in a manner reasonably as effective as the same would have been performed if the injury had not been sustained,' seems to us a solecism in language, if it does not involve a contradiction in terms. A carpenter with a sprained finger might not be able to pursue his calling as effectively as if he had not received the injury, and at the same time he might be able to do, without serious inconvenience, 90 per cent as much work as he could have done before the accident happened. Clearly, he would not be 'wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation.' And such is the case with many other physical injuries. The effectiveness of the performance may be impaired although the injured person may not be wholly disabled to perform a duty. The charge involves a technical error, as we think, and can only be justified upon the theory that the slightest impairment of the mental faculties wholly disables one who is engaged in buying and selling from pursuing his avocation. Such, however, is not the fact, for there are infinite gradations in mental deterioration, and it is a matter of common knowledge that persons with some degree of cerebral disturbance may continue to prosecute with reasonable efficiency a business which requires the exercise of judgment and discretion."

So, the loss of the left arm by a druggist does not constitute a total disability within the meaning of a contract of a fraternal organization, providing for payment of benefits whenever a member becomes totally disabled from following his usual or regular business, occupation, or profession. Smith v. Supreme Lodge, O. S. F. 62 Kan. 75, 61 Pac. 416.

23 L R A.(N.S.)

And one is not wholly and continuously disabled from performing any and every kind of duty pertaining to his occupation, within the meaning of an accident policy, where he was previously employed as lumper in a granite yard, where his duties involved the overseeing of boxing and loading, and it appears that he is still employed by the same firm in superintending the work which he had been previously doing. Bylow v. Union Casualty & Surety Co. 72 Vt. 325, 47 Atl. 1066.

So, where an accident policy allows indemnity to a section foreman while he is wholly disabled from transacting any and every kind of business pertaining to his occupation, he cannot recover benefits after he returns to his position of foreman, over the same number of hands and at the same salary as before. Rayburn v. Pennsylvania Casualty Co. 141 N. C. 425, 54 S. E. 283.

And where an accident policy allows indemnity when the injury wholly disables the insured from transacting any and every kind of business pertaining to his occupation, one classed as a capitalist cannot recover where his hand is cut and the tendons injured, but he is able to be at his office every day and attend to practically all of the usual routine, although he is greatly inconvenienced by the injury. Coad v. Travelers' Ins. Co. 61 Neb. 563, 85 N. W. 558.

And where insured has lost no time from business on account of an injury resulting in hernia, and has been promoted since receiving it, no recovery can be had under an accident policy containing provisions allowing benefits when the insured is wholly disabled and prevented from engaging in any productive occupation. Ætna L. Ins. Co. v. Lasseter, 153 Ala. 630, 15 L.R.A.(N.S.) 252, 45 So. 166.

So, under an accident policy indemnifying for injuries wholly disabling insured from transacting any of the duties pertaining to his occupation as a merchant, recovery can be had while he is totally unable to attend to duties at the store, but not during the time he is able to perform some of the work around his store, although there are many duties that he cannot perform.

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but from a business standpoint that he was very well thought of; that he took a good deal of interest in the place; that he had many friends throughout the country, and was a good talker. In the court below the plaintiff recovered judgment in the full amount claimed, and defendants appeal.

The rights of the parties depend upon the construction of a part of one section of the regulations of the relief department in force at the time deceased became a member, and which is as follows: "Wherever used in these regulations, the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work." It is the defendants' contention that the words "physical inability to work," as used above, mean physical inability to do any work whereby one could maintain himself, and that the deceased, having recovered from his injury so as to be able to perform the duties of a bartender, was under no disability within the meaning of the regulations quoted. The trial court refused an instruction submitting this theory to the jury. Instead he gave an instruction in which he said: "By the word 'disability' is meant inability to perform the ordinary duties in the employment in which Keith was engaged at the time of his injury." It would, indeed, be a harsh rule which would require the relief department to pay to its members continuously the relief promised during disability, in the event that such

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McKinley v. Banker's Acci. Ins. Co. 106 Iowa, 81, 75 N. W. 670.

And in Shirts v. Phœnix Acci. & Sick Ben. Asso. 135 Mich. 439, 97 N. W. 966, where insured was entitled to benefits only when wholly incapacitated from transacting any and every kind of business, and while confined to the house, his right to benefits was held to be terminated by his going to his store for a couple of hours and superintending his business.

But recovery has been allowed by some courts although insured is still able to perform a part of his duties.

Thus, in James v. United States Casualty Co. 113 Mo. App. 622, 88 S. W. 125, where a clause of an accident policy insured against loss which immediately, continuously, and wholly disabled the holder, it was held that the latter, a queen's-ware merchant having separate wholesale and retail stores, might recover although he was able to be at his place of business daily, and write checks, approve orders, and dictate letters, but could do none of the principal matters pertaining to his business, and could not get about the store or from one of his stores to the other, as before. The court, in speaking of a provision intended to explain "totally," said: "But stress is laid by defendant's able counsel upon a part of the clause above set out, which, itself, assumes to define what is meant by wholly disabled, wherein it is said that the assured must be totally unable to perform any part of his duties. We do not consider that such provision has any material control over the other portion of the clause. When parties enter into a contract it must be assumed that they intended that which, in certain events or contingencies, would mean something and have some effective force. And so it has been held that, if a promissory note reads that A promises not to pay B $100, the word 'not' will be disregarded, since the parties must have meant something by the execution of the note. . . . The occupation of a merchant calls for both mental and physical exertion. If 'wholly disabled' means that he shall, literally, be totally unable to perform any part of his business, then mental capacity exercised in merely directing, in a single instance, a matter the most trivial, as, for instance, to sweep the floor, or the physical effort of doing it himself, would bar a recovery on the policy. Total mental disability means that one must have his mental faculties entirely suspended; and total physical disability means the loss of power to move. It cannot be that the parties intended that, before an assured could recover on the policy, he should lie the full period of his injury in a state of coma. To interpret the clause in its contractual sense, as defendant seeks to have us do, would render the contract utterly useless to an assured, and would be nothing short, practically speaking, of collecting a premium without rendering a consideration. We therefore find ourselves driven back to the position taken by the authorities on the construction of the first part of the clause; *viz.*, that the disability meant is a disability as to the performance of any substantial part of the business."

And it has been held that disability within the meaning of a provision allowing benefits "for the immediate, continuous loss of such business time as may necessarily result" is shown by evidence that a chief railroad clerk fell when bowling and injured his knee so that he was prevented from doing substantially all of the necessary and material things of his occupation in his accustomed and usual manner. Pacific Mut. L. Ins. Co. v. Branham, 34 Ind. App. 243, 70 N. E. 174.

So, a carpenter who loses the use of his left arm, but is still able to do light work, is nevertheless entitled to sick benefits from a lodge allowing benefits only when the member is "sick and unable to work." Platt-deutsche Grot Gilde v. Ross, 117 Ill. App. 247. The court said: "We cannot concur in the contention of appellant's counsel that 'to obtain sick benefits a member must be actually sick, and so sick as to be unable to do work of any kind. He cannot draw sick benefits and earn money at the same time.' If this construction of the words 'sick and unable to work' be correct, it

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member, although unable to resume the employment in which he was engaged at the time of the injury, should so far recover as to be physically able to earn wages equal to or greater than the wages earned by him in such employment. Such construction cannot be given to the provisions of this contract. If an injured member of the relief department recovers to the extent that he is no longer disabled in the performance of the work contemplated or similar work,—that is, employment equally as desirable and remunerative,—then the obligation of the defendants to pay disability benefits ceases. The work contemplated is the work of railway employees. The purpose of the department is to partially indemnify its members against the loss of wages occasioned by their inability to perform such labor. In other words, the "disability" for which partial indemnity is paid is the disability which prevents the member from doing the "work" contemplated in the contract, and which results in his financial loss. The regulations of the relief department are similar to the by-laws of a mutual insurance company. They enter into and become a part of the contract. Indemnity to the injured member, and not profits, is the object of the department. This would be defeated if an injured member should be permitted to collect the benefits provided after he had recovered to such an extent that he could enter a similar employment equally as desirable and remunerative. In Chicago, B. & Q. R. Co. v. Olsen, 70 Neb. 570, 99 N. W. 847, in

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would follow that a person who earned $5 a day before he became sick would have no right to a benefit if capable of earning 10 or 20 cents a day, or any sum, however small, afterwards. The by-law must receive a reasonable construction. Its meaning evidently is that so long as a man is not restored to his full health, and is substantially unable to do such work or make such a living as he did before, he is entitled to the benefit."

And the fact that the manager of a clothing company is able to do minor and trivial things, not requiring much time or physical labor, will not prevent a recovery under a provision of a policy allowing benefits when insured is wholly disabled from performing any and every kind of business pertaining to his occupation, where he is unable to do the things which constitute substantially all of his occupation. Commercial Travelers' Mut. Acci. Asso. v. Springsteen, 23 Ind. App. 657, 55 N. E. 973.

So, the fact that a farmer is able to direct his business, and do some of the work himself, will not prevent his recovering, as for total disability if he is wholly disabled from doing all the substantial and material acts necessary to be done. Foglesong v. Modern Brotherhood, 121 Mo. App. 548, 97 S. W. 240.

And it cannot be said, as a matter of law, that a shoe dealer whose shoulder is injured so that he is unable to attend to his business, although he has been to his store, is not entitled to recover under a policy allowing benefits where insured is wholly disabled from transacting any and every kind of business pertaining to his occupation. Thayer v. Standard Life & Acci. Ins. Co. 68 N. H. 577, 41 Atl. 182. The court said: "As long as one is in full possession of his mental faculties, he is capable of transacting some parts of his business, whatever it may be, although he is incapable of physical action. If the words, 'wholly disable him from transacting any and every kind of business pertaining to the occupation under which he is insured,' were to be construed literally, the defendants would be liable in no case unless, by the accident, the insured should lose his life or his reason. . . . It is certain that neither party intended such a result. It cannot be said, as a matter of law, that the plaintiff's disability was not sufficient to entitle him to compensation under the terms of the policy."

So, a finding by the jury that the insured was wholly and continuously disabled from attending to every kind of business pertaining to his occupation from the first day of his injury will not be set aside as not sustained by the evidence, where it appears that insured swallowed a pin, but, for a considerable time, with the exception of a day or two, he was at his place of business, but did not perform the duties usually demanded by his occupation. Order of United Commercial Travelers v. Barnes, 72 Kan. 309, 82 Pac. 1099, 7 A. & E. Ann. Cas. 809.

And where the regulations of a benefit association provide that the word "disability" shall be held to mean physical inability to work, the decision of the medical examiner that a carpenter who has suffered an amputation of a leg by reason of his injury is "able to work" will not be construed to mean that he has recovered from his disability, where the evidence shows that, at the same time, the examiner declared the insured able to do light work, but still disabled. Chicago, B. & Q. R. Co. v. Olsen, 70 Neb. 559, 97 N. W. 831, rehearing denied in 70 Neb. 570, 99 N. W. 847.

Ability to work in other occupation.

As stated in the note to Turner v. Fidelity & C. Co. supra, the question of a disability when insured is still able to work in some other occupation depends largely on the terms of the contract defining the disability.

It has been held that the words "to earn a livelihood in an employment suited to his capacity," contained in the regulations of a relief society, formed to relieve unfortunate members during the time when, by accident, they are prevented from earning a livelihood, refer to his capacity as it exists after the injury, at the time of application for benefits, and not his capacity as it existed

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the opinion overruling the motion for rehearing, it is said: "There seems to be force in the argument that, if the plaintiff had recovered from the injury so as to be able to perform labor similar and equivalent to that required in the employment in which he was engaged at the time of the accident, or was able to perform the duties of an engagement that was open and available to him whereby he could support and maintain himself as he was able to do before the accident, he was 'able to work' within the meaning of that expression in the contract." This is a correct rule, and should be adhered to whenever applicable. Defendants invoke it here. It follows, of course, that the instruction given herein was erroneous, in that it defined "disability" as "inability to perform the ordinary duties in the employment in which Keith was engaged at the time of his injuries." But, as we view it, this error was without prejudice. Under the evidence the judgment rendered was the only one permissible. Keith never became physically able to resume his work as a switchman; nor did he ever become physically able to earn wages in any similar employment; nor was he ever able to earn wages equal to the wages of a switchman. He was retained as a bartender notwithstanding his physical defects, which partially incapacitated him. A review of the evidence leads us to the conclusion that he was able to hold this position by reason of his employer's indulgence, and, further, because of a tenacity of purpose on his part

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prior to the injury. Hunt v. Northern C. R. Co. 124 App. Div. 43, 108 N. Y. Supp. 267.

And where a flagman earning $75 a month loses an arm, but there is no other evidence of disability, and it appears that he subsequently accepted a position as messenger at $40 a month, which he retained for some time and voluntarily resigned, the evidence does not show that he is unable to earn a livelihood within the foregoing provision. Ibid.

So, where a certificate of a mutual benefit association was made payable in case of total disability to follow any avocation, an instruction that the fact that a man may work continuously for a few months is not conclusive evidence that he can follow some vocation, but that, if the jury find that insured could keep a newspaper or peanut stand or could follow any line of employment, he could not recover, is not prejudicial to the insurer, where the jury are told that the question of his ability to follow an avocation is for them to decide. Starling v. Supreme Council R. T. T. 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340.

But, under a by-law providing that, when a member becomes "totally and permanently disabled, . . . from following any occupation whatever," he shall be paid a sum by the order, one who previously has been strong and vigorous and able to do heavy manual labor is entitled to the benefit where he received an injury which paralyzed his leg entirely, and was otherwise disabled thereby so that he was incapable of performing any work requiring travel or exercise; and this was held true although insured, at the time of trial, was the nominal manager of a mine, for which service he received his board. Monahan v. Supreme Lodge, O. C. K. 88 Minn. 224, 92 N. W. 972.

And in Foglesong v. Modern Brotherhood, 121 Mo. App. 548, 97 S. W. 240, where a benefit certificate provided for indemnity in case of "permanent and total disability of said member, which renders him unable to carry on or conduct any vocation or calling," the court refused to construe the provision to mean that no recovery could be had if insured was able to carry on any vocation whatever. It was there said: "But we are unwilling to adopt such a doctrine, the effect of which would be, practically, to reduce all such contracts to nullities and to make them the instruments of extracting dues from policy holders without creating any liability on the part of the insurers. Common knowledge of the occupations in the lives of men and women teach us that there is scarcely any kind of disability that prevents them from following some vocation or other, except in cases of complete mental inertia. We have examples of persons without hearing, and without sight, following a vocation,—some without feet, and some without hands, engaged in business. The achievements of disabled persons are seemingly marvelous. Under defendant's theory, the plaintiff might embark in the peanut trade, or follow the business of selling shoe strings or lead pencils, or follow some similar calling, in which instances, under the rule invoked, there would be no disability within the meaning of the policy. In our opinion, such was not within the contemplation of the parties. In order to carry out the intent of the parties, it is our duty to disregard the broad language used, which would have the effect to defeat the purpose of the contract and render it a nullity. It has been said: 'The policy is the law by which the mutual rights and liabilities of the parties are to be measured, and should be construed strictly against the insurer where they narrow the range and force of the allegation, or provide for forfeiture.' . . . The language of the policy, 'permanent and total disability of said member, which renders him unable to carry on or conduct any vocation or calling,' the vocation of the insured not being designated, should be construed as meaning, if anything, the vocation or calling which he might be following at the time he became disabled, and not any vocation whatever, which he might be able to follow after he had been disabled. . . . We have seen to what absurd consequences a literal construction of the language would lead."

To the same effect is Wall v. Continental

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to earn what he could in spite of his impaired physical condition. His condition was such that he could not reasonably be expected to go into the business world and procure remunerative employment. He was badly crippled. People usually do not employ such help except at very small wages. The words "physical inability to work," as used in the regulations of the defendants' relief department, mean inability to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged at the time he was injured. The fact that the injured member earned wages by employment procured through charitable or indulgent relatives or friends is insufficient to establish his ability to work, within the meaning of the contract. The evidence shows that the minimum which Keith earned in such employment was $72.50 a month, with a prospect for higher wages. The greater portion of his employment as a bartender he earned $22.50 less than his minimum wages as a switchman. There is no evidence that he could have commanded greater wages as a bartender or in any other employment.

The error of the district court being without prejudice, we recommend that the judgment be affirmed.

Duffie and Good, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

Casualty Co. 111 Mo. App. 504, 86 S. W. 491.

And recovery may be had by a member of a switchmen's benefit association as for a total disability where he loses his left eye, and the by-laws allow recovery in case of any physical disability that permanently disqualifies a member from performing the duties of a switchman, notwithstanding another provision mentions, among other things, total blindness as an injury which shall be considered a total and permanent disability. Switchmen's Union v. Colehouse, 131 Ill. App. 349, affirmed in 227 Ill. 561, 81 N. E. 696.

The decision in Neill v. Order of United Friends, 78 Hun, 255, 28 N. Y. Supp. 928, included in the note in 38 L.R.A., where it was held that the words "some other occupation" contained in a benefit certificate did not mean disability from performing any other occupation, but referred to an occupation requiring substantially the same physical and mental ability as that in which he was usually engaged, was affirmed in 149 N. Y. 430, 52 Am. St. Rep. 738, 44 N. E. 145.

What loss of members constitutes disability.

The loss of the fingers of a hand, not including the thumb, by a stone and brick mason, does not constitute such a disability as to justify the allowance of benefits under a certificate providing therefor in case of permanent and total disability. Supreme Tent, K. M. v. King, 79 Ill. App. 145.

And no recovery for loss of one eye can be had under an accident policy providing for payment of the whole certificate for "total permanent disability," and for one half the amount for loss of the sight of both eyes. Phillipy v. The Homesteaders (Iowa) 118 N. W. 880.

But, allegations that insured has lost one hand, that the forearm is lacerated and crushed and amputated below the elbow; that, as a result of such injury, paralysis has supervened, and that, by reason of such injury and consequent paralysis, a deformity apparent to anyone has resulted, states a cause of action under the by-laws of a beneficial association allowing recovery where a member suffers a disability arising from some disease or injury producing some local lesion or deformity apparent to anyone, and of such a nature that such lesion or deformity shall amount to total disability. Faulkner v. Grand Legion, S. K. 63 Kan. 400, 65 Pac. 653.

And where both of insured's hands are amputated, so that his injury is total and permanent, and the policy provides for payment of a sum for a given time in such case, a subsequent provision for weekly payments for actual loss of time in case of temporary total disability does not apply, so that a stipulation therein that such benefits shall be allowed only while the insured is under the care of a physician or, in case of amputation, until the members are healed, does not affect the decision. Cook v. Benefit League, 76 Minn. 382, 79 N. W. 320.

So, where a by-law allows benefits "if a member lose both feet, both hands, or both eyes, thereby becoming totally disabled," it is not necessary that the members be actually severed, but they are lost if they are so badly injured that they cannot perform the functions intended for them. Theorell v. Supreme Court of Honor, 115 Ill. App. 313.

Death as disability.

Death is not within the contemplation of "total disability" in a policy undertaking to indemnify insured, and his representative is not entitled to the benefit upon his death. Shaw v. Equitable Mut. Acci. Asso. 5 Neb. (Unof.) 584, 99 N. W. 672.

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NEBRASKA SUPREME COURT.

HERMAN BREIL
v.
CLAUS GROTH PLATTSDUTSCHEN VEREEN, Appt.

(— Neb. —, 120 N. W. 905.)

Insurance — sick benefits — "constantly to the house."

Within the meaning of an insurance contract for sick benefits, it cannot be said that an assured is not confined "constantly to the house" during an illness characterized by recurring periods of severity, although at intervals he may occasionally step into his yard, or make visits to his physician, or other short and unusual trips; the assured at all times being unable to resume the ordinary duties or pleasures of life.

(April 13, 1909.)

Headnote by EPPERSON, C.

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover a balance of certain sick benefits alleged to e due under the rules of defendant society. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. **Albert S. Ritchie** and **Charles L. Fritscher**, for appellant:

The constitution and by-laws of mutual fraternal societies are construed most favorably to the society.

Royal Highlanders v. Scovill, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 208; Field v. National Council, K. & L. S. 64 Neb. 226, 89 N. W. 773.

Plaintiff was not constantly confined within the meaning of the society regulations.

Kelly v. Ancient Order of Hibernians, 9 Daly, 289; Shirts v. Phœnix Acci. & Sick Ben. Asso. 135 Mich. 439, 97 N. W. 966;

***Case Note.** — Construction and effect of condition in accident or health policy that assured must be confined to the house to entitle him to indemnity.*

The decisions upon this question cannot be said to be in entire harmony. Each case depends largely upon the wording of the contract of insurance and the intention of the parties as shown thereby. The tendency, however, is so to construe the contract as to allow assured to take exercise in the open air.

Thus, the fact that a member of a beneficial association leaves his room under the direction of the doctor, and takes short walks in his yard and on the pavement near his house, will not prevent his recovery, notwithstanding a provision that he shall be entitled to benefits only during the time he is continuously confined to the house and under the physician's care. Columbian Relief Fund Asso. v. Gross, 25 Ind. App. 215, 57 N. E. 145. The court said: "But we cannot agree with counsel that the acts of appellee, as shown by the findings, in going out of his house under the directions and advice of skilful and competent physicians, for the purpose named, was a violation of the conditions upon which he was to receive indemnity. Conceding such acts to be a violation of the strict letter of the contract, they were not a violation of the spirit and true intent and purpose of the contract. The very acts of which appellant complains were done for the purpose of restoring the member's health and thus ending his right to benefits. The policy itself requires that, in order to receive benefits, the beneficiary must be under a physician's care. Appellant would, no doubt, earnestly complain if a member continued sick through refusal to follow the physician's instructions. And it now complains because the member, in trying to regain his health, followed out the instructions of a physician which the policy compels him to call before he can claim any benefits. It would be unreasonable to compel a member to place himself under a physician's care, and then deny him benefits for submitting himself to that physician's treatment."

And, under a like provision, the fact that insured, a consumptive, leaves his house for consultation with, or by direction of, his physician, and even, under the latter's direction, goes to a distant city for a stay of several weeks, will not prevent recovery. Hoffman v. Michigan Home & Hospital Asso. 128 Mich. 323, 54 L.R.A. 746, 87 N. W. 265.

So it has been held that the words "confined to the house," contained in a benefit certificate, do not contemplate a constant restraint indoors, and the fact that insured visits his physician's office, using a car line, will not defeat his right to recovery. Mutual Ben. Asso. v. Nancarrow, 18 Colo. App. 274, 71 Pac. 423.

And a provision for benefits when insured "shall be necessarily confined to the house" means while he is confined to the porches as well as other parts of the house, where he is taking treatment for tuberculosis. Dulany v. Fidelity & C. Co. 106 Md. 17, 66 Atl. 614.

So it has been held that taking exercise and exposing one's self to outside air will not prevent a recovery on a policy insuring against sickness if insured is entirely incapacitated for work or business because of illness, although the policy provides that a disability, to constitute a claim, shall be continuous, complete, and total, requiring absolute, necessary confinement to the house. Jennings v. Brotherhood Acci. Co. 44 Colo. 68, 18 L.R.A.(N.S.) 109, 96 Pac. 982. The court said: "The intention of the parties to a contract of insurance is indemnity, and this intention is to be kept in view and favored in construing its provisions. Having indemnity for its object, a pol-

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Bishop v. United States Casualty Co. 99 App. Div. 530, 91 N. Y. Supp. 176; Dunning v. Massachusetts Mut. Acci. Asso. 99 Me. 390, 59 Atl. 535.

Mr. **William F. Wappich**, for appellee:

The plaintiff was constantly confined to the house, within the meaning of the insurance contract.

Hoffman v. Michigan Home & Hospital Asso. 128 Mich. 323, 54 L.R.A. 746, 87 N. W. 265; Turner v. Fidelity & C. Co. 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 898; Hohn v. Inter-State Casualty Co. 115 Mich. 79, 72 N. W. 1105; Coad v. Travelers' Ins. Co. 61 Neb. 563, 85 N. W. 558.

Epperson, C., filed the following opinion:

On May 29, 1906, the plaintiff was, and for several years had been, a member of the defendant society. This society is a mutual fraternal association, organized for the purpose of paying sick benefits to its members at the rate of $8 per week, exclusive of the first week of sickness, and for a period not exceeding twenty-six weeks. No policies, certificates, or contracts are issued to its members, but liability is fixed by the rules and regulations adopted for its government, and which provide, omitting provisions not pertinent: "Every member of the society is entitled to sick benefits if his sickness is such that the member must remain constantly in the house and under the care and treatment of a registered physician." On the 29th of May, the plaintiff was suffering with cataracts of the eyes. This trouble continued until after the institution of this action, on November 13, 1906. Plaintiff sued to recover a balance due for twenty-three weeks' benefit; defendant having paid him for five weeks. He recovered in the court below, and defendant appealed.

About the second week of his said illness, and acting under the directions of his physician, he went to a hospital, where an operation was performed, and where he was retained for a period of two weeks for treatment. He then went to his home, in the city of Omaha, where his physician resided, and where also the hospital was maintained.

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icy of insurance is to be construed liberally to that end; and for this reason conditions and provisos therein will be strictly construed against the insurers, because their object is to limit the scope and defeat the purpose of the principal contract . . . The evident purpose of the policy, construed as a whole, was to indemnify the insured from loss occasioned through illness, by providing for the payment to him of certain benefits while incapacitated for performing labor. When so incapacitated, he was disabled within the meaning and intent of the policy. It was not necessary that he be helpless, or that he remain in bed, or in the house, during such illness, when it might advance his recovery and correspondingly relieve the company from its obligations to him, if he should take some exercise and expose himself to the healing influences of sunshine and fresh air, provided he is entirely incapacitated for work or business on account of his illness."

To the same effect is Scales v. Masonic Protective Asso. 70 N. H. 490, 48 Atl. 1084. The court, in that case, said: "It would be generally understood that a sick person was confined 'to' the house, although he went into the dooryard to take sun baths or get fresh air. To the strict constructionist, the phrase 'to the house' does not mean the same as 'in the house.' 'To' signifies direction, connection with, appurtenant; while 'in' signifies the quality of being interior. Strictly speaking, confinement to a house differs from confinement in a house. According to the strictly literal meaning of the words, the plaintiff was 'absolutely, necessarily, continuously confined to his house,' notwithstanding he spent a portion of the time in his dooryard, as stated in the case."

But, as before stated, the decisions are not in entire harmony. Most of them, however, may be reconciled on the ground that the conditions of the contracts are different.

Thus it has been held that where a sick benefit policy provides for allowance while insured is "necessarily, entirely, and continuously confined to the house," there can be no recovery for the period during which insured went out for airings, although he acted under his physician's orders. Cooper v. Phœnix Acci. & Sick Ben. Asso. 141 Mich. 478, 104 N. W. 734. The court, after noting the difference in the provision of the policies in Hoffman v. Michigan Home & Hospital Asso. supra, and that in the one under consideration, said: "In the clause now before us the words are 'necessarily, entirely, and continuously confined to the house.' The contract is not one of indemnity for disability caused by a felon. It is only when the resulting disability is of such nature that the holder of the policy is necessarily, entirely, and continuously confined to his house that indemnity is promised. If the provision had been written expressly to meet and avoid the effect of the reasoning in the case referred to, it could not have well been made stronger."

And where a health policy insures against disease "necessitating continuous confinement indoors and treatment by a regularly qualified physician," a complaint which only alleges that the insured was wholly unable to transact any part of his business is bad on demurrer. Bishop v. United States Casualty Co. 99 App. Div. 530, 91 N. Y. Supp. 176. The court said: "It seems clear that the plaintiff would not be entitled to recover his weekly indemnity unless his physical disability was such as reasonably to necessitate continuous confinement to his house and medical treatment. In other words, no

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His physician never visited him at his home, nor did plaintiff perpetually remain within the house. He stepped into the yard occasionally, and went from one to four times each week to his physician's office. He returned to the hospital a few weeks later (the exact time is not disclosed), and again remained about two weeks and suffered additional operations. He then spent two months at his home until October or November, and then returned once more to the hospital for further operations. This brings us to the time the suit was instituted, and perhaps beyond such time. The exact dates of the plaintiff's confinement in the hospital are not given; but it is reasonable to presume that such periods prior to the institution of this suit did not exceed six weeks. Plaintiff experienced considerable pain and inflammation of the eyes; but his physical condition was such that he did not need to remain within the house, except when in the hospital, and he was strong enough to go to his physician's office. When he did so, he was accompanied by some member of his family. This was necessary on account of his defective eyesight. On two or three occasions prior to the institution of the suit, he went to the place of business of the president of the defendant society, and made demands for the sick benefits sued for. The defendant admitted a liability for five weeks of his sickness, covering, we presume, the time plaintiff was in the hospital, but refused liability for the remainder of the time, claiming that the plaintiff was not required by his sickness to remain in the house.

The rules and regulations of the defendant association constitute the agreement between the parties, and, in construing it, it is necessary to give force to the meaning which the parties evidently intended the words used should have. We are convinced that the only interpretation which may be given to this contract is that the defendant intended to pay to its members a weekly benefit during sickness, provided the sickness was such as would disable the member from departing from the house for the purpose of attending to the ordinary affairs of life. That a person "must remain constantly in the house" does not necessarily mean that

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matter what the nature of the malady may have been, and no matter though it may have totally disqualified him from performing his business, if it did not require him to remain indoors, and if the professional services were not reasonably required, it was not within the contemplation of the contract that the assured should have indemnity. The plaintiff undertook to allege part of the requisite consequences of his disease and omitted the balance. Without proof of that, the judgment in his favor could not be sustained; and I think that, without its allegation, he should not be permitted to reverse the decision sustaining the demurrer."

So it has been held, under a provision of a health policy that "no disability shall constitute a claim . . . where the claimant is able to leave his bed or house . . . nor during any period of convalescence, nor when the attendance of a physician is not required every second day at the bedside," that no recovery can be had for the time subsequent to the date that the insured left his bed, went out for air and recreation, and made a visit out of town for his health, especially where there was evidence that a physician visited him only once. Liston v. New York Casualty Co. 28 Misc. 240, 58 N. Y. Supp. 1090.

And it has been held that where a policy provides for payment in case of disability and necessary confinement to the house, there can be no recovery unless there is evidence of necessary confinement to the house as well as of disability. Schneps v. Fidelity & C. Co. 101 N. Y. Supp. 106.

So it has been held, under provisions of a health policy allowing benefits where the disability is continuous, complete, and total, and requires absolute and necessary confinement to the house, that recovery cannot be had by one suffering from iritis, where he is not necessarily confined to the house. Dunning v. Massachusetts Mut. Acci. Asso. 99 Me. 390, 59 Atl. 535. The court said: "The defendant company had a right to frame its health policy upon the assumption that confinement to the house would be found so tedious and irksome that few would submit to it except under compulsion of a severe illness. It had a right to make 'absolute and necessary confinement to the house' a conclusive test of the disability, and a condition precedent to the right of recovery. It has inserted this condition in the contract in plain and unambiguous language, and it is not suggested that any principle of public policy is thereby contravened. To hold that this requirement is not a condition precedent is to defeat the obvious intention disclosed by the terms employed, and to substitute for the plaintiff's policy a contract not made by the parties."

Where an accident policy provides for benefits when insured is "wholly incapacitated from transacting any and every kind of work or business pertaining to his occupation, and, as a result thereof, be confined to the house or bed," he cannot recover benefits after he goes to his store and sits around a couple of hours, superintending his business. Shirts v. Phœnix Acci. & Sick Ben. Asso. 135 Mich. 439, 97 N. W. 966. The court did not attempt to distinguish this case from Hoffman v. Michigan Home & Hospital Asso. supra, but said that the circumstances of the two cases were so different that the same rule did not apply.

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one must remain perpetually within the four walls of a house. Within the meaning of the by-law quoted, one is confined to the house by sickness if his condition is such that he is unable to attend to the ordinary affairs of life, and is required to remain in the house, except when making necessary visits to his physician. It cannot be said that a patient is not confined to his house constantly during an illness which is characterized by recurring periods of severity, although at intervals he may occasionally step into his yard, or make visits to his physician, or other short and unusual trips; he at all times being unable to resume the ordinary duties or pleasures of life.

In Hoffman v. Michigan Home Hospital Asso. 128 Mich. 323, 54 L.R.A. 746, 87 N. W. 265, it was held that a similar contract is not defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of the illness, he was continuously confined to the house the larger portion of the time. In the case at bar, there can be no doubt but that the plaintiff was entitled to recover during the time he was in the hospital. With reference to the intervening periods of time, it cannot be said that he was convalescing, except following his last visit to the hospital, and as to that time we are not concerned. Between operations he was simply undergoing treatment for the purpose of preparing for the following operation. At all times he suffered intense pain. There was inflammation about the eyes, and there can be no doubt but that he was physically disabled from attending to his daily business or from enjoying the ordinary pleasures of life. The construction placed upon the contract by the trial court and the jury was consistent with the above.

We find no error in the record, and recommend that the judgment be affirmed.

Good, Calkins, and Duffie, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied June 25, 1909.

NEBRASKA SUPREME COURT.

THOMAS DENNISON
v.
DAILY NEWS PUBLISHING COMPANY, Appt.

(82 Neb. 675, 118 N. W. 568.)

Libel — evidence — identification of plaintiff.

1. In a civil action to recover damages for libel, it is proper to produce evidence showing the relations existing between the plaintiff and the author of the alleged libel, for the purpose of proving that the plaintiff was the person referred to, when his name does not appear in the article, and defendant does not admit that he is the one referred to.

Same — damages — grief.

2. Neither the grief experienced by the plaintiff's wife upon reading an alleged libelous article regarding plaintiff, nor the influence of her grief upon the plaintiff's mind, are elements of damage recoverable in action for libel.

Same — evidence — publication of retraction.

3. In a civil action for libel in this state, wherein punitive damages are not recoverable, neither evidence of defendant's refusal to publish a retraction, nor evidence that others, who had also published the alleged libel, had published a retraction, is admissible for the purpose of enhancing the plaintiff's recovery.

Same — identification of plaintiff.

4. In such case the editor of defendant's paper, in which the alleged libel was published, should not be required, upon objection, to testify as to whom he "considered" and "supposed" the article referred.

(November 19, 1908.)

Case Note. — Admissibility of evidence of family relations of plaintiff on question of damages in an action for libel or slander.

It may be laid down as a general rule of law, supported by all the authorities, that evidence as to whether the plaintiff is married, as to the existence of children or other relatives, is admissible as an important factor on the question of damages. Rhodes v. Naglee, 66 Cal. 677, 6 Pac. 863; Dixon v. Allen, 69 Cal. 527, 11 Pac. 179; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547; Clements v. Maloney, 55 Mo. 352; Morey v. Morning Journal Asso. 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 161, affirming 17 N. Y. S. R. 266, 1 N. Y. Supp. 475; Beehler v. Steever, 2 Whart. 313; Klumph v. Dunn, 66 Pa. 141, 5 Am. Rep. 355; Binder v. Pottstown Daily News Pub. Co. 33 Pa. Super. Ct. 411.

Thus, in Enquirer Co. v. Johnston, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443, in which the libel complained of imputed unchastity to the plaintiff, the court held that the plaintiff was properly permitted to testify as to the number and ages of her children, and said that the children were a part of her environment, and that her relation to them was such as to make the injury of herself more acute and permanent, and such as might render her more sensitive to, and more helpless against, the wrong done.

And in Cahill v. Murphy, 94 Cal. 29, 28 Am. St. Rep. 88, 30 Pac. 195, in which it was held that it was competent, on the

Headnotes by EPPERSON, C.

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APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for libel. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. **J. H. Van Dusen** and **Irving F. Baxter** for appellant.

Mr. **W. J. Connell** for appellee.

Epperson, C., filed the following opinion:

On the night of November 22, 1904, in the city of Omaha, the home of Elmer E. Thomas, attorney for the Civic Federation, while it was occupied by himself and his family, was partially wrecked by the explosion of a dynamite bomb, brought about by some person unknown, with the probable intention of murdering said Thomas. On November 26, 1904, the defendant herein published in the Omaha Daily News an address delivered by Mr. Thomas at a mass meeting of citizens of Omaha, which, with unimportant matters omitted, is as follows: "When I began this fight as attorney for the Civic Federation, I saw at the outset a man who stood across the path of good government in this city. It was necessary that this man be driven out of the city. It is because of the fight made on that man that my family has been placed in jeopardy of their lives. When Richard L. Metcalf, editor of the World Herald, opposed the se-

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question of damages, for the plaintiff to prove the number and ages of her children, the court went on to say that such rule rested upon the principle that, as mental suffering entitles the plaintiff to compensation in cases of this character, such suffering may be increased and the damages consequently enhanced by the fact that members of the plaintiff's family will suffer by reason of the disgrace visited upon the plaintiff by the slanderous charge.

And in Barnes v. Campbell, 60 N. H. 27, in which it was held that evidence that the plaintiff had a wife and child, was competent on the question of damages, the court said: "The plaintiff was entitled to compensation for mental suffering, and that suffering might be heightened, and his damages consequently increased, by the fact that his wife and child would suffer from the disgrace thrown upon him by the charge that he was a thief."

And in Enos v. Enos, 135 N. Y. 609, 32 N. E. 123, in which the libel complained of imputed unchastity to the plaintiff, and also charged her with theft, it was held that it was competent to permit proof that the plaintiff had a family of young children, as bearing upon the question of damages. To quote from the opinion: "It certainly was a serious aggravation that the words were spoken of a mother, having children who would be disgraced by such a charge."

Upon the same principle, it was held, in Washington Times Co. v. Downey, 26 App. D. C. 258, 6 A. & E. Ann. Cas. 765, that testimony that a female plaintiff had no parents living was admissible. The court said: "Mental suffering being a recognized element of the damages recoverable, it was not error to let the jury be put in a situation to consider whether that mental suffering might not be more poignant as well as certain in the case of a single woman without parents to sustain and comfort her when charged with the disgraceful conduct."

Attention may be here called to Gaines v. Gaines, 109 Ill. App. 226, in which an instruction of the trial court that as much protection was due a man's reputation with his family as with strangers was objected to by the defendant, upon the ground that the plaintiff had no other family than his father, and in which the court defined the word "family" to include parents, children, and servants, and added that it made no difference whether it consisted of one, few, or many besides the plaintiff.

It will be noticed that all of the above cases are confined to the question of the admissibility of evidence as to the plaintiff's family relations, and do not consider the question whether testimony as to the effect of libel or slander upon the feelings of the plaintiff's relatives would be admissible to enhance the plaintiff's damages. Upon that question the conclusion reached in DENNISON v. DAILY NEWS PUB. CO. finds support in Sheftall v. Central R. Co. 123 Ga. 589, 51 S. E. 646, in which evidence as to the effect of the alleged libel upon the members of the plaintiff's family when the matter was discussed at home was held to be properly rejected. To quote from the opinion: "If the writing was a libel, it could have no other effect than an injurious one upon the feelings of anyone interested in the plaintiff, and human experience, and not direct testimony, was all that was necessary to convey this to the jury."

And in Guy v. Gregory, 9 Car. & P. 584, it was held that the plaintiff could not, in an action for libel, recover damages for the sufferings of his wife. Upon a further contention by the plaintiff that he should be allowed to give general evidence of the effect of the libels upon his wife, because they referred to her in direct terms, Coleridge, J., said: "If you had stated her illness on the record, you could not have gone into evidence of it; and I think you cannot do so the more, as you have not stated it."

And in Couch v. Mining Journal Co. 130 Mich. 294, 89 N. W. 936, testimony of the plaintiff as to the effect that the libel had upon his wife, which testimony was limited by instruction to the injury to the plaintiff's feelings by reason of the effect of the libel upon his wife, was held to be inadmissible, for the reason that it was not specially set out in the declaration. The court expressly refused to say whether such testimony would be competent under any circumstances.

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lection of a certain chief of police, this man hired a slugger to dog his footsteps. Whenever Mr. Metcalf and his family went out at night, this thug followed him for the purpose of intimidating his wife and family. A few years ago, Walter Moise, a saloon keeper, offended this same man, and a convict, Al Green, now in the Missouri penitentiary, says this person offered him $5,000 to kill Moise. County Attorney Shields offended this same individual, and a convict in the Iowa penitentiary says he offered $3,000 to dynamite Shield's house. It is important that the unholy alliance between the officials and this man be broken up. The police can scour the cornfields, run down the long and short man, or the glass-eyed man, search the cellars of respected citizens, but when we say, 'Here is the man who knows who did it,' we can get nothing done. Who threw the bomb? This man either threw that bomb, hired someone to throw it, or knows who did it. He has educated and sent out more thieves than any other man in the country. He has the reputation, among great detective agencies, of being one of the greatest criminals in the United States, and yet he is harbored here." This action was instituted by the plaintiff, who alleged that he is the individual referred to in the speech of Elmer E. Thomas, published as aforesaid; that said publication is libelous, and sought to recover general damages in the sum of $50,000. A judgment of $7,500 was obtained in the court below, and defendant has appealed.

1. Upon trial, the plaintiff was permitted, over objection, to testify that Elmer E. Thomas, who uttered the words reproduced in the alleged libelous article, had appeared as an attorney against the plaintiff in certain prosecutions pending against the latter in Iowa, and also in proceedings in this state, for the extradition of plaintiff. Such actions were pending at the time the Thomas speech was made and published. We find no error in the admission of this testimony. Evidence showing the relations existing between the plaintiff and the author of the alleged libelous utterance is proper for the purpose of showing that the article referred to the plaintiff when his name is not mentioned therein, and the pleadings do not admit that he is the party referred to. Some of the testimony in this regard, however, was otherwise incompetent. For instance, plaintiff testified: "He [meaning Thomas] had been over in Harrison county, Iowa, and had the assistance of a man out of the penitentiary; . . . had me indicted over there on two charges." These are but the conclusions of the witness, and probably would have been stricken from the record had defendant requested it.

2. The plaintiff testified that he had first read the libelous article while absent from his home.

Over objections he was further permitted to testify as follows:

Q. Where again do you say you saw it?

A. At home.

Q. Under what conditions as affecting your mental condition, or causing you pain or anguish of mind?

A. My wife had it, and was reading it and was crying.

Defendant moved to strike out the last answer of the witness as incompetent, irrelevant, and immaterial. The motion was overruled.

Q. And did that condition affect you, as far as the pain and anguish of mind is concerned?

A. That worried me all of the time. The worry was so I could not eat or sleep as I used to.

A motion to strike out this last-quoted answer was also overruled. It is not contended by the plaintiff that he is entitled to recover for the suffering endured by his wife, but it is urged that the testimony is admissible to show that his suffering was greater because of the grief which the publication caused her. In actions for libel or slander, plaintiff is entitled to prove that he has a family, and of whom it consists. Such evidence bears directly upon the question of damage. Cahill v. Murphy, 94 Cal. 29, 28 Am. St. Rep. 88, 30 Pac. 195; Enos v. Enos, 135 N. Y. 609, 32 N. E. 123; Klumph v. Dunn, 66 Pa. 141, 5 Am. Rep. 355; Enquirer Co. v. Johnston, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443. It shows, in part, his position in society. Such evidence is admissible for the purpose of proving that the plaintiff has a family, whose disgrace, shame, or humiliation by reason of the libel increase his mental suffering. In Cahill v. Murphy, supra, it was held: "Mental suffering is an element for which damages may be recovered in an action for slander, and such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family suffer by reason of a disgrace visited upon him or her by the slanderous charge." Evidence that plaintiff was a married man is admissible, as held in Morey v. Morning Journal Asso. 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 161, "as bearing upon the hurtful tendency of the libel and the general damage to which he was exposed." There can be no doubt but that the fact that one libeled has a family is an important circumstance which bears upon the question of damages, and this is so because the members of the family suffer by reason of the

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disgrace visited upon the father and husband. For it is apparent that not only is the finger of scorn, ridicule, disgrace, and shame pointed to the father, but also is directed towards the family; and, because of this fact, his damage is the greater, and his mental suffering accordingly increased. But we do not understand that the mental suffering experienced by the members of his family, nor the effect thereof upon him, can be taken into consideration for the purpose of enhancing the damages which he is entitled to recover. The mental suffering for which one libeled may recover must be the direct, immediate, and approximate effect of the publication. Such mental suffering, therefore, must be that which the plaintiff experienced because the libelous article exposed him to public hatred, contempt, or ridicule. Upon thorough research we are unable to find where the competency of such evidence has ever been adjudicated. The above-cited cases do not go to this extent. The only case bearing upon the question considered which we have been able to find is Flam v. Lee, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70, wherein it is held: "In an action for malicious prosecution, it was not error to permit plaintiff to show that on his arrest at his home his mother fainted or was prostrated by the shock, and that plaintiff thereby suffered distress of mind." The reasons for the principle are given in the opinion as follows: "But the principal basis of recovery in most actions of this kind is mental suffering and anguish arising from the wrongful charge and arrest; and, if the arrest be made in the presence of one's family or friends, bringing him into shame and humiliation before them, it is a proper matter to be considered as bearing upon the pain inflicted upon him. If, then, in addition to the indignity of his arrest, he sees, as the effect of such act, his wife or mother fall in a faint, and he is forced to leave her in such prostrate and suffering condition, we see no reason why this increased pain, which naturally follows such a situation, shall not be an element in assessing his damages, if he is found entitled to recover at all." The nature of the action, the unwarranted removal of the plaintiff from his family upon a false accusation of murder, we think is sufficient to distinguish that case from this. There the plaintiff, through the wrong inflicted, was taken upon his arrest from his mother, who was in great distress. From the opinion it appears that the rule announced in the syllabus was followed partly, at least, because plaintiff was "forced to leave her in such a prostrate and suffering condition."

We have considered the harm and the benefits which would result from the adoption of a rule which would permit the admission of such evidence, and are apprehensive that its adoption and application would meet with considerable difficulty. Would the rule apply only when the plaintiff had observed the demonstration of his wife's mental suffering, or would it also be extended to the litigant who had not observed the evidences of his wife's distress, although conscious that she suffered, and whereby he himself was distressed? Should the defendant in libel be permitted to prove that the plaintiff's wife experienced or demonstrated no grief? Yet, if the rule is adopted, the defendant would be permitted to refute the evidence which the plaintiff would be permitted to introduce. Can it be considered that a man with a large family is entitled to recover greater damages under otherwise like circumstances than a man with a smaller family? In the event that some of plaintiff's family experienced grief and others did not, what rule then would apply? If the emotional feelings demonstrated by a plaintiff's wife are caused through love and sympathy, is that not a benefit to him instead of a damage? If the libelous article alienates her affections, his damages are thereby increased, according to a former decision of this court. Case v. Case, 45 Neb. 493, 63 N. W. 867. If some of plaintiff's family demonstrate hatred as a result of the publication, and some sympathy, should he be allowed damages by reason of the effect either condition has upon his mind? If the wife remained indifferent, her husband might, and probably would, suffer by reason thereof. It is not our purpose to argue that the emotions experienced by a wife under such circumstances, no matter what form they may take, may not be distressing to the husband. Although her sympathy may be of value to him, yet the fact that it is required or made necessary by the illegal act of the defendant would naturally cause him distress. But it cannot be said as a matter of law, nor does it seem susceptible of proof, that a husband, under circumstances such as surrounded the plaintiff herein, was damaged more than he would have been had the conduct and emotions of his wife been different. Even if such damage could be considered the proximate result of the wrong done, it is so difficult of measurement that it seems necessary to exclude it entirely. Mental distress caused by sympathy for another's suffering is not a recoverable element of damage. It is true that the publication complained of was the cause of the wife's grief, but to permit the plaintiff to recover because his mental suffering was thereby made the greater would be to permit him to recover because of his sympathy for her.

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We arrive at no satisfactory conclusion, except that the plaintiff, in an action to recover general damages for libel, may only prove in this regard the fact that he has a wife and children, and their position in society.

3. Two days after the publication of the article in controversy, the plaintiff visited Mr. Polcar, the editor of the Daily News, and was permitted, over objection, to testify that, in a conversation then had, the plaintiff requested Mr. Polcar to publish a letter which plaintiff had written in answer to Thomas's speech; that the reason he wanted the letter published was he understood that everybody up in Logan and Harrison counties, Iowa, where the criminal proceedings were pending against plaintiff, looked to the Daily News to get the inside facts in regard to plaintiff's case, and that the Bee and the World Herald, and other daily papers in which the alleged libelous article had also been published, had agreed to publish the plaintiff's letter. He was also permitted to prove that the World Herald had published the same. The admission of this testimony was error. The article was libelous *per se*, and the amount of plaintiff's recovery must be determined by the damages which flow from the acts of the defendant complained of, and not by reason of its omission to publish the article which the plaintiff requested. Defendant's refusal to publish the plaintiff's letter could be construed only as evidence of defendant's malice in publishing the alleged libelous article. But, even then, the evidence would be incompetent for the purpose of enhancing the plaintiff's recovery. Bee Pub. Co. v. World Pub. Co. 59 Neb. 718, 82 N. W. 28. Again, it must be remembered that Thomas's speech was also published in the Bee and the World Herald, two daily newspapers of the city of Omaha of wide circulation. By the objectionable evidence the plaintiff proved that the editors of these two papers had agreed to publish the plaintiff's answer to the alleged libelous article in the other papers, and proof of defendant's refusal to publish the same would only tend to enhance the amount of plaintiff's recovery, for which purpose it was evidently intended. The conduct of other publishers, who also published the alleged libel, in their apparent attempts to lessen the evil results of their publications, is laudable, but in no proper manner can such conduct be considered by the jury for the purpose of determining whether or not the defendant had committed a wrong, or for the purpose of measuring the damage, if a wrong had been done. Many courts of high standing have held that evidence of defendant's refusal to publish a retraction is admissible. But the purpose of such evidence is to prove malice; and, so far as the author of this opinion has observed, the rule is not followed, except in jurisdictions permitting the recovery of punitive damages. The above evidence related to a part of a conversation which plaintiff contends was properly admitted for the purpose of showing to whom the article referred. The remainder of the conversation related to statements of Mr. Polcar that he knew that plaintiff was the person referred to. Mr. Polcar was not an officer of the defendant. It is not shown that he saw the article or knew of it before its publication. His admissions, made two days subsequent to the publication, do not form a part of the *res gestæ*. We do not say that the evidence of Polcar's admissions was prejudicial; but, if without prejudice, that fact would not justify evidence of the conversation, a part of which related to a refusal to publish plaintiff's answer to Thomas's speech.

4. Upon the cross-examination of the witness Polcar, he was required, over objection, to testify that, at the time of the publication of Thomas's speech, he considered and supposed that it related to the plaintiff. He had previously testified that he did not know that it referred to the plaintiff. The evidence objected to should have been excluded. Whatever the witness supposed or considered in this regard is immaterial. Plaintiff, however, suggests that this evidence, as well as plaintiff's testimony above referred to, regarding Polcar's admissions, is without prejudice, as it is otherwise well established that plaintiff is the person referred to in Thomas's speech. Plaintiff's competent evidence fairly establishes the fact that he is the person referred to by Mr. Thomas. No attempt was made to prove the contrary. Defendant tried the case upon the theory that plaintiff was the person whose character was assailed by the publication.. If the case depended upon this assignment of error, we doubt that we could recommend a reversal. However, upon another trial, this evidence should, and undoubtedly will, be omitted. Defendant further urges that the judgment is excessive. It is unnecessary to consider this assignment. The errors above referred to as prejudicial are so because their tendency is to enhance the damages; and, as the case must be remanded for a new trial, the amount of recovery will be determined from the evidence then taken. Neither do we consider an assignment of error alleging misconduct on the part of plaintiff's counsel. This alleged misconduct pertained to statements made in open court, before the jury, relative to publication in the defendant's paper, at about the time the jury was impaneled to try the case. Upon anoth-

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er trial it is not probable that such publications will be repeated, nor counsel animated to conduct similar to that complained of here.

We recommend that the judgment of the district court be reversed, and this cause remanded for a new trial.

Duffie and Fawcett, CC., not sitting. Calkins, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and this case remanded for a new trial.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

CLIFTON L. JARRELL, Appt.,
v.
YOUNG, SMYTH, FIELD COMPANY.

(105 Md. 280, 66 Atl. 50.)

Trial — waiver of exception.

1. Proceeding with the trial after refusal of the court to take the case from the jury waives the exception taken to such refusal.

Same — sale — instruction.

2. When recovery for the purchase price of goods depends upon their having been accepted by the purchaser, and the evidence shows that they were shipped to him, and that he paid the freight both ways, and reshipped them to the seller, he is entitled to have the jury instructed that, to render him liable, he must have intended to receive the goods and accept them as owner.

Witness — sale — intent.

3. Upon the question whether or not a buyer has received and accepted the goods so as to comply with the statute of frauds in paying the freight and reshipping them, he may be allowed to testify as to his intent.

(March 1, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Kent County in plaintiff's favor in an action brought to recover the purchase price of goods alleged to have been sold and delivered. Reversed.

The facts are stated in the opinion.

Messrs. **Hope H. Barroll** and **James P. Gorter**, for appellant:

Under the law of the state of Maryland, to be an acceptance, as required by the statute of frauds, there must be an actual acceptance by the purchaser with intent to take possession as owner.

Belt v. Marriott, 9 Gill, 331; Jones v. Mechanics' Bank, 29 Md. 294, 96 Am. Dec. 533; Corbett v. Wolford, 84 Md. 429, 35 Atl. 1088; Brantly Contr. p. 57.

Defendant might testify as to his intent in the matter.

Fenwick v. State, 63 Md. 239; Phelps v.

***Subject Note.** — Right of one to testify as to his intent.*

I. The common-law rule.
- a. Statement of, 368.
- b. Retention of common-law rule in some jurisdictions.
  1. Generally, 368.
  2. The Alabama rule.
     (a) Generally, 368.
     (b) Application in criminal cases, 369.
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     (d) Exceptions, 371.

II. Rule under statutes permitting parties to testify.
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- b. The test of admissibility, 374.
- c. Exceptions and limitations.
  1. Varying terms of written instrument, 376.
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  3. Mental operations and intentions depending upon nonexistent or supposititious circumstances, 381.
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  10. To residence, occupation, or use.
     (a) With reference to domicil, etc., 397.
     (b) With reference to homestead, 397.
     (c) With reference to abandonment of easement or other rights, 397.
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We arrive at no satisfactory conclusion, except that the plaintiff, in an action to recover general damages for libel, may only prove in this regard the fact that he has a wife and children, and their position in society.

3. Two days after the publication of the article in controversy, the plaintiff visited Mr. Polcar, the editor of the Daily News, and was permitted, over objection, to testify that, in a conversation then had, the plaintiff requested Mr. Polcar to publish a letter which plaintiff had written in answer to Thomas's speech; that the reason he wanted the letter published was he understood that everybody up in Logan and Harrison counties, Iowa, where the criminal proceedings were pending against plaintiff, looked to the Daily News to get the inside facts in regard to plaintiff's case, and that the Bee and the World Herald, and other daily papers in which the alleged libelous article had also been published, had agreed to publish the plaintiff's letter. He was also permitted to prove that the World Herald had published the same. The admission of this testimony was error. The article was libelous *per se*, and the amount of plaintiff's recovery must be determined by the damages which flow from the acts of the defendant complained of, and not by reason of its omission to publish the article which the plaintiff requested. Defendant's refusal to publish the plaintiff's letter could be construed only as evidence of defendant's malice in publishing the alleged libelous article. But, even then, the evidence would be incompetent for the purpose of enhancing the plaintiff's recovery. Bee Pub. Co. v. World Pub. Co. 59 Neb. 718, 82 N. W. 28. Again, it must be remembered that Thomas's speech was also published in the Bee and the World Herald, two daily newspapers of the city of Omaha of wide circulation. By the objectionable evidence the plaintiff proved that the editors of these two papers had agreed to publish the plaintiff's answer to the alleged libelous article in the other papers, and proof of defendant's refusal to publish the same would only tend to enhance the amount of plaintiff's recovery, for which purpose it was evidently intended. The conduct of other publishers, who also published the alleged libel, in their apparent attempts to lessen the evil results of their publications, is laudable, but in no proper manner can such conduct be considered by the jury for the purpose of determining whether or not the defendant had committed a wrong, or for the purpose of measuring the damage, if a wrong had been done. Many courts of high standing have held that evidence of defendant's refusal to publish a retraction is admissible. But the purpose of such evidence is to prove malice; and, so far as the author of this opinion has observed, the rule is not followed, except in jurisdictions permitting the recovery of punitive damages. The above evidence related to a part of a conversation which plaintiff contends was properly admitted for the purpose of showing to whom the article referred. The remainder of the conversation related to statements of Mr. Polcar that he knew that plaintiff was the person referred to. Mr. Polcar was not an officer of the defendant. It is not shown that he saw the article or knew of it before its publication. His admissions, made two days subsequent to the publication, do not form a part of the *res gestæ*. We do not say that the evidence of Polcar's admissions was prejudicial; but, if without prejudice, that fact would not justify evidence of the conversation, a part of which related to a refusal to publish plaintiff's answer to Thomas's speech.

4. Upon the cross-examination of the witness Polcar, he was required, over objection, to testify that, at the time of the publication of Thomas's speech, he considered and supposed that it related to the plaintiff. He had previously testified that he did not know that it referred to the plaintiff. The evidence objected to should have been excluded. Whatever the witness supposed or considered in this regard is immaterial. Plaintiff, however, suggests that this evidence, as well as plaintiff's testimony above referred to, regarding Polcar's admissions, is without prejudice, as it is otherwise well established that plaintiff is the person referred to in Thomas's speech. Plaintiff's competent evidence fairly establishes the fact that he is the person referred to by Mr. Thomas. No attempt was made to prove the contrary. Defendant tried the case upon the theory that plaintiff was the person whose character was assailed by the publication.. If the case depended upon this assignment of error, we doubt that we could recommend a reversal. However, upon another trial, this evidence should, and undoubtedly will, be omitted. Defendant further urges that the judgment is excessive. It is unnecessary to consider this assignment. The errors above referred to as prejudicial are so because their tendency is to enhance the damages; and, as the case must be remanded for a new trial, the amount of recovery will be determined from the evidence then taken. Neither do we consider an assignment of error alleging misconduct on the part of plaintiff's counsel. This alleged misconduct pertained to statements made in open court, before the jury, relative to publication in the defendant's paper, at about the time the jury was impaneled to try the case. Upon anoth-

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er trial it is not probable that such publications will be repeated, nor counsel animated to conduct similar to that complained of here.

We recommend that the judgment of the district court be reversed, and this cause remanded for a new trial.

Duffie and Fawcett, CC., not sitting. Calkins, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and this case remanded for a new trial.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

CLIFTON L. JARRELL, Appt.,
v.
YOUNG, SMYTH, FIELD COMPANY.

(105 Md. 280, 66 Atl. 50.)

Trial — waiver of exception.

1. Proceeding with the trial after refusal of the court to take the case from the jury waives the exception taken to such refusal.

Same — sale — instruction.

2. When recovery for the purchase price of goods depends upon their having been accepted by the purchaser, and the evidence shows that they were shipped to him, and that he paid the freight both ways, and reshipped them to the seller, he is entitled to have the jury instructed that, to render him liable, he must have intended to receive the goods and accept them as owner.

Witness — sale — intent.

3. Upon the question whether or not a buyer has received and accepted the goods so as to comply with the statute of frauds in paying the freight and reshipping them, he may be allowed to testify as to his intent.

(March 1, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Kent County in plaintiff's favor in an action brought to recover the purchase price of goods alleged to have been sold and delivered. Reversed.

The facts are stated in the opinion.

Messrs. **Hope H. Barroll** and **James P. Gorter**, for appellant:

Under the law of the state of Maryland, to be an acceptance, as required by the statute of frauds, there must be an actual acceptance by the purchaser with intent to take possession as owner.

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      (a) With reference to domicil, etc., 397.
      (b) With reference to homestead, 397.
      (c) With reference to abandonment of easement or other rights, 397.
    11. To dedication, 398.

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George's Creek & C. R. Co. 60 Md. 536; Trader v. Lowe, 45 Md. 1; Friend v. Hamill, 34 Md. 307.

Mr. **Lewin W. Wickes**, for appellee:

By paying the freight, the appellant accepted and received the goods, and took them into his possession.

Langstaff v. Stix, 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97; Benjamin, Sales, 3d ed. 847.

It is not permissible for a party to say what his intention was when doing a certain thing.

Hewes v. Jordan, 39 Md. 472, 17 Am. Rep. 578; Phelps v. George's Creek & C. R. Co. 60 Md. 539; Lineweaver v. Slagle, 64 Md. 465, 54 Am. Rep. 775, 2 Atl. 693; Ecker v. McAllister, 45 Md. 309.

Boyd, J., delivered the opinion of the court:

The appellant, who was a merchant at Chestertown, gave the appellee's agent a verbal order for some articles of merchandise, which the appellee claims were to be shipped to him on March 10, 1906; while the appellant contends that they were not to be shipped until the 15th of that month, and that he could, in the meantime, countermand the order. No payment was made on them by the appellant, and, there being no memorandum in writing signed by him, the real question at the trial below was whether there was such acceptance and receipt of them as complied with the requirements of the 17th section of the statute of frauds. A verdict was rendered in favor

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12. To gambling contracts, 398.
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14. To other and miscellaneous matters, 399.
e. Proof by agent or associate, 401.
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I. The common-law rule.

a. Statement of.

Previous to the enactment of statutes making parties to an action competent witnesses therein, the intent of a party could be shown only by the acts of the party and the circumstances which occurred from which it might be inferred. Zimmerman v. Marchland, 23 Ind. 474.

b. Retention of common-law rule in some jurisdictions.

1. Generally.

An early Indiana case held that the enactment of a statute permitting parties to an action to testify therein as witnesses did not change the common-law rule that the intention of a party can be shown only by the circumstances which occurred from which it might be inferred. Zimmerman v. Marchland, 23 Ind. 474.

But this case was overruled by Greer v. State, 53 Ind. 420, since which decision Indiana courts have been with the great majority supporting the contrary rule.

So, in Bayliss v. Cockcroft, 81 N. Y. 363, it was said that the court does not encourage the reception of testimony as to the mental operations of a party and the intent with which he did an act.

And in Hathaway v. Brown, 18 Minn. 423, Gil. 373, it was said that the majority of this court would be unwilling to concede the correctness of the rule that, where the character of the transaction depends upon the intent of the party, it is competent, when the party is a witness, to inquire of him what his intention was, if the question was then before it.

But, as will be seen by reference to infra II. a, b, both New York and Minnesota have adopted the general rule admitting testimony as to intent when the intent is material.

Alabama, however, apparently all alone, continued to cling and still clings tenaciously to the common-law rule.

And it is there held that a statute making parties competent witnesses in their own favor does not enable them to testify to their own uncommunicated motives or intentions. Burke v. State, 71 Ala. 377.

2. The Alabama rule.

(a) Generally.

The rule of the Alabama cases is that motive or intention is an inferential fact, to be drawn by the jury from the facts and circumstances in evidence. Alexander v. Alexander, 71 Ala. 295; Burke v. State, 71 Ala. 377; Wheless v. Rhodes, 70 Ala. 419; Whizenant v. State, 71 Ala. 383; McCormick v. Joseph, 77 Ala. 236; Stewart v. State, 78 Ala. 436; Baldwin v. Walker, 91 Ala. 428, 8 So. 364.

And an uncommunicated belief, motive, or intention cannot be testified to by a party to a civil suit, when examined as a witness. Burke v. State, supra; Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Wheless v. Rhodes; Whizenant v. State; McCormick v. Joseph; and Stewart v. State,—supra; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Ball v. Farley, 81 Ala. 288, 1 So. 253; Baldwin v. Walker, supra; East Tennessee, V. & G. R. Co. v. Davis, 91 Ala. 615, 8 So. 349; Toliver v. State, 94 Ala. 111, 10 So. 428; Richardson Bros. v. Stringfellow, 109 Ala. 416, 14 So. 283; State ex rel. Atty. Gen. v. Tally, 102 Ala. 25, 15 So. 722; Dean v. State, 105 Ala. 21, 17 So. 28; Mobile Furniture Commission Co. v. Little, 108 Ala. 399, 19 So. 443; Williams v. State, 123 Ala. 39, 26 So. 521; Barker v. State, 126 Ala. 83, 28 So. 589; Hurst v. State, 133 Ala. 96, 31 So. 933; Barnevell

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of the plaintiff (appellee), and this appeal is from the judgment entered thereon.

A prayer was offered at the close of the plaintiff's case, seeking to take the case from the jury; but, when that was rejected, the defendant called a witness and proceeded with his case. The exception taken to the rejection of that prayer was thereby waived, and is not before us for review. Barabasz v. Kabat, 91 Md. 53, 46 Atl. 337, and other cases since decided.

The defendant's attorney called the defendant, and asked him the following question: "Did you at any time ever intend to receive and accept as owner these goods after you were notified of their receipt at the railroad?" The court sustained an objection to that question, and its ruling is presented by the second bill of exceptions. The third bill of exceptions embraces the rulings on the prayers. Exceptions were taken to the court's action in granting the plaintiff's second prayer, and rejecting the defendant's fifth, and modifying his first, offered at the end of the case. It will be convenient to first consider the rulings on the prayers.

The appellant, not having done anything from which it can be claimed that the 17th section of the statute of frauds had in other respects been complied with, the question was whether he did "accept part of the goods so sold, and actually receive the same,"—to use the language of the statute. The goods were shipped to the appellant at Chestertown from Philadelphia, on the 10th of March, and were received at the railroad

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v. Stephens, 142 Ala. 609, 38 So. 662; Lawrence v. Alabama State Land Co. 144 Ala. 524, 41 So. 612; Smith v. State, 145 Ala. 17, 40 So. 957; Vest v. Speakman, 153 Ala. 393, 44 So. 1017; Patterson v. State (Ala.) 47 So. 52.

And the question whether a witness approved or disapproved of a particular act is irrelevant if propounded with the view of eliciting a mere mental view, unaccompanied with acts or words. Burns v. Campbell, 71 Ala. 271.

Nor is evidence concerning the uncommunicated motive or purpose of a witness with reference to certain acts to which he had testified admissible. Reeder v. Huffman, 148 Ala. 472, 41 So. 177.

And a party cannot state his uncommunicated reason for acts or conduct on his part, though he testified to such acts or conduct on cross-examination; it amounting to an admission against his interest. Burks v. Bragg, 89 Ala. 204, 7 So. 156.

Nor can an uncommunicated belief, motive, or intention be stated by a defendant in a criminal case in the unsworn statement which he is allowed by statute to make. Burke v. State and Whizenant v. State, supra.

The reason for the rule that uncommunicated motives and intentions cannot be given in evidence is that such testimony, in its nature, is insusceptible of contradiction. Alabama Fertilizer Co. v. Reynolds, supra.

But, where intention is the fact to be ascertained, objection to proof of it by the testimony of the party entertaining it may be waived; and the evidence, when so introduced, is legal and relevant. Fuller v. Whitlock, 99 Ala. 411, 13 So. 80.

(b) Application in criminal cases.

The intention of a person accused of homicide is a conclusion to be ascertained by the jury from all the facts testified to in the case. Fonville v. State, 91 Ala. 39, 8 So. 688.

And a person on trial for homicide should not be permitted to testify as to the uncommunicated intention with which he did the act which caused the death of the deceased. Lewis v. State, 96 Ala. 6, 38 Am. St. Rep. 75, 11 So. 259; Pate v. State (Ala.) 50 So. 357; Fonville v. State, supra.

So, a person on trial for murder cannot be asked why he shot the deceased, the question calling for the secret and uncommunicated motive or intention of the accused, and not for facts from which such mental status could be lawfully inferred. Seams v. State, 84 Ala. 410, 4 So. 521.

And a person charged with murder cannot, in testifying as a witness for himself, deny any purpose to engage in the difficulty which resulted in the killing. Stewart v. State, 78 Ala. 436.

Nor can a person on trial for homicide be asked, as a witness in his own behalf, for what purpose he took his gun or pistol to the scene of the homicide. Dean v. State, 105 Ala. 21, 17 So. 28; Smith v. State, 145 Ala. 17, 40 So. 957.

And he may not be asked on direct examination why he did not retreat. Patterson v. State (Ala.) 47 So. 52.

And he cannot be permitted to testify that, just prior to the difficulty resulting in the killing, he was in a fright. Stewart v. State, supra.

Nor can a person on trial for homicide be called upon to testify as to his reason for removing from one place to another, the question calling for a secret and uncommunicated motive. Poe v. State, 155 Ala. 31, 46 So. 521; Gibbs v. State (Ala.) 47 So. 65.

And that a person charged with murder went to the house of the person killed, and asked for matches, is a fact which may properly be testified to; but it is not proper for him to state what he wanted the matches for, this being a secret, uncommunicated motive, inadmissible in evidence. Dent v. State, 105 Ala. 14, 17 So. 94.

Nor can a person on trial for assault with intent to kill be asked if he intended to kill the person assaulted. Fonville v. State, supra.

And a person on trial for assault with intent to murder cannot be asked how he happened to have a pistol on the occasion

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station on the 12th of that month. A carter who hauled for the appellant went to the station to get them, but the appellant sent word to him not to take them; that he did not want them. The appellant paid the freight both ways, and reshipped the goods to the appellee, and on that day (March 16th) signed a shipping order and wrote a letter to the appellee. The letter stated he was returning the goods, and asked the appellee to take them back, as he had disposed of his stock and mercantile business; that "the goods were not opened, and go back as they were shipped, freight paid." The appellee replied on April 10th, but declined to accept the goods, as they had reason to believe he was still in business. On April 20th they were received by the railroad company from Easton, Maryland; they having been shipped there by mistake, and then forwarded to Chestertown, where they still remain at the depot. The carter paid the railroad company the freight; but, when the appellant notified him not to take the goods, the company refunded the amount. There were some expressions in the letters of the appellant which might have led the jury to believe that he had accepted the goods, although they were not instructed as to what was a sufficient acceptance to comply with the statute of frauds.

It was important for them to be so instructed, in order that they could understand what was necessary to show an acceptance, within the meaning of the law. The defendant's first prayer, as offered, and

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of the assault, and what he was going to do with it, the question calling for an uncommunicated purpose or intention, the proper proof of which lies in inference from the circumstances in evidence, and not in a direct statement of a witness. Holmes v. State, 136 Ala. 80, 34 So. 180.

But, where no objection is interposed to a question asked the defendant in a prosecution for assault with intent to kill, calling for the intent which led him to carry a pistol, and the answer is responsive, the party against whom it is offered cannot afterwards object and move to exclude the question and answer. Ellis v. State, 105 Ala. 72, 17 So. 119.

So, a person on trial for carrying concealed weapons cannot testify, as a witness in his own behalf, that he did not intend to conceal the weapon at the time. Barker v. State, 126 Ala. 83, 28 So. 589.

And a person on trial for attempted arson cannot testify that he went to the house which was burned, not for the purpose of setting fire to it, but to get something out of it. Brown v. State, 79 Ala. 51.

Nor can the prosecuting witness in a criminal trial for seduction be permitted to testify that she yielded in consequence of a promise of marriage or of any act or declaration of the defendant, this being a matter of inference or deduction from facts and circumstances proved or presumed, and not a fact to which a witness can testify. Wilson v. State, 73 Ala. 527; Anderson v. State, 104 Ala. 83, 16 So. 108.

But want of consent on the part of a party alleged to have been raped is an essential constituent of the crime, to be proved in the prosecution therefor, and is a fact to which the woman may swear, the testimony to be weighed in connection with all the other evidence tending to show consent. Jones v. State, 104 Ala. 30, 16 So. 135.

(c) Application in civil cases.

In the construction of a written contract, the intention and meaning of the parties must be ascertained from the terms of the writing, the nature of the transaction, and

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the surrounding circumstances; and the parties cannot be allowed to testify as to their understanding and intention. Kyle v. Bellenger, 79 Ala. 516.

And a party to a contract, testifying for himself in an action thereon, cannot be permitted to state the intention with which he entered into the contract. Oxford Iron Co. v. Spradley, 51 Ala. 171.

So, a claim of ownership, unless communicated, is an improper subject for testimony. East Tennessee, V. & G. R. Co. v. Davis, 91 Ala. 615, 8 So. 349.

And a purchaser of goods, in an action against the vendor for misrepresentation with reference to them, cannot be permitted to testify that the representation was relied on and induced the purchase, since this is not strictly fact, but an inference or conclusion of fact, to be drawn by the jury. Sledge v. Scott, 56 Ala. 202.

And a purchaser of a safe, suing for breach of warranty, the safe proving not to be burglar-proof, cannot testify that, if he had known the real thickness of the iron of the safe, he would not have risked his money in it as he did, as this would be simply proving a reason or motive not communicated for doing the act which resulted in the loss of the money. Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

Nor can a person seeking to recover goods sold to another, who proved to be insolvent, testify that he sold the goods to the purchaser because he believed him to be solvent, and that he would not have sold had he known of his insolvency. McCormick v. Joseph, 77 Ala. 236.

And where goods were purchased of a debtor, and they were afterwards seized for the debtor's debts, in an action against the marshal and his sureties for damages for illegal seizure, the purchaser cannot be permitted to testify that he acted in good faith and honesty in making the purchase, and had no purpose to aid the debtor in defrauding his creditors. Hinds v. Keith, 6 C. C. A. 231, 13 U. S. App. 222, 314, 57 Fed. 10. This case arose in Alabama and the court followed the Alabama rule.

So, a person who, loaning money to an-

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the court's instruction, in lieu of it, will be considered before referring to the plaintiff's prayer which was granted, as the theory of the appellant is thereby distinctly presented. After asking the court to say there was no sufficient memorandum in writing to evidence the sale of goods sued for, the defendant's prayer proceeded: "And, in order for the plaintiff to recover in this cause, it is necessary for the plaintiff to establish by a preponderance of evidence, to the satisfaction of the jury, *that the defendant intended to receive the goods sued for, and to accept the same as owner.*" The court's instruction used the language of that prayer to and including the words "preponderance of evidence," and, in place of the rest of it, substituted the words, "*that the defendant received and accepted said goods.*" We will italicize the parts of the two which differ. Under the circumstances of the case, which we have sufficiently stated, it would seem to be clear that the instruction of the court was not as specific as to acceptance and receipt as the defendant was entitled to. The fact that the defendant did pay the freight from and to Philadelphia, and did give the shipping order for the goods to be returned, together with other facts we have mentioned, might have led the jury to believe he had accepted and received the goods, and they could not be presumed to know what sort of an acceptance or receipt was required to bind the defendant. As early as Belt v. Marriott, 9 Gill, 335, our predecessors quoted with

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other on a letter of recommendation from a third person, loses the money, and sues the person giving the letter, cannot testify as a witness for himself, that he never would have loaned the money but for the letter of recommendation, such testimony not being of a fact, but being an inference or conclusion of fact, to be drawn by the jury. Baker v. Trotter, 73 Ala. 277.

And a witness in an action against a constable for a failure to execute certain writs for the seizure of personal property should not be allowed to testify whether or not he would have told the constable he had the property if the constable had inquired of him concerning it. Reeder v. Huffman, 148 Ala. 472, 41 So. 177.

Nor can a person suing for damages against one who had sued out an attachment against her, on the ground that she was about to remove from the state, be allowed to testify that she had no intention of removing from the state, or to state the reasons why she was attached to her residence in such state. Baldwin v. Walker, 91 Ala. 428, 8 So. 364.

And the belief of a creditor that garnishment was necessary to obtain satisfaction of his debt, and his belief as to the indebtedness and insolvency of his debtor, alone are not an answer to a claim of actual damages for wrongfully suing out a garnishment. Mobile Furniture Commission Co. v. Little, 108 Ala. 399, 19 So. 443.

So, a person seeking to recover land in ejectment cannot be asked, while testifying as a witness in his own behalf, why he did not pay the taxes on the land. Lawrence v. Alabama State Land Co. 144 Ala. 524, 41 So. 612.

And where it appears, in an action of ejectment in which the issue is the sufficiency of the delivery of the deed, that, after the signing and acknowledgment of the deed, the grantor left it with his attorney, with no instructions as to delivery, the grantor cannot be permitted, when examined as a witness, to testify as to his purpose and intention as to the delivery of the deed. Fitzpatrick v. Brigman, 130 Ala. 450, 30 So. 590.

So, one of a firm of lawyers sued for negligence in failing to collect a demand placed in their hands for collection cannot testify that an arrangement entered into with reference to the claim was, under all the circumstances, the best that, in his judgment, could be made. Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

And where an auditor is sued by an attorney for refusal to allow the attorney to inspect the records in the auditor's office in which were kept the accounts between the state and certain tax collectors represented by the attorney, neither the auditor nor his clerk may testify to the belief either may have had as to the attorney's employment, or as to his authority to represent the tax collectors. If this belief is a material fact in the case, it is an inference to be drawn by the jury from the circumstances in evidence. Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318.

So, in an action on an insurance policy, on an issue as to ownership, where there was a transfer of the policy, testimony of the agent of the insurance company as to whom he thought he was consenting for the transfer to be made to, whether to the plaintiff's agent or the plaintiff himself, is inadmissible. Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 So. 759.

And a statement by a witness that a third person had made a statement to him that made him wish to visit a named family is properly rejected. Barnewell v. Stephens, 142 Ala. 609, 38 So. 662.

(d) Exceptions.

An exception to the rule that a witness cannot testify to his uncommunicated motives or intentions exists where the accused in a criminal case testifies in his own behalf to a particular act of his, relevant to the issue, permitting him to be asked on cross-examination what motive prompted him to the act, or what intention actuated him, or why he did it. Williams v. State, 123 Ala. 39, 26 So. 521; Hurst v. State, 133 Ala. 96, 31 So. 933; Linnehan v. State, 120 Ala. 293, 25 So. 6.

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approval from 2 Starkie on Evidence, 490, that, "in order to satisfy the statute, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter, with intent to take possession as owner." That has been since followed a number of times in this court. See Jones v. Mechanics' Bank, 29 Md. 293, 96 Am. Dec. 533; Hewes v. Jordan, 39 Md. 479, 17 Am. Rep. 578; Corbett v. Wolford, 84 Md. 429, 35 Atl. 1088; Cooney v. Hax, 92 Md. 136, 48 Atl. 58; Richardson v. Smith, 101 Md. 19, 70 L.R.A. 321, 109 Am. St. Rep. 552, 60 Atl. 612, 4 A. & E. Ann. Cas. 184. Judge Miller, in Jones v. Mechanics' Bank, referred to the necessity of discrimination "between a sale at common law, which is consummated by delivery, and a sale as affected by this statute;" and referred to the rule quoted in 9 Gill, 335, from Starkie on Evidence, as being "very accurately stated." In Hewes v. Jordan, supra, Judge Alvey discussed the question at length. He said: "That the acceptance and actual receipt of the goods sold, or some part of them, by the vendee, to gratify the statute, must be intended by the parties to effect a final and complete change of property in the goods so actually received, under the contract, would seem to be clear." He quoted with approval from Blackburn on Sales that "it is immaterial whether his (buyer's) refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all,

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And, on cross-examination of the defendant in a prosecution for crime, it is permissible to inquire as to his motives for particular acts testified to by him. Patterson v. State (Ala.) 47 So. 52.

And a person on trial for homicide may be asked on cross-examination what he carried his pistol with him for. Ibid.

And where a witness in a prosecution for burglary in which two defendants are charged with having stolen a quantity of meat testifies to having heard a conversation between the defendants, respecting the division of the meat, and details on his direct examination his movements at the time this conversation was overheard, he may be asked on cross-examination as to the reasons for the movements so described by him. Yarbrough v. State, 115 Ala. 92, 22 So. 534.

So, a witness in an action upon a contract, having testified to what took place at an interview between the parties at the plaintiff's house, may be asked on cross-examination how he happened to go with the defendant to the plaintiff's house. Thomason v. Dill, 30 Ala. 444.

And where an assignment was attacked for fraud, and it was shown that the assignor had said that he might make an assignment, and that he might be forced to make one, it is competent for him to rebut any prejudicial inference sought to be drawn from this evidence by any reasonable explanation he can give; but it is not competent for him to state in explanation the uncommunicated intention or purpose which actuated him to make the statement. Richardson Bros. v. Stringfellow, 100 Ala. 416, 14 So. 283.

Likewise, an exception to the rule that a witness cannot testify as to his uncommunicated motives or intentions exists to the effect that where a witness is sought to be impeached by showing by him, on cross-examination, that he has made contradictory statements, he may be asked in rebuttal why he made the statements in question. Williams v. State, supra; Campbell v. State, 23 Ala. 44.

And a witness for the state in a criminal prosecution, who, on cross-examination, testified that he had taken an active part in the prosecution, and that he cherished unfriendly feelings toward the prisoner, may be asked on re-examination whether his feelings toward the prisoner are such that he would desire to see him convicted though innocent. Campbell v. State, supra.

And, while uncommunicated motives and intentions are not admissible in evidence, where a witness in a prosecution for homicide, after testifying that he saw the difficulty in which the accused was the slayer, admits on cross-examination with a view to impeachment, that he had previously stated that he knew nothing of the difficulty, it is competent, on re-examination by the defendant, for the witness to explain his motive in making such prior statement, such testimony tending to rebut the discredit which his admission, unexplained, would throw upon his evidence. Johnson v. State, 102 Ala. 1, 16 So. 99.

So, a father suing for injuries to his son caused by the negligence of the son's employer may state as a witness whether he consented to his son's working at the foundry of the employer, this being a material fact under the issues, and not a mere uncommunicated mental status of the father. Dimmick Pike Works v. Wood, 139 Ala. 282, 35 So. 885.

And the superintendent of a defendant in an action for malicious prosecution, who swore out a warrant, may testify that he swore it out on his own responsibility, this relating to the capacity in which he acted, and not to his intention or motive. Emerson v. Lowe Mfg. Co. (Ala.) 49 So. 69.

II. Rule under statutes permitting parties to testify.

a. Generally.

The rule that the intent of a person must be inferred from his acts and words had its foundation in necessity created by the rule which excludes parties in interest from the witness stand; and it is modified, if not wholly abrogated, by innovations upon the common law, under which parties are al-

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it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted, them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts." The third prayer offered by the defendant in that case, which this court said should have been granted, concluded by saying "that, in order to constitute an acceptance, so as to bring the case within the provisions of the statute of frauds, there must have been an actual acceptance by the defendants, with an intention of taking possession as owners." That prayer is very similar, in its effect, to the one under consideration, which we think the defendant was entitled to have granted. The delivery of the goods to the carrier, and receipt of them by it as carrier, did not operate as such acceptance and receipt as the statute requires (Jones v. Mechanics' Bank, supra), nor did the payment of freight by him (29 Am. & Eng. Enc. Law, 2d ed. p. 983). The fifth prayer ought also to have been granted. The fact that the defendant's third, which was granted, concludes by saying, "and if the jury shall further find that the defendant did not at any time receive and accept said goods as owner, then the verdict of the jury must be for the defendant," did not correct the error in rejecting the first and fifth. That prayer presented the defendant's theory that it was a conditional sale; that, if he did not need the goods, he could countermand the order; and the

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lowed to testify in their own behalf. People v. Farrell, 31 Cal. 576.

And when parties to a suit and parties interested in the transactions are permitted by statute to testify, they may testify what their intentions were, where intent is a material issue. Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786; Berry v. State, 30 Tex. App. 423, 17 S. W. 1080; Gimbel v. Gomprecht (Tex. Civ. App.) 36 S. W. 781; Peightal v. Cotton States Bldg. Co. 25 Tex. Civ. App. 391, 61 S. W. 428; International & G. N. R. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236; Bertelsen v. Bertelsen, 7 Cal. App. 258, 94 Pac. 80; Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50; Lane v. State, 44 Fla. 105, 32 So. 896; Germania F. Ins. Co. v. Stone, 21 Fla. 555; Alexander v. State, 118 Ga. 26, 44 S. E. 851; Hale v. Robertson, 100 Ga. 168, 27 S. E. 937; Royce v. Gazan, 76 Ga. 79; Dunbar v. Armstrong, 115 Ill. App. 549; Pardridge v. Cutler, 104 Ill. App. 89; Odin Coal Co. v. Denman, 84 Ill. App. 190, affirmed in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; Wohlford v. People, 148 Ill. 296, 36 N. E. 107; Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Wilson v. Clark, 1 Ind. App. 182, 27 N. E. 310; Ross v. State, 116 Ind. 495, 19 N. E. 451; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; Sedgwick v. Tucker, 90 Ind. 271; White v. State, 53 Ind. 596; Greer v. State, 53 Ind. 420; Larson v. Thoma (Iowa) 121 N. W. 1059; Dorn v. Cooper (Iowa) 118 N. W. 35; Chew v. O'Hara, 110 Iowa, 81, 81 N. W. 157; Kruse v. Seiffert & W. Lumber Co. 108 Iowa, 352, 79 N. W. 118; Browne v. Hickie, 68 Iowa, 330, 27 N. W. 276; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382; State v. Wright, 40 La. Ann. 589, 4 So. 486; Cushing v. Friendship, 89 Me. 525, 36 Atl. 1001; Wheelden v. Wilson, 44 Me. 18; Fenwick v. State, 63 Md. 239; Faxon v. Jones, 176 Mass. 206, 57 N. E. 359; Snow v. Paine, 114 Mass. 520; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Berkey v. Judd, 22 Minn. 287; Grout v. Stewart, 96 Minn. 230, 104 N. W. 966; Albion v. Maple Lake, 71 Minn. 503, 74 N. W. 282; Vansickle v. Brown, 68 Mo. 627; State use of Glaser v. Mason, 24 Mo. App. 321; State v. Banks, 73 Mo. 592; State v. Palmer, 88 Mo. 568; State v. Williams, 95 Mo. 247, 6 Am. St. Rep. 46, 8 S. W. 217; Hackney v. Raymond Bros. Clarke Co. 68 Neb. 624, 94 N. W. 822; McCormick Harvesting Mach. Co. v. Hiatt, 4 Neb. (Unof.) 587, 95 N. W. 627; Norris v. Morrill, 40 N. H. 395; Hale v. Taylor, 45 N. H. 405; Graves v. Graves, 45 N. H. 323; Delano v. Goodwin, 48 N. H. 203, 97 Am. Dec. 601; Homans v. Corning, 60 N. H. 418; Clark v. Marshall, 62 N. H. 498; Lewis v. Rogers, 2 Jones & S. 64; Durfee v. Bump, 20 N. Y. S. R. 833, 3 N. Y. Supp. 505; People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072; Lally v. Emery, 54 Hun, 517, 8 N. Y. Supp. 135; Learned v. Ryder, 61 Barb. 552; Fiedler v. Darrin, 50 N. Y. 437; Cortland County v. Herkimer County, 44 N. Y. 22; Thurston v. Cornell, 38 N. Y. 281; McKown v. Hunter, 30 N. Y. 625; Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; State v. Hall, 132 N. C. 1094, 44 S. E. 553; State v. Johnson (N. D.) 118 N. W. 230; State v. Tough, 12 N. D. 425, 96 N. W. 1025; Tucker v. Hendricks, 25 Ohio C. C. 426; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Mahon v. Rankin (Or.) 102 Pac. 608; Juniata Bldg. & L. Asso. v. Hetzel, 103 Pa. 507; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; Jackson v. Com. 96 Va. 107, 30 S. E. 452; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Brown v. State, 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258; Fischer v. State, 101 Wis. 23, 76 N. W. 594.

The opposite party being entitled to a liberal scope in the cross-examination. Watson v. Chesire, supra.

And this is especially so where the intention with which the act was done may render the act void or may make it valid. Wade v. Odle, supra.

Or when the character of an act depends upon the intent with which it was done. Pittsburgh, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549; Bidinger v. Bishop, 76 Ind. 244; Greer v. State, supra.

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appellant could not have had advantage of that prayer unless the jury found those facts in his favor. It follows, from what we have already said, that the plaintiff's prayer should have been rejected, as, on that question, it simply left to the jury to find whether "the said goods were accepted and received by the defendant," without in any way instructing them what those terms meant. Under the circumstances, that was not sufficient and was too general.

2. It only remains to determine whether the court should have allowed the defendant to answer the question stated in the second bill of exceptions. There can be no doubt that the intent of the buyer is material and relevant in a case of this kind, as is shown by the cases above cited. The only question is whether the buyer can testify to his own intent. We do not see any valid reason for excluding such evidence. It is, of course, not conclusive, but the opposite party can prove such facts and circumstances as he can obtain, which reflect upon the question. It might be that a purchaser might do some act which would be conclusive of his intention as to the question whether there has been such an acceptance and receipt as complies with the requirements of the statute of frauds. The court could then instruct the jury that, if they found that the purchaser had done such acts, the statute was complied with, and the mere fact that the purchaser would swear he did not intend thereby to become the owner of the goods would not relieve him. As said in 29 Am. & Eng.

And it is so whether the witness is a party or not. Mahon v. Rankin; Grout v. Stewart; and Albion v. Maple Lake,—supra.

This is the rule of JARRELL v. YOUNG, S. F. Co.

The conduct of a party being in evidence and relevant to the issue, the testimony of such party as to the reason or motive for such conduct is admissible to rebut the inference which such conduct suggests. Macy v. St. Paul & D. R. Co. 35 Minn. 200, 28 N. W. 249.

So, parties may be permitted to speak of their mental operations in the doing of an act which is called in question, where the intent with which it was done serves to characterize it. Bayliss v. Cockcroft, 81 N. Y. 363.

And where the issue on a trial is whether there has been a concurrence in understanding of two parties, it is not improper to prove separately the understanding of each. Delano v. Goodwin, 48 N. H. 203, 97 Am. Dec. 601.

And, as a general rule, when malice is directly in issue, a party may testify directly to his friendly feeling toward the other party. Dorn v. Cooper (Iowa) 118 N. W. 35.

An intent is a fact which may be testified to as any other fact. Barker v. Western U. Teleg. Co. 134 Wis. 147, 14 L.R.A.(N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 439; Lally v. Emery, 54 Hun, 517, 8 N. Y. Supp. 135; International & G. N. R. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. E. 236; Conway v. Clinton, 1 Utah, 215.

And the fact that testimony as to the reason or motive for an act is conceived and concealed in the mind of the witness, and that there is no reliable method of disproving it other than may be gathered from the facts and circumstances, may affect the weight of the evidence, but not its competency. International & G. N. R. Co. v. Armstrong, supra; Hamburg v. Wood, 66 Tex. 168, 18 S. W. 623; Thorn v. Helmer, 2 Keyes, 27; Mahon v. Rankin and Conway v. Clinton, supra.

The object of changes in the common law by which parties are allowed to testify in their own behalf was not merely to enable parties to disclose facts wholly within their own knowledge, but also to explain their acts and the motives with which they were performed, and to explain, if need be, what they meant or intended to be understood as meaning, by what they may have said in regard to any material fact. People v. Farrell, 31 Cal. 576.

There is no difference in principle between permitting a witness to testify what his undisclosed intentions were, or whether he had a particular one in doing a specified act, and allowing him to state the undisclosed effect that a certain representation or promise had upon his conduct. Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177.

b. The test of admissibility.

The test of the admissibility of evidence of the motive or intent with which an act was done is the materiality of the motive or intent in giving character to the act. State v. King, 86 N. C. 603.

Where the intention of a party is not an issue in a case, his undisclosed wishes are incompetent and immaterial. Leland v. Converse, 181 Mass. 487, 63 N. E. 939; Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867.

And where a person was sued for wrongfully and negligently causing injury to another by shooting him, and it was not claimed that his act was intentional, and the recovery was sought only on the ground of his negligence, evidence of his intent was inadmissible. Hankins v. Watkins, supra.

And, in an action by brokers against a married woman, for a balance alleged to be due on account of the purchase and sale by them for her of certain stocks, where the defense is that the transactions were not those of the defendant, but of her husband, she cannot be asked whether the purchase of any of the stocks was in accordance with her wishes, since her intention is not in issue, and therefore her undisclosed wishes are immaterial. Leland v. Converse, 181 Mass. 487, 63 N. E. 939.

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Enc. Law, 2d ed. p. 982: "Acts of ownership consistent only with the intent to keep the property are often sufficient and sometimes conclusive evidence of acceptance." But, in a case like this, the intention of the appellant, in doing what it was proven he did, was very material, and he should have been permitted to testify to it.

The subject of permitting a party to a suit to testify as to his intention is fully and ably considered in 1 Wigmore on Evidence, § 581. The author mentions, as one argument which is urged against its admissibility, that "such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases as to his own state of mind." He then proceeds to give some answers to the argument, amongst others, that the "assumption is incorrect in fact; namely, that there is no other available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked; for the evidence from conduct and circumstances and from others' testimony is not only a permissible but a potent source of belief, and is amply sufficient to guard against falsification." He quotes in the text from cases in New York, Vermont, Indiana, and California, and cites, in over four pages of notes, numerous cases where such testimony was held admissible, briefly stating the character of each case.

The decisions in this state are not opposed to the views of that author, in so far as the

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Nor does the rule that, where the character of a transaction depends upon the intent of a party, it is competent to inquire of him what his intention was, apply where the question was not one of intent, but was whether the witness had been defrauded. Learned v. Ryder, 61 Barb. 552.

So, the motive of the maker of a note in delivering the same is immaterial in an action against the sureties thereon. Weis v. Morris Bros. 102 Iowa, 327, 71 N. W. 208.

Nor is it material with what motives and under what circumstances a person acted in signing a paper calling, and in attending, a meeting of the directors of a corporation, in which certain assessments were made, and his testimony as to such motives and circumstances is properly excluded. Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

And where a person charged with attempting to intimidate certain persons by threats has testified that he did not make any such attempt, it is not material error to refuse to allow him to testify as to whether he intended to intimidate such persons. Fischer v. State, 101 Wis. 23, 76 N. W. 594.

And a refusal of a referee to allow a party to testify that he believed that a statement was true is harmless where the witness had testified that he acted on the statement. Morris v. Wells, 4 Silv. Sup. Ct. 34, 7 N. Y. Supp. 61.

When the question of a party's intent is one of the issues in an action, however, he may testify that he had or did not have the intent charged. Hankins v. Watkins, supra.

And when an act and the intent with which it was done must be alleged and proved as distinct acts to constitute a crime, the inference to be deduced may be made and repelled by the direct testimony of the party as to the intent entertained by him. State v. King, 86 N. C. 603; Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

And where the fact to be established is the intention with which an act has been done to which, as matter of law, no conclusive presumption attaches, the party whose intention is the subject of inquiry may testify to the nature of his intention, as he might to any other material fact. Phelps v. George's Creek & C. R. Co. 60 Md. 536.

So, where the doing of an act is not disputed, but is affirmed, and whether the act shall be held valid or invalid hangs upon the intent with which it was done, which intent, from its nature, would be formed and held without avowal, he upon whom the intent is charged may testify whether he secretly held such intent when he did the act. Dillon v. Anderson, 43 N. Y. 231; Fiedler v. Darrin, 50 N. Y. 437; Phenix Mills v. Miller, 25 N. Y. Week. Dig. 290, 4 N. Y. S. R. 787.

And where a mortgage was assailed on the ground of fraud, and whether it was fraudulent depended entirely upon the intent or motive with which it was received, the person receiving it, as a witness on the stand, in his own behalf, may be permitted to testify as to his motive in taking the mortgage. Wheelden v. Wilson, 44 Me. 18.

So, where a person's acts are ambiguous, and the effect thereof depends upon the intention with which they were done, or their good faith is in issue, he may testify as to his reason for doing them. McCormick Harvesting Mach. Co. v. Hiatt, 4 Neb. (Unof.) 587, 95 N. W. 627; Hackney v. Raymond Bros. Clarke Co. 68 Neb. 624, 94 N. W. 822.

And when, at the time an act susceptible of alternatives was done by one of two parties, and permitted to be done and accepted by the other, nothing was said as to the question under which alternative the act was done, the party permitting and accepting the act may testify as to the object of the act. Funke v. Orient Mut. Ins. Co. 6 Jones & S. 349.

So, if the language of a witness, either written or oral, is introduced to establish an admission not acted on, or having the force of an estoppel, he has the privilege of giving his understanding of its import, and of stating its true meaning in the connection as used by him. Mickey v. Burlington Ins. Co. 35 Iowa, 174, 14 Am. Rep. 494.

And whenever one's actual feelings or in-

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question has arisen. In Friend v. Hamill, 34 Md. 307, an action was brought by the appellee against the appellants, who were judges of election, to recover damages for refusing to allow him to vote at an election. They were permitted to testify to their own intentions and motives at the time they acted. In Phelps v. George's Creek & C. R. Co. 60 Md. 536, which was an action of deceit, the president and engineer were allowed to testify as to their intentions in doing certain acts and making certain statements. The court said: "We think the weight of authority to be that, where the fact to be established is the intention with which an act has been done, to which act as matter of law no conclusive presumption attaches, as, for instance, the intention of a party in determining his place of residence, the party whose intention is the subject of inquiry may testify to the nature of his intention, as he might to any other material fact. As we have intimated, what credit is to be given the testimony of the witness on this point is for the jury to determine, looking to all the evidence in the cause." In Fenwick v. State, 63 Md. 239, the court held that it was competent for a person on trial for assault with intent to murder to testify as to the purposes for which he procured the instrument with which he committed the assault. See also Reddy v. Finnegan, 43 Md. 501, and Gambrill v. Schooley, 95 Md. 260, 63 L.R.A. 427, 52 Atl. 500.

Such cases as Lineweaver v. Slagle, 64 Md. 465, 54 Am. Rep. 795, 2 Atl. 693, and Ecker v. McAllister, 45 Md. 309, cited by appellee, do not in any way conflict with the general doctrine. As was said in the first of those cases: "Where the law imputes the intent from the acts done by a party, his testimony as to what his intention was in doing the act cannot be received in evidence,"—referring to Ecker v. McAllister, in which case the court went on to say: "Every person of

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tentions are in issue, as distinguished from his manifestation of them, he may testify directly upon that point. Faxon v. Jones, 176 Mass. 206, 57 N. E. 359.

It is a correct practice to ask a witness if he did an act in good faith, leaving the opposite party, upon cross-examination, to call for details and the collateral circumstances of the transaction, if he desires them. Miner v. Phillips, 42 Ill. 123.

And where a part of the case or defense in an action is based upon the state of mind at a certain time of a party to the action who becomes a witness, it is pertinent and proper that he should state, in answer to leading questions of the opposite party, what was his declaration as to his state of mind at a subsequent time, in reference to a subject alleged by him to have induced that former state of mind which was essential to his cause of action. Livingston v. Keech, 2 Jones & S. 547.

c. Exceptions and limitations.

1. Varying terms of written instrument.

The rule that a party will be allowed to testify to his intent, either in civil or criminal cases, whenever his intent is material, is subject to the exception that the evidence is not admissible to vary the terms of a written instrument by which he is bound. Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; Russell v. Haltom, 76 Ark. 506, 89 S. W. 471; Green v. Akers, 55 Ga. 159; Merriam v. Pine City Lumber Co. 23 Minn. 314.

And testimony as to the private intention of a person when he executes a deed is never competent for the purpose of changing its natural and obvious meaning, or adding new provisions when its meaning is clear. Nixon v. McKinney, supra.

And a person who executed to another a bill of sale of goods, absolute on its face, cannot be asked, in an action involving the validity of the bill of sale, if there was any intentional sale made by him. Raymond v. Richmond, 88 N. Y. 671.

Nor can a party to a written contract be permitted to testify, in an action thereon, as to what was the motive or the inducing circumstances which led him to execute it. Thomas v. Loose, 114 Pa. 35, 6 Atl. 326.

And he may not testify as to what he had in mind in the preliminary negotiations, nor state his unexpressed intent in such negotiations. Cornelius v. Atchison, T. & S. F. R. Co. 74 Kan. 599, 87 Pac. 751.

So, the intention of a grantor in executing a deed must be gathered from the deed itself and from his acts and the surrounding circumstances; and his own statement of his intention is not admissible. Ecker v. McAllister, 45 Md. 290.

And, on an issue whether the plaintiff made a contract for labor with the defendant or his son, the plaintiff cannot testify that he supposed that he was contracting with the father, or that he thought the son was not a man of responsibility. Denman v. Campbell, 7 Hun, 88.

And where an assignment for the benefit of creditors in terms vests in the assignee the right of immediate possession, it is not competent to prove the absence of an agreement at the time of the assignment that the assignor should retain possession of the assigned property, since the assignment speaks for itself and must be judged by its terms. Forbes v. Waller, 25 N. Y. 430.

So, after language is used on which a party relies as a warranty, and on which he has a right to rely, the other party may not go behind a fair understanding from his language, and say, "I did not so intend." Zimmerman v. Brannon, 103 Iowa, 144, 72 N. W. 439; Haywood v. Foster, 16 Ohio, 88.

And a person sued on a warranty of prop-

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sound mind is presumed to intend the necessary natural or legal consequences of his deliberate act. 'This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention.'" Such a case as this is altogether different. As we have seen, there must be an actual acceptance of goods by the purchaser, with intent to take possession as owner, in order to comply with the statute; and hence it becomes material to ascertain his intention. As we have indicated, there may be acts done which would be conclusive of his intent; but, in this case, the appellant's theory is that he only accepted the goods, in so far as there was any acceptance, for the purpose of reshipping them to the appellee, and not for the purpose of taking possession as owner. Of course, the appellee would not have been concluded by his answer, but could have cross-examined him, and relied on such facts as tended to show that he did take possession, as owner. Oftentimes the circumstances might be such as it would be important to explain the purpose of a purchaser in doing what was claimed to be evidence of acceptance; and, inasmuch as parties are now authorized to testify in their own behalf (unless, of course, there be some statutory disqualification), the purposes of justice may require that he be permitted to testify as to his intention. We are of the opinion that the appellant should have been allowed to so testify.

It follows, from what we have said, that the judgment must be reversed.

Judgment reversed, and new trial awarded, the appellee to pay the costs.

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erty sold by him cannot testify that he did not intend to guarantee the property, where his language fairly imports a warranty. Zimmerman v. Brannon, supra.

So, the rule that writings are not to be varied by parol evidence, though such evidence is competent to show the circumstances under which they were made, so that the construction shall be what the parties intended, applies to testimony by the writer of a letter constituting a contract, as to the intent of the writer in writing it. Flower v. Brumbach, 30 Ill. App. 294, affirmed in 131 Ill. 646, 23 N. E. 335.

And where a person's letters to one not a party to the suit are given in evidence against him to disprove the existence of a contract claimed by him, he may show the circumstances under which they were written, but he cannot testify generally as to his intentions or purpose in writing them, and thereby avoid their effect as a statement or declaration of the facts contained in them. Brant v. Gallup, 111 Ill. 487, 53 Am. Rep. 638.

So, while everything that was said and done at the execution of an instrument is evidence in an action founded thereon, the unexpressed intent, motive, or belief of a party thereto is not admissible. Spencer v. Colt, 89 Pa. 314.

And where two persons are named in a contract as joint contractors, and one of them does not sign it, the burden rests upon the other to show that he was not bound as a party by his execution of it until it was also executed by the other; and the party signing cannot testify, in an action based on the contract, that he did not intend to make an individual contract. Dillon v. Anderson, 43 N. Y. 231.

And the testimony of a party to an agreement attacked as fraudulent, as to whether certain representations were made with intent to deceive or mislead, and whether, in his representations, he spoke and acted in good faith and in the belief that what he said was true, is properly excluded as testimony as to his intent. Ballard v. Lockwood, 1 Daly, 158.

In the above case Seymour v. Wilson, 14 N. Y. 567, infra, II. d, 9 (c), was distinguished upon the ground that that case was one to set aside an assignment which was alleged to have been made with intent to hinder, delay, and defraud creditors, which was the sole issue in the cause, and that the question of fraudulent intent was declared by the statute to be a question of fact, and not of law; and the court said that the decision in that case should be confined to the class of cases in which it originated until the court of last resort should otherwise adjudge.

Permitting a person to testify that false and fraudulent representations were the consideration or inducement to her action, however, is not a violation of the rule that a party to a contract shall not testify to his undisclosed purpose or intention for the purpose of nullifying words or acts which are relied on by others, which words and acts themselves are prima facie evidence of the agreement. Com. use of Shaffer v. Julius, 173 Pa. 322, 34 Atl. 21.

And persons who signed an agreement may testify that, at the time of signing it, they believed and relied upon representations made by a third person with reference thereto. Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177.

And a person who signed bonds and a mortgage may testify in an action founded upon them that he did so relying at the time upon a contemporaneous agreement in parol that the mortgagee was to look only to the real estate for payment. Spencer v. Colt, supra.

So, where a wife bought land in her own name with money given her by her husband,

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CALIFORNIA SUPREME COURT.

CITY OF LOS ANGELES, Respt.,
v.
JOHN McCOLLUM et al., Appts.

(— Cal. —, 103 Pac. 914.)

Dedication — streets — filing plat.

1. The filing of a map of a subdivision of a tract of land, with spaces marked thereon for streets, followed by the sale of lots with respect thereto, is an offer to dedicate the streets to public use, which cannot be withdrawn after they have been accepted by ordinance, and it is immaterial that no names are attached to the spaces shown on the plat, or that they are cut off at one end by dotted lines.

Same — acceptance — ordinance.

2. An ordinance adopting all streets and parks theretofore offered to the public for dedication is sufficient to render spaces marked as streets on a recorded plat public highways.

Same — intent — evidence.

3. Where the acts of one filing an addition to a municipality manifest an intent to dedicate to public use streets shown on the plat, he will not be permitted to testify that he did not intend to make the dedication.

Same — evidence of instructions.

4. Upon the question of the intent of one who has filed a plat of lots to be sold, and dedicated to public use spaces shown thereon as streets, evidence is not admissible of instructions given by him to his surveyor.

(August 16, 1909.)

APPEAL by defendants, McCollum et al., from a judgment of the Superior Court for Los Angeles County in plaintiff's favor

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in a subsequent action by the husband to declare a trust in the land, he should be permitted to testify as to his intentions when he gave his wife the money, and his intentions in permitting her to retain title to the land. Bertelsen v. Bertelsen, 7 Cal. App. 258, 94 Pac. 80.

And the plaintiff in an action on a contract may testify that he understood that the defendant was personally liable upon the contract, although it was made by the defendant with the plaintiff's wife, acting as his servant or agent. Delano v. Goodwin, 48 N. H. 203, 97 Am. Dec. 601.

So, on an issue whether a deed of land was signed by the grantor with knowledge of its contents, he may testify that he never intended to convey his land to the grantee. Perry v. Porter, 121 Mass. 522.

And a grantor named in a deed may be permitted to testify on an issue whether the deed signed by her passed into the hands of the grantee so as to convey the title, that she never parted with the possession of the deed with the intent that it should take effect as a deed. Stevens v. Stevens, 150 Mass. 557, 23 N. E. 378.

So, where it is material to know whether a grantor acted in good faith in making a deed, or the motives of the grantee in taking the benefit of the conveyance, either party may testify as to his intention in the transaction. Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154.

And where the question whether one entered into possession of land in good faith is involved in a case, it is competent for him to testify affirmatively that he paid for it in good faith. Acme Brewing Co. v. Central R. & Bkg. Co. 115 Ga. 494, 42 S. E. 8.

And whether a holder of a fire insurance policy did or did not knowingly make a false statement as to values is an issue of fact, to be submitted to the jury in an action upon the policy, and the party charged may testify directly to his intent and motive, and that, in making his application and proofs of loss, he had no intention or purpose to deceive or mislead the insurance company on the subject of values. Helm v. Anchor F. Ins. Co. 132 Iowa, 177, 109 N. W. 605.

So, where papers or documents are introduced collaterally in the trial of a cause, the purpose and object for which they were made and the reason why they were made in a particular form may be explained by parol evidence. National Bank v. Kennedy, 17 Wall. 19, 21 L. ed. 554.

And where articles of copartnership, partly printed and partly written, were pasted in a blank book, and on other pages following were pasted separate sheets containing signatures, apparently written before the insertion of such sheets, and following these were other signatures written on the pages of the book itself, on the question whether persons whose names thus appeared ever signed the written articles of copartnership, one of them may testify as to what was his purpose and as to what the understanding was in reference thereto when he signed his name on the book. Moore v. May, 117 Wis. 192, 94 N. W. 45.

So, on an issue as to whether alleged transfers were made without consideration, in expectation of immediate death, the belief on the part of the person making the transfers, that death was impending, and his motives and intentions in making them, are material, and his testimony as to what his beliefs, motives, and intentions then were is competent in evidence. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

And, in a proceeding by a surety who had paid a judgment for the principal debt, and taken an assignment thereof to himself, to enforce contribution from the cosurety, he may testify that a satisfaction of the judgment which had been subsequently effected was not intended to inure to the benefit of the cosurety. Merchants' Nat. Bank v. Great Falls Opera House Co. 23 Mont. 33, 45 L.R.A. 285, 75 Am. St. Rep. 499, 57 Pac. 445.

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and from an order denying a new trial in an action brought to recover possession of certain land alleged to be a part of a public street. Affirmed.

The facts are stated in the opinion.

Mr. **Thomas C. Ridgway**, with Miss **Elizabeth L. Kenney** and Mr. **Charles L. Batcheller**, for appellants:

The fact that the owner sells lots by reference to a map of a tract duly recorded is not conclusive evidence of a dedication to the public of the streets and parks platted upon the map.

Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Prescott v. Edwards, 117 Cal. 301, 59 Am. St. Rep. 186, 49 Pac. 178.

If no one has acted upon an offer to dedicate in such a mode that he would be injured by revocation, the owner may revoke the dedication, even though it is an actual dedication, and not a mere offer, if such revocation results from any act of the owner which satisfactorily shows his intention to retain possession of or title to the land.

Los Angeles v. Kysor, supra; Hayward v. Manzer, 70 Cal. 480, 13 Pac. 141; Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Prescott v. Edwards, supra; People ex rel. Howland v. Dreher, 101 Cal. 271, 35 Pac. 867; Niles v. Los Angeles, 125 Cal. 572, 58 Pac. 190.

It need not appear upon a map what use the owner intended to make of certain space marked off on a plat, and intention to dedicate to public use cannot be inferred unless it is clearly manifested on the plat.

Brown v. Stein, 38 Neb. 596, 57 N. W. 401; Duluth v. St. Paul & D. R. Co. 49 Minn. 209, 51 N. W. 1163; Covington v. McDonald, 94 Ky. 1, 21 S. W. 235; Mt. Vernon

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So, where a person sold a yoke of oxen, he claiming it to be a conditional sale, title to pass on payment, and the other claiming it to be an absolute sale, in which he was to have a long time to pay, it is competent for the seller to testify that he forbore to sue because he had a lien for payment. Pollard v. Bates, 45 Vt. 506.

And permitting a person to testify that, in making a sale, he intended and believed that he was selling only his interest in the property, is not the admission of prejudicial evidence of intention, it being pertinent to the construction of the contract of sale, and the expression of belief being subordinate to that of his intention. Pitt v. Elser, 7 Tex. Civ. App. 47, 32 S. W. 146.

And where notes were made by an agent professing to represent a principal, and the principal executed a mortgage securing the notes, on land to which he held title, upon being advised that it was for the benefit of the person for whom he held title, he may testify, in an action based on the notes, that he did not deliberately and understandingly execute a mortgage as one given to secure these notes as his notes, past due. Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

So, where a note was made by a person under arrest on an accusation charging him with an injury to the payee, and the defense was made that the note was obtained by extortion, the maker of the note may testify that the charge against him was false, and that he executed the note for the purpose of procuring his liberation from illegal restraint. Osborn v. Robbins, 36 N. Y. 375.

And where there was evidence that one person induced another to sign the name of a third person to a note, knowing that the person signing it had no authority, and after authority was sought to be proved by the circumstances, he may be allowed to testify as a witness that, at the time the note was so signed, he supposed and believed that the party signing it had authority to do so. Turner v. Keller, 66 N. Y. 66.

2. Conclusions of witnesses.

Ordinarily, a witness will not be allowed to tell what he thought, but he may testify that he relied upon promises and believed them. Toledo Stove Co. v. Reep, 18 Ohio C. C. 58.

Nor is it competent to take the opinion of a witness on questions involving a conclusion of law. Ohio Coal Co. v. Davenport, 37 Ohio St. 194.

And a question which calls for a reflection of a witness upon a supposed state of facts is properly excluded. Sturm v. Williams, 6 Jones & S. 325.

Thus, a vendor in a sale impeached as made with intent to hinder, delay, or defraud creditors cannot be asked whether he gave the plaintiff to understand, in anything that transpired between them, that the transaction was for an improper purpose or to defraud creditors, since this would be asking the witness to give his conclusion as to the effect of what occurred between them. Blaut v. Gabler, 8 Daly, 48.

And where an action is brought for the specific performance of a parol agreement to convey land, the defendant should not be asked as to whether he had ever said anything to lead the plaintiff to believe that she was going to obtain title or a deed of the land, or whether he intended to give more than a life estate.—a question to this effect calling for a conclusion of the witness. Burlingame v. Rowland, 77 Cal. 315, 1 L.R.A. 829, 19 Pac. 526.

So, a witness may testify as a fact that he did not entertain a particular intent, but he cannot state a conclusion of law which may be based upon other circumstances besides the existence of the specific intent. Gimbel v. Gomprecht (Tex. Civ. App.) 36 S. W. 781.

And it is not competent for a witness to state that he was not actuated by malice in suing out an attachment, since what constitutes malice involves a conclusion of law. Ibid.

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v. Young, 124 Iowa, 517, 100 N. W. 694; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

The strip in controversy being without designation as a street on the map, and requiring extraneous evidence to explain it, makes it so ambiguous that the defendant was entitled to explain what she intended by said map.

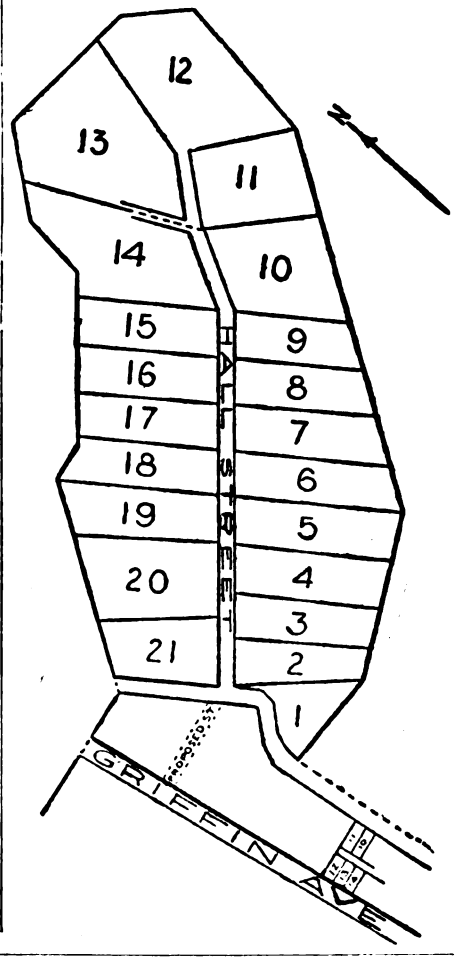
Elliott, Roads & Streets, 1st ed. p. 130.

Messrs. **Hass, Garrett, & Dunnigan,** with Mr. **Leslie R. Hewitt,** for respondent.

Sloss, J., delivered the opinion of the court:

Action by the city of Los Angeles to recover possession of a parcel of land claimed to be part of a public street. Judgment went for plaintiff, and four of the defendants appeal from the judgment, and from an order denying their motion for a new trial.

The court finds that, on June 27, 1884, the defendant Elmira Hall, then the owner of a tract of land including the parcel in controversy, caused to be recorded a plat or map in which said tract was divided into lots and blocks, and streets were laid out in connection with the plat, for the use of prospective purchasers of said lots and blocks. By such recording, she offered to dedicate as public highways of the city of Los Angeles the streets shown upon the map. The strip of land in controversy was shown upon the map as a public street, and formed a continuation or extension of Johnston street, a then public and accepted street of the city. The street was thereupon opened for public travel, and remained so until August, 1894. In December, 1890, the city council, by ordinance, accepted said street, so offered to be dedicated, as a public street. The offer to dedicate was never withdrawn or rescinded prior to August, 1904. The appellants attack, as unsupported by the evidence, the findings that there was an offer to dedicate, and that such offer, if any was made, was not revoked prior to acceptance. We think the evidence fully sustains each of these findings. The questions presented can be best explained by a reproduction of the essential features of the map filed by Mrs. Hall in June, 1884:



Nor can a witness state his motive for doing an act when that motive involves a legal conclusion. Hamburg v. Wood, 66 Tex. 168, 18 S. W. 623.

But evidence as to the motive with which a witness did an act is admissible where it is not an opinion or a legal conclusion. Ibid.

And, in an action to recover money paid and laid out at the request of another, charged upon the books of the person paying it, to a third person, the plaintiff should be allowed to give testimony as to any other facts, even mental operations, tending to explain why the entries in their books were against a third person, but he should not be allowed to give mere reasoning in evidence. Volkman v. Feldmann, 10 Jones & S. 44.

And a person who purchased an interest in the business of another on a representation by the latter that it was worth at least a specified sum per year, who sues for damages for false representations upon discovering that the business was worth much less, may testify that he believed the defendant's statements as to the extent of the business, such testimony not consisting of a simple mental process upon the part of the plaintiff, but of a fact. Charbonnel v. Seabury, 23 R. I. 543, 51 Atl. 208.

So, a man testifying as a witness in an action brought by his wife on promissory notes may be asked if, at the time he handed the notes to his wife, he intended to part with the title and give the notes to her,—the question not being objectionable as call

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The land in controversy is the undesignated strip, 94 links in width, running along the westerly line of lot 21. That this strip, south of its intersection with Hall street, as shown on the map, was and is a public street, known as Johnston street, is not disputed by appellants; but they contend that no street was created north of Hall street. It seems perfectly clear that the court was at least authorized, if not bound, to conclude, from a mere inspection of the map itself, that its filing constituted an offer to dedicate, as a public street, the whole of the strip bordering on lots 1 and 21. Dedication is, in each case, a question of intention. Harding v. Jasper, 14 Cal. 643; San Francisco v. Canavan, 42 Cal. 541. The filing of a map showing a subdivision of land into lots and blocks, followed by a sale of lots as designated on the map, constitutes an offer to dedicate to public use the spaces marked thereon as streets. Logan v. Rose, 88 Cal. 263, 26 Pac. 106. We have no doubt that this map did mark the disputed strip as a street. It is true that it is not, on the face of the map, described or named as a street. On the other hand, it is not numbered as a lot, nor is it by lines cut off from the adjoining streets and bounded, as are the lots shown on the plat. It joins Hall street, and, so far as the map shows, furnishes the only means of access to Hall street, and through it to the numbered lots of the subdivision. There is nothing to indicate any distinction or demarcation between the part of the strip

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And a plaintiff testifying in his own behalf may be asked if supplies furnished by him to the defendant after the delivery of the note in suit, and before the maturity thereof, were furnished on the note or not,—the question calling for a fact as well as for a conclusion of the mind of the witness. Lewis v. Rogers, 2 Jones & S. 64.

But, refusal of the court to permit the defendant in an action for wrongfully killing a person to testify that he drew his pistol and fired the fatal shot for the purpose of protecting his life and person is not error, since the statement of the witness is a mere declaration by him that he shot the deceased in self-defense, which is the very question the jury is called upon to determine in the light of all the facts and circumstances in the case. Vawter v. Hultz, 112 Mo. 633, 20 S. W. 689.

And a person charging another with obtaining goods from him under false pretenses cannot be asked by the counsel for the prosecution if he was induced to part with his property on the representations which were made to him at the time by the accused as to his ability and means of payment, and whether on that ground alone he gave the credit, since this would be to leave to him the determination of a fact which it is the province of the jury alone to determine. Com. v. Daniels, 2 Pars. Sel. Eq. Cas. 332.

Nor may a vendor in a sale impeached as made with intent to hinder, delay, or defraud creditors be asked whether he made the sale for any improper purpose, since this leaves the question whether the sale was for a proper or an improper purpose to the conclusion formed by the witness. Blaut v. Gabler, 8 Daly, 48.

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And, in an action for a breach of a contract of sale, the vendor, testifying as a witness, cannot be asked why he kept back the papers and sent them all together with the notice of arrival of the goods purchased, the question calling for what was in the witness's mind. Fresno Home Packing Co. v. Turle & Skidmore, 60 Misc. 79, 111 N. Y. Supp. 839.

3. Mental operations and intentions depending upon nonexistent or supposititious circumstances.

While inquiries as to intent relating to a supposed past fact, and as to what particular intent or design was entertained by the witness on a certain occasion and under existing facts, are permissible, an inquiry not as to any past or existing facts, but as to what would have been the mental operations and desires of the witness under a state of facts contradictory to those which he testified did in fact exist, cannot be made. Cook v. People, 2 Thomp. & C. 404; Learned v. Ryder, 61 Barb. 552.

And it is not error to refuse to permit a party to testify as to a potential intention, depending upon a future contingency, particularly where it does not appear from the record that the contingency suggested did in fact happen. State v. Ferguson, 71 Conn. 227, 41 Atl. 769.

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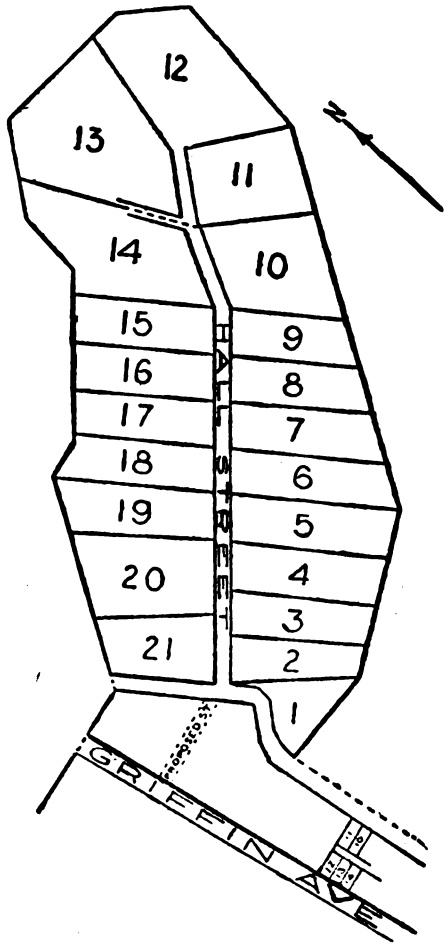

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north and that south of the northerly line of Hall street, the latter, as we have said, being concededly a public street. As against all this, the fact that the strip is not named or designated as a street does not overcome the inference that it was intended to mark a street or public highway. San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; London & S. F. Bank v. Oakland, 33 C. C. A. 237, 61 U. S. App. 224, 90 Fed. 691; Rowan v. Portland, 8 B. Mon. 232, 246; Hanson v. Eastman, 21 Minn. 509; Elliott, Roads & Streets, 2d ed. § 119. Nor is any force to be attributed to the circumstance that the northerly end of the strip was cut off by a dotted line. In each of the cases last cited, the land held to be dedicated constituted a cul-de-sac.

Where rights of individuals have not intervened, an offer to dedicate may be revoked before acceptance by the proper public authorities. Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90. Here, however, the offer was duly accepted by ordinance of the city council, accepting in general terms all streets, parks, etc., theretofore offered to the public for dedication. This was a sufficient acceptance. Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085. On the question of revocation efore acceptance, the most that can be said in support of appellants' position is that the evidence was conflicting. There was testimony tending to show that the strip in question had never been used

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had not understood that a claimed fact existed, when such testimony would amount to nothing more than an argument from the witness stand that such claimed fact did exist. Patterson v. Smith, 73 Vt. 360, 50 Atl. 1106.

And a witness should not be permitted to testify what course of action he would have taken if certain specified facts had not occurred. Palmer v. Pinkham, 33 Me. 32.

And a witness may not be asked what would have been his conduct at a past time under a supposed state of facts which did not exist. Cook v. People, supra.

In the above case, Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177, infra II. d, 5, was distinguished upon the ground that, in that case, although the question was put in such form that the witness might have answered it by stating that she would not have done under a state of facts which did not exist, yet the question strictly called for no such answer and was not so answered.

So, a person sought to be held as an indorser of notes cannot testify that he would not have indorsed them if it had not been for an express stipulation that he should not be liable thereon. Cake v. Pottsville Bank, 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302.

And an employee suing his employer for personal injuries caused by a defective appliance cannot be permitted to testify as to whether or not he would have continued to work if his employer had refused to promise to repair. Yerkes v. Northern P. R. Co. 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33.

Nor can the defendant in an action against a surety on a bond given to secure a loan be asked whether he would have signed the bond in suit unless it had been understood and agreed at a meeting of the directors of the association to which it was given that certain real estate should be mortgaged as security for the loan, and be first liable for its repayment. Juniata Bldg. & L. Asso. v. Hetzel, 103 Pa. 507.

And it is not competent to ask an officer of an insurance company in an action upon a policy issued by the company, in which the defense was fraudulent overvaluation, if he would have taken the risk at the amount of valuation at which it was taken if he had known that the valuation was based in part on Mexican bonds. Sturm v. Williams, 6 Jones & S. 325.

And where an action upon an insurance policy is defended upon the ground of fraud practised upon the adjusters in procuring an adjustment based upon an inspection of the books of the insured, which had been altered, testimony of the adjusters that they would not have made the adjustment if they had known of the alteration of the books is not admissible, it being merely their opinion as to what they would have done under altered circumstances. Commercial Bank v. Firemen's Ins. Co. 87 Wis. 297, 58 N. W. 391.

So, a witness accustomed to buy and sell lumber, and to haul it in the direction of a proposed new road, cannot be asked, on an application for such road, over which road he intends to haul his lumber in case the new road is built, his intention being immaterial. Hayward v. Bath, 38 N. H. 179.

A purchaser of real estate may be asked, as a witness in an action for commissions for procuring a purchaser, however, whether he would have purchased the property if he had not talked with the broker, such testimony tending to aid in determining whether the broker brought about the sale, or had a material influence in bringing it about. Larson v. Thoma (Iowa) 121 N. W. 1059.

And an agent who made a sale of property in behalf of his principal may testify, on a claim that possession of the property was obtained by fraudulent representations as to the financial ability of the purchaser, that he would not have sold the property to the purchaser if the purchaser had given him such intimation relative to his financial condition as he had testified on the trial that he did give. Whitney Wagon Works v. Moore, 61 Vt. 230, 17 Atl. 1007.

So, a person to whom a telegram was directed which was never delivered may testify, in an action against the telegraph company for mental anguish caused by failure to deliver the telegram, as to what he would

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as a road, that natural conditions were such as to preclude such use, and that the defendant Hall had at all times kept it fenced at both ends, had a house standing upon it, and had exercised acts of ownership inconsistent with the existence of a public right of way. But, if these circumstances evidenced a revocation of the offer to dedicate, they were met by testimony showing that parties having occasion to reach the land beyond the strip did use it as a passageway, from time to time, and that the southern end of the strip was not closed until after the passage of the ordinance of acceptance. This testimony supports the finding that there had been no revocation prior to acceptance.

A point is made on the refusal of the court below to permit Mrs. Hall to testify that she had not intended to dedicate the alleged street. The position of the appellants is that, inasmuch as the ultimate question, in cases of dedication, is one of intention, the party may be asked to state his intention in performing the acts relied on, as evidencing a dedication. Such testimony has, in cases of this character, been held to be admissible for the purpose of throwing light upon the real nature of acts which were in themselves consistent with the intent to dedicate or not to dedicate. Bidinger v. Bishop, 76 Ind. 244; Pittsburgh, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Goodfellow v. Riggs, 88 Iowa, 540, 55 N. W. 319; Chicago v. Chicago, R. I. & P. R. Co. 152 Ill. 561, 38 N.

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have done if he had received it. Bright v. Western U. Teleg. Co. 132 N. C. 317, 43 S. E. 841.

And where a principal wired his agent to settle a claim because of a message he received from him which was changed in transmission, he may testify, in an action against the telegraph company for the loss sustained by reason of the settlement, that, if the message had been delivered as sent, he would not have authorized the settlement. Hasbrouck v. Western U. Teleg. Co. 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034.

So, a person who purchased goods of another, supposing the vendor had them on hand, ready for delivery, may be asked, in an action growing out of the failure to deliver, whether he would have entered into the contract if he had known that the vendor did not have the goods on hand to furnish. Mann v. Taylor, 78 Iowa, 355, 43 N. W. 220.

And a shipper of stock by rail, acting under a contract providing that he should look after and feed his stock *en route*, who was injured by the sudden backing of the train after being told by a brakeman that the train would stand for some time, may testify, in an action for the injury, that, but for the statement of the brakeman, he would not have placed himself in the position he was in when injured, and that, in so doing, he expected the train to stand still. International & G. N. R. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

4. *Secret and undisclosed intent or motive.*

The mere intention of a party, not manifested by or accompanying any act or declaration, is, as a general rule, not admissible to affect the rights of another. Hale v. Taylor, 45 N. H. 405; Gale v. Belknap County Ins. Co. 41 N. H. 170; Dunbar v. Armstrong, 115 Ill. App. 549; Phœnix Mills v. Miller, 25 N. Y. Week. Dig. 290, 4 N. Y. S. R. 787; Shrader v. Bonker, 65 Barb. 608.

Unless his intentions become a subject of legitimate inquiry. Shrader v. Bonker, supra.

And a party to a contract may not testify to thoughts and purposes on his part, undisclosed at the time of making the contract, in order to affect its legal import. Cake v. Pottsville Bank, 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302; Cullmans v. Lindsay, 114 Pa. 166, 6 Atl. 332; Juniata Bldg. & L. Asso. v. Hetzel, 103 Pa. 507; Browne v. Hickie, 68 Iowa, 330, 27 N. W. 276.

And it is error to permit a party to a contract, or his agent, to testify what induced him to execute it. Cullmans v. Lindsay, supra.

Nor can a party to an action prove by his own witness what the mere purpose of the witness's mind had been on a former occasion. Law v. Payson, 32 Me. 521.

And proof of the secret intention or purpose of the writer of a document, as to what he meant to express thereby, is not admissible to bind another, to whom it is addressed and by whom it is acted upon. Willingham v. Sterling Cycle Works, 113 Ga. 953, 39 S. E. 314.

And a person delivering a letter or other writing to another, upon which the latter might act, cannot testify as to his intention when he delivered it. Colborn v. Fry, 23 Ind. App. 485, 55 N. E. 621.

And the writer of a letter upon which a contract for a sale of goods was based, the writer not being a party to the action, cannot be permitted to testify as to the sense in which he used a word occurring therein; the meaning the writer intended to express is immaterial except as the letter itself, in view of the surrounding circumstances known to both sides, discloses that intention. Harrison v. Kirke, 6 Jones & S. 396.

So, where a man purchased land and had the deed made to his daughter, he cannot testify, where the transfer is attacked, that his purpose in taking the deed in the name of his daughter was to keep it in his possession with a view of delivering it to her in case they effected a subsequent arrangement by which he was to have certain rights in consideration of the deed, this being, in substance, an offer to prove the undisclosed purposes of his mind. Shrader v. Bonker, supra.

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E. 768. In Helm v. McClure, 107 Cal. 199, 40 Pac. 437, this court said that the testimony of the alleged dedicator, that he had had no intention to dedicate, "was relevant, but not conclusive, evidence of his actual purpose." On the other hand, the rule that the party may give testimony of his actual intent should, we think, be limited to cases where the acts done by him do not manifestly indicate an intent to dedicate. Where they are inconsistent with anything but such intent, he cannot destroy the effect of his own conduct by subsequent declarations that he did not mean to be bound by the necessary import of that conduct. No weight should be given to declarations of an intent contrary to that plainly shown by acts done and acted on long before. "The intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law regards." Indianapolis v. Kingsbury, 101 Ind. 201, 213, 51 Am. Rep. 749; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96. See also Morgan v Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743; 4 Wigmore Ev. § 2413, note. In accordance with these views, this court has held it proper to exclude evidence of the unexpressed intention of the landowner, where her acts and deeds plainly indicated that she intended to dedicate, and did dedicate, a street to public use. Brown v. Stark, 83 Cal. 636, 24 Pac. 162. What we have already said concerning the map filed by Mrs. Hall will be sufficient to make clear our reasons for holding, as we do hold, that the paper itself, taken in connection with the

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And, on an issue in an action to recover money fraudulently converted by the defendant to his own use, whether there was an agreement between the plaintiff and the defendant that certain promises of the defendant were taken in satisfaction of the plaintiff's claim against the defendant for his fraud, it is not competent to put in evidence the undisclosed intention of the plaintiff not to accept the written promises of the defendant in satisfaction of his original claim. Tallant v. Stedman, 176 Mass. 460, 57 N. E. 683.

And where an employee of a railroad company was killed while going between moving cars to couple or uncouple them, the conductor of the train cannot be called upon, in an action against the company for causing the killing, for an expression of his undisclosed intention with reference to uncoupling and setting out a car, where such intention was never indicated by him to the person killed, or to anyone else prior to the accident, since the employee could not be charged with the violation of an order conceived in the mind of his superior officer, but never indicated to him. Lowe v. Chicago, St. P. M. & O. R. Co. 89 Iowa, 420, 56 N. W. 519.

So, where a person sought to purchase a house and lot through a broker, and later purchased it from the owner, at a lower figure than that given to the broker, the purchaser cannot testify, in an action by the broker for commissions, on an issue as to whether the negotiations were continuous from the time of the first offer till the purchase, whether he had in mind continuously the purchase of the premises in question in case they could be obtained at the figure he desired to pay for them. Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426.

Permitting a party who had delivered a letter to another to testify as to his intention in doing so, however, though erroneous, is harmless, where the evidence thus given did not tend to change or affect the plain meaning of the words used in the letter itself. Colborn v. Fry, supra.

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5. *Intent of wrongful acts intentionally done.*

When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offense; and no one who violates the law which he is conclusively presumed to know can be heard to say that he had no criminal intent in doing the forbidden act. State v. King, 86 N. C. 603; Mettler v. People, 36 Ill. App. 324.

And, in questions of unlawful intent, when the facts of a case conclusively show an illegal purpose, and the party intended to do the act from which the consequences inevitably flowed, he is held to intend both, and cannot be heard to testify to the contrary. Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

It is not material in a criminal case to know whether the defendant intended to violate the law: the material question is, Did he intend to do that which the law prohibits? and refusal to permit a party charged with a violation of law to testify as to whether he had any intention of violating the law in doing the act in question is not erroneous. Ross v. State, 116 Ind. 495, 19 N. E. 451.

So, the intent with which a person committed a rape is immaterial, and evidence is not competent to show his intent. State v. La Mont (S. D.) 120 N. W. 1104.

And, when a person knowingly gives such provocation as is calculated to bring about retaliatory violence, and violence does ensue in consequence, he cannot escape responsibility to the criminal law by saying that he did not expect violence from the adversary to whom it was offered because of a supposed want of courage to resent. State v. King, supra.

So, a party to a contract upon which a suit was brought, which was defended on the ground that trades made in pursuance of the contract were violations of the statute against options, cannot be permitted to

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fact that it was made and filed as the basis for sales of lots delineated thereon, so clearly manifested an intent to offer the strip in question for dedication that the court was fully justified in excluding Mrs. Hall's offer to prove by her own statement that she had a contrary intent. In any view, the exclusion of the proffered testimony, if erroneous, was without prejudice, as her statement would have been entitled to no weight as against her prior unequivocal acts.

It is also urged that the court erred in striking out some of Mrs. Hall's testimony with reference to the preparation of the map. The court's ruling went no further than to strike out her testimony that she had instructed her surveyor to leave a street from Griffin avenue, and that she did not intend to leave Johnston street open beyond the north line of Avenue Twenty-Eight, or to have a line drawn across the space marked "Proposed Street." If she was entitled to show that she was ignorant of the real condition of the map when it was filed, any testimony which she may have given tending to show such ignorance was allowed to stand. Her instructions to her surveyor were mere hearsay. The exclusion of her testimony as to what she intended the map to represent was correct, for reasons already stated.

The judgment and order appealed from are affirmed.

We concur: Angellotti, J.; Shaw, J.

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testify as to his intention when he made the contract, since the other party to the contract could not be affected by any secret intent on his part unless he knowingly participated in it. Scanlon v. Warren, 68 Ill. App. 213, affirmed in 169 Ill. 142, 48 N. E. 410.

And the offense under statutes prohibiting the sale of adulterated milk is established by the proof of the sale of the milk, which is shown to be adulterated when tested by the standard set up by the act; and that the seller had knowledge of the adulteration need not be shown; and he is not entitled to go to the jury upon the question of his guilty knowledge or intent. People v. Schaeffer, 41 Hun, 23.

And where a superintendent of police was tried for receiving a bribe while acting in his official capacity for permitting the prosecution of an illegal business, it is not competent to permit a party paying money to him to testify to the purpose for which he paid it, and that it was paid for protection. State v. Ames, 90 Minn. 183, 96 N. W. 330.

Where one does an act apparently in violation of a criminal statute, however, but in fact under circumstances tending to show a want of guilty intention, the excusing circumstances may be given in evidence on the trial to show his good faith in the transaction, where that is a material element, or he may show that he was ignorant of the facts which would make his acts criminal. Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614.

And where the acts of a person are themselves equivocal, and become criminal only by reason of the intent with which they are done, both the act and the intent must unite to constitute the offense, and both facts must be proved in order to convict, and the accused may be permitted to disavow the imputed purpose, and repel the presumption of criminal intent. State v. King, 86 N. C. 603.

So, where a purchaser of a load of hay gave an order of doubtful character for its delivery at his barn, and the person in charge of the load of hay caused it to be taken and left standing upon a sidewalk while it was being unloaded, in violation of an ordinance of the city, it is competent to show by the purchaser that, when he gave the order, he either intended or contemplated, or did not intend or contemplate, a violation of the ordinance by the execution of his order through his agent. Roddy v. Finnegan, 43 Md. 490.

And a person charged with the sale of intoxicating liquors without a license may testify, as tending to show good faith and want of guilty intention, that he bought the bitters alleged to contain intoxicating liquor under the information and belief that they were free from alcholic properties, and that he sold them honestly, believing from information at the time of the purchase that they were not an intoxicating liquor. Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614.

And a person charged with a statutory offense of watering and skimming milk to be supplied to a cheese factory may be asked as a witness if, in skimming his milk, he supposed he was violating the law, as tending to show the intent of his action. Stearns v. Ingraham, 1 Thomp. & C. 218.

But the motive is immaterial if a false representation be made with knowledge of its falsity, and injury ensues, and, in an action for deceit, the question asked of the defendant. "In all your transactions with the plaintiff in regard to this trade, did you act in good or bad faith?" is properly excluded. Anslyn v. Franke, 11 Mo. App. 597.

And where facts constituting a fraud are proved, the intention to deceive sufficiently appears to authorize a finding, and the person entertaining such intent cannot be asked to state his intention. Dulaney v. Rogers, 64 Mo. 201.

And a person who makes representations which are material and known by him to be false cannot excuse himself by showing

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that he intended no harm. Flower v. Brumbach, 30 Ill. App. 294, affirmed in 131 Ill. 646, 23 N. E. 335.

So, in an action for deceit, where there is proof that the representation in question was false, to the defendant's knowledge, the proof of fraudulent intent is regarded as conclusive, and evidence that the defendant intended no fraud will not be received. Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

And acts fraudulent in view of the law because of their necessary tendency to delay or obstruct creditors in pursuit of their legal remedy do not cease to be such because the fraud, as an independent fact, was not in the mind of the persons taking a conveyance from the debtor, and such acts may be held invalid though such persons testified that they did not intend thereby to hinder, delay, or defraud the creditors of the debtor, or to secure any benefit to him. Cheatham v. Hawkins, 80 N. C. 161.

6. Intention shown by acts, declarations, or circumstances.

When, by law, certain consequences must necessarily follow an act done, the presumption that such consequences were intended is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention. Ecker v. McAllister, 45 Md. 290; Phelps v. George's Creek & C. R. Co. 60 Md. 536.

Where a case presents circumstances in themselves conclusive evidence of a fraudulent intent, no proof of innocent motives, however strong, will overcome the legal presumption. Seymour v. Wilson, 14 N. Y. 567.

And where the law conclusively presumes bad faith from specific facts, testimony as to the intent or motive of a party with reference thereto is inadmissible. Hale v. Robertson, 100 Ga. 168, 27 S. E. 937.

While the testimony of a person as to his purpose and intent in doing an act is not incompetent, it should not be permitted to prevail against inconsistent, overt acts; it is entitled to be considered for what it is worth, in connection with the other facts and circumstances of the case. Clark v. Evans, 6 S. D. 244, 60 N. W. 682; Browne v. Hickie, 68 Iowa, 330, 27 N. W. 276; Grever v. Taylor, 53 Ohio St. 621, 42 N. E. 829.

And where a man's conduct was inconsistent with his intention expressed on the witness stand, and he is interested in the matter, the court will ascertain his intentions from his conduct, and not from his statements as to what they were. Lewis v. McDonald (Neb.) 120 N. W. 207.

Thus, in criminal cases, the guilty intention of a party committing an illegal act is implied from his conduct, and he is not permitted, upon principles of public policy, to give evidence of a different intention, although he may rebut the same by other evidence. Roddy v. Finnegan, 43 Md. 490.

And where one person shot another, and the evidence shows that his action consisted of making, and not repelling, an attack, and that he was carrying out previous threats, his testimony as to his nonmurderous intention in firing the shot should be rejected. State v. Musick, 101 Mo. 261, 14 S. W. 212.

Nor will the testimony of a person charged with murder, that he did not intend to kill the deceased, be received or made the basis of an instruction, where it appears that he stabbed the deceased once in the arm and twice in the side. State v. Strong, 153 Mo. 548, 55 S. W. 78.

And where, in a prosecution for homicide, an intentional shooting with a deadly weapon at a vital part is plainly shown, and there was nothing accidental about it, a refusal to permit the defendant to state with what intent and purpose he fired the shot is harmless, and will not justify a reversal of the cause. State v. Hultz, 106 Mo. 41, 16 S. W. 940.

So, the intent to defraud is shown by acts and declarations; and if a person is guilty of an act which defrauds another, his declarations that his intentions were honest cannot be taken as sufficient to overthrow the act. Brown v. J. I. Case Plow Works, 9 Kan. App. 685, 59 Pac. 601; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Cheatham v. Hawkins, 80 N. C. 161.

And an insolvent husband who makes gifts to his wife cannot testify that he did not thereby intend to defraud his creditors. Garrett v. Wagner, 125 Mo. 450, 28 S. W. 762.

And where misrepresentation in a sale of property is alleged, the vendor cannot be asked if he gave or intended to give the purchaser anything more than his opinion in regard to its condition. Waugh v. Fielding, 48 N. Y. 681.

And where certain lots were sold at auction, and a map was prepared and produced at the auction, and the auctioneer, before putting up the lots, described them to the persons present, the rights of the parties on a controversy as to the boundaries of the lots sold depend on what took place at the sale, not on the intentions of one of the parties, not communicated to the other, and the former owner of the lots cannot be permitted to testify as to what he intended to sell. Phillips v. Higgins, 7 Lans. 314.

So, where a letter is written by one person to another, and acted upon by the latter, the letter is the only proper evidence of the facts contained in it, and the former party cannot put a secret construction on a letter, and show what he intended and what he did not intend by it. Flower v. Brumbach, 131 Ill. 646, 23 N. E. 335; Harris v. Amoskeag Lumber Co. 97 Ga. 465, 25 S. E. 519; Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63.

And where a witness in an action was allowed to testify that a letter purporting to have been written at a named place and dated a named date and signed by a named person was in fact written by a different person, on a different date, and at a different place, it was not error for the trial court to reject evidence as to the particular reason for it being so written. Gleckler v. Slavens, 5 S. D. 364, 59 N. W. 323.

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Nor is it competent for a party to testify as to his own intention with reference to a transaction, to show that a conveyance was not a mortgage, but a deed. Zimmerman v. Marchland, 23 Ind. 474.

And, if land is bought by a person, and the deed is made and delivered to him, the title to the premises passes to him regardless of any secret or unexpressed intention that the grantor may have entertained, that the title should pass to a different person, and such intention is immaterial. Fyffe v. Fyffe, 106 Ill. 646.

And where a man gave lands to his wife, and directed the conveyance to be made so as to consummate and perfect the gift, and vest the title in her as her sole and separate estate, in a subsequent controversy as to the title of the land, it is for the court to decide as to his intentions from his acts and conduct at the time; and a question asked him as to what his intentions were is properly excluded, since his secret, undisclosed intentions would be unavailing as against his acts and declarations at the time of the transaction. Woods v. Whitney, 42 Cal. 358.

And where two persons indorsed upon a bond and signed a statement that, for value received, they became jointly liable in all respects with the original makers, the question whether they adopted the seals of the original bond depends upon what they did and said, and not what they intended, and they cannot be called upon to testify, in an action growing out of the bond, that they intended, by signing the indorsement, to adopt the seals of the obligors. Brown v. Champlin, 66 N. Y. 214.

So, a person on trial for setting out fire and suffering it to extend beyond his own land cannot be permitted to testify that he did not have any thought or desire to allow the fire to extend beyond his own land. Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292.

And the intent with which machinery was put into a building, as to its being a fixture, is to be determined from the facts and circumstances surrounding the particular case; and it is not admissible for the person who put it in to testify that it was not his intention to make an annexation to the freehold. Phœnix Mills v. Miller, 25 N. Y. Week. Dig. 290, 4 N. Y. S. R. 787.

And the secret, inchoate, unexecuted intention of the owner of a freehold to substitute for the dissevered portions of a building, others of a different construction, cannot change the character and convert into chattels personal what would otherwise be a part of the realty, and, as against the grantee, evidence of such secret, inchoate, unexecuted intention of the grantor is inadmissible to control the facts and circumstances as determined by the law, which, at the time of the conveyance, gave to movable objects an immovable character. Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

Nor can a person sued for commissions on a sale of a lot of logs testify that, in his conversation with the plaintiff, he had no idea that plaintiff intended to charge for commissions. McKinnon v. Gates, 102 Mich. 618, 61 N. W. 74.

And the intention of a voter is to be inferred, not from evidence given by him of the mental purpose with which he deposited his ballot, or his notions of the legal effect of what it contained or omitted, but by a reasonable construction of his acts; and his writing a name upon a ballot in connection with the title of an office is such a designation of a name for that office as to satisfy the law, although he omits to strike out a name printed upon it in connection with the same office. People v. Saxton, 22 N. Y. 309, 78 Am. Dec. 191.

d. Application.

1. Generally.

The rule that a party may be asked the direct question what his intent was at a particular time or with respect to a particular act, when the intent is a material issue in the case, applies both in criminal and civil suits. Dunbar v. Armstrong, 115 Ill. App. 549; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196.

And, in a criminal proceeding, where the intent is the gist of the offense charged, the defendant is a competent witness to testify as to the intention with which he did the alleged criminal act. White v. State, 53 Ind. 596; Wohlford v. People, 148 Ill. 296, 36 N. E. 107; State v. Palmer, 88 Mo. 568; Cummings v. State, 50 Neb. 274, 69 N. W. 756; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; State v. Tough, 12 N. D. 425, 96 N. W. 1025.

And, in all cases where a witness is competent to prove a criminal intention, he is also competent to rebut the imputation. Stockdale's Case, 22 How. St. Tr. 301.

And under statutes permitting persons charged with crime to testify in their own behalf, they are competent witnesses in a case of homicide to testify to the state of their own feelings when the fatal act was committed, such testimony to be taken for what the jury may think it is worth. State v. Evans, 33 W. Va. 417, 10 S. E. 792.

So, when evidence has been given tending to show a guilty motive upon the part of a person accused of crime, he has a right to give evidence to prove a different motive and repel the imputation. People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072.

And a person accused of crime should be allowed the fullest latitude to explain what his intent was in writing or making certain statements apparently incriminating, and to explain what he meant by certain equivocal statements. State v. Johnson (N. D.) 118 N. W. 230.

So, the testimony of a person charged with crime, as to intent in doing the act charged, should be taken into consideration with reference to the fixing of a basis for an instruction for a lower degree of the crime. State v. Banks, 73 Mo. 592; State v. Tough, 12 N. D. 425, 96 N. W. 1025.

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The testimony of a person charged with crime, as to his intent, for the purpose of instructing the jury, occupies the same footing as that of any other witness; and where, in a prosecution for homicide, the accused testifies that he did not intend to kill the deceased, he is entitled to an instruction for a lower grade of homicide than murder in either degree. State v. Palmer, 88 Mo. 568.

So, under a statute permitting a party to a civil action to testify in his own behalf, it is competent for him, where the question is whether or not he did a certain act with a fraudulent intent, to testify as to his intention, and to state whether or not, at the time of acting, he considered that he had a right to do the act. Germania F. Ins. Co. v. Stone, 21 Fla. 555.

And a person who has been induced to a certain action by the false and fraudulent representations of another is competent to testify, in an action based thereon, that the false and fraudulent representations were the consideration or inducement to her action. Com. use of Shaffer v. Julius, 173 Pa. 322, 34 Atl. 21; Ohio Coal Co. v. Davenport, 37 Ohio St. 194.

And whether a person believed in the correctness of the exhibit submitted to him, upon which he acted, is a material fact to be proved on an issue with reference to such action, and he may swear directly as to the existence of such belief. Berkey v. Judd, 22 Minn. 287.

So, where a party calls himself as a witness in an action, and is examined in chief, it is the right of the opposite party, by cross-examination, to search out everything in the way of motive that would affect the mind of the witness and its emanations on the trial. Livingston v. Keech, 2 Jones & S. 547.

And a person on trial for homicide may be asked, on cross-examination, whether he was going to shoot the deceased, and whether he had a pistol or not, the accused not having claimed his exemption, or suggested that his answer would criminate him. Litton v. Com. 101 Va. 833, 44 S. E. 923.

And the privilege of declining to answer a question that might subject a witness to criminal prosecution is the privilege of the witness, and not of the party, and where one is both a party and a witness for himself, and is asked a question as to his intention, the answer to which might criminate him, he must be held on his cross-examination as waiving the privilege as to any matter about which he had given testimony in chief. Roddy v. Finnegan, 43 Md. 490.

So, a defendant who is called by his own counsel as a witness, and testifies in the case, cannot complain when the opposite party, on cross-examination, is allowed to examine him as to his intention in signing a written contract involved in the case. Quimby v. Morrill, 47 Me. 470.

And it is within the sound discretion of a trial court to permit a party to recall a witness after his evidence in rebuttal is in, for the purpose of testifying to the intent with which he did an act material in the case, which ought properly to have been given in the case of the plaintiff in chief. State use of Glaser v. Mason, 24 Mo. App. 321.

2. To homicide.

A person under trial for homicide may, when the intention is material, testify as to the intent with which he did the act charged. Taylor v. People, 21 Colo. 426, 42 Pac. 652; Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50.

And testimony that the accused is a prosecution for murder had no unlawful purpose in going to the place of the killing is competent if his guilt in some measure depended upon his purpose in going there. State v. Hall, 132 N. C. 1094, 44 S. E. 553.

And where, in a prosecution for homicide, evidence is given that, previous to the killing, the accused had entered the room where the killing took place, with a pistol in his hand, he is entitled to testify in his own behalf as to what his intention was at the time he entered the room where the killing took place. State v. Wright, 40 La. Ann. 589, 4 So. 486.

So, in a prosecution for homicide, where evidence of a threat by the accused against the deceased is given to show a motive and intent to kill, it is permissible for the defendant to testify directly as to his intent or feeling toward the deceased when he made the threat, for the purpose of rebutting such evidence. Emery v. State, 92 Wis. 146, 65 N. W. 848; Pratt v. State, 50 Tex. Crim. Rep. 227, 96 S. W. 8.

And where, in a prosecution for homicide, evidence was given of ambiguous statements made by the defendant before the homicide, claimed to indicate a purpose to take the life of the deceased, the defendant is entitled to tell the jury what he intended to state. State v. Kirby, 62 Kan. 436, 63 Pac. 752.

So, a person on trial for homicide, who claims action in self-defense, may testify as to what he thought the deceased intended to do when the act in question was committed. Taylor v. People, 21 Colo. 426, 42 Pac. 652.

And he must be permitted to give testimony in his own behalf, based on the facts and circumstances of the case, that it was necessary to kill the deceased in order to save his own life, or to protect himself from great personal injury. Lane v. State, 44 Fla. 105, 32 So. 896; State v. Harrington, 12 Nev. 126.

And in determining whether the evidence of an actual apprehension of bodily harm is admissible in a prosecution for manslaughter, the court cannot be governed by its own conclusions from the testimony as to the sufficiency of the proof of reasonable cause; but, if there is any testimony which, if believed, would warrant the jury in finding that there was such reasonable cause, though it comes from the defendant alone, and is in conflict with all the other evidence

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in the case, it is sufficient to entitle the defendant to testify that he did in fact act under such an apprehension. Com. v. Woodward, 102 Mass. 155.

So, in a prosecution for homicide, where it is proved that the deceased previously made threats against the accused, and immediately before the killing made some demonstration with his hand, declaring that he would kill the accused, the accused may testify what he believed the person whom he shot was about to do. Wallace v. United States, 162 U. S. 466, 40 L. ed. 1039, 16 Sup. Ct. Rep. 859.

And a person on trial for manslaughter, who testified to facts from which the jury might find that he had reasonable cause to apprehend an attack upon and serious bodily harm to himself from the person whom he killed, may testify that he struck such person because he thought the deceased was going to strike him. Com. v. Woodward, supra.

So, a person charged with murder, who pleads adequate cause sufficient to reduce homicide to manslaughter, may prove by a witness who was standing by him immediately before the shots were fired that the witness passed from the defendant's left side around behind his back to his right side, because he expected the deceased would strike at the defendant with a billiard cue, and he feared deceased would miss defendant and hit him, the effect produced on a bystander going to illustrate the effect likely to be produced upon the mind of the accused himself. Cochran v. State, 28 Tex. App. 422, 13 S. W. 651.

3. To assaults.

A person under prosecution for assault with intent to murder is entitled to testify as to his intent in making the assault, an intent to kill being an essential element of the crime charged. State v. Ferguson, 71 Conn. 227, 41 Atl. 769.

And he is competent to testify as to the purpose for which he procured the instrument with which he committed the assault. Fenwick v. State, 63 Md. 239.

And he may testify as a witness as to his intention in shooting. State v. Nelson, 118 Mo. 124, 23 S. W. 1088.

And the testimony of the defendant in a prosecution for assault with intent to kill, that she went over to cut the person injured because "she spilled my blood and I was bound to spill some of hers. I did not try to kill her, I only wanted to draw her blood because she drew mine," is admissible and furnishes an appropriate hypothesis for an instruction as to the lower grade of offense charged. State v. Tate, 12 Mo. App. 327.

In a prosecution for assault with intent to kill, refusal to permit a question addressed to the defendant, as to what he intended or would have intended to do to the person assaulted if he had met him under certain circumstances, however, is not error, especially where it does not appear from the record that the contingency suggested ever came to pass. State v. Ferguson, 71 Conn. 227, 41 Atl. 769.

And refusal to permit a person under indictment for assault with intent to murder to testify in his own behalf as to the intent with which he made the assault in question is not prejudicial error, where the record does not show what answer to this question was expected by the defense. Bolen v. State, 26 Ohio St. 371.

So, a person charged with assault with a deadly weapon with intent to inflict a bodily injury has a right to state to the jury on the trial the intent with which the blow was struck. Wohlford v. People, 148 Ill. 296, 36 N. E. 107.

And, when he has pleaded self-defense, he is entitled to testify directly and explain his motives for drawing a revolver at the time of the alleged assault. Ryan v. Territory (Ariz.) 100 Pac. 770.

And, upon the trial of an indictment for an assault with a dangerous weapon, in which the defense was that the defendant committed the assault in defending his property or that of others, intrusted to his care, against a trespasser seeking to take forcible possession, the intent with which the act was done is competent evidence. Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143.

So, the defendant in an action for damages for assault and battery may testify as to the intent with which he approached the plaintiff, and as to what he thought the plaintiff was about to do with an ax which he then raised in his hand. Plank v. Grimm, 62 Wis. 251, 22 N. W. 470.

But, a person charged with committing an assault with a revolver should not be permitted to testify, in a prosecution therefor, as to his purpose in taking the revolver with him, since, however innocent his purpose may have been, it would not justify an assault with it. State v. Montgomery, 65 Iowa, 483, 22 N. W. 639.

So, a person charged with assault and battery with intent to commit a felony, who becomes a witness in his own behalf, may testify as to what his intention was in committing the alleged assault and battery. Greer v. State, 53 Ind. 420.

And, on a trial for an assault with intent to rape, the defendant may testify that it was not his intention to use force. Lewallen v. State, 33 Tex. Crim. Rep. 412, 26 S. W. 832.

And the prosecutrix in a prosecution for rape may be asked if the act of the defendant was against her will. Brown v. State, 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258.

And a person charged with aggravated assault upon a child may be asked what was his object and purpose in striking the child. Berry v. State, 30 Tex. App. 423, 17 S. W. 1080.

So, a person sent to the premises of another to collect water rates, and who meets with resistance, and injures the person resisting him, may testify, in a prosecution for maliciously wounding the latter with intent to maim and kill, that he did not in-

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tend to cut the water off from the premises of the latter through malice, but thought he had a right to do so. Jackson v. Com. 96 Va. 107, 30 S. E. 452.

And whether the conductor of a railway train intended to expel a passenger, or was misunderstood as to his purpose, is relevant evidence on a claim of punitive damages in an action against a railroad company for the improper expulsion of a passenger, and the conductor is competent to testify as to what his intention really was. Georgia R. & Bkg. Co. v. Eskew, 86 Ga. 641, 22 Am. St. Rep. 490, 12 S. E. 1061.

4. To burglary, larceny, robbery, etc.

In a criminal case, a defendant may testify as to the intent with which he entered a building, although, of course, a jury is not bound to believe him. Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50.

And a person on trial for burglary, charged with breaking and entering a railway car in which property was kept, with intent to steal therein, may testify in defense that he entered the car to obtain coal, in reliance upon statements made to him by persons who accompanied him and assisted in taking the coal, that such persons had a license to take coal from the car; and he is entitled to have the jury instructed, upon his request, as to the statutory definition of larceny, in order that they may be informed that, to convict, they should find he intended all that is essential to constitute larceny. State v. Tough, 12 N. D. 425, 96 N. W. 1025.

And a person prosecuted for taking goods from a vessel, under a statute imposing a penalty for stealing or destroying goods or other effects belonging to any vessel in distress, wrecked, lost, stranded, or cast away, may be permitted to testify as to his intention in taking the goods in question. United States v. Stone, 8 Fed. 232.

But an instruction in a prosecution for burglary in which the defendant did not testify, that the intent is a simple mental operation, and unless the defendant himself speaks, it is not possible to give any direct, positive proof of intent in the commission of any act, is not subject to the objection that it tells the jury that a presumption should be indulged against the defendant because he did not give evidence as a witness in the cause. People v. Morton, 72 Cal. 62, 13 Pac. 150.

So, a man who lost a large sum of money gambling, believing that it was unlawfully won from him, who, after losing it, at the point of a revolver took back a sum of money from the card table, and robbed the person in charge of another sum, may be asked, on a prosecution for the robbery, if he honestly believed that the money was his and that he had a right to take it. People v. Hughes, 11 Utah, 100, 39 Pac. 492.

And where a person is charged with maliciously and wantonly destroying the goods of another, his motive is in issue, and he may testify to it himself. Conway v. Clinton, 1 Utah, 215.

So, in larceny, the intent to steal is an element of the crime, and it is competent for the defendant to testify as to the intent with which he did the act. State v. Williams, 95 Mo. 247, 6 Am. St. Rep. 46, 8 S. W. 217.

And a person charged with stealing property may testify in a prosecution therefor as to the intention existing in his mind when he came into possession of the property which he is charged with having stolen. White v. State, 53 Ind. 596; State v. Lowe, 67 Kan. 183, 72 Pac. 524.

So, a person charged with having stolen certain personal property from a farm occupied by him may be permitted to show the nature of his contract, the character of his occupation, and that, in doing what he did, he was acting under a claim of right, and without any wrong intent. Severance v. Carr, 43 N. H. 65.

And where boards were placed by a person upon his neighbor's premises, of which the neighbor was the lawful occupant, without his consent, and he removed them from the place where they were put to the cellar way of his house, and afterwards, upon vacating the premises, left them there, on a charge of larceny for removing the boards, he is entitled to testify that he had no other object in view when he moved them except to clear out his yard. George v. Johnson, 25 App. Div. 125, 49 N. Y. Supp. 203.

So, a person charged with stealing a cow has the right to testify, in a prosecution therefor, that he purchased a duebill against the owner of the cow, and was informed and believed that such owner would let the cow go on the duebill, and he took her, believing he had a right to do so, and with no intent to steal the cow or do a wrong. State v. Williams, supra.

And where a person was found in possession of a skiff which had been recently stolen, he is entitled to testify in his own behalf that he had no felonious intention in taking it, and no intention of converting the property to his own use, or of depriving the owner of it, but that he was endeavoring to escape arrest under a warrant, and, in so doing, took the skiff and used it, intending to send it back by a person whom he had carried along for that purpose. State v. Dillon, 48 La. Ann. 1365, 20 So. 913.

And a person charged with the larceny of a watch, who had picked up the owner of the watch from the ground in a public street where he was lying, is not debarred from testifying why he picked him up, on the ground that this would be permitting him to make his own defense. People v. Quick, 51 Mich. 547, 18 N. W. 375.

And, upon a charge of grand larceny against a banker in obtaining possession of and converting to his own use a draft which had been deposited in the bank, he may be asked whether or not he intended, at the time of discounting the draft, to

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make an assignment, and as to whether he expected to pay the proceeds of the draft to the owner, and as to whether, at the time, he expected to continue in business and be able to pay his debts as they matured. People v. Moore, 37 Hun, 84.

So, a person charged with knowingly, and without the consent of the owner, cutting and carrying away timber on lands not his own, but adjoining his own, may give evidence that he did not intend to get on the adjoining land. Matthews v. State (Tex. Crim. App.) 42 S. W. 375.

And a tenant for life of a farm, sought to be evicted on the charge of waste in maliciously cutting the timber thereon, is entitled to testify that he cut the wood in good faith, believing that he had a right to do so. Rutherford v. Aiken, 2 Thomp. & C. 281.

Likewise, where property is alleged to have been stolen, the best evidence of nonconsent is that of the owner himself. Smith v. State, 13 Tex. App. 507.

5. To seduction or alienation.

The prosecutrix in a trial for seduction under promise of marriage may be permitted to tell the jury that she yielded because of the defendant's promise of marriage, and her reliance thereon. Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177.

But she cannot be asked if she would have consented in the absence of a promise, such a question calling for merely a speculative answer on her part. Cook v. People, 2 Thomp. & C. 404.

So, in an action to recover damages for the procuring and enticing of plaintiff's wife to leave him, if the separation appears to have resulted from statements made and advice given to the wife by the defendant, he may be permitted to testify that he had no intention to bring about a separation. Tasker v. Stanley, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417.

6. To usury.

The voluntary taking or reservation of a greater interest or compensation for a loan or forbearance of money than that allowed by law is *per se* usurious, and the offense is not condoned by a want of intent to violate the law, and the person taking the usury cannot testify as to his intent not to take more than the law allows. Fiedler v. Darrin, 50 N. Y. 437.

And, in a case of alleged usury, where a bonus is specified and agreed upon between the parties, whether of money or other valuable thing, the case is not open to the admission of evidence of a purpose or intent to or not to violate the law, for in such case the law itself declares the unlawful intent. More v. Deyoe, 22 Hun, 208.

So, where there is a direct or express agreement to take more money for a loan than the law allows, evidence of the intent of the parties is not admissible. Ibid.

And, where an action on a note is sought to be defeated by a plea of usury, it is not admissible by way of rebutting a usurious intent to inquire of the party who made the loan whether there was any intention, shift, or device on his part to get more than the legal rate of interest, since that is calling on him to pronounce broadly upon the very point in dispute. Sizer v. Miller, 1 Hill, 227.

The rule that a party may testify what his motive or intention was, where the motive or intention actuating him is a subject of inquiry, however, applies in cases in which the question of usury is involved. Peightal v. Cotton States Bldg. Co. 25 Tex. Civ. App. 390, 61 S. W. 428.

And where the facts in regard to an alleged usurious transaction do not directly show usury, but are such that a jury could infer that they were intended as a cover for usury, it is competent to ask the lender whether he intended to take usury. Black v. Ryder, 5 Daly, 304.

And where a transaction by which a loan is made is equivocal, and usury is alleged, the illegality of the act depends upon the intention of the parties; and the intent must be ascertained in order to characterize the act, and in such case it is admissible to allow the party to testify as to his intention. More v. Deyoe, supra.

In the above case, Fiedler v. Darrin, 50 N. Y. 437, supra, was distinguished upon the ground that, in the former case, there was no specified sum of money offered or demanded as a bonus for the loaning of the money in the case, as was done in the latter.

So, where a loan was made and a larger sum was reserved than that allowed by law for interest, it is competent to ask a party to the loan whether the amount in excess of the legal rate was intended as compensation for the loan, or as compensation for trouble and expense incurred in collecting the money to be loaned. Thurston v. Cornell, 38 N. Y. 281.

And a person taking a note reserving usurious interest, claimed to be an accommodation note, never having had a legal inception until it came to his hands, may testify to his belief in the truth of a certificate required of and given by the maker after the transfer of the note in suit, to the effect that it was business paper, and that he had no purpose or intent to use it to evade the statute of usury. Bayliss v. Cockcroft, 81 N. Y. 363.

So, where a person made a loan, and it appears that she was credited annually with interest at a rate forbidden in the state, on a claim that the note was not void, as an agreement for excessive interest, on the ground that the note was given as security for a note made to parties in another state, where an agreement for interest at the rate in question was legal, she may properly be permitted to testify that she did not intend to make an illegal and corrupt agreement, or to loan the money to a person in the state. Davis v. Marvine, 160 N. Y. 269, 54 N. E. 704.

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And where it was sought to avoid a mortgage upon the ground of usury, the usury consisting in the overvaluation of certain railroad bonds transferred by the mortgagee to the mortgagor, and which formed part of the consideration for which the mortgage was given, the mortgagee is entitled to testify as to his intention in making the arrangement for the transfer of the bonds, and he may be asked whether, at the time the mortgage was taken, he believed the bonds were worth the price for which they were taken by the mortgagor. More v. Deyoe, supra.

7. *To libel and slander.*

The rule that the motive with which an act was done or words uttered may be inquired into, and the real motive may be stated as a fact to be considered with the other evidence, is applicable in an action for libel or slander. Lally v. Emery, 54 Hun, 517, 8 N. Y. Supp. 135; Wilson v. Noonan, 35 Wis. 321.

And, as the question of malice is directly at issue in a libel case, the defendant may testify to his lack of malice, and that his feelings toward the plaintiff were friendly both before and recently after the publication. Dorn v. Cooper (Iowa) 118 N. W. 35, overruling Barr v. Hack, 46 Iowa, 308.

And direct evidence to disprove the existence of a bad motive or malicious intent, such as the testimony of the defendant himself, denying that he had any such intent, is admissible in an action for libel under the general denial. Wilson v. Noonan, 35 Wis. 321.

So, it is proper for the defendant in an action for damages for an alleged libelous publication to testify that he had no ill-will against the plaintiff when he made the publication, and that he had no other motive in such publication than the public good. Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

And, in an action for libel, under a statute authorizing the defendant to give proof of intention, the defendant may give evidence of his intent in making the publication, for the purpose of showing that it was without malice; and this includes the right to show that the libelous language charged was rendered so by mistake in punctuation; and when an alleged libelous publication consists of several epithets, the defendant may be permitted to disclaim any intention to apply certain of the epithets to the plaintiff, and justify the others. Arnott v. Standard Asso. 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361.

So, in an action for libel, where the proof is such as to indicate that the defendant is at least liable in compensatory damages, direct testimony of the defendant himself is admissible to show that the publication was not made with any bad motive or malicious intent, as bearing on the question of the liability of the defendant for punitive damages. Wilson v. Noonan, supra; Heun v. Horn, 56 Ohio St. 442, 47 N. E. 248.

And a person sued for libel for the publication of an article may be asked, as a witness, why he wrote it; his testimony on this subject being admissible, not in mitigation of the compensatory but of the vindictive damages which a jury might award in such a case. Bennett v. Smith, 23 Hun, 50.

And where an action was brought against a union for damages for charging a person with selling a certain kind of bad meat, and it was claimed that one object of the union was to prevent the sale of that particular kind of meat, it is proper to allow the plaintiff to explain that he had other reasons for refusing to join the union than a desire to deal in that particular kind of meat. Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157.

The testimony of a person charged with the publication of a libel as to what he meant by the article in question, however, is properly excluded where the language of the article is not ambiguous. State v. Heacock, 106 Iowa, 191, 76 N. W. 654; Wilson v. Noonan, supra.

And a defendant in an action for an alleged libel cannot be allowed to state that, in the article published, he did not intend to charge the plaintiff with the commission of any crime or misdemeanor, where the article was not ambiguous, since, in such case, he must be held to have intended the meaning those words obviously conveyed. Hay v. Reid, supra.

But where a landlord said to a tenant, "If you have money in your pocket and do not pay your rent, you are acting like a thief," the landlord may testify, in an action for slander brought against him by the tenant, that he did not intend to accuse the plaintiff of the crime of stealing. Faxon v. Jones, 176 Mass. 206, 57 N. E. 359.

So, in an action for newspaper libel, the motive of a subordinate in publishing the libelous article is irrelevant if not communicated to his principal, and if a showing has been made of everything that passed between principal and subordinate before the publication. Maclean v. Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

Where a person caused a publication alleged to be a libel, the question whether his belief in the truth of the publication was well or ill founded is for the jury in an action for damages for the libel. Henn v. Horn, supra.

8. *To malicious prosecution.*

The motive which operated upon and induced the defendant in an action for malicious prosecution to have the plaintiff arrested is directly involved in the issues before the jury, and, where he is a competent witness, the defendant has the right to explain to the jury the motives under which he acted. Flickinger v. Wagner, 46 Md. 580; Coleman v. Heurich, 2 Mackey, 189; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549; Leake v. Carlisle, 75 N. Y. Supp. 382; George v. Johnson, 25 App. Div. 125, 49 N. Y. Supp. 203.

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And a person who caused a prosecution against another, and who was sued for malicious prosecution, is entitled to testify, in the action against him, as to whether or not he was influenced by malice in instituting the prosecution. Autry v. Floyd, 127 N. C. 186, 37 S. E. 208; Coleman v. Heurich, supra; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Turner v. O'Brien, 5 Neb. 542; McCormack v. Perry, 47 Hun, 71; Greer v. Whitfield, 4 Lea, 85; Sherburne v. Rodman, 51 Wis. 474, 8 N. W. 414.

In McCormack v. Perry, supra, the court refused to follow Lawyer v. Loomis, 3 Thomp. & C. 396, so far as that case expresses the opinion or holds that, in an action for malicious prosecution, the law infers malice on the part of the defendant when the want of probable cause is established.

So, a defendant in an action for malicious prosecution may be asked on direct examination whether he made the complaint in such prosecution in good faith, believing the other party was guilty as therein charged. Sherburne v. Rodman, and Spalding v. Lowe, supra; Garrett v. Mannheimer, 24 Minn. 193; Turner v. O'Brien, supra; White v. Tucker, 16 Ohio St. 468; Greer v. Whitfield, supra.

And he may, while on the stand, testify that he acted in good faith, and had no ill feelings against the person prosecuted. Vansickle v. Brown, 68 Mo. 627.

And where one person started a prosecution against another for perjury, and the latter sued him for malicious prosecution, the defendant may testify in his own behalf that he believed the evidence given by the plaintiff, charged to be false, was material, and that he believed, at the time he made the complaint against the plaintiff for perjury, that he was guilty of the charge made against him, as tending to repel the imputation of malice and want of probable cause. McKown v. Hunter, 30 N. Y. 625.

So, in a suit for malicious prosecution by the arrest of a boy by a special officer of a railroad company, charging him with being unlawfully on the cars, in which the special officer is called to prove the arrest and the circumstances under which it was made, it is competent for the railroad company to show that the officer was not actuated by any feeling of ill-will, in order to exclude an inference of malice in fact. Campbell v. Baltimore & O. R. Co. 97 Md. 341, 55 Atl. 532.

And a party may testify that, in taking out a writ of attachment, he did not intend to injure or harass defendants, and that he was actuated only by an honest desire to collect his debt. Gimbel v. Gomprecht (Tex. Civ. App.) 36 S. W. 781.

But, while a defendant, in an action for malicious prosecution, may testify that he believed the complaint upon which proceedings were instituted against the plaintiff to be true, such belief is a question for the jury, and the defendant's testimony has no more weight than that of any other witness. Spalding v. Lowe, supra.

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9. To fraud.

(a) Generally.

When a fraudulent intent is imputed to a person, or forms an element of a crime with which he is charged, he may deny the fraudulent intent, whether the effect is to defeat the action or to diminish the damage or punishment. Babcock v. People, 15 Hun, 347.

And where intent to defraud upon the part of the defendant is an issue in an action, his own testimony as to the absence of such intention is admissible on his own behalf. Hubbell v. Alden, 4 Lans. 214; Pope v. Hart, 35 Barb. 630.

And this is so, however inconclusive, unsatisfactory, or inconsistent his evidence may be. Pope v. Hart, supra.

So, where the facts of a case in which fraud is alleged do not necessarily prove it, but only tend to that conclusion, the evidence of the party charged with the fraud, when he is so circumstanced as to be a competent witness, should be received for what it may be considered worth. Seymour v. Wilson, 14 N. Y. 567.

And the former secretary and vice president of a corporation, in an action by it to set aside a decree foreclosing a vendor's lien, may be permitted to testify that they had no intent to defraud the corporation in waiving service of citation in the foreclosure proceeding. Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597.

And where an action on an insurance policy was defended on the ground of fraud practised upon the adjusters in procuring an adjustment based upon an inspection of the books of the insured, which had been altered, testimony of the manager of the assured, who made the alterations, as to his intent in doing so, is admissible. Commercial Bank v. Firemen's Ins. Co. 87 Wis. 297, 58 N. W. 391.

So, where a person was charged with receiving a sum of money from another with intent to defraud him, and evidence of other payments made by the other to him before and after the payment in question was given, he may testify that, at the time of the payment in question, he did not intend to defraud the person making it, and, as proof of the other payments was competent only to show a guilty intention, he has the right to show also that he did not receive them with such intent. People v. Baker, 96 N. Y. 340.

(b) By false representation.

Where representations upon which a person acted are alleged to have been fraudulent, the belief of the person so acting upon them is one of the facts to be proved in an action for damages therefor, and the plaintiff's own testimony directly upon the point may be received. Thorn v. Helmer, 2 Keyes, 27; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Com. use of Shaffer v. Julius, 173 Pa. 322, 34 Atl. 21.

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And where it was sought to avoid a mortgage upon the ground of usury, the usury consisting in the overvaluation of certain railroad bonds transferred by the mortgagee to the mortgagor, and which formed part of the consideration for which the mortgage was given, the mortgagee is entitled to testify as to his intention in making the arrangement for the transfer of the bonds, and he may be asked whether, at the time the mortgage was taken, he believed the bonds were worth the price for which they were taken by the mortgagor. More v. Deyoe, supra.

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And, as the question of malice is directly at issue in a libel case, the defendant may testify to his lack of malice, and that his feelings toward the plaintiff were friendly both before and recently after the publication. Dorn v. Cooper (Iowa) 118 N. W. 35, overruling Barr v. Hack, 46 Iowa, 308.

And direct evidence to disprove the existence of a bad motive or malicious intent, such as the testimony of the defendant himself, denying that he had any such intent, is admissible in an action for libel under the general denial. Wilson v. Noonan, 35 Wis. 321.

So, it is proper for the defendant in an action for damages for an alleged libelous publication to testify that he had no ill-will against the plaintiff when he made the publication, and that he had no other motive in such publication than the public good. Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

And, in an action for libel, under a statute authorizing the defendant to give proof of intention, the defendant may give evidence of his intent in making the publication, for the purpose of showing that it was without malice; and this includes the right to show that the libelous language charged was rendered so by mistake in punctuation; and when an alleged libelous publication consists of several epithets, the defendant may be permitted to disclaim any intention to apply certain of the epithets to the plaintiff, and justify the others. Arnott v. Standard Asso. 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361.

So, in an action for libel, where the proof is such as to indicate that the defendant is at least liable in compensatory damages, direct testimony of the defendant himself is admissible to show that the publication was not made with any bad motive or malicious intent, as bearing on the question of the liability of the defendant for punitive damages. Wilson v. Noonan, supra; Henn v. Horn, 56 Ohio St. 442, 47 N. E. 248.

And a person sued for libel for the publication of an article may be asked, as a witness, why he wrote it; his testimony on this subject being admissible, not in mitigation of the compensatory but of the vindictive damages which a jury might award in such a case. Bennett v. Smith, 23 Hun, 50.

And where an action was brought against a union for damages for charging a person with selling a certain kind of bad meat, and it was claimed that one object of the union was to prevent the sale of that particular kind of meat, it is proper to allow the plaintiff to explain that he had other reasons for refusing to join the union than a desire to deal in that particular kind of meat. Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157.

The testimony of a person charged with the publication of a libel as to what he meant by the article in question, however, is properly excluded where the language of the article is not ambiguous. State v. Heacock, 106 Iowa, 191, 76 N. W. 654; Wilson v. Noonan, supra.

And a defendant in an action for an alleged libel cannot be allowed to state that, in the article published, he did not intend to charge the plaintiff with the commission of any crime or misdemeanor, where the article was not ambiguous, since, in such case, he must be held to have intended the meaning those words obviously conveyed. Hay v. Reid, supra.

But where a landlord said to a tenant, "If you have money in your pocket and do not pay your rent, you are acting like a thief," the landlord may testify, in an action for slander brought against him by the tenant, that he did not intend to accuse the plaintiff of the crime of stealing. Faxon v. Jones, 176 Mass. 206, 57 N. E. 359.

So, in an action for newspaper libel, the motive of a subordinate in publishing the libelous article is irrelevant if not communicated to his principal, and if a showing has been made of everything that passed between principal and subordinate before the publication. Maclean v. Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

Where a person caused a publication alleged to be a libel, the question whether his belief in the truth of the publication was well or ill founded is for the jury in an action for damages for the libel. Henn v. Horn, supra.

8. *To malicious prosecution.*

The motive which operated upon and induced the defendant in an action for malicious prosecution to have the plaintiff arrested is directly involved in the issues before the jury, and, where he is a competent witness, the defendant has the right to explain to the jury the motives under which he acted. Flickinger v. Wagner, 46 Md. 580; Coleman v. Heurich, 2 Mackey, 189; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549; Leake v. Carlisle, 75 N. Y. Supp. 382; George v. Johnson, 25 App. Div. 125, 49 N. Y. Supp. 203.

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And a person who caused a prosecution against another, and who was sued for malicious prosecution, is entitled to testify, in the action against him, as to whether or not he was influenced by malice in instituting the prosecution. Autry v. Floyd, 127 N. C. 186, 37 S. E. 208; Coleman v. Heurich, supra; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Turner v. O'Brien, 5 Neb. 542; McCormack v. Perry, 47 Hun, 71; Greer v. Whitfield, 4 Lea, 85; Sherburne v. Rodman, 51 Wis. 474, 8 N. W. 414.

In McCormack v. Perry, supra, the court refused to follow Lawyer v. Loomis, 3 Thomp. & C. 396, so far as that case expresses the opinion or holds that, in an action for malicious prosecution, the law infers malice on the part of the defendant when the want of probable cause is established.

So, a defendant in an action for malicious prosecution may be asked on direct examination whether he made the complaint in such prosecution in good faith, believing the other party was guilty as therein charged. Sherburne v. Rodman, and Spalding v. Lowe, supra; Garrett v. Mannheimer, 24 Minn. 193; Turner v. O'Brien, supra; White v. Tucker, 16 Ohio St. 468; Greer v. Whitfield, supra.

And he may, while on the stand, testify that he acted in good faith, and had no ill feelings against the person prosecuted. Vansickle v. Brown, 68 Mo. 627.

And where one person started a prosecution against another for perjury, and the latter sued him for malicious prosecution, the defendant may testify in his own behalf that he believed the evidence given by the plaintiff, charged to be false, was material, and that he believed, at the time he made the complaint against the plaintiff for perjury, that he was guilty of the charge made against him, as tending to repel the imputation of malice and want of probable cause. McKown v. Hunter, 30 N. Y. 625.

So, in a suit for malicious prosecution by the arrest of a boy by a special officer of a railroad company, charging him with being unlawfully on the cars, in which the special officer is called to prove the arrest and the circumstances under which it was made, it is competent for the railroad company to show that the officer was not actuated by any feeling of ill-will, in order to exclude an inference of malice in fact. Campbell v. Baltimore & O. R. Co. 97 Md. 341, 55 Atl. 532.

And a party may testify that, in taking out a writ of attachment, he did not intend to injure or harass defendants, and that he was actuated only by an honest desire to collect his debt. Gimbel v. Gomprecht (Tex. Civ. App.) 36 S. W. 781.

But, while a defendant, in an action for malicious prosecution, may testify that he believed the complaint upon which proceedings were instituted against the plaintiff to be true, such belief is a question for the jury, and the defendant's testimony has no more weight than that of any other witness. Spalding v. Lowe, supra.

9. To fraud.

(a) Generally.

When a fraudulent intent is imputed to a person, or forms an element of a crime with which he is charged, he may deny the fraudulent intent, whether the effect is to defeat the action or to diminish the damage or punishment. Babcock v. People, 15 Hun, 347.

And where intent to defraud upon the part of the defendant is an issue in an action, his own testimony as to the absence of such intention is admissible on his own behalf. Hubbell v. Alden, 4 Lans. 214; Pope v. Hart, 35 Barb. 630.

And this is so, however inconclusive, unsatisfactory, or inconsistent his evidence may be. Pope v. Hart, supra.

So, where the facts of a case in which fraud is alleged do not necessarily prove it, but only tend to that conclusion, the evidence of the party charged with the fraud, when he is so circumstanced as to be a competent witness, should be received for what it may be considered worth. Seymour v. Wilson, 14 N. Y. 567.

And the former secretary and vice president of a corporation, in an action by it to set aside a decree foreclosing a vendor's lien, may be permitted to testify that they had no intent to defraud the corporation in waiving service of citation in the foreclosure proceeding. Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597.

And where an action on an insurance policy was defended on the ground of fraud practised upon the adjusters in procuring an adjustment based upon an inspection of the books of the insured, which had been altered, testimony of the manager of the assured, who made the alterations, as to his intent in doing so, is admissible. Commercial Bank v. Firemen's Ins. Co. 87 Wis. 297, 58 N. W. 391.

So, where a person was charged with receiving a sum of money from another with intent to defraud him, and evidence of other payments made by the other to him before and after the payment in question was given, he may testify that, at the time of the payment in question, he did not intend to defraud the person making it, and, as proof of the other payments was competent only to show a guilty intention, he has the right to show also that he did not receive them with such intent. People v. Baker, 96 N. Y. 340.

(b) By false representation.

Where representations upon which a person acted are alleged to have been fraudulent, the belief of the person so acting upon them is one of the facts to be proved in an action for damages therefor, and the plaintiff's own testimony directly upon the point may be received. Thorn v. Helmer, 2 Keyes, 27; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Com. use of Shaffer v. Julius, 173 Pa. 322, 34 Atl. 21.

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And testimony by the parties as to what was believed and intended and relied upon is admissible in an action for false representations in effecting a sale of property. Boddy v. Henry, 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771.

Thus, in a suit involving the good faith of a sale of goods, which is attacked for fraud the vendor may testify in his own behalf regarding his motives in selling. Brown v. Lessing, 70 Tex. 546, 7 S. W. 783.

And, on an issue as to fraud or good faith of a party in making a transfer of his property, he may be asked in his examination as a witness, in general terms, if he made the transfer in good faith, and may answer in the same general terms that it was made in good faith, without stating the particular terms of the sale. Miner v. Phillips, 42 Ill. 123.

And, in an action for false and fraudulent representations concerning the character of land, the plaintiff may be permitted to testify that he was induced to buy the land by reason of the representations of the defendant that it was land of a certain character. Bartlett v. Falk, 110 Iowa, 346, 81 N. W. 602.

So, a purchaser charging that a sale to him was voidable by reason of false representations which induced it may testify, in a suit to enforce payment of the purchase money, that he would not have purchased if the false representations had not been made. Pridham v. Weddington, 74 Tex. 354, 12 S. W. 49.

Likewise, when the good faith of a purchase is sought to be impeached, the purchaser may be examined as to the intent with which it was made. Bedell v. Chase, 34 N. Y. 386; Standard Oil Co. v. Meyer Bros. Drug Co. 74 Mo. App. 446.

And, in an action to replevin goods from an assignee on the ground that the sale thereof to the assignor was induced by fraud, the vendee may be permitted to testify that he did not purchase them with intent to cheat his vendor, the plaintiff, nor with intent not to pay for them. Morris v. Wells, 4 Silv. Sup. Ct. 34, 7 N. Y. Supp. 61; Bell v. Kaufman, 9 Colo. App. 259, 47 Pac. 1035.

And a defendant in an action in attachment may testify as a witness in his own behalf as to his intent in regard to the transaction in question. Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196.

And so, in a proceeding to dissolve an attachment. Brown v. Blanchard, 39 Mich. 790.

And where the good faith of one who buys a stock of goods is in question in a contest between himself and an officer who has taken them under attachment, the purchaser may properly testify that he bought them in good faith, and for what he considered a full consideration, and with no other purpose than to get the stock at a fair price. Bedford v. Penny, 58 Mich. 424, 25 N. W. 381.

So, whether representations as to his pecuniary circumstances, made at one time by a purchaser to a seller of goods, in order to obtain credit, influenced the seller in making a like sale to the same party at a subsequent time, is a question of fact, and it is competent for the seller to testify that they did. Grever v. Taylor, 53 Ohio St. 621, 42 N. E. 829; Safford v. Grout, 120 Mass. 20.

And a person who took a note in payment for property sold is competent to testify that he relied on representations of the purchaser that the note was good, and believed them to be true. Beebe v. Knapp, 28 Mich. 53; Safford v. Grout, supra.

But a person charged with obtaining a promissory note from another by false and fraudulent representations is entitled to be asked on the trial whether he stated anything to the other that he believed or knew to be false. Babcock v. People, 15 Hun, 347.

And where, in an action for damages for the loss of goods obtained from plaintiff by fraud, in which the plaintiff claims that he was induced to surrender the goods on the representations that a check given for their payment was good and would be paid, and that, after the plaintiff surrendered the goods, the defendant stopped payment of the check, it is proper to permit the defendant to testify that, when he gave the check, he had no other intent than that it should be paid, and that he stopped payment under advice of counsel. Cole v. High, 173 Pa. 590, 34 Atl. 292.

And it has been held that refusing to permit a purchaser of property to testify on an issue charging fraud in the purchase, as to his motive in purchasing it, is not material error. Powell v. Watts, 72 Ga. 770.

So, the understanding and intention of a person in regard to the meaning of an alleged misrepresentation which was acted on in a transaction between other parties may be proved by him in an action against him for fraud in making the statement. Nash v. Minnesota Title Ins. & T. Co. 163 Mass. 574, 28 L.R.A. 753, 47 Am. St. Rep. 489, 40 N. E. 1039.

And a person who sells his stock in a corporation, and brings an action for damages against another for a loss alleged to have been occasioned by a false representation of the defendant, which induced the plaintiff to sell his stock for less than its market value, may properly be asked what it was that induced him to sell his stock at the price at which he did. Weaver v. Cone, 174 Pa. 104, 34 Atl. 551.

So, upon an indictment for false pretenses, where the false pretenses alleged consists of an untrue statement of the accused with reference to his position and occupation, the belief of the person defrauded in the truth of the statement, and his opinion as to the position and occupation of the accused, formed upon such statements, is admissible as evidence of his belief in the truth of the false pretense, though it is not necessarily conclusive. R. v. King, 66 L. J. Q. B. N. S. 87.

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But a person who sold goods upon the alleged false and fraudulent representations made by another as to the credit and responsibility of the purchaser, and who sued the person making them for damages, cannot be asked on the trial if he did not sell and deliver the goods on faith of the representations and statements of the defendant respecting the pecuniary position and responsibility of the purchaser, the question requiring the witness to declare to the jury what the private operations of his mind were at the time of the sale. Shaw v. Stine, 8 Bosw. 157.

(c) By insolvent, as against creditors.

Where it is in question whether an act was done to defraud creditors, it is competent to prove directly by the actor what his actual intent was. Sedgwick v. Tucker, 90 Ind. 271.

And the parties to the transaction may testify to their belief as to the solvency of the parties concerned. Durfee v. Bump, 20 N. Y. S. R. 833, 3 N. Y. Supp. 505.

Thus, on an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor is a witness, to inquire of him whether, in making the assignment or transfer, he intended to delay or defraud his creditors. Seymour v. Wilson, 14 N. Y. 567; Durfee v. Bump, supra; Persse & B. Paper Works v. Willett, 1 Robt. 131; Vilas Nat. Bank v. Newton, 25 App. Div. 62, 48 N. Y. Supp. 1009; Morris v. Wells, 4 Silv. Sup. Ct. 34, 7 N. Y. Supp. 61; Love v. Tomlinson, 1 Colo. App. 516, 29 Pac. 666; Selz v. Belden, 48 Iowa, 451; Gardom v. Woodward, 44 Kan. 758, 21 Am. St. Rep. 314, 25 Pac. 199; Bice v. Rogers, 52 Kan. 207, 34 Pac. 796; Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Pierce v. White, 10 Ohio Dec. Reprint, 552; Robertson v. Gourley, 84 Tex. 575, 19 S. W. 1006.

And he may be asked whether he sold out for any other purpose than to pay his debts. Sweeney v. Conley, 71 Tex. 543, 9 S. W. 548.

And he may testify that his object was to prevent sacrifices of his property. Forbes v. Logan, 4 Bosw. 475.

And it is admissible for the witness to state both the particular reasons that induced the act, and that he communicated them to his creditors before doing it. Persse & B. Paper Works v. Willett, supra.

And although, by statute, the question whether or not a sale of chattels was made with intent to hinder, delay, or defraud creditors is one of fact, which must be submitted to the jury upon the evidence, in the trial of an action wherein a sale is impeached as made with intent to hinder, delay, or defraud creditors, the vendor, as a witness, may be asked whether he had such intent in making the sale. Blaut v. Gabler, 8 Daly, 48.

So, where one party to an action has introduced evidence of an intent to defraud his creditors on the part of the other party it is competent for the latter to rebut that evidence by testifying to his intentions. Graves v. Graves, 45 N. H. 323.

And where it is sought to impeach a person's conveyance to his wife on the ground that it was made for a fraudulent purpose, an inquiry into his intentions and motives in making the grant to her is relevant and material, and he may be inquired of as to such intentions and motives, and may testify that he executed the conveyance in good faith. Thacher v. Phinney, 7 Allen, 146; Woodman v. Penfield, 2 Silv. Sup. Ct. 246, 6 N. Y. Supp. 803; McGhee v. Wells, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529.

And the wife may also be permitted to testify that they had no intent to hinder, delay, or defraud creditors when the transfer was made. Woodman v. Penfield, supra.

And a wife who signed a deed of her husband, alleged to have been fraudulent, is a competent witness for the defendant on an issue as to whether or not the deed was made to hinder and delay creditors, to testify as to what was her intent and purpose in making the deed, and that she did not understand at the time that any payment was to be made for the conveyance, and that she was not willing to part with the property. Mulford v. Tunis, 35 N. J. L. 256.

So, where a conveyance to a trustee, made by a father for his daughter, is attacked as fraudulent and void as against creditors, the father may testify that his intention in having the deed made to his daughter was to pay money he owed her, and to set the land aside for her for the purpose of sending her to school. Cohen v. Parish, 105 Ga. 339, 31 S. E. 205.

Likewise, on the question of the validity of a chattel mortgage charged to be fraudulent, the mortgagee may testify directly what her intention was in taking it. Gentry v. Kelley, 49 Kan. 82, 30 Pac. 186.

And a person taking by assignment a mortgage and a note secured by it may testify in his own behalf, where the mortgage is attacked as fraudulent as against creditors, that he knew nothing of any understanding between the parties to the mortgage, that the mortgagor was to remain in possession, nor of any purpose on the part of either to defraud the mortgagor's creditors. Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

And a mortgagor of a stock of goods, who was left in possession of them to dispose of them to the best advantage, without any arrangement for the appropriation of the moneys received, is competent to testify that he had no intent, in making the mortgage, to defraud his creditors. Ibid.

And where the question under consideration is whether a person was about to remove his property with intent to defraud his creditors, his belief on the subject is important, and he should be allowed to show, by his own testimony, that, when the attachment was served, he did not know that he

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was owing anyone. Hyde v. Nelson, 11 Mich. 353.

So, where a general assignment for the benefit of creditors is attacked on the ground that it was fraudulent, the debtor's intentions in making it are competent, and his testimony as to his intent is admissible. Watkins v. Wallace, 19 Mich. 57; Mathews v. Poultney, 33 Barb. 127; Forbes v. Waller, 25 N. Y. 430.

And a person assigning his property for the benefit of his creditors may testify, on an attack against the assignment, that his intent in making it was to prevent a sacrifice of his property. Forbes v. Waller, supra.

And where the terms of a bill of sale by an insolvent debtor were not such as to render the transaction fraudulent in law as against the creditors, the debtor is entitled to testify that he made the sale with no intention of defrauding or delaying his creditors, but for the purpose of paying all of his debts. Adam Roth Grocery Co. v. Lewis, 69 Mo. App. 463.

So, where the evidence was conflicting upon the issue whether an assignment was absolute and in good faith, or was a mere device to evade the bankruptcy act, it is proper to permit the parties thereto to testify to their intention. Hackney v. Raymond Bros. Clarke Co. 68 Neb. 624, 94 N. W. 822.

And a party seeking to impeach an assignment for the benefit of creditors for fraud is entitled to inquire of the assignor as to his object and intent in making it. Forbes v. Waller, supra.

And the intent of an insolvent in making a payment is material in an action by an assignee in insolvency to recover money alleged to have been paid by the insolvent with a view to give preference to a creditor, in fraud of other creditors, and to such intent the insolvent is a competent witness. Stearns v. Gosselin, 58 Vt. 38, 3 Atl. 193.

So, on an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignee or purchaser is called as a witness, to inquire of him whether, in making the purchase or taking the assignment, he intended to delay or defraud the creditors of the vendor or assignor. Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Hale v. Robertson, 100 Ga. 168, 27 S. E. 937; Wilson v. Clark, 1 Ind. App. 182, 27 N. E. 310; Edwards v. Currier, 43 Me. 484; Starin v. Kelly, 88 N. Y. 420; Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

And where a sale of personal property is assailed as fraudulent by attacking creditors, it is competent for the vendor to state whether the contract was an absolute one, and whether there were any reservations outside of it, and the vendee may testify whether he had anything in view except an honest purchase of the goods, and both parties may testify as to their intent in entering into the contract. Angell v. Pickard, 61 Mich. 561, 28 N. W. 680.

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And where an action is brought against a sheriff for conversion, and he defends upon the ground that the sale of the property by the execution debtor to the plaintiff, through which the plaintiff claimed title, was fraudulent as to creditors, the plaintiff and the execution debtor may properly be allowed to testify directly as to their intent in making the sale and purchase. Hill v. Page, 108 App. Div. 71, 95 N. Y. Supp. 465.

So, where the validity of a chattel mortgage was assailed on the ground of fraud, it is proper to allow the holder thereof to state as a witness that he did not know that the mortgage was made by the mortgagor with intent to defraud his creditors, and that he himself had no such motive in taking it. Frost v. Rosecrans, 66 Iowa, 405, 23 N. W. 895; Sperry v. Baldwin, 46 Hun, 120.

When the probable consequence of an act of an insolvent debtor is to give a preference, however, the debtor will be conclusively presumed to have intended to give such preference, and his testimony that he did not intend to give it is inadmissible. Ecker v. McAllister, 45 Md. 290.

And where elements of fraud are shown to have existed in a sale, and it is attacked by creditors for fraud, the real intention of the parties is immaterial; and the intention of the debtor at the time ultimately to pay creditors, testified to by the parties themselves, cannot render the sale valid Miller v. Jannett, 63 Tex. 82.

And when any person is indebted, and makes a sale or transfer of his property, or any of it, to another person, with intent to hinder, delay, or defraud his creditors, and it appears that the person to whom the transfer is made knows, or has reasonable cause to believe, that the transfer is made for the purpose of hindering, delaying, or defrauding the creditors of the person making the transfer, the sale is void, and the law charges the purchaser with a guilty knowledge which makes him a participator in the fraud, and his evidence that he did not intend to defraud anyone is incompetent. Hathaway v. Brown, 18 Minn. 423, Gil. 373.

So, an alleged fraudulent grantor cannot be asked to testify generally as to what was his intention, since such a question might open up matters foreign to the issue, and lead to false issues. Vilas Nat. Bank v. Newton, 25 App. Div. 62, 48 N. Y. Supp. 1009.

And where it is alleged that an attachment had been wrongfully sued out, and the issue is whether the plaintiff at the time had reasonable ground to believe that the defendants had disposed of their property with intent to defraud their creditors, all the facts and circumstances attending the alleged fraudulent sales are admissible in evidence, but the secret intent of the defendants is not admissible to establish this issue. Selz v. Belden, 48 Iowa, 451.

And where an assignment of goods was

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made for the benefit of creditors, and it was attacked as fraudulent, an inquiry of one of the assignees, called as a witness, whether there was any actual fraud in the whole transaction, so far as he was concerned, is irrelevant as being an inquiry for the secret operation of the witness's mind, which could not affect the case in any way. Hanford v. Artcher, 1 Hill, 347.

10. To residence, occupation, or use.

(a) With reference to domicil, etc.,

On an issue as to the character of a person's stay or abode in a certain place, whether it was permanent or temporary, he may testify as to his intent in going there. Hulett v. Hulett, 37 Vt. 586.

And, on an issue whether a person who has left the state has changed his residence, he may testify as to his intent and his declarations of intent on leaving the state. Reeder v. Holcomb, 105 Mass. 94.

And testimony of parties to a residence of more than twelve months in a state and more than sixty days in a county, and that they had their home in the county, warrants a finding that they were residents of the county, which will not be disturbed on appeal. Hope v. Flentge, 140 Mo. 390, 47 L.R.A. 806, 41 S. W. 1002.

So, since the enactment of a statute making parties competent witnesses, a party to a suit in which the issue is in which of two towns his domicil was at a particular time, may testify to the intent with which he removed from one town to the other, shortly before, and returned soon after, that time. Fisk v. Chester, 8 Gray, 506.

And, in an action against a village corporation to enforce its liability for refusal to care for its poor under the town system, it is competent for the pauper cared for elsewhere to testify directly as to the place he intended as his home or residence. Albion v. Maple Lake, 71 Minn. 503, 74 N. W. 282.

So, where the question at issue is whether the removal of a pauper from one county to another was made with the intent to charge the latter county with the support of the pauper, it is competent to prove the intent with which the act was done by those engaged in its performance. Foster v. Cronkhite, 35 N. Y. 139.

And a superintendent of the poor of a county, who sent a pauper from the county to another, may be asked, in a proceeding to recover for the support of the pauper, whether he sent the pauper from his county in good faith. Cortland County v. Herkimer County, 44 N. Y. 22.

And where it was contended that supplies were furnished to a pauper, not in good faith, but to prevent his gaining a settlement, it is competent for the overseer furnishing the supplies to testify that they were furnished in good faith, and upon his judgment of what duty required. Corinna v. Exeter, 13 Me. 328.

So, on an issue as to the residence of a person, for the purpose of maintaining a legal action, he is entitled to testify that he came to the place claimed as his place of residence for the purpose of making a home and living there. Kennedy v. Ryall, 67 N. Y. 379.

And, upon the question of a business residence for jurisdictional purposes of a nonresident who owns, but has discontinued the operation of, a distillery within the county, his testimony as to his intent with respect to the resumption of such operation may be considered. Gambrill v. Schooley, 95 Md. 260, 63 L.R.A. 427, 52 Atl. 500.

So, a person charged with illegal voting may be allowed to prove that, in good faith, and with an honest purpose to ascertain the right, he had made a true statement of his case and obtained the advice of counsel that he had a right to vote, and had believed in it and acted upon it; but he cannot be allowed to show an absence of intent to commit the offense charged by acting under the advice of counsel and others, especially where he does not allege that he believed or relied on such advice. Hamilton v. People, 57 Barb. 625.

And the question of a person's intention in leaving a town for a prolonged absence is material in its bearing on the issue before the jury in an action by him against the selectmen of the town for refusal to put his name on the list of voters, and rejecting his vote, and his own testimony that he did not thereby intend to change his domicil is admissible. Lombard v. Oliver, 7 Allen, 155.

(b) With reference to homestead.

Where the question is whether or not certain premises which a party had formerly occupied constituted, at that time, his homestead, he may be allowed to testify for what purposes and with what intention he used or occupied the premises at the time. Clark v. Evans, 6 S. D. 244, 60 N. W. 862.

So, intention to abandon land as a homestead is a fact which may be disproved by the testimony of the party claiming the homestead. Glasscock v. Stringer (Tex. Civ. App.) 32 S. W. 920.

And, on the question of the abandonment of a homestead by leaving it, it is proper to allow the occupants to testify that, when they left it, they intended to return to it. Aultman v. Allen, 12 Tex. Civ. App. 227, 33 S. W. 679.

And where a husband and wife left their farm and bought a house in town, and resided there for eight years, the husband may testify, in a proper case, that, when he purchased the town house, he did not intend to abandon the farm as a homestead, but moved to town to educate his children. Gunn v. Wynne (Tex. Civ. App.) 43 S. W. 290.

(c) With reference to abandonment of easement or other rights.

Abandonment is a mixed question of intention and fact; and where grantors of a

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ditch and water right had not used it for a period of three years prior to conveying it, it is competent for them, in an action to determine the right to the use of the water, to testify as to their intention in not using it. Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959.

And where one person sues another for flowing his land, if he relies upon an abandonment of an easement by the defendant's predecessor in title, the predecessor may testify to his intent in doing certain acts, as bearing upon the question of abandonment. Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128.

So, a grantee of two adjoining lots of land, who, after the purchase of the second lot, built a permanent fence westerly of the division line between them, and extended a portion of a building on the first lot upon the second lot, east of the fence, and concreted the space between the building and the fence, and subsequently erected a building on the second lot, west of the fence, may testify, at the trial of a petition to enforce a lien against the second lot, describing it as it was described in the deed to him, that it was his intention, by the erection of the fence, to establish a new and permanent division between the lots. Pollock v. Morrison, 176 Mass. 83, 57 N. E. 326.

11. To dedication.

The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts and declarations explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify to in relation to his real intentions. Fossion v. Landry, 123 Ind. 136, 24 N. E. 96; Columbus v. Dahn, 36 Ind. 330; Elizabethtown, L. & B. S. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67.

And the testimony of a person alleged to have dedicated land for a city street, which dedication is shown by surrounding circumstances, that he never intended to dedicate it, is incompetent. Columbus v. Dahn, supra.

Where a dedication of land to public use is clearly manifested by unequivocal acts or declarations upon which the public or those interested in such dedication have acted, the fact that the owner may have entertained a different intention from that manifested by his acts or declarations is of no consequence; and in such case the real intent of the owner in making the dedication cannot be given in evidence. Lamar County v. Clements, 49 Tex. 347; Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Pittsburgh, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332.

Where a dedication of land to public use is communicated by declarations of an equivocal character, which are consistent with a dedication to public use or the mere permissive use by the public for a temporary though indefinite period of time, however, the intention of the owner in permitting such use is of controlling importance, and admissible in evidence in determining whether or not the property had been dedicated to the public use. Lamar County v. Clements, supra.

And, on the controversy as to whether or not lands had been dedicated to the public for a street, the testimony of the person claiming to own them, showing the intention and purpose for which the alleged way was previously fenced up, is competent as tending to show an intention not to dedicate. Bidinger v. Bishop, 76 Ind. 244.

In the above case, Columbus v. Dahn, supra, was distinguished upon the ground that, in that case, the secret intention of the witness contradicted his acts manifesting a dedication.

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And where an action is brought by one person against another, to recover money had and received, alleged to have been paid under a wagering contract in securities and commodities, prohibited by law, a person employed by the party paying over the money is a competent witness for the plaintiff to show that the defendant had no intention to perform the purchase by the actual receipt of securities and payment of the price. Crandell v. White, 164 Mass. 54, 41 N. E. 204

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And he may, when testifying on his own behalf, be permitted to answer the question whether, if he had known the condition of certain appliances, the defects of which were alleged to have caused the accident, he would have continued to work with them. Great Northern R. Co. v. McLaughlin, 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669.

And where an employee was injured by the alleged negligence of his employer, and he remained in the employer's service more than a year after the alleged accident and injury without disclosing the fact or making complaint, his testimony may be given in an action for the injury, showing, as the reason for such conduct, that he was afraid of losing his position in his employer's service. Macy v. St. Paul & D. R. Co. 35 Minn. 200, 28 N. W. 249.

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a case were taken from the files, and the defendant admitted their taking, he has the right to testify in regard to his intention in taking them, and whether he took them with intent to suppress or destroy them, or with intent that they might be preserved and presented to the jury when his trial came on. Crawford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, reversing 30 App. D. C. 1.

And where it appeared from the examination in chief of the witness for the plaintiffs in an action of garnishment, that the account books of the principal debtor were destroyed before the trial, the garnishee defendant is entitled, on cross-examination, to show the reason for such destruction, in order to repel the inference of an improper motive. Gage v. Chesebro, 49 Wis. 486, 5 N. W. 881.

So, where both the seller and buyer of property believed a note given therefor to be that of a certain person, when it is in fact that of another, the contract of sale will be set aside for mistake; and one of the parties may properly testify that he believed the note delivered to him for his property to be that of the person who he supposed gave it. Parrish v. Thurston, 87 Ind. 440.

And where an employee took a note from the agent of his employer for wages due him, he may testify, in an action against the employer for services rendered, as to the intent with which he took the note. Kruse v. Seiffert & W. Lumber Co. 108 Iowa, 352, 79 N. W. 118.

And where a man deposited money in a savings bank, in his own name, as trustee for his son, the claim of the father thereto is not barred by reason of the form of the deposit, and, on a contest between the father and son, as to the right to the money, the father may testify as to his intention at the time of the deposit. People's Sav. Bank v. Webb, 21 R. I. 218, 42 Atl. 874.

So, an elector who gave a vote for a man, abbreviating his name by using the initial letters of his first name only, may testify, in an election contest, as to who was the person intended to be voted for. People ex rel. Yates v. Ferguson, 8 Cow. 107.

And a voter called as a witness in an action to try the title to an office may be asked for whom he voted, and, if he declines or is unable to state, he may be asked for whom he intended to vote, as one of the circumstances bearing upon the question. People ex rel. Smith v. Pease, 27 N. Y. 45, 84 Am. Dec. 242.

So, the plaintiff in an action upon an insurance policy, in which the defense was a fraudulent overvaluation, may properly be asked if he did not intend an amount named in the application to be what was stated in the application as invoice cost and 5 per cent added. Sturm v. Williams, 6 Jones & S. 325.

And where, in case of a loss under a policy of fire insurance, the insured made out two sworn statements, one covering his father's loss of personalty, and the other his own, and, on cross-examination, he testified that some of the articles in the statement of his own loss belonged to his father, a question as to the good faith of the execution of the papers is raised, and the witness is entitled to swear to his intent, and may testify that this was a mistake. Gristock v. Royal Ins. Co. 84 Mich. 161, 47 N. W. 549.

And a witness who, on his examination upon a second trial, gives his opinion that the value of property in controversy was greater than the amount he had testified to on a former trial, may be permitted to state the reasons for the change, by way of explanation. Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

So, a party in a statutory proceeding against intruders may testify as to his mental state, and that he claims possession in good faith. Thompson v. Glover, 120 Ga. 440, 47 S. E. 935.

And where the selectmen of a town took from the collector the warrants and lists of taxes, and brought suit against him and his sureties to recover for uncollected taxes, the plaintiffs may show why they took the warrants and lists, and what was their purpose in so doing. Northumberland v. Cobleigh, 59 N. H. 250.

And where a corporation and its officers or directors are sued for infringement of a patent, and it is claimed by the plaintiff that the corporation was a mere device to protect the individual defendants against the consequences of their infringement, the testimony of one of the defendants as to his belief in the validity of a patent under which they claimed to make their machines is admissible as tending to show that the defendants were acting in good faith. National Cash Register Co. v. Leland, 37 C. C. A. 372, 94 Fed. 502.

So, where a church organ was bought with funds raised by voluntary subscription, whether the property shall remain in the contributors, or pass by gift to the church or society, depends upon the intention of the contributors; and on that question the person who obtained the subscriptions may testify as to the purpose for which he obtained them. Downes v. Union Cong. Soc. 63 N. H. 152.

And where a man purchased a binder with a warranty, and the machine failed to work, and it was claimed that his acts were intended to be and were an acceptance of the machine, he may testify that he persisted in cutting his grain with the machine when it did not do satisfactory work, for the reason that the vendor of it told him to go ahead and use the machine, and he would make it good. McCormick Harvesting Mach. Co. v. Hiatt, 4 Neb. (Unof.) 587, 95 N. W. 627.

So, where one person sold liquor to another, and the latter sought to avoid payment, on the ground that the sale was in violation of law, the agent of the seller may be asked if he knew that the purchaser had

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no license to sell liquors, and may testify that the purchaser intended to sell the liquors again, as tending to show the purpose of the purchase. Weil v. Golden, 141 Mass. 364, 6 N. E. 229.

Upon an issue whether a sawyer waived his lien on lumber for a sawmill by receiving notes in payment, or by surrendering possession of the lumber, however, his testimony that he did not intend to waive his lien is inadmissible, his intention not being the controlling feature of the case. Germain v. Central Lumber Co. 116 Mich. 245, 74 N. W. 644.

And where the defense to an action upon a promissory note is that the note had been given to cover an overdraft by a depositor in the discounting bank, testimony of one of the makers as to his understanding of the purpose and object of giving the note is inadmissible. Lacey v. Central Nat. Bank, 4 Neb. 179.

e. Proof by agent or associate.

Though a party may be examined as to his own intentions and motives when a question of fraudulent intent on his part is in issue, he cannot be permitted to testify as to the motives or intent of another party. Manufacturers' & T. Bank v. Koch, 105 N. Y. 630, 12 N. E. 9; Whetstone v. Bank at Montgomery, 9 Ala. 875; Clement v. Cureton, 36 Ala. 120; Odin Coal Co. v. Denman, 84 Ill. App. 190, affirmed in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192.

And an officer or agent of a corporation cannot testify directly to the intent of the whole corporation. Odin Coal Co. v. Denman, supra.

Nor can an attorney employed by a creditor to appear at the time of a disclosure of his debtor be allowed to tesitfy as to his intention of bringing a suit upon a poor debtor's bond, formed at the time of the hearing. Winsor v. Clark, 39 Me. 428.

Officers of a corporation, whose acts of malicious intention would be acts of the corporation, however, may testify, in an action for libel against the corporation, that they had not, and, to their knowledge, no officer or employee of the corporation had, any hatred or ill-will or malicious intention toward the plaintiff in the publication of the alleged libel. Brown v. Massachusetts Title Ins. Co. 151 Mass. 127, 23 N. E. 733.

And the cashier of a bank in which a note was deposited or by which it was discounted, which note was altered by inserting a higher rate of interest, may testify whether he had any intention to defraud, or whether any of the officers of the bank, so far as he knew, had any intent to defraud, in what was done. Tucker v. Hendricks, 25 Ohio C. C. 426.

And where a contract was based upon representations and estimates made by the president and chief engineer of a corporation, one of the parties, and was attacked on the ground that such representations and estimates were fraudulent, the president and chief engineer of the corporation are competent to testify on its behalf that the representations were made in good faith, and from the best information obtainable, and that they had been made upon the estimates in good faith, and with no intention to defraud. Phelps v. George's Creek & C. R. Co. 60 Md. 536.

So, where an insolvent corporation assigns for the benefit of creditors, and the assignment is attacked for fraud, the directors may testify to their good motives in making the assignment. Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319.

And, on an issue as to whether the right to divert and use water had been abandoned by the substitution of an iron pipe for part of a flume, evidence by the officers of the corporation which owned the flume, as to the intent with which the substitution was made, is competent. Wood v. Etiwanda Water Co. 147 Cal. 228, 81 Pac. 512.

And a director of a corporation may testify as to his intention in voting for an assignment contested on the ground of actual fraud. National Bank v. George M. Scott & Co. 18 Utah, 400, 55 Pac. 374.

So, where the intent to defraud of a defendant is an issue in the action, his testimony as to the absence of such intent is admissible on behalf of codefendants alleged to have been acting in concert and combination with him in the fraud. Hubbell v. Alden, 4 Lans. 214.

And when a husband and wife are in accord, evidence of the intention of the wife in regard to the selection of a homestead is admissible as pointing to the intention of the husband. Gunn v. Wynne (Tex. Civ. App.) 43 S. W. 290.

And where a father and son were charged with being engaged in the same difficulty which resulted in a homicide, and were separately indicted therefor, the father, as a witness on behalf of the son, may be permitted to testify that he did not intend to have any difficulty. Alexander v. State, 118 Ga. 26, 44 S. E. 851.

Nor is evidence by a witness in an action to rescind a contract for a sewer extension, on the ground that it was entered into under a mutual mistake caused by the error of an engineer employed to make the estimate, of what was in the mind of himself and contractors, incompetent, where it appears that he referred, and was understood to refer, to what was in his own mind as representing them. Long v. Athol, 196 Mass. 497, 17 L.R.A.(N.S.) 96, 82 N. E. 665.

And, on the trial of an indictment under a Federal statute for an attempt to defraud by means of the postal service by sending out notices promising employment for unemployed teachers, it is competent to ask an agent of the defendant, whose duty it was to send out notices of vacancies, whether, in sending them out, she ever knowingly misrepresented facts, or whether she sent them without having before her informa-

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tion as to the existence of such vacancies, as tending to show the defendant's intent in the conduct of his business. Bass v. United States, 20 App. D. C. 232.

So, on an issue as to whether a transfer of property was made to hinder, delay, or defraud creditors, the seller or his agent through whom the sale was made may properly be asked whether or not the transfer was made with intent to delay or defraud creditors. Love v. Tomlinson, 1 Colo. App. 516, 29 Pac. 666.

f. Weight and conclusiveness.

The testimony of a party as to his intent is not conclusive, but is to be weighed and considered by the jury with the other evidence in the case, in passing upon the question of actual intent. Thurston v. Cornell, 38 N. Y. 281; Germania F. Ins. Co. v. Stone, 21 Fla. 555; Juniata Bldg. & L. Asso. v. Hetzel, 103 Pa. 507.

It is not conclusive as against the inference to be drawn from his actions and the circumstances giving color to them. Larson v. Thoma (Iowa) 121 N. W. 1059.

Whether a witness testifying to his purpose or intention should be believed is a question solely for the consideration of a jury. State v. Hall, 132 N. C. 1094, 44 S. E. 553; Graves v. Graves, 45 N. H. 323.

And so is the weight to be given to the testimony of a person as to his belief and intent in a matter McKown v. Hunter, 30 N. Y. 625; Thorn v. Helmer, 2 Keyes, 27; Wohlford v. People, 148 Ill. 296, 36 N. E. 107; State v. Dillon, 48 La. Ann. 1365, 20 So. 913; McGhee v. Wells, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529; Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

Nor does the impracticability of contradicting a witness when he is allowed to testify to the operation of his own mind form any objection to the admissibility of such testimony; it is to be received, and the weight to be given it is a question for the jury. Thorn v. Helmer, supra; Conway v. Clinton, 1 Utah, 215.

While a party to an action or a proceeding may testify as to his mental state, this does not prevent the jury from testing the reasonableness and truthfulness of his statement by comparing it with all the facts and circumstances attending the transaction. Thompson v. Glover, 120 Ga. 440, 47 S. E. 935.

And, in determining the issue of intent, the jury should consider the party's statements as to his own intent, together with all the other evidence, and all the facts and circumstances in evidence in the case. Odin Coal Co. v. Denman, 84 Ill. App. 190, affirmed in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; Royce v. Gazan, 76 Ga. 79.

Though a witness claimed to have acted honestly and in good faith with reference to a matter in which his honesty and good faith were impeached, the court has the right to disregard his unsupported or improbable professions, and to construe his acts in the light which the facts and circumstances of the case throw upon his possible and probable motives, designs, and interests. Bruce v. Kelly, 7 Jones & S. 27.

And where a party testifies to his intention, the court should, if asked, and perhaps upon its own motion, state to the jury in substance that, in judging of a man's belief or intention, they should consider all the evidence and all of the circumstances; that his statement in that respect is not conclusive upon them; but they should arrive at their own conclusion upon the whole case, including the statement of the witness, giving it such weight as, under all the circumstances, they believe it fairly entitled to. Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382.

And where a person charged with crime testifies as to the intent with which he did the act, and his testimony is unreasonable and inconsistent with the experience of mankind, the court is not bound to believe him, and to instruct the jury, on his testimony, for a lesser degree of the offense charged. State v. Nelson, 118 Mo. 124, 23 S. W. 1088.

And the denial of a party charged with fraud that there was any intention to defraud has been held to be nothing more than an expression of opinion of the party charged with the fraud, as to the character of the transaction, and his own estimate of it. Newman v. Cordell, 43 Barb. 448.

So, on an issue as to the fraudulent character of an assignment, the testimony of the assignor that he made it for the purpose of gaining time to pay his creditors and to pay his debts establishes no fact conclusively, but is to be weighed and considered with the other evidence in the case, in passing upon and determining the question of actual fraudulent intent. Griffin v. Marquardt, 21 N. Y. 121.

And where the evidence in an attachment case, other than that given by the defendant himself, tends strongly to establish the fact of the fraudulent intent in contracting the debt, direct testimony of the defendant as to the absence of such intent will not necessarily be permitted to outweigh the other evidence in the case. Anderson v. Wehe, 62 Wis. 402, 22 N. W. 584.

And a disavowal, upon the part of a purchaser of property, of any improper purpose in making the purchase, is subject to correction on an issue in an action as to the fraudulent character of the sale, by evidence going to show the contrary, under proper instructions from the court. Powell v. Watts, 72 Ga. 770.

III. Conclusion.

At common law, parties to an action could not testify at all; and, of course, could not testify as to their intent. The only way of proving intent was by evidence of such conduct or of such circumstances as tended directly or indirectly to show the particular intent. A few of the early Ameri-

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can cases leaned toward or adopted this rule, and while it has been repudiated probably in all the states except Alabama, it always has been and is now the law in that state, and is applicable alike in criminal and civil cases, though an exception exists, permitting the examination of a witness as to the intent with which he did acts previously testified to by him, on cross-examination or in rebuttal.

Statutes have been generally, if not universally, enacted, however, by which parties are permitted to testify, and under these statutes, outside of Alabama, the rule would seem to be universal that a party may testify to his intent in doing an act when intent is a material issue, the test of admissibility being the materiality of the intent in giving character to the act. This rule, however, does not warrant the admission of evidence of motive or intent which will have the effect of varying the terms of a written instrument, though motive or intent may be shown to establish reliance upon false representations in entering into a contract, and to establish mistake, and that therefore there was no contract. Nor does this rule warrant a witness in expressing an opinion involving a conclusion of law or a reflection of the witness upon a supposed state of facts; it is the existence of an intention or motive as a fact that may be proved. Nor does the rule warrant evidence of mental operations and intentions depending upon nonexistent or suppositious circumstances or future contingencies which did not happen. Nor is the secret and undisclosed intent or motive of a person admissible in evidence to affect the rights of another. And where a wrongful act is intentionally done, and the intent to do the act is the criminal intent which imparts to it the character of an offense, he cannot deny the existence of the criminal intent; the material question in such case is, Did he intend to do that which the law prohibits? So, where, by law, certain consequences must necessarily follow an act done, the presumption that such consequences were intended is ordinarily conclusive, and cannot be rebutted by evidence of the absence of such intention. And when the case presents circumstances in themselves conclusive evidence of a particular intent, no proof of innocent motives, however strong, will overcome the legal presumption. And evidence by a person of intent in doing an act should not be permitted to prevail against inconsistent overt acts on his part.

These rules apply generally in both criminal and civil suits, applying to all criminal acts in which malice, intent, or motive is involved, and to questions of intent in usury, libel and slander, and malicious prosecution. And they apply also to fraudulent intent, both in general matters and as against creditors, and to reliance upon fraudulent representations. And they apply to intent in matters pertaining to domicil, homestead, and dedication, as well as to practically everything else with relation to civil matters in any way involving intent. And while this note is limited to the "right of one to testify as to his intent," and it is a rule of law that one person cannot be permitted to testify to the motive or intent of another, where the acts and intention of a person would be those of a principal for whom he was agent, or of a corporation for which he was an officer, he may testify to the motive, good faith, or intent of the representative or corporate act performed by him.

The testimony of a party as to his intent is not conclusive. Whether it is to be believed at all, and the weight to be given it, are questions for a jury. And it should be considered in connection with the facts and circumstances of the case throwing light upon his possible and probable motives, designs, and interests.

F. H. B.

SOUTH CAROLINA SUPREME COURT.

RICHARD PYROSS, Respt.,
v.
JOHN W. FRASER, Appt.

(82 S. C. 498, 64 S. E. 407.)

Mortgage — tender — effect.

1. A tender before maturity of the amount of principal and interest which will be due at maturity on a mortgage is not sufficient to discharge its lien.

Same — partial payment — acceptance — effect.

2. Acceptance before maturity of a partial payment on a mortgage will not waive the right to have the balance of the investment remain until maturity.

(April 24, 1909.)

Case Note. — Effect of tender before maturity of debt to discharge lien of mortgage.

The earlier cases on this question are gathered in a subject note to Parker v. Beasley, 33 L.R.A. 235.

An examination of the cases there found will reveal the fact that, in general, they are in accord with the doctrine of PYROSS v. FRASER; *viz.*, that a tender before maturity of the amount of principal and interest which will be due at maturity on a mortgage is not sufficient to discharge its lien. This was also recognized in Buchanan v. Selden, 43 Neb. 559, 61 N. W. 736, where

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APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Georgetown County in plaintiff's favor in an action brought to foreclose a mortgage. Affirmed.

The facts are stated in the opinion.

Mr. **T. St. Mark Sasportas** for appellant.

Mr. **M. W. Pyatt** for respondent.

Woods, J., delivered the opinion of the court:

This action was brought for the foreclosure of a mortgage on land in the city of Georgetown, given by the defendant to the plaintiff to secure a bond for the sum of $250, the purchase money of the land. The complaint alleged the balance due at the time of the commencement of the action to be $117, with interest and attorneys' fees. The defense alleged in the answer was tender on March 14, 1905, of the sum of $67, as the full amount then unpaid. The issues were referred to a referee, who reported that the last instalment of the bond became due on July 20, 1905, and on that day the entire sum due by the defendant was $47, and that the defendant's tender on March 14, 1905, was not a legal tender, and did not discharge the lien of the mortgage, because the tender was made before the last instalment fell due, and the mortgagee could not be compelled to accept his debt until maturity. The circuit court sustained the referee and made a decree of foreclosure.

Few adjudications of the question here made as to the right of a debtor to pay his debt before maturity are to be found, for the reason that a creditor rarely refuses to accept a premature tender of his debt when it includes interest to the date of maturity. In all the cases, however, where the question has been decided under the common law, it has been held that the creditor cannot be compelled to give up his investment before maturity. Quynn v. Whetcroft, 3 Harr. & McH. 136, 1 Am. Dec. 375; Abbe v. Goodwin, 7 Conn. 377; Brown v. Cole, 14 Sim. 427. To hold otherwise would be to change the contract of the parties. The creditor may, however, waive his right to insist on strict compliance with the contract.

In this case it was admitted the plaintiff received from the defendant without objection a partial payment of $15 of the last instalment on 15th February, 1904, long before it became due. The argument is that this showed waiver of right to insist on postponement of payment of the remainder until maturity. But this favor extended to the defendant as to part of the debt did not bind the creditor to extend a like favor as to the remainder. Each party had an equal right to require the other to perform the contract as it was written. Paying a part of the debt before maturity would not have been a waiver by the debtor of his right to postpone payment of the remainder until maturity. So receiving a part of the debt before maturity was not a waiver of the right of the creditor to hold the remainder of his investment until maturity. The provisions of § 2375 of Civil Code of 1902, requiring satisfaction of mortgages on payment or legal tender of the debt, though relied on by the appellant, does not affect the matter, for the reason that the tende before maturity was not a legal tender.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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it was sought to foreclose a mortgage on real estate, by the terms of which the mortgagee was permitted to declare the whole debt due upon a default in interest payments.

So, in Bowen v. Julius, 141 Ind. 310, 40 N. E. 700, the tender of the amount represented by a note, the day before it was in fact due, was held insufficient to sustain an action for the cancelation and satisfaction of the mortgage.

However, in Rice v. Kahn, 70 Wis. 323, 35 N. W. 465, it was held that, if a mortgagee, availing himself of a stipulation in a chattel mortgage, takes possession of the property, or is about to do so, before the debt secured by the mortgage falls due, he thereby confers upon the mortgagor the right to pay the debt and keep his property.

And where, by the terms of a deed of trust, it is contemplated that the mortgagor may pay off the debt before maturity, such payment will discharge the lien of the deed of trust. Snow v. Bass, 174 Mo. 149, 73 S. W. 630.

In Silva v. Turner, 166 Mass. 407, 44 N. E. 532, it was held that, under an agreement that the mortgagee shall accept payment of part of the principal debt at stated times of payment of interest, the mortgagee is bound to accept payments of the principal only upon those dates; and therefore a tender of the whole of the principal and interest upon other days will not defeat a foreclosure of the mortgage because of a breach of condition on the part of the mortgagor to pay taxes.

For cases on effect of tender, after default, of amount due under chattel mortgage, see case note to Thomas v. Seattle Brewing & Malting Co. 15 L.R.A.(N.S.) 1164.

Effect of tender by vendee of purchase price before due, to put other party in default, see case note to Hanson v. Fox, 20 L.R.A.(N.S.) 338.

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ILLINOIS SUPREME COURT.

CITY OF CHICAGO
v.
JANE CREIGH WELLS, Appt.

(236 Ill. 129, 86 N. E. 197.)

Special assessment — subdivision of property.

A municipal corporation cannot be authorized by the legislature to subdivide a tract of private property within its limits for the purpose of levying a tax for water mains with house connections, under a constitutional provision that no person shall be deprived of his property without due process of law.

(October 26, 1908.)

APPEAL by objector from a judgment of the Cook County Court confirming a special assessment against her property for the laying of water service pipes. Reversed

The facts are stated in the opinion.

Mr. John M. Blakeley, for appellant:

The act is unconstitutional and void in so far as it provides that unsubdivided tracts of land may be subdivided for the purpose of spreading assessments for house drains and water service pipes.

Warren v. Chicago, 118 Ill. 329, 9 N. E. 883, 11 N. E. 218; Cram v. Chicago, 139 Ill. 265, 28 N. E. 758; People ex rel. Kochersperger v. Cook, 180 Ill. 341, 54 N. E. 173; Bickerdike v. Chicago, 185 Ill. 280, 56 N. E. 1096; Braceville Coal Co. v. People,

Case Note.* — *Right to subdivide private owner's land for the purpose of assessment for public improvement.

The conclusion reached in CHICAGO v. WELLS finds support in the Illinois cases reviewed in that opinion, and in State, Muller, Prosecutor, v. Bayonne, 55 N. J. L. 102, 25 Atl. 267, in which it was held that assessing officers had no authority, for the purpose of assessment for the construction of a sewer, to subdivide into lots a tract of land which the owner had always treated as an entirety.

On the other hand, the language of the court in State v. Robert P. Lewis Co. (Ramsey County v. Robert P. Lewis Co.) 72 Minn. 87, 42 L.R.A. 639, 75 N. W. 108, would seem to tend to an opposite conclusion, though the precise question here offered for discussion was not passed upon. The court, in holding that a tract could not be regarded as partly platted and partly unplatted, for the purpose of making assessments thereon, if the owner had not actually platted it, went on to say that, if any portion was treated and considered as if laid out into lots, all must be.

As to whether the establishment of a street across an undivided portion of land will make it two parcels, the authorities are divided. In De Koven v. Lake View, 129 Ill. 399, 21 N. E. 813, and in Watts v. River Forest, 227 Ill. 31, 81 N. E. 12, it was held that the division of a tract of land by a street did not, for the purpose of assessment, make two separate parcels of the lot.

On the other hand, in Spangler v. Cleveland, 35 Ohio St. 469, and in Younglove v. Hackman, 43 Ohio St. 69, 1 N. E. 230, it was held that the opening of a street by a municipal corporation through a tract of land which stood on the tax duplicate as one lot severed the same into two lots for the purposes of assessment.

And in Re Westlake Ave. 40 Wash. 144, 82 Pac. 279, it was held that where a street divided a lot into two parcels, a tax for the benefits accruing to each of them from a public improvement should be assessed thereon separately.

In Chicago, R. I. & P. R. Co. v. Chicago (Ill.) 27 N. E. 926, in which it appeared that a tract of land owned by a railroad company, through which its right of way passed, was assessed as two parcels, one on each side of the right of way, such assessment was held not to be erroneous, where the sum of the two assessments was not more than the benefits received by the entire block. This decision, however, proceeded apparently upon the ground that the railroad company had in fact divided the tract by running its right of way through it.

The authorities are also divided upon the question whether it is proper to make an assessment only upon that portion of an undivided tract of land which is benefited by the improvement. In Barber v. Chicago, 152 Ill. 37, 38 N. E. 253, and in Mock v. Muncie, 9 Ind. App. 536, 37 N. E. 281, an assessment under such circumstances was upheld.

And in Forry v. Ridge, 56 Mo. App. 615, in which it appeared that an assessment for a street improvement was made upon a tract of land according to the frontage thereof, but the tax bill purported to charge such front extending back only a portion of the entire depth of the tract, the court, though saying that the entire tract, to the full depth, should have been described in the tax bill, refused to condemn the assessment, where it appeared that the owner could not have been injured thereby.

On the other hand, in Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539, in which it appeared that the property on the opposite side of the street from the undivided tract of land in question was divided into lots, and that the owner of such undivided tract objected to an assessment, upon the ground that the lots opposite each end of his property were not assessed, it was held that it was the assessing officer's duty to assess each tract or parcel benefited by the improvement by its legal description as one tract, without attempting to divide it into smaller tracts to correspond with some legal existing subdivision of other property that was included in the benefited district, —citing Cram v. Chicago, 139 Ill. 265, 28

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APPEAL by objector from a judgment of the Cook County Court confirming a special assessment against her property for the laying of water service pipes. Reversed

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147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

The plan of assessment discriminates unjustly.

Warren v. Chicago, supra.

Mr. Edward J. Brundage, with Messrs. George A. Mason, William T. Hapeman, and Eugene H. Dupee, for appellee.

The local improvement act is not unconstitutional and void in so far as it provides that unsubdivided tracts of land may, for the purpose of spreading assessments for house drains and water service pipes, be divided into lots.

Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383; Walker v. Chicago, 202 Ill. 531, 67 N. E. 369; Chicago v. Corcoran, 196 Ill. 146, 63 N. E. 690; Vandersyde v. People, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806.

Cartwright, Ch. J., delivered the opinion of the court:

The county court of Cook county overruled the objections of the appellant to the special assessment against her property, abutting on North Clark street, for the purpose of laying water service pipes in said street between Devon avenue and Howard street, which questioned the authority of the city to subdivide appellant's property and assess it in strips of 25 feet each. Appellant excepted, and waived a jury on the question of benefits, which question was submitted to the court for decision. The court overruled all objections, and entered judgment of confirmation, from which judgment this appeal was taken.

The ordinance provides for laying lead water service pipes, with brass taps and stopcocks and spiral cast-iron shut-off boxes, from the public main water pipe in the street to a point 7 feet from the street line of each of the lots, blocks, tracts, and parcels of land described therein. The appellant is the owner of a tract of land, the legal description of which is block 2, Rogers park, Cook county, Illinois. It is bounded on the east by Clark street, on the south by Touhy avenue, on the north by Rogers avenue, and on the west by the right of way of the Chicago & Northwestern Railway Company, and it has never been subdivided into lots. The ordinance divides the block into 46 strips of ground, each 25 feet in width, described in the ordinance as "N. 25 ft.—S. 25 ft. N. 50 ft.—S. 25 ft. N. 75 ft.," etc. The assessment against each of the strips is $20.52, making a total assessment of $948.92.

The authority to subdivide appellant's block of land is claimed by appellee under the following portion of § 41 of the local improvement act (Hurd's Rev. Stat. 1905, chap. 24, § 547), added by amendment in 1901 (Laws 1901, p. 106): "Unsubdivided tracts of land may, for the purpose of spreading assessments for house drains and water service pipes, be divided into lots of a frontage of twenty-five (25) feet each; and any fraction of frontage then remaining may be assessed as a fractional lot." Prior to that amendment it was decided in several cases that a city had no power arbitrarily to subdivide a piece of land which the owner had allowed to remain in one parcel. In Warren v. Chicago, 118 Ill. 329, 9 N. E. 883, 11 N. E. 218, there was an assessment like this, for the purpose of constructing water service pipes to be laid and connected with the main water pipe, and it was held that an arbitrary subdivision of the appellant's lots for the purpose of the special assessment was without any authority, either in law or fact. In Cram v. Chicago, 139 Ill. 265, 28 N. E. 758, which was another special assessment to lay water service pipes, the ordinance subdivided the property into strips

N. E. 758, and People ex rel. Kochersperger v. Cook, 180 Ill. 341, 54 N. E. 173.

And in Scott County v. Hinds, 50 Minn. 204, 52 N. W. 523, in which the owner of a tract of land along a portion only of whose frontage a sidewalk had been built objected to an assessment therefor upon the lot as a whole, insisting that the expense of the improvement should be charged to that part only of the lot which fronted on the sidewalk, the court said that, while it was true that the entire frontage had not been covered, it was evident that there was no power or authority vested in any of the city or county officers to split up and divide the tract for assessment purposes, and added that, had such a thing been attempted, a substantial cause for objection would have been afforded the owner.

And in State, Aldridge, Prosecutor, v. Essex Public Road Board, 51 N. J. L. 166, 16 Atl. 695, reversing 46 N. J. L. 126, and in State, Coward, Prosecutor, v. North Plainfield, 63 N. J. L. 61, 42 Atl. 805, the court refused to uphold an assessment upon those portions of certain lots lying between imaginary lines drawn by the assessors at a certain distance from each side of the street on which the improvement was made, the assessors having decided that the land lying outside of such lines was not benefited by the improvement, upon the ground that such method of assessment was likely to be unreasonable and injurious to the landowner. To quote from the opinion in the first-mentioned case: "If the size and situation of a plot of ground, or if the improvements upon it be such as to render it fit for use only as an entirety, then it involves an absurdity to say that a part is benefited, but the whole is no[t]"

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of 25 feet, each of which was assessed a certain sum. The court said that an arbitrary description, or one having no foundation in fact, could never have been contemplated by the law, and that the property should have been proceeded against as it was known and legally described. In People ex rel. Kochersperger v. Cook, 180 Ill. 341, 54 N. E. 173, where the question arose in a collateral proceeding for judgment against delinquent lands on a special assessment for laying drain pipe, it was held that the ordinance which subdivided the tract into forty-four parcels was void. The decision was not rested on the want of an enabling act, but upon the rights of an owner of land. The court said (page 343 of 180 Ill.): "The owner of property cannot be compelled to subdivide his land into 25-feet strips fronting upon a street. The owner has a right to subdivide his land in such a way as he sees fit. He may use his own pleasure and best judgment in subdividing it, so that it will produce to him the best revenue. A municipality cannot dictate to the owner how he shall subdivide his land." In Bickerdike v. Chicago, 185 Ill. 280, 56 N. E. 1096, the ordinance for a sewer provided that house slants should be placed on both sides of the sewer, opposite every 20 feet of lot frontage. It was again said that a city cannot dictate to an owner how he shall subdivide his land, and that property cannot be assessed in the character of lots when not subdivided. It did not appear in that case what the house slants were, and it was assumed, as the language indicated, that they were substantial parts of the improvement, adding materially to the cost; but it appeared in subsequent cases that they were nothing more than open joints in the main pipe of the sewer, where house connections might afterward be put in and joined to the main sewer. Being nothing but open joints, they were not substantial additions to the main sewer, and in subsequent cases they were so regarded. The Bickerdike Case was decided in 1900, and in 1901 § 41 was amended, as above stated. In the cases which have since been considered by this court there was no subdivision of the property into lots or parcels for the purpose of an assessment. In Vandersyde v. People, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806, the ordinance included house connection slants every 20 feet on each side of the sewer. The question of the validity of the assessment arose in a collateral proceeding, and it was not contended that the ordinance was void, which the court said it would have been if it had provided for a subdivision of the tract of land. There was nothing from which it could be said that the provision for the openings was unreasonable, and the assessment was made upon the entire tract as a whole. In Chicago v. Corcoran, 196 Ill. 146, 63 N. E. 690, the assessment again included house slants on both sides of the sewer, opposite each 25 feet. The assessment was upon the entire tract as a whole, according to its legal description, and it was held that there was no subdivision of the property. In Walker v. Chicago, 202 Ill. 531, 67 N. E. 369, there was no subdivision of the property by the ordinance, and the same was true in Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383.

Section 2 of the Bill of Rights provides that no person shall be deprived of property without due process of law; and under that provision no person can be deprived of property by legislative act or ordinance. The ordinance in question does not deprive appellant of her land, but it does deprive her of her control and dominion over it. In Austin on Jurisprudence (vol. 2, p. 817), property is defined as follows: "Taken with its strict sense, it denotes a right—indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration—over a determinate thing." In Rigney v. Chicago, 102 Ill. 64, the court said (page 77): "Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others; and doubtless this is substantially the sense in which it is used in the Constitution." In Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62, the same definition of property is adopted, as follows: "Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it." The right of dominion, possession, and power of disposition over a tract of land includes the right of an owner to subdivide it in such a way as he sees fit, or to leave it unsubdivided. That is the principle upon which People ex rel. Kochersperger v. Cook, supra, was decided, where it was held that an owner may use his own pleasure and best judgment in subdividing his land or refusing to subdivide it, and that a municipality cannot dictate to him how he shall subdivide his land, or that he shall subdivide it at all. In this case the whole assessment, amounting to $948.92, is levied to pay for the lead pipe connections, with their appurtenances, and the effect of sustaining the attempted subdivision would be to deprive the appellant of her right to subdivide her property as she may see fit, and compel her to subdivide the entire block,

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with nearly 1,200 feet of frontage, into strips of 25 feet in width, fronting on Clark street, or be deprived of a greater or less number of the water service pipes. The unsubdivided tract is assessed in strips of 25 feet each, and each strip is charged with $20.52, according to an arbitrary subdivision of the property, without the sanction of the owner. If property may be subdivided to suit the views of a board of local improvements and city council, against the will of the owner, for the purpose of special assessment, the same thing could be done under any other form of taxation, so as to compel an owner to subdivide property in only one way. The Constitution, which stands for and expresses the will of the people, prohibits an interference with rights of property by legislative enactment, and denies to the legislature the power to provide that a municipality may subdivide the property of an owner without his consent, for any purpose whatever. The amendment and the ordinance based upon it are void.

The judgment of the County Court is reversed, and the cause remanded.

IOWA SUPREME COURT.

JOSEPHINE NIEMEYER
v.
CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Appt.

(— Iowa, —, 121 N. W. 521.)

Action — married woman — independent employment.

The intention of a music teacher to continue her vocation after marriage is sufficient to give her a right to maintain an action in her own name for personal injuries happening after that event, although, in the few weeks which have elapsed between the marriage and the accident, she has not in fact performed any service as such,—at least, where the husband consents to her maintaining her independent employment.

(June 5, 1909.)

APPEAL by defendant from a judgment of the District Court for Scott County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Lane & Waterman**, for appellant:

In order to recover, it must be shown that the woman was in fact engaged in an independent business or employment when the injury occurred.

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Fleming v. Shenandoah, 67 Iowa, 505, 56 Am. Rep. 354, 25 N. W. 752; Tuttle v. Chicago, R. I. & P. R. Co. 42 Iowa, 518; Nichols v. Dubuque & D. R. Co. 68 Iowa, 732, 28 N. W. 44; Denton v. Ordway, 108 Iowa, 487, 79 N. W. 271; McClintic v. McClintic, 111 Iowa, 615, 82 N. W. 1017; Elenz v. Conrad, 115 Iowa, 183, 88 N. W. 337.

Messrs. **Ely & Bush**, for appellee:

Plaintiff was engaged in an independent business, and the mere fact that she had gone upon a wedding trip, which prevented her from carrying on that business while traveling on such trip, was not an abandonment or discontinuation of her independent business.

Texas & P. R. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526; Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Gilbert v. Glenny, 75 Iowa, 513, 1 L.R.A. 479, 39 N. W. 818; Lindsey v. Lindsey, 116 Iowa, 480, 89 N. W. 1096; Ehlers v. Blumer, 129 Iowa, 168, 105 N. W. 406; Croft v. Chicago, R. I. & P. R. Co. 134 Iowa, 411, 109 N. W. 723; Millmore v. Boston Elev. R. Co. 198 Mass. 370, 84 N. E. 468;

Case Note. — Effect of temporary cessation from independent employment upon right of married woman to recover for loss of earning capacity due to personal injury.

A thorough search has disclosed but one other case involving the question presented in NIEMEYER v. CHICAGO, B. & Q. R. Co. as to the right of a married woman to recover for the loss of her earning power because of personal injuries, where at the time, she was temporarily not following an independent employment.

In Texas & P. R. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526, the plaintiff, a married woman, had for some years conducted a hotel as her sole and separate business; during a period of temporary illness she had given up the business, but had in substance recovered when she sustained injuries which incapacitated her for further work. It was held that, under these circumstances, the lower court properly refused to charge that the plaintiff could not recover for diminished capacity to labor because there was "no evidence showing any capacity to labor or earn money at and just before she was injured." To pin the evidence of the capacity down to the very point of time when the injury was inflicted was said to be refining too much on the principle involved. "This loss of ability to make earnings outside the discharge of household duties, and irrespective of her husband, was, under the statutes of Arkansas, her loss, and not her husband's, and the mere fact that, at the moment of the injury, she happened to be out of business, should not deprive her of the benefit of the rule which would have been otherwise applicable."

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Harmon v. Old Colony R. Co. 165 Mass. 100, 30 L.R.A. 658, 52 Am. St. Rep. 499, 42 N. E. 505; Jordan v. Middlesex R. Co. 138 Mass. 425; Louisville & N. R. Co. v. Dick, 25 Ky. L. Rep. 1831, 78 S. W. 914; Powell v. Augusta & S. R. Co. 77 Ga. 192, 3 S. E. 757; Hamilton v. Great Falls Street R. Co. 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

Weaver, J., delivered the opinion of the court:

The plaintiff, a married woman, while a passenger on one of defendant's trains, was injured in a collision, and brought this action at law to recover damages. There was a verdict and judgment in her favor for the sum of $2,300. As the appellant does not contest the question of its liability to make compensation to plaintiff for the pain and suffering caused by the injury, and assigns error only upon the ruling of the trial court allowing her to recover for loss or impairment of earning capacity, we shall consume no time in referring to the circumstances of the accident, or discussing questions of negligence or contributory negligence.

The evidence tended to show that the plaintiff was a resident of Jamestown, North Dakota. She had been recently married, and, after a wedding trip to the South, was returning with her husband to their home at Jamestown, when the accident occurred. Prior to her marriage she taught music, and at that date had a class of about thirty pupils, from each of whom she received $1 per lesson. Before leaving upon her wedding trip, she promised her pupils to resume charge of their music lessons on her return, and it was her intention, approved or agreed to by her husband, to continue in said business; but she had in fact given no lessons and earned no independent income between the date of her marriage and her injury. On this showing, the appellant asks the court to instruct the jury that, plaintiff having failed to prove that she had been engaged in any independent business since her marriage she could not recover in her own right for loss of earnings or earning capacity; and that her recovery, if any, must be confined to compensation for pain and suffering caused by the injury received by her in the collision. This request was refused, and the court charged the jury that, if appellee had, prior to her marriage and wedding journey, engaged in music teaching as an independent calling on her own account, her marriage and trip were in fact only a temporary interruption of her said business, and she was intending to resume the work of her said calling on returning to her home, but was prevented from so doing by her injury in the collision upon appellant's road, then she would be entitled to compensation not only for pain and suffering, but also for loss, if any, of earnings and impairment of earning capacity. The same question was raised upon the trial by objections to testimony offered. The record as to these objections and rulings is confused, but we think the facts as we have stated them are fairly shown, or, at least, that the testimony left in the case by the rulings of the trial court was sufficient to support such findings. It is to be admitted that our statute, which apparently provides for the removal of common-law disabilities of coverture so far as they hamper or restrict the rights of married women to transact business and to sue and be sued in their own right, has been so construed by the courts as to leave the time, labor, earnings, and earning capacity of the wife among the assets of the husband,—and, we may add, not infrequently, the most valuable of his possessions. It is held, however, that, if she has a separate and independent employment in which she earns and receives compensation from her customers and employers, she is sufficiently mistress of her own time and of her own person to maintain in her own right an action for damages on account of injuries disabling her from pursuing such employment. Fleming v. Shenandoah, 67 Iowa, 505, 56 Am. Rep. 354, 25 N. W. 752.

Counsel for appellant do not deny the rule thus stated, but ask us to hold that appellee, not having performed any service as a music teacher during the few days or weeks intervening between her marriage and her injury, cannot be said to have had, as a married woman, any independent employment. In support of this proposition it is said that marriage works a radical change in the legal status of a woman, that she is presumed to have entered the household of her husband as his helpmate; that, to justify the finding of any independent right on her part to her own time and earning capacity after such event, there must be something more than an intention or mental purpose on her part to resume and continue the work on her own account, and that she must actually have resumed the independent employment after marriage before she can maintain an action of this nature. In the cases to which we are cited we find nothing to uphold the doctrine we are here asked to approve. The most they can be said to establish is that service performed by a married woman as a house-

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wife and in the care and nurture of her family constitutes no cause of action by her against her husband, and, so long as her activities are confined to such employment, the husband alone can maintain an action for the loss of her time and earning capacity when she has been negligently or wrongfully injured; but marriage works no surrender of her legal capacity to carry on other business or to serve another employer than her husband, and if, while single, she has fitted herself to be a teacher, a stenographer, a bank clerk, a milliner, or musician, and as such has built up a business from which she derives a substantial income, and then marries with the expectation and intention of continuing such employment,—and especially when such purpose is known to and concurred in by the man she marries,—we see no reason why she does not remain teacher, stenographer, clerk, milliner, and musician, with all the legal rights, immunities, and liabilities which would have been hers had she remained single. Her status with relation to her domestic and family relations has been changed, but her status as a business person remains unchanged. It would be unreasonable to say that a brief vacation from such service during the honeymoon season operates as an abandonment of her business, and that she cannot be held to have an independent occupation until she returns to earth and takes up again her accustomed labor. The lawyer who temporarily leaves an established business to take a wedding journey does not cease *ad interim* to be a lawyer, simply because he tries no case and earns no professional fees during his absence. The appellee was none the less a music teacher because she had become a wife. She had left a large class of pupils, to whom she was returning to continue their course of instruction. Whatever she might earn in such employment would be her own, and her capacity to earn money in this manner was her own personal capital, her stock in trade, for the loss or impairment of which she was entitled to recover. Whether it be necessary to show the husband's consent to the independent employment before the wife can successfully assert a right of recovery in this class of actions we do not undertake to decide, for the record here sufficiently shows the consent.

There was no error in the rulings of the trial court, or in the refusal of the instructions asked by the appellant, or in denying appellant's motion for judgment notwithstanding the verdict, and the judgment appealed from is therefore affirmed.

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KANSAS SUPREME COURT.

LEWIS F. COOPER, Plff. in Err.,
v.
CITY OF GOODLAND et al.

(— Kan. —, 102 Pac. 244.)

Waterworks plant — municipal regulation.

1. Under the provisions of chapter 135, p. 223, Laws 1907, power is delegated to cities of the second class to make by ordinance every necessary and reasonable regulation for the control, operation, and maintenance of waterworks plants supplying the inhabitants of the city, provided such regulation be not in derogation of the laws of the state, nor subversive of the property rights of the inhabitants.

Public water supply — municipal regulation — meters.

2. An ordinance of a city of the second class, owning and operating waterworks to supply its inhabitants, which prohibits consumers from taking from its mains any water except such as shall have been measured by means of a water meter, and that meters of the kind and make ordered by the mayor and council shall be furnished, or the expense thereof be borne by the consumers severally, also reserving to the city the right to stop the supply of water for a violation of the regulations, is not unreasonable, but is valid.

(May 8, 1909.)

Headnotes by SMITH, J.

Case Note. — Right of municipal corporation to require use of water meters and to impose expense of same on consumers.

It is within the power of a municipal corporation to require consumers of water, in certain cases, to install meters, and keep them in repair at their own expense, under charter authority to legislate as to means for ascertaining the amounts to be paid as water rates by consumers, and to make regulations for the protection of the works and the use thereof. State ex rel. Hallauer v. Gosnell, 116 Wis. 606, 61 L.R.A. 33, 93 N. W. 542.

It was also held in State ex rel. Hallauer v. Gosnell, supra, that an ordinance which required consumers who used large service pipes to procure a meter, and left the matter of using a meter optional with other consumers, was not unreasonable or discriminating.

The right of a city to require the use of water meters by consumers was upheld in Powell v. Duluth, 91 Minn. 53, 97 N. W. 450, where a regulation of the board of water commissioners provided that meters might be installed at the wish of the consumer or at the pleasure of the board, and the latter had refused the application of a

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ERROR to the District Court for Sherman County to review an order refusing to enjoin the defendants from installing a water meter on complainant's premises and from shutting off his water supply. Affirmed.

The facts are stated in the opinion.

Messrs. **C. C. Perdieu** and **John Hartzler**, for plaintiff in error:

The defendant city sustains the same relation to the property owners and water consumers as a private corporation, which cannot compel its patrons to install water meters at the expense of the consumer.

30 Am. & Eng. Enc. Law, 2d ed. p. 404; Albert v. Davis, 49 Neb. 579, 68 N. W. 945; Louisville Gas Co. v. Dulaney, 100 Ky. 405, 36 L.R.A. 125, 38 S. W. 703; State, Red Star S. S. Co., Prosecutors, v. Jersey City, 45 N. J. L. 246; Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123; State ex rel. Weise v. Sedalia Gaslight Co. 34 Mo. App. 501; Blondell v. Consolidated Gas Co. 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817; Public Service Corp. v. American Lighting Co. 67 N. J. Eq. 122, 57 Atl. 482; Smith v. Capital Gas Co. 132 Cal. 209, 54 L.R.A. 769, 64 Pac. 258; Ferguson v. Metropolitan Gaslight Co. 37 How. Pr. 189; 1 Dill. Mun. Corp. p. 95 (note 2); American Waterworks Co. v. State, 46 Neb. 194, 30 L.R.A. 477, 50 Am. St. Rep. 610, 64 N. W. 711.

Mr. **E. F. Murphy**, for defendants in error:

Municipal water companies who serve the inhabitants of a city with water may make rules for the government of their customers in the use of water, and enforce such rules even by shutting off such customers' supply of water for any violation thereof.

Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; 30 Am. & Eng.

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consumer to discontinue the use of a meter and renew the uniform flat rate.

The constitutionality of a statute authorizing the commissioner of public works of the city of New York to cause water meters to be placed in buildings in which water was furnished for business purposes, and to charge the cost of the water to the owner of the premises, is upheld in Hill v. Thompson, 18 Jones & S. 165.

A municipal corporation having power to distribute water throughout the city and regulate the use thereof, and establish and collect the prices to be paid therefor, may require water supplied to a private fire system to pass through a meter, to be set at the expense of the owner. Shaw Stocking Co. v. Lowell, 199 Mass. 118, 18 L.R.A. (N.S.) 746, 85 N. E. 90. It should be noted in this case that the defendant city was found to be under no legal obligation to furnish the plaintiff with water for its private fire service system.

Swanberg v. New York, 123 App. Div. 774, 108 N. Y. Supp. 364, was an action to restrain the defendant from installing a water meter on the premises of the plaintiff at the latter's expense. A demurrer to the complaint was overruled and a temporary injunction was granted. The special term did not indicate the grounds for its action, but, upon appeal, it was urged that the section of the city charter authorizing the placing of meters upon the premises of consumers at the discretion of the water commissioners was unconstitutional, as authorizing the taking of property for private purposes without due process of law. The contention was held untenable, the court saying: "While it is true that the city of New York, in delivering water to private individuals, acts, in a sense, as a private corporation, yet the duty and obligation of the municipality to afford fire protection and to safeguard the public health through a pure and wholesome supply of water make the maintenance of the water system more of the nature of a duty owing by a public or municipal corporation; and to say that it is not within the province of the state legislature, in authorizing the city of New York to construct and maintain a water plant, to provide for placing meters upon the premises of those who are to use the water, on the theory that this is a taking of the property of the individual without due process of law, is carrying constitutional limitations to the limit of absurdity."

The power of a municipal corporation to require the use of water meters "to enable them to fix their rates with exactness, instead of uncertain estimates, and to deal justly with the consumer," is conceded in State, Red Star Line S. S. Co., Prosecutors, v. Jersey City, 45 N. J. L. 246, where the board of public works had statutory power to make by-laws, rules, and regulations for the security and proper management of the waterworks, for the introduction of water into the houses, and to regulate the use thereof as might seem to them necessary or proper, but the right to charge the cost of a meter to the consumer is denied.

General statutory provisions conferring upon a city power to enforce all needful rules and regulations for the use of water, and to assess and collect a rent or rate for the use of water, do not authorize the city to require consumers of water to supply meters at their own expense, where there is not only an absence of express power in the city to sell meters or to compel consumers to supply themselves, but, on the other hand, an affirmative grant of power to fix and collect charges for the use of water meters, thus excluding by implication the power to compel consumers to furnish their own meters. Albert v. Davis, 49 Neb. 579, 68 N. W. 945.

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Enc. Law, pp. 418, 419; 29 Am. & Eng. Enc. Law, pp. 6, 10, 18; State ex rel. Lanyon v. Joplin Waterworks, 52 Mo. App. 312.

Smith, J., delivered the opinion of the court:

The city of Goodland is a city of the second class, and as such, for some time previous to the commencement of this action, had owned, operated, and maintained a system of waterworks, and had thereby supplied the inhabitants of the city with water. It seems that the city had been supplying water to the users thereof without any means of measuring the amounts used, and in January, 1908, the mayor and council of the city duly passed and published an ordinance, providing, among other things, that on and after April 1, 1908, no consumer of water from the city waterworks should take from the mains thereof any water except such as should be measured by means of a water meter connected with the pipe of the consumer, and of the kind and make ordered by the mayor and council of the city for the purpose; that all the expense of connecting and establishing the meter with a box or other receptacle for the same should be borne by the consumer, and, when the same was done and furnished by the city, the price thereof would be $17. By the ordinance the city reserved the right to shut off the supply of water to a consumer for any violation of the rules governing the use of water in the city. Shortly prior to April 1, 1908, the plaintiff in error, Cooper, filed in the district court of the county his verified petition, setting forth the facts, and with a copy of the ordinance attached as an exhibit, in which petition he prayed for an injunction against the city to restrain it from installing a water meter upon his premises at his expense, and also from shutting off the water and excluding him from the use thereof, and praying that the ordinance be declared unconstitutional, null, and void. Thereafter the plaintiff also filed his motion for a temporary injunction, supported by affidavits that the city was installing water meters on the premises of consumers and threatening to shut off the water from such consumers as had no meters. Notice of the hearing of the motion, and that the same would be heard upon the petition and affidavits filed, was duly served upon the attorney of record for the city, and the application for a temporary injunction was heard in accordance with such notice, and the temporary injunction was by the court refused.

The attorney for the city moves to dismiss the case here on the ground that the evidence heard on the application for a temporary injunction was not made a part of the record by a bill of exceptions, and hence has no place in the transcript of the record upon which the case is brought here. Technically, under the common law, depositions or affidavits used in evidence did not become a part of the record until made so in a bill of exceptions. It is, in substance, said in Miller v. Tobin (C. C.) 9 Sawy. 401, 18 Fed. 609-611, that while, at common law, depositions were not included in the record unless made a part thereof by a bill of exceptions, yet depositions which were used in evidence and filed in the case should be considered as a part of the record, and taken up as a part of the transcript of the record, upon the removal of a cause from a state court to the Federal court. We have a statute providing for the identification and correction of evidence taken by stenographers in court, and making the same a part of the record without including the same in a bill of exceptions, and where evidence is reduced to the form of an affidavit, and notice of the filing thereof is given and acknowledged before the hearing, and the same is used as evidence on the hearing, it would seem that no good purpose is subserved by requiring a bill of exceptions, but that the evidence, being in writing and filed, and thus fully identified, may be included in a transcript of the record. However this may be, the affidavits appear to be only cumulative evidence of the facts alleged in the verified petition, and, if they were excluded from consideration, it would not necessitate the dismissal of the case. It would not then appear that the motion of the plaintiff in error was entirely unsupported by evidence. The verified petition is evidence of equal standing with the affidavit upon such hearing. The motion to dismiss is overruled.

It is contended by the plaintiff in error that a water meter used in connection with a waterworks system is for the benefit of the owner of the waterworks, and is a part of the system,—an instrumentality for measuring and delivering the water,—and should be installed and paid for by the owner of the system. Chapter 135, p. 223, Laws 1907, provides for the acquirement and ownership of waterworks by cities of the first and second class, and authorizes the mayor and council of such cities to enact ordinances necessary for the control, operation, and maintenance of such waterworks located in such cities. It is conceded that the only restriction upon the power to pass such ordinances is that they conform to the laws of the state and are reasonable. Provisions are made in the ordinance in question, making the charges for furnishing water and incidentals a lien upon the real estate, and for the collection thereof as other taxes are

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collected. These provisions may be invalid, but the question is not involved herein. Practically the only question we have to determine is whether or not the ordinance is reasonable, in that it requires the consumer to furnish a meter and meter box of the kind and description ordered by the mayor and council of the city.

It is said in Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, that the expense of such meters cannot be imposed upon the consumer. In that case the question arose between a waterworks company, presumably organized and conducted for profit, and the city and the board of supervisors under an ordinance requiring the water company to furnish meters to consumers who made request therefor. The ordinance also provided that the company should collect only for water furnished at meter rates, which were different from the house rates. One of the questions involved in the case was whether this provision of the ordinance was valid. It was held valid, and that the expense of the meters could not be imposed upon the consumers. Other cases are cited in which it is held, as between water companies, organized and conducted for profit, and consumers of the water furnished by them, that a meter for the measurement of water is for the benefit of the water company and an instrumentality for delivering the water, and that the cost of such meters should be borne by such companies. The case most nearly in point, however, is Albert v. Davis, 49 Neb. 579, 68 N. W. 945. By the statute of Nebraska the city, litigant, was authorized to construct or acquire waterworks and appoint a water commissioner, and that "it shall be the duty of such water commissioner, subject to the supervision of the mayor and council or board of trustees, to have the general management and control of the system of waterworks in the city or village, fixing the rates to be paid by the inhabitants thereof within such limits as may be prescribed by ordinance for the use of water, water meters, and hydrants." The court held that, inasmuch as the franchise authorized the city neither to sell meters nor to compel consumers to supply themselves with meters, but did authorize the city to collect rent for meters, it was implied that the city should furnish the meters and collect rent therefor, but could not compel consumers to furnish their own meters. The court, in that case, expressly declined to express an opinion as to whether, in the absence of authority to rent water meters, the city would be authorized by ordinance to require that meters should be furnished by consumers, but based its decision solely upon the provision authorizing the city to rent meters. The statute of Kansas, supra, makes no provision for the renting of water meters or the supplying or ownership thereof, but in the broadest terms authorizes the mayor and council of cities to which the act applies to enact ordinances necessary for the control, operation, and maintenance of such waterworks located in such cities.

The inhabitants of the city of Goodland have, through their mayor and council, and under the statutory franchise, acquired a system of waterworks and are supplying themselves with water. It is evident that the only fair basis of fixing the amount which the individual consumer should contribute for the benefit individually received is by measuring the water he gets. The water meter is the instrument for this purpose, and the question is whether it is reasonable to require each consumer of water to pay for his individual meter, instead of all the taxpayers of the city paying for all the meters used. As is commonly the case, it may be in Goodland that some of the taxpayers of the city are not so located that they can, and they do not in fact, use water from the public waterworks. If this be true, it seems very reasonable that they should be relieved of any contribution to pay for the meters of those who do use the water, and very reasonable that the consumers of water should pay for the meters of which they alone, as individuals, get the benefit.

The only question remaining, then, is whether the grant of power from the legislature to the city is sufficiently broad to authorize this provision of the ordinance. The court found, and we believe correctly, that the provision made by the ordinance is reasonable and fairly included in the grant of power. No inhabitant of the city is required to use water furnished by the city, or to buy of the city or otherwise to furnish a water meter; but, if one desires to use the city water, he must furnish or pay for a meter to measure the quantity he may receive. The city has the right to have the measurement uniform, and for this reason, and to avoid mistakes of its employees, may require all meters to be of one kind and make. Whether the city is authorized to buy and sell meters is not involved in this case. Presumably a large number could be bought at a less price for each meter than one could be had singly, and perhaps for this reason the plaintiff did not ask to have the city enjoined from doing the business.

The order of the court refusing the temporary injunction is therefore affirmed.

All the Justices concur.

Petition for rehearing denied June 12, 1909.

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UTAH SUPREME COURT.

PETER N. CAMPBELL, Respt.,
v.
HUGH S. GOWANS et al., Impleaded, etc., Appts.

(— Utah, —, 100 Pac. 397.)

Broker — agency.

1. A broker may be found to be the agent of the lender in a loan transaction where the matter of attending to the execution and delivery of the securities and paying over the money was committed to him, and he was permitted to collect the interest and deliver the receipts and canceled coupons therefor.

Agent — payment — authority.

2. A borrower making payments of principal to an agent has the burden of showing that he has either express or apparent authority to receive such payments for the lender.

Same — absence of securities — effect.

3. That an agent, in receiving payment of the principal of a loan, has not the securities in his possession, is not conclusive that he had not implied authority to receive the payment, but is a mere circumstance to be weighed and considered in connection with all the facts and circumstances attending the transaction.

Appeal — evidence — review.

4. Where, under the Constitution, an appeal in an equity case takes before the reviewing court all questions of law and fact, that court is not bound by findings of the trial court upon conflicting evidence, at least, where all evidence was taken by deposition.

Broker — collection — loss.

5. A broker may be found to have ostensible authority to collect the principal of a loan which had been effected through him by a foreign lender, so that the loss caused by his default will fall on the lender rather than on the borrower, although he had

Case Note. — Effect of fact that agent does not have possession of security upon question of his authority to receive payment.

It is not intended to include herein cases involving the validity of payments to the assignor of securities after assignment to a third person, whether notice of the assignment, actual or constructive, was given the debtor, unless such decision was based on principles of agency rather than on a doctrine peculiar to assignments.

For cases involving the right of a debtor to pay a person at the place of payment designated in a security, who is not in possession of the security, see note annexed to Hoffmaster v. Black, 21 L.R.A.(N.S.) 52.

To protect himself in paying a negotiable security, the debtor must see that the person receiving payment is in possession thereof; and a payment to one not in possession casts the burden on the debtor of showing that such person was authorized to receive payment, or that the money paid actually reached the holder of the security.

"If a debtor owing money on a written security pays to or settles with another as agent, it is his duty at his peril to see that the person thus paid or settled with is in possession of the security. If not thus in possession, the debtor must show the person to whom he pays or with whom he settles has special authority or has been represented by the creditor to have such authority, although, for some reason, not in possession of the security." Dillon, J., in Tappan v. Morseman, 18 Iowa, 499.

This doctrine was also recognized and stated in Union Trust Co. v. McKeon, 76 Conn. 508, 57 Atl. 109, wherein it was held that the trial court committed error in holding that want of possession of securities by the agent was the controlling fact, which, as a matter of law, prevented the court from drawing any inferences, from other facts found, that the agent had apparent authority to receive the contested payments. In reaching this conclusion, the court said: "Possession of the securities by the agent, of itself, in the absence of countervailing facts, clothes the agent with apparent authority, and justifies a third party, relying upon that fact, and acting in good faith and without notice, in making payments upon the securities to the agent. . . . But, while this is so, it does not follow that such possession is, as matter of law, essential to the existence of apparent authority, or that without it there can be no apparent authority. In reason, other facts may justify a third party in inferring, or a court in finding, the existence of such authority."

And Security Co. v. Richardson, 33 Fed. 16, in denying the contention that the possession of negotiable paper is indispensable evidence of authority to receive payment, Shiras, J., said: "It certainly cannot be true that the only legal evidence of the authority to receive payment of negotiable paper is the possession thereof. The weight to be given to the possession, or lack of possession, of the negotiable paper, depends upon the facts of each particular case, and the special issue involved." To the same effect, see Security Co. v. Christy, 33 Fed. 22.

In Fortune v. Stockton, 182 Ill. 454, 55 N. E. 367, the court, after pointing out that the agent in question had never received payment of loans and executed releases in behalf of the holder of securities without the securities, said: "It is practically the universal custom to take up and cancel notes when they are paid, and for one who is authorized to collect, to have possession of the notes and be able to surrender them . . . the inference of authority to receive payment arising from the possession of the securities is founded upon such possession, and it does not exist without possession. 1 Am. & Eng. Enc. Law, 2d ed. p. 1026."

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not possession of the securities when the money was paid, where he acted for the lender in negotiating the loan and collecting the interest, and the lender, with knowledge of his failure to account for collections with reasonable promptness, failed to notify the borrower not to make payments to him, but continued to permit him to make collections without objections, since the person should suffer whose negligence enabled the broker to occasion the loss.

Evidence — presumption — mail.

6. The presumption of the receipt of a letter properly addressed, stamped, and placed in the mail, may be overcome by testimony of the addressee that he never received it.

(January 2, 1909.

APPEAL by defendants from a decree of the District Court for Tooele County foreclosing a trust deed on certain real property. Reversed.

The facts are stated in the opinion.

Messrs. **Richards, Richards, & Ferry,** for appellants:

The broker was the agent of the lender. Mechem, Agency, § 41.

The possession of securities is not indispensable to establish one as an authorized agent to receive payments.

Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762; Story, Agency, 7th ed. §§ 89-91; 1 Am. & Eng. Enc. Law, p. 960.

Messrs. **Booth, Lee, & Badger,** for respondent:

The broker was not the ostensible nor apparent agent to receive payment for the lender.

22 Am. & Eng. Enc. Law, 2d ed. pp. 518, 520, 521, 534; Lane v. Duchac, 73 Wis. 646, 41 N. W. 962; Stiger v. Bent, 111 Ill. 330; Connecticut General L. Ins. Co. v. Eldredge, 102 U. S. 545, 26 L. ed. 245.

Express authority or general agency.

Agency or express authority to receive payment of securities may, as already indicated, be shown by other proof than the possession of the securities, and when such authority is shown, the payment is binding on the holder, although the security paid was not in the custody of the agent. To establish agency or express authority, it is not essential that it be proven by any formal written instrument or special oral contract, but, like other questions of agency, it may be established from the mutual conduct and relations of the parties, or from the general nature of the transaction and the surrounding circumstances.

The rule as to the inference to be drawn from the presence or absence of the note in the hands of the person assuming authority to collect it is only a matter of evidence, which may be rebutted by other circumstances. If express authority is given to collect, the absence of the note cannot affect it, and any circumstance tending to show express or intended authority to collect may, if strong enough, overcome the presumption of the want of authority raised by the absence of the note. Antioch College v. Carroll, 11 Ohio Dec. Reprint, 220.

So, in Church Asso. v. Walton, 114 Mich. 677, 72 N. W. 998, the court said that, to support a claim of payment by a mortgagor to one assuming to act as agent of the mortgagee, who did not have possession of the securities, it must appear either that express authority to receive the payment was given, or that the dealing beween the agent and principal was such as to justify the conclusion that it was understood between them that the agent had authority to bind his principal by accepting payment.

Before paying a negotiable promissory note, it is the duty of the debtor to see that the person to whom he pays is in possession of the note; and whoever pays without such evidence of the right to make the collection does so at his own risk, unless he can prove that such right actually existed at the time of payment. Rhodes v. Belchee, 36 Or. 141, 59 Pac. 117, 1119.

The doctrine that possession of securities is not essential to a valid payment where the person to whom the payment was made had express authority to receive it was also stated and applied in Shane v. Palmer, 43 Kan. 481, 23 Pac. 594; Townsend v. Studer, 109 Iowa, 103, 80 N. W. 210, wherein the facts were held sufficient to prove such authority.

Bank of University v. Tuck, 101 Ga. 104, 28 S. E. 168, also held that, in order that a payment of money to a person who did not have possession of the security be binding upon the mortgagee, the debtor making the payment must show not only that he paid the money, but that the payment was made to a person authorized by the mortgagee of the security to receive it, or else that it actually reached the holder's hands.

Express authority to collect may be established although the agent is not in possession of the securities; as where the holder of a negotiable note secured by a mortgage instructed the agent to notify the mortgagors that the mortgages must be paid, and authorized him to receive payment thereof, and knew that, from time to time, payments were made, and approved of the same. Wilson v. La Tour, 108 Mich. 547, 66 N. W. 474; Ziegan v. Stricker, 110 Mich. 282, 68 N. W. 122; Brooke v. Struthers, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272; Bissell v. Dowling, 117 Mich. 646, 76 N. W. 100.

A presumption against the authority of an agent to collect the principal of a note and mortgage is raised by the fact that he has not the possession of the papers. This presumption may, however, be overcome by proof of actual authority in that regard, and where that question is submitted to the jury as a question of fact, its finding that such authority existed will not be disturbed

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Possession of securities by an agent is indispensable to authorize him to collect.

Stiger v. Bent, 111 Ill. 328; Eaton v. Knowles, 61 Mich. 625, 28 N. W. 740; Williams v. Walker, 2 Sandf. Ch. 325; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Garrels v. Morton, 26 Ill. App. 433; Lane v. Duchac, supra; Roberts v. Matthews, 1 Vern. 150; Wolstenholm v. Davies, Freem. Ch. 289; Hooks v. Frick, 75 Ga. 715; Henn v. Conisby, 1 Ch. Cas. 93; Curtis v. Drought, 1 Molloy, 487; Klindt v. Higgins, 95 Iowa, 529, 64 N. W. 414; Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643, 24 N. E. 456; Antioch College v. Carroll, 11 Ohio Dec. Reprint, 220; Western Security Co. v. Douglass, 14 Wash. 215, 44 Pac. 257; Cox v. Cutter, 28 N. J. Eq. 13; Haines v. Pohlmann, 25 N. J. Eq. 179; Jones, Mortg. 2d ed. § 964; Lucas v. Harris, 20 Ill. 169; Mayo v. Moore, 28 Ill. 428; Keohane v. Smith, 97 Ill. 156; Stiger v. Bent, 111 Ill. 338.

The mere possession by an agent of evidences of indebtedness or securities does not confer upon him ostensible power to receive payment thereof.

22 Am. & Eng. Enc. Law, p. 520; Lawson v. Nicholson, 52 N. J. Eq. 821, 31 Atl. 386; Central Trust Co. v. Folsom, 26 App. Div. 40, 49 N. Y. Supp. 670; Brown v. Taylor, 32 Gratt. 135.

The broker did not have apparent authority to make the collection.

Crane v. Gruenewald and Smith v. Kidd, supra; Dickson v. Wright, 52 Miss. 585, 24

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where there is competent evidence tending to prove it. Swegle v. Wells, 7 Or. 222.

Where a general agency is shown, payments made to such agent are binding upon the principal, although the agent did not have possession of the securities at the time of the payment. In so holding, in Noble v. Nugent, 89 Ill. 522, the court said that "the circumstance that the notes were not surrendered, as against clear proof that they were paid to a person having authority to receive payment, amounts to nothing. Their possession is simply presumptive evidence of nonpayment, which may always be overcome by proof that they were in fact paid."

This doctrine was also recognized in the following cases, wherein the facts were held to show a general agency to collect the principal without the possession of the securities: Doe v. Callow, 64 Kan. 886, 67 Pac. 824; Verdine v. Olney, 77 Mich. 310, 43 N. W. 975; Howe Mach. Co. v. Simler, 59 Ind. 307; Sax v. Drake, 69 Iowa, 760, 28 N. W. 423; Dilenbeck v. Wilhelm, 105 Iowa, 749, Appx., 73 N. W. 1072; Fowle v. Outcalt, 64 Kan. 352, 67 Pac. 889.

If general agency is established to transact all of a principal's business in the making of loans and the collection of principal and interest, this will be sufficient to sustain a payment to such agent, even though he has not the possession of the securities. Cheshire Provident Inst. v. Feusner, 63 Neb. 682, 88 N. W. 849; Bettle v. Tiedgen, 77 Neb. 795, 110 N. W. 548.

But in no case can agency be established without showing some connection between the principal and the claimed agent, from which may be reasonably inferred authority from the principal to do the act for which it is sought to hold him responsible; the general rule being that, unless express authority is established *aliunde*, possession of the securities by the agent is the indispensable evidence of his authority to collect the principal, and whoever pays the agent without that authority does so at his own risk. Hall v. Smith, 3 Kan. App. 685, 44 Pac. 908.

Ostensible or apparent authority.

Payment to a person not in possession of the security paid, but who assumes to act as agent for the holder, is not only valid when actual authority to receive payment is shown, but, according to many authorities, at least, such a payment may be justified and sustained by showing apparent or ostensible authority to receive payment.

Thus, Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762, while recognizing the principle that lack of possession of a security is a circumstance to be considered in determining the agent's authority to receive payment, held that such fact is not conclusive of the question, and that ostensible authority can be proven from other facts tending to show that the holder of the paper either intentionally, or by want of ordinary care, caused or allowed the mortgagor to believe that the person to whom payment was made had authority to receive payment.

So, the nature and extent of the authority of the agent may be implied or inferred from circumstances. If the agency arises by implication from numerous acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed limited to acts of like nature; and where it appears that an alleged agent has repeatedly performed acts like the one in question, which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred. Cummings v. Hurd, 49 Mo. App. 139 (facts held not sufficient to show agency to collect within this rule, where agent did not have possession of the securities).

A holder of securities is bound according to the extent of the apparent authority of an agent to receive payment; and, if he knowingly permits the agent to assume authority to collect his notes, or holds him out to the public or the debtor as possessing such authority, and money is paid in reliance thereon, payment will be good though in fact no authority to receive payment was given, and the agent did not have possession of the security paid. May v. Jarvis-Conklin Mortg. Trust Co. 138 Mo. 275, 39 S. W.

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Am. Rep. 677; Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Curtin v. Phenix Ins. Co. 78 Cal. 619, 21 Pac. 370; Martin v. United States, 2 T. B. Mon. 89, 15 Am. Dec. 129.

Straup, J., delivered the opinion of the court:

This action is brought by the plaintiff to foreclose a deed of trust on real property, executed and delivered by the defendants Hugh S. and Betsy Gowans, to secure their promissory note of even date, payable to the plaintiff. The defendant S. B. Milner, a resident of Salt Lake City, was named the trustee in the deed. The answer of the Gowanses contained a plea of payment, and a demand for the surrender and cancelation of the note and deed.

The note was for $500, dated July 1896, and was payable July, 1898, at the National Bank of the Republic, at Salt Lake City. The facts are substantially as follows: The Gowanses, who resided in Tooele county, applied to Porter J. Conway, who was in the real estate and loan business at Salt Lake City, for a loan of $500. Conway, who was acquainted with the plaintiff, wrote him in New York, where the plaintiff resided, that the Gowanses desired a loan, and that, in his opinion, the loan would be good. The plaintiff wrote him that he would make the loan if Milner approved it. The plaintiff testified Milner represented him at Salt Lake City, and

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782; First Nat. Bank v. Mutual Ben. L. Ins. Co. 145 Mo. 127, 46 S. W. 615; White v. Kehlor, 85 Mo. App. 557; City Nat. Bank v. Goodloe-McClelland Commission Co. 93 Mo. App. 123; Maguire v. Donovan, 108 Mo. App. 511, 84 S. W. 156.

Possession of the securities is not, in every case, essential to the existence of apparent or ostensible authority in an agent to receive payment. The existence of an apparent agency is essentially a question of fact, to be determined from the legitimate and relevant evidence bearing on the question; and where there is evidence tending to establish such fact, it is error not to submit it to the jury. Union Trust Co. v. McKeon, 76 Conn. 508, 57 Atl. 109, and see, to the same effect, International Harvester Co. v. Smith, 51 Fla. 220, 40 So. 840.

And where there is evidence from which may be inferred ostensible authority to collect the principal of a note and trust deed not in possession of the collector, that question is one properly to be submitted to the jury, although the facts are undisputed, where different inferences may reasonably be drawn therefrom. Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687.

Whether the facts authorize an inference of authority to collect where not in possession of the security is a question for the jury if there is evidence from which such inference may be drawn. Ferneau v. Whitford, 39 Mo. App. 311.

By operation of estoppel.

In some jurisdictions, even as to negotiable securities, it is held where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to accept payment of a negotiable security, and therefore pays him, the principal is estopped as against such third person from denying the agent's authority, although he retains possession of the security. Harrison Nat. Bank v. Austin, 65 Neb. 632, 59 L.R.A. 294, 101 Am. St. Rep. 639, 91 N. W. 540.

That the holder of securities may, by his conduct or course of dealing, estop himself from denying authority in a person who assumed to act as his agent in receiving payment of securities not in his possession, was also the doctrine of Pennypacker v. Latimer, 10 Idaho, 618, 81 Pac. 55, wherein the facts were held sufficient to establish such estoppel. This doctrine was also recognized in Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; but the facts were held insufficient to create such estoppel.

A payment by the mortgagor to a person acting as agent of the mortgagee will not be held to be at the risk of the mortgagor, although the person to whom payment was made did not have possession of the mortgage or note, and it was payable at his place of business, where so to hold would be a fraud upon the mortgagor, who was induced to make the payment to such third person by the conduct of the mortgagee. Kent v. Congdon, 33 Fed. 228.

Evidence of agency or authority.

As heretofore shown, authority to collect a security not in possession of the person collecting it may be established by showing general agency, express, apparent, or ostensible authority to collect, and also facts to raise an estoppel. Without reference to the variant theories adopted by courts of different jurisdictions as to whether a certain state of facts establishes general agency, or a certain character of authority, the facts relied upon to establish authority or agency are usually very similar, and the conclusion of the court on a given state of facts is generally, in its result, the same, although such facts are held to have established authority of a character different from that held to have been established by the same state of facts in some other jurisdiction. Hence, as a practical proposition, the important question is not whether a certain state of facts establishes authority of a certain character, but whether it establishes authority. In the cases already considered, the abstract question has been covered, and the cases have

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that he had, at various times, loaned a great deal of money for him in that vicinity. Milner approved the loan. The plaintiff sent a New York draft for the sum of $500, payable to himself and indorsed by him to Milner. Milner paid Conway the sum of $500, either in cash or by Milner's individual check. The money was paid by Conway to the Gowanses, either in cash or by Conway's own check. The note and trust deed were executed by the Gowanses and delivered to Conway. After the deed was recorded, Conway delivered the deed and note to Milner, who sent them to the plaintiff. All the transactions had with the Gowanses with respect to the negotiation of the loan, and the execution and delivery of the note and deed, were had with Conway. None of them were had directly with plaintiff or with Milner. When the interest coupons became due, the plaintiff sent them to Milner. Milner delivered them to Conway, who collected the interest from the Gowanses. All the interest paid by them was paid to Conway. When received by him, he paid it to Milner. Milner forwarded it to the plaintiff. In December, 1896, the plaintiff wrote Milner: "I have written Conway that I have sent the Gowans coupons to you." In remitting interest to the plaintiff, Milner stated: "Paid by P. J. Conway, Gowans's interest coupon, $25." At one time he write plaintiff: "Conway paid me the Gowans interest yesterday. It seems his clerk had got in on January 13th and had used it. When I

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been subdivided acording to such questions. But, in the following cases, the distinction as to classification, at least, is ignored, and the cases are grouped with reference to the main facts presented and relied upon to prove agency or authority. It has, however, not been practicable to bring out all the facts which may have influenced the decision in a given case, although the main facts relied upon are mentioned. The fact, however, that these facts are mentioned, does not indicate that they were the only facts presented to the court which influenced the decision.

In establishing agency or authority to collect money on a security without possession of the security, from the surrounding facts and circumstances and the course of dealing between the parties, the burden is upon the debtor. No inference of such authority will be implied from facts and circumstances or a course of dealing, where such inference of authority would extend beyond the necessary and legitimate effect of the facts from which the inference is sought. This proposition is illustrated in the following cases, where an authority to collect a security without its possession was held not to have been shown. No attempt is made to give the facts in these cases except as they may come within some of the subdivisions hereinafter considered. Ilgenfritz v. Mutual Ben. L. Ins. Co. 81 Fed. 27; Winer v. Bank of Blytheville, 89 Ark. 435, 117 S. W. 232; Security Co. v. Graybeal, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. 497; Artley v. Morrison, 73 Iowa, 132, 34 N. W. 779; United States Bank v. Burson, 90 Iowa, 191, 57 N. W. 705; Walter v. Logan, 63 Kan. 193, 65 Pac. 225; Rand v. Perkins, 74 Minn. 16, 76 N. W. 950; Padley v. Neill, 134 Mo. 364, 35 S. W. 997; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. 590; South Branch Lumber Co. v. Littlejohn, 31 Neb. 606, 48 N. W. 476; Thompson v. Buehler, 1 Neb. (Unof.) 590, 95 N. W. 854; Lay v. Honey, 2 Neb. (Unof.) 749; 89 N. W. 998; Bull v. Mitchell, 47 Neb. 647, 66 N. W. 632; Richards v. Waller, 49 Neb. 639, 68 N. W. 1053; Greenman v. Swan, 51 Neb. 81, 70 N. W. 504; City Missionary Soc. v. Reams, 51 Neb. 225, 70 N. W. 972; Porter v. Ourada, 51 Neb. 510, 71 N. W. 52; Frey v. Curtis, 52 Neb. 406, 72 N. W. 478; Chandler v. Pyott, 53 Neb. 786, 74 N. W. 263; Thompson v. Kyner, 53 Neb. 625, 74 N. W. 52; Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179; Campbell v. O'Connor, 55 Neb. 638, 76 N. W. 167; Frank v. Tuozzo, 26 App. Div. 447, 50 N. Y. Supp. 71; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Wooding v. Bradley, 76 Va. 614.

Collecting interest.

That one other than the holder of securities collected the interest thereon, without the possession thereof, for the holder, without protest on his part, is not sufficient to raise a presumption or implication of authority to collect the principal without the possession of such securities. Thompson v. Buehler, 1 Neb. (Unof.) 590, 95 N. W. 854; Porter v. Ourada, 51 Neb. 510, 71 N. W. 52; Frey v. Curtis, 52 Neb. 406, 72 N. W. 478; Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179; Campbell v. O'Connor, 55 Neb. 638, 76 N. W. 167; Hall v. Smith, 3 Kan. App. 685, 44 Pac. 908; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Trull v. Hammond, 71 Minn. 172, 73 N. W. 642; Dewey v. Bradford, 2 Neb. (Unof.) 388, 89 N. W. 249; Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Higley v. Dennis, 40 Tex. Civ. App. 133, 88 S. W. 400; Cunningham v. McDonald, 98 Tex. 316, 83 S. W. 372; Chandler v. Pyott, 53 Neb. 786, 74 N. W. 263; Thompson v. Kyner, 53 Neb. 625, 74 N. W. 52; United States Bank v. Burson, 90 Iowa, 191, 57 N. W. 705; Walter v. Logan, 63 Kan. 193, 65 Pac. 225; Bull v. Mitchell, 47 Neb. 647, 66 N. W. 632; Richards v. Waller, 49 Neb. 639, 68 N. W. 1053; Greenman v. Swan, 51 Neb. 81, 70 N. W. 504; City Missionary Soc. v. Reams, 51 Neb. 225, 70 N. W. 972; Joy v. Vance, 104 Mich. 97, 62 N. W. 140; Bromley v. Lathrop, 105 Mich. 492, 63 N. W. 510; Trowbridge v.

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wrote him (Gowans) that suit would be brought at once, he sent me a check and the receipt." In January, 1897, Milner wrote the plaintiff, inclosing interest money which Conway had collected on the Gowans note, and on a Mrs. Cherishino's note, also due the plaintiff: "I do not want to injure anyone wrongfully and my suspicions may be without foundation, but I would advise you to be careful of Conway and not trust him too far." Conway collected interest from other persons to whom plaintiff had made loans, and paid it over to Milner. In referring to one of them, Milner wrote plaintiff: "Conway claims he sent you the interest money he had collected from Adonis. I made him give me a guarantee to pay it if he had not paid you." At another time he wrote: "I also inclose Conway's letter and agreement to pay your Adonis interest —if you have not already got it." At still another time he wrote plaintiff: "I saw Conway to-day. He says he has some interest paid by Gowans, Adonis, or someone, he forgets which, that belongs to you. He said he would bring it in to-day, but he has not done so." Plaintiff himself testified that, on one occasion, when he was in Salt Lake City, he met Conway on the street, who told him that he had $30 interest money received by him from Gowanses, and that Conway then paid it over to him. Plaintiff also testified that he had received letters from Conway and that he had written letters to him. When asked to produce the letters received by him and copies of

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Ross, 105 Mich. 598, 63 N. W. 534; Wilson v. Campbell, 110 Mich. 580, 35 L.R.A. 544, 68 N. W. 278; Van Deusen v. Ingraham, 110 Mich. 38, 67 N. W. 914; Terry v. Durand Land Co. 112 Mich. 665, 71 N. W. 525.

So, payment of part of the principal of a bond to a scrivener not in possession thereof, but who had, from time to time, received interest thereon and remitted it to the obligee, is not a valid payment. Roberts v. Matthews, 1 Vern. 150.

Wolstenholm v. Davies, Freem. Ch. 289, also held the fact that a scrivener had received interest on part of the principal of a bond, and had paid it to the obligee, who had possession thereof, did not imply that he had authority to receive the balance, but payment to him was at the peril of the obligor.

So, where a loan company guaranteed loans made by it, and it was customary for people making loans through it to present interest coupons for payment, which, to protect its guaranty, the loan company paid and thereafter collected from the debtor, such mode of doing business is not sufficient to justify the debtor in paying the principal to the loan company without the possession of the security. John Stuart & Co. v. Asher, 15 Colo. App. 403, 62 Pac. 1051.

The general rule also applies to payments to the original holder of securities after he has assigned them to a third person, where there is no other evidence of agency than the fact that the original holder was permitted by the assignee to collect the interest and deliver up the coupon notes representing the same. Schultz v. Sroelowitz, 191 Ill. 249, 61 N. E. 92.

Negotiating loans.

Authority to solicit or negotiate loans raises no presumption or implication of authority to collect such loans without the possession of the securities. Austin v. Thorp, 30 Iowa, 376; Evans-Snider-Buel Co. v. Holder, 16 Tex. Civ. App. 300, 41 S. W. 404; Western Security Co. v. Douglass, 14 Wash. 215, 44 Pac. 257; Englert v. White, 92 Iowa, 97, 60 N. W. 224; Werth v. Ollis, 70 Mo. App. 318.

So, the fact that a scrivener loaned the money of a third person, and took security by mortgage in trust for such person, does not authorize a debtor to make payment thereof to him, where the scrivener has not possession of the securities. Henn v. Conisby, 1 Ch. Cas. 93. To same effect is Williams v. Walker, 2 Sandf. Ch. 334.

Howard v. Rice, 54 Ga. 52, also enunciated the doctrine that, if money is due upon a written security, it is the duty of the debtor, if he pays it to an agent, to see that the person to whom he pays it is in possession of the security; "for though the money may have been advanced through the medium of the agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor . . . if he took the risk of paying the agent the money due to the plaintiffs therefor, when he knew the agent did not have his note, it will not discharge him from its payment to the plaintiffs, unless he could show that they had received the money." Cited with approval in Hooks v. Frick, 75 Ga. 715; and see, to the same effect, Paris v. Moe, 60 Ga. 90.

Authority to place loans and collect interest does not authorize collection of the principal in the absence of the possession of the note. Antioch College v. Carroll, 11 Ohio Dec. Reprint, 220; Hitchcock v. Kelley, 18 Ohio C. C. 808; Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Security Co. v. Graybeal, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. 497; Artley v. Morrison, 73 Iowa, 132, 34 N. W. 779; Rand v. Perkins, 74 Minn. 16, 76 N. W. 950; Padley v. Neill, 134 Mo. 364, 35 S. W. 997.

And the fact that a lender of securities advanced money to the borrower through a third person is no proof of authority in such third person to collect the principal, where not intrusted with the custody of the security; neither is the fact that such third person is authorized to collect the interest sufficient to warrant an inference on the part of the borrower that he is also authorized to

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those written by him to Conway, he testified that he did not keep either. He admitted receiving the letters from Milner, and that he replied to them, but stated that he also kept no copies of those letters. Milner testified that he received letters from the plaintiff in reply to the letters written by him, but that he was able to find only one of them. The plaintiff, however, testified that after the Gowanses were behind on their interest due January 13, 1899, he wrote Conway several letters, saying, "Please have Gowans pay interest." He, however, testified that he wrote these letters "considering and believing that Conway was the agent or representative of the defendants, Gowans, in the matter of my loan to them." The interest was thereafter paid by the Gowanses to Conway, as theretofore, which was by him paid over to Milner, and by him forwarded to plaintiff. On July 12, 1899, the Gowanses paid Conway $325, principal and interest, and on September 15, 1899, they paid him the further sum of $203, principal and interest, being payment in full of the principal and interest on the note. Conway failed to pay these moneys over to either Milner or plaintiff. He absconded after he received them, and has not been heard of since. One of the defendants testified that when he made the last payment he asked Conway for the note and mortgage and for a release; that Conway told him that the note and mortgage were in the possession of Mr. Campbell, in New York, and that Mr. Campbell

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receive the principal. Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Hefferman v. Boteler, 87 Mo. App. 316.

On this subject, in Madison v. Cabalek, 86 Ill. App. 450, the court said: "It would be a very dangerous rule to hold that a loan broker, engaged in negotiating loans upon real estate, should be regarded as the general collecting agent of a lender from whom he has obtained money for a client, merely because he frequently before, for other borrowers, had obtained money from him [the lender] and collected interest coupons in certain instances."

This doctrine was also applied in Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296, and the debtor was held not entitled to make payment to a third person, not in possession of the note and deed of trust, although the note was payable at the office of such person, and he was trustee in the deed of trust collateral thereto, and he had also negotiated the loan and collected the interest thereon, which had been thereafter credited on the note by the holder.

And where the broker paid was not in possession of the security, the same result was also reached in Leon v. McIntyre, 88 Ill. App. 349, where, among other facts to establish agency or ostensible authority, it was shown that the broker to whom payment had been made had collected the interest and had made the loan.

Also in Ortmeier v. Ivory, 208 Ill. 577, 70 N. E. 665, where, among other facts tending to show authority, it appeared that the holder and securities had written to the broker who had made the loan and collected the interest thereon, to notify the debtor to pay his interest. The court said this letter was as consistent with the theory that the holder of the securities was writing to the broker as the agent of the debtor, as that he was treating the broker as his agent.

But see Peterson v. Fullerton, 106 Ill. App. 237, where the court held that, under the facts shown, general authority to receive payment would be presumed. In this case, however, the securities were payable to the agent and had been thereafter assigned to the principal, who did not notify the debtor of the assignment, and permitted the agent to collect the interest as though it was his own matter, although he retained possession of the securities.

Collecting interest and principal.

The fact that a bond and mortgage, when paid, were not in the hands of the person assuming to receive payment as agent for the holder, is not conclusive of the question of agency, but is a matter of evidence, to be weighed and considered in connection with all the facts and circumstances in evidence. And even though the principal retains possession of the security, agency may be established by evidence of previous payments of principal as well as interest to the person assuming to act as agent for the holder, to the knowledge of the holder, and without protest on his part. Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055; Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086; Phœnix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; Bradbury v. Kinney, 63 Neb. 754, 89 N. W. 257; Breck v. Meeker, 68 Neb. 99, 93 N. W. 993; Cheshire Provident Inst. v. Gibson, 2 Neb. (Unof.) 392, 89 N. W. 243; Faulkner v. Simms, 68 Neb. 295, 89 N. W. 171, 94 N. W. 113; Lebanon Sav. Bank v. Blanke, 2 Neb. (Unof.) 403, 89 N. W. 169.

Such a payment, however, is not sufficient, unless it affirmatively appears that the holder knew that the person collecting the interest and principal assumed to do so as his agent. Bradbury v. Kinney, supra; but, to establish ostensible authority, a single payment of the principal is sufficient. Phœnix Ins. Co. v. Walter, supra. *Contra*, see Bacon v. Pomeroy, 118 Mich. 145, 76 N. W. 324.

In Minnesota, if the holder of securities paid to an agent knows that the agent is assuming to collect the principal without having in his custody the securities or a satisfaction thereof, the court will imply an admission or recognition on the part of the principal of authority in the agent to collect. General Convention v. Torkelson, 73 Minn. 401, 76 N. W. 215; Springfield Sav. Bank v. Kjaer, 82 Minn. 180, 84 N. W. 752; Randall

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was indisposed and sick and had gone South. He further testified that he knew Campbell did not live in Utah, that he resided in New York, and that Conway had to send East to get the note and mortgage and a release; and that, believing and expecting everything would be all right, he paid the money.

With respect to the foregoing facts there is substantially no conflict. Milner, however, testified that some time prior to July, 1899, and before the first payment of principal was made to Conway, he wrote a letter to both of the Gowanses, addressed to them at Tooele city, notifying them that he was the trustee, and that he represented the plaintiff and had charge of his affairs, and that they should pay all moneys to him, and not to Conway; that the letter was postpaid, and mailed in due course of business. Both the Gowanses testified that they lived in Tooele city for something like fifty years, and that they were well known to the postmaster and to the people generally in Tooele city, and that no such letter was received by them as testified to by Milner. They further testified that the only letter received by them from Milner was a letter dated December 17, 1900, which notified them that the note and interest were past due, and requested them to call and arrange for further time or to pay the note; that, when they received the letter, they had paid the note in full to Conway, and that, in response to the letter, they came to Salt Lake City, and showed it to

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v. Eichhorn, 80 Minn. 344, 83 N. W. 154; Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111; Lynn v. Hanson, 75 Minn. 346, 77 N. W. 976, 1117; Hare v. Bailey, 73 Minn. 409, 76 N. W. 213. In the following cases, where such fact did not appear, it was held that authority to collect was not established, and the cases were distinguished on this ground: Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546; Budd v. Broen, 75 Minn. 316, 77 N. W. 979; Thomas v. Swanke, 75 Minn. 326, 77 N. W. 981; Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800.

Evidence of the previous payment of a portion of the principal of a note and mortgage to one not in possession thereof, but assuming to act as agent for the holder, and an acceptance of the same by the holder, without disclaiming the authority of the agent, is sufficient to sustain a finding that he had authority to receive payment of the balance, although not in possession of the security. Doyle v. Corey, 170 Mass. 337, 49 N. E. 651.

The doctrine that ostensible authority to collect negotiable securities without being in possession thereof may be implied from a general course of dealing was applied in the following cases, where such authority was implied from the fact that collections of both principal and interest had been previously made by the assumed agent with the knowledge and apparent approval of the holder. Harrison v. Legore, 109 Iowa, 618, 80 N. W. 670; Meserve v. Hanford, 59 Kan. 777, Appx., 53 Pac. 835; Security Co. v. Richardson, 33 Fed. 16; Security Co. v. Christy, 33 Fed. 22; International Harvester Co. v. Smith, 51 Fla. 220, 40 So. 840.

McVay v. Bridgman, 21 S. D. 374, 112 N. W. 1138, holds that an assignee of a negotiable note secured by a trust deed, who permits the trustee to collect the interest coupons attached to the note as they fall due, thereby ostensibly, at least, holds him out to the debtor as his agent to collect the coupons, and justifies the debtor in believing that he is authorized to receive payment of the principal indebtedness, and to release or enter satisfaction of the trust deed, although not in possession of the note or deed.

And see Estey v. Snyder, 76 Wis. 624, 45 N. W. 415, where, as to non-negotiable security, it was held that evidence that an agent made collections and remitted same to his principal, who thereupon sent him the original securities representing the debt collected, was sufficient evidence of authority in the agent to collect a chattel mortgage given to secure the purchase price for property sold by him, although his principal had possession of the mortgage at the time of payment. The court said: "It seems to us idle to contend, in the face of such testimony, that Hills [the agent] had no authority, express or implied, to do what he did in collecting the money on a chattel mortgage. . . . For . . . Hills did make such collections and was allowed to make them."

But the doctrine as to the necessity of possession of a security to justify payment to a third person, as applied to negotiable instruments, is different in this jurisdiction, and the ordinary rules of agency or of apparent or ostensible authority do not apply. This distinction is very clearly drawn in Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423, wherein the court said "that this rule [of commercial paper] has been held sufficient to deny efficacy to such acts as permitting collection of interest, or even prior instalments of principal, which, in relation to other business not involving collection of negotiable paper, might well suffice to establish apparent agency. Commercial paper has always been favored in the law, not less for the ultimate benefit of the giver than of the holder; and the rule just referred to is in line with that policy. It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper distinctively from other property by the very dominant purpose of easy and probable transfer at any moment, so that what may be true as to ownership of such paper on one day is likely to have changed on the next.

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one of their attorneys in this case. Further testimony was given by the plaintiff that he at no time had authorized Conway to represent him in negotiating the loan or in collecting the interest, or in receiving payment of moneys for him for any purpose, and that Milner alone represented him in all the transactions in which he and the Gowanses were interested. He further testified that Conway was the agent of the Gowanses in negotiating the loan and in collecting the interest, but such testimony seems to be a voluntary statement made by the plaintiff, not responsive to any question propounded to him, and was the mere conclusion of the witness.

The court found that Conway was not at any time the agent of the plaintiff; that he did not represent him in any of the dealings or transactions had by Conway with the Gowanses; and that Conway, in the negotiation of the loan and the payment of moneys made by the Gowanses to him, was the agent of the Gowanses. The court further found that Conway was not authorized by the plaintiff to receive payments of the sums of money paid to him on the principal; that the Gowanses had no right or authority to pay such money to Conway for the plaintiff; that, at the time the Gowanses paid such money to Conway, they knew that the note and mortgage were not in the possession of Conway, but were in the possession of the plaintiff, and that Conway would have to send East for them, and also for a release; and that, in the

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Of the probability of such change the negotiability of the instrument is a continual warning."

And see also Bartel v. Brown, 104 Wis. 493, 80 N. W. 801, wherein the court said "that the importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal sum on any such paper has such authority, possession of the paper itself by such person, or proof *aliunde* of express authority, is indispensable." The doctrine of this case was approved and applied in Kohl v. Beach, 107 Wis. 409, 50 L.R.A. 600, 81 Am. St. Rep. 849, 83 N. W. 657; Spence v. Pieper, 107 Wis. 453, 83 N. W. 660; Bautz v. Adams, 131 Wis. 152, 120 Am. St. Rep. 1030, 111 N. W. 69.

And it has been held to be the debtor's duty to pay to the person owning and holding a negotiable note at the time of payment, or to his duly authorized agent, and no payment to any other person is of any effect, unless made in reliance upon the actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of the assumed agent to receive such payment as to estop him from denying it. "Possession of a negotiable instrument is generally the sole adequate evidence of apparent authority to collect upon which the debtor has any right to rely, or can, without negligence, do so." Loizeaux v. Fremder, supra; and see, to the same effect, Winkelmann v. Brickert, 102 Wis. 50, 78 N. W. 164.

So, Mynick v. Bickings, 30 Pa. Super. Ct. 401, holds that the holder of securities, by allowing or employing an attorney to collect money on loans made through him, and accepting payment thereof, did not invest the attorney with authority to receive and receipt for the principal and interest of any bond or mortgage that the holder might own, unless he had possession of the instrument, or express authority to make the collection. To the same effect, see also Cowden v. Bechlar, 6 Pa. Co. Ct. 8; Bryant v. Hamlin, 3 Pa. Dist. R. 385.

And see Garrels v. Morton, 26 Ill. App. 433, wherein the court said that "the burden of proof is on the debtor to show that the securities were in the custody of the agent at the time of the payment . . . the collection of other securities or even a part of the existing debt is not sufficient to raise an implied authority in the agent to receive payment . . . express authority to collect interest is not sufficient to authorize the collection of the principal . . . the rule has been strictly adhered to in all the adjudged cases, that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal . . . any other principle would be dangerous in the extreme." And see, to the same effect, Viskocil v. Doktor, 27 Ill. App. 232.

So, if money is paid to one who usually received money for the obligee, such payment is not binding on the obligee if the person to whom payment was made has not the custody of the bond. Gerrard and Baker, 1 Eq. Cas. Abr. 145.

But where the scrivener who had made the loan thereafter collected interest from time to time and paid it to the obligee, and later collected the principal, and sent to the obligee for the bond, which was forwarded to him, the payment was held valid, although the scrivener was not in possession of the bond at the time of payment. Abbington and Orme, 1 Eq. Cas. Abr. 145.

That an attorney collected and turned over to the holder of a bond and mortgage a portion of the principal and interest thereon, and interest on other mortgages, does not establish his authority to receive payment thereof as agent of the holder, unless he has possession. Cox v. Cutter, 28 N. J. Eq. 13.

Miscellaneous.

Authorizing an attorney to foreclose a mortgage is sufficient to entitle a junior mortgagee to pay to him the amount of such mortgage after foreclosure has been commenced; especially where any defect in authority is afterward cured by the holder sending the mortgage to the attorney, who delivered it to the person who had made the

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making of such payments, Conway was their agent, and not the agent of the plaintiff.

Upon such findings the court rendered a judgment in favor of plaintiff and against the defendants, ordering a sale of the property, and providing for a deficiency judgment. Upon appeal, the defendants contend that the findings are not supported by the evidence.

We are very clearly of the opinion that the findings which the court made, that Conway was the agent of the defendants, and that he in no particular was the agent of the plaintiff, and did not represent him in any of the transactions referred to, is against the clear weight of the evidence. That Conway was not the agent of the defendants, and that he was some sort of an agent for the plaintiff, and represented him in some of the matters, we think is very clearly established by the evidence. True, there is no evidence to show that the plaintiff had given him any express or direct authority to negotiate the loan or to collect the interest, or to receive payment of any moneys from the Gowanses. In fact, there is affirmative evidence to show that no such direct or express authority was given Conway by the plaintiff. But the question still remains, Did the Gowanses, from plaintiff's conduct in the premises, and from Conway's participation in the transactions, with the knowledge and apparent acquiescence of the plaintiff, have the right to presume that Conway had the apparent or ostensible au-

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payment. Sessions v. Kent, 75 Iowa, 601, 39 N. W. 914.

Authority in an agent to sell property and take a note for the purchase price does not carry with it authority to collect the note, unless he has possession of it. Draper v. Rice, 56 Iowa, 114, 41 Am. Rep. 88, 7 N. W. 524, 8 N. W. 797.

Proof that it was the custom of manufacturers of farm machinery to send their wares to their general agents at a certain point, who, in their turn, sent them to their local dealers in that territory, and that the local dealers sold the machinery, usually taking notes in payment therefor, which they guaranteed and sent to the general agents, and that, as the notes matured, they were returned to the local agent who had sold the machinery, to collect the money thereon as the agent for the holder of the note, does not establish authority in a local agent to receive payment of a note taken under such circumstances, unless he has possession of the instrument. Rhodes v. Belchee, 36 Or. 141, 59 Pac. 117, 1119.

Effect of revocation of authority.

Where the agent was never in possession of the securities, notice of the revocation of his authority to collect, without possession, must be given a debtor in order to render invalid, as against the principal, payments to the agent after the revocation of his authority.

Thus, where the holder of securities knew that a third person made collections of principal due on such securities, and required him to account for such collections, and forbade him collecting more on the principal, but gave to the mortgagors no notice that he had in any way limited the authority of the agent, the effect was to give the agent apparent authority to deal with the mortgagors as he had been doing; and, as between the mortgagors and the holder of the securities, the holder should suffer the loss arising from a subsequent payment of principal by the mortgagors to such agent. Fitzgerald v. Beckwith, 182 Mass. 177, 65 N. E. 36.

So, payment of a note to an agent who formerly had authority to collect, but whose agency had been revoked, is nevertheless binding upon the principal, although the agent did not have possession of the note, where no notice of the revocation of the agency had reached the debtor at the time he made the payment. Ulrich v. McCormick, 66 Ind. 243.

Spencer v. Wilson, 4 Munf. 130; Edinburgh-American Land Mortg. Co. v. Noonan, 11 S. D. 141, 76 N. W. 298, also hold that the maker of negotiable securities is entitled to pay same to a person other than the holder thereof, who has theretofore been authorized to receive payment, although such authority is revoked, unless notice of such revocation is given the debtor. Of course, payment to such an agent after notice of revocation of his authority to receive payment is not binding on the holder of securities. Upton v. Jameson, 67 Mo. 234.

But where the agent was in possession of the securities at the time of payment, the withdrawal of the securities from his possession is a sufficient notice of revocation of authority to collect, and payments thereafter made are at the risk of the debtor making same.

On this point, in Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643, 24 N. E. 456, the court said: "Information of the physical fact of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. This knowledge he did not have, for it was not the fact. By his own wrongful act, the attorney had parted with possession, and, as a necessary consequence, has deprived himself of the power to longer misrepresent his authority in respect thereto to the detriment of the mortgagee. The mortgagor thereafter placed his trust solely in the assertions of the attorney and was deceived. In so doing he was legally as much at fault as the mort-

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thority to represent the plaintiff and to receive moneys for him? So far as pertains to the negotiations of the loan, it appears all that Milner had to do with it was to approve the loan. The matter of negotiating and consummating the loan, attending to the execution and delivery of the note and deed, and paying over the moneys of the loan to the Gowanses, were all conducted by Conway. As a result of such transactions on the part of Conway, the plaintiff received and accepted the note and deed, and recognized the transactions so had and concluded by him, and to that extent ratified the acts of Conway. The natural inference to be drawn from the evidence is that the coupons were delivered to Conway for collection, and that all the interest payments were made to him, presumably when he had the coupons in his possession. The undisputed evidence shows that the plaintiff had knowledge that Conway collected the interest of the Gowanses, and that it was paid over to Milner by him. The plaintiff having knowledge of such fact, and of the manner in which Conway collected the interest, and by plaintiff's receiving and accepting it, and in no manner repudiating the acts of Conway, it justifies a finding that his acts in those particulars were also ratified by the

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gagee, who also relied upon the attorney's trustworthiness. Therefore he cannot invoke in support of his contention the doctrine of apparent authority,—a rule which undoubtedly had its foundation in the equitable principle that, if one of two innocent persons must suffer, he ought to suffer in preference whose conduct has misled the confidence of the other into an unwary act."

And in Stiger v. Bent, 111 Ill. 328, the court remarked that where the agent has the possession of the promissory note after due, it may be inferred that he has authority to receive payment of it; and the burden is on the debtor who makes payment to the agent, relying upon such inference, to show that the promissory note was in his possession when the payment was made; the fact that the note was neither surrendered nor offered to be surrendered, under the circumstances is conclusive that he did not then have it.

So, money paid to an agent as owner of a bond and mortgage after a withdrawal of the papers from such agent by the owner is not a valid payment. Emery v. Gordon, 33 N. J. Eq. 447.

Authority to collect may, in some cases, be inferred from the possession of the bond and mortgage; but, in such cases, it is incumbent upon the debtor making the payment to show that the securities were in the possession of the person assuming authority to receive payment on each occasion when the payments were made, for the withdrawal of the security would be a revocation of the authority. Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Williams v. Walker, 2 Sandf. Ch. 325.

A debtor is authorized to infer that an attorney or scrivener who has been employed to make a loan is empowered to receive both principal and interest, from his having possession of the bond and mortgage given for the loan, or of the former only; but the inference in such cases is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent on the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made. This rule, however, does not apply where express authority to pay the principal and interest to an agent is shown. Haines v. Pohlmann, 25 N. J. Eq. 179.

And see Bloomer v. Dau, 122 Mich. 522, 81 N. W. 331, which holds that the withdrawal of securities from a general agent having authority to collect both principal and interest is an implied revocation of such authority. An express notice of such revocation to a debtor who had been paying such agent is not necessary. The court said: "When the debtor pays his debt, he is entitled to a surrender of the written evidence of that debt. Creditors usually place the bonds, notes, and mortgages they desire to have paid into the hands of their agent whom they authorize to collect. The absence of such papers is usually sufficient to place the debtor upon inquiry as to the agent's authority. A general agency continues until, in some way, parties have been notified of its termination, or have sufficient facts in their possession to put them upon inquiry. Banks are collection agencies, and the courts will take judicial notice of the fact that notes and other evidences of debt accompany the agency, and are placed in their hands, to be surrendered when the debt is paid. It must be presumed, therefore, that defendants knew that this was the customary method of doing business, and that this bank would, in the due course of business, if its agency continued, have the note and mortgage in its hands for surrender."

In the absence of the possession of the security paid, actual agency may be established by proof of circumstances—by circumstantial evidence—bearing upon the question. Thus, where it appears that the alleged agent has repeatedly accepted payment of securities belonging to the principal, without being in possession, which act the principal has ratified and accepted, his authority for the performance of the disputed act may be inferred. This mode of proof of agency does not rest on estoppel, it is proof of a fact by deduction or inference from other facts. Hence, the acts need not be shown to have been known by the party claiming that he dealt with the agent. Hefferman v. Boteler, 87 Mo. App. 316.

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plaintiff. It is a general rule that a subsequent ratification has a retrospective effect and is equivalent to a prior command. We think it is quite clearly established that Conway had the apparent or ostensible authority to represent the plaintiff in the negotiation of the loan and in receiving the interest payments. The judgment of the court below can, therefore, not stand on the findings made that Conway was the defendants' agent, and not plaintiff's agent, in any particular and for no purpose.

The difficult question, however, in the case, is, Does the evidence show that Conway had authority to receive payments of the principal for the plaintiff? The burden was on the Gowanses to prove that Conway had either express or apparent authority to receive the payments in question for the plaintiff. There is again no proof to show that he had direct or express authority to receive payments of the principal. The question then is, Have the defendants sustained the burden of proof that Conway had such an apparent or ostensible authority as to reasonably indue them to believe that he was authorized to receive payments of the principal? Counsel for respondent invoke the rule that a payment of the principal, in part or in full, to an alleged or an assumed agent who has not the possession of the securities at the time of the payment, nor express or special authority to receive the payments, is not binding on the creditor. There is no doubt that a number of cases so hold.

The rule in that regard, as stated in 1 Jones on Mortgages, 5th ed. § 964, is as follows: "Even authority to collect the interest upon a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the securities. The mortgagor is bound to know the extent of the agent's authority. If he pays the principal to an agent, he must be prepared to prove express authority. He pays to an agent at his peril. The rule has been strictly adhered to in all the adjudged cases that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal."

In the case of Eaton v. Knowles, 61 Mich. 625, 28 N. W. 740, it is said: "The rule is well settled that, when a person makes payment upon non-negotiable securities to a person assuming to act as agent, he should see to it that the securities are in the possession of the person claiming to be agent; otherwise he may be compelled to pay the same again, unless he can show that the money was actually paid over to the principal, or that the agent was specially authorized to receive payment."

In the case of Garrels v. Morton, 26 Ill. App. 433, the following language is used: "The collection of other securities, or even a part of the existing debt, is not sufficient to raise an implied authority in the agent to receive payment. . . . Express authority to collect interest is not sufficient to authorize the collection of the principal. . . . The rule has been strictly adhered to in all the adjudged cases that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal."

The following, among other cases which might be cited, also support this doctrine: Smith v. Kidd, 68 N. Y. 136, 23 Am. Rep. 157; Lawson v. Nicholson, 52 N. J. Eq. 821, 31 Atl. 386; Lane v. Duchac, 73 Wis. 646, 41 N. W. 962; Western Security Co. v. Douglass, 14 Wash. 215, 44 Pac. 257; Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643, 24 N. E. 456.

These cases all proceed on the theory that an apparent or an ostensible authority cannot be inferred of one assuming to act as the agent of another in receiving payments of the principal, who has not, at the time of the making of such payment, the securities in his possession, and who has not direct or special authority for so acting. That is to say, in order to imply such authority, in the absence of proof of direct or special authority, it is held by these cases that two things are essential and indispensable: (1) Possession of the securities by the supposed agent, with the consent of the mortgagee at the time of the payment; and (2) knowledge of such possession on the part of the mortgagor or debtor at the time of the making of the payment.

On the contrary, there are cases supporting the rule that the fact that the note and mortgage were not in the possession of the supposed agent when he collected the principal is not conclusive of the questions of agency and authority, but is a matter of evidence, to be weighed and considered in connection with all the facts and circumstances in evidence. Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055; Phœnix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; Harrison v. Legore, 109 Iowa, 618, 80 N. W. 670; Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762; Morgan v. Neal, 7 Idaho, 629, 97 Am. St. Rep. 264, 65 Pac. 66; Fowle v. Outcalt, 64 Kan. 352, 67 Pac. 889; Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687.

In all these cases a finding of apparent or ostensible authority of the alleged agent to collect and receive payment of the principal was upheld, notwithstanding the fact that the assumed agent did not have in his possession the note or mortgage at the time of the making of the payment. Of course, in these cases it was held that there were other

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sufficient facts and circumstances shown to justify the presumption of such apparent authority of the assumed agent. We believe these cases state the better rule. They proceed on the theory, not that some one particular fact, such as the failure of the assumed agent to have possession of the securities, is determinative or conclusive of the question of agency and authority, but on the broader doctrine, well stated in Johnston v. Milwaukee & W. Invest. Co. 46 Neb. 480, 64 N. W. 1100, that "where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform, on behalf of his principal, a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it."

It, however, is said that the ruling in the case of Quinn v. Dresbach, supra, was based on a statute which provided that "ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." But, as there observed by the court in that case, "this is the embodiment of a well-established principle of the common law, which has been called 'the foundation of the law of agency.'" The principle invoked in these cases, and as expressed in some of them, is but the application of the maxim declared many years ago by Mr. Justice Ashhurst, in the case of Frith v. Leroux, 2 T. R. 70, that "we may lay it down as a broad general principle that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." The fact, therefore, that Conway did not have the securities in his possession at the time when the Gowanses paid the principal to him, which was then well known to them, is not to be regarded as conclusive of the question of Conway's agency, or of his ostensible authority, but is, as matter of evidence, to be considered with all the other facts and circumstances in the case. The fact that an alleged agent did not have in his possession the securities at the time the debtor paid the principal to him is, as matter of evidence, entitled to great weight. And we think it may be said, generally that such fact, when considered as evidence, may be alone sufficient to require a finding that an agent, though he has express authority to negotiate the loan and collect the interest, and thereunder performs such acts, nevertheless has not the ostensible authority to collect or receive any part of the principal, and that the debtor has not the right reasonably to presume that he had such authority. To the contrary, there may be instances where the agent has express authority to collect the interest, and has possession of the securities with the consent of the creditor, and the fact of such possession is known to the debtor when he pays the principal to such agent, but where, nevertheless, the debtor because of other facts and circumstances, may not be justified in presuming that such agent had ostensible authority to collect and receive the principal, or any part of it. If this were a law case, and the court or jury, from all the evidence here shown, had found either way on the question of Conway's apparent or ostensible agency and authority to receive and collect the moneys here in question we would not feel justified in disturbing the finding or verdict on the ground of insufficiency of evidence to support it. But, this being a case in equity, brought here on an appeal on questions of both law and fact, it is our duty, under the Constitution, to determine not whether there is sufficient evidence in the record to support the findings, but whether the findings, as made, are such as were called for by the evidence adduced. True, in the case of McKay v. Farr, 15 Utah, 261, 49 Pac. 649, it was decided shortly after the adoption of the Constitution that while this court had the "power under the Constitution to review questions of fact in an equity case, still, when such cases have been regularly tried before a court of chancery, and facts found on all material issues, we will not disturb such findings unless they are so manifestly erroneous as to demonstrate some oversight or mistake which materially affects the substantial rights of the appellant." In support of this rule, cases from the territorial supreme court are cited which were decided long prior to the adoption of the Constitution. The court evidently was mindful of the maxim that "the practice of the court is the law of the court," regardless of the Constitution; that, since it was the practice of the territorial supreme court before the Constitution to so regard the facts in an equity case, the state supreme court would continue to do so notwithstanding the Constitution, which conferred not only the power, but also imposed the duty on the court, in an equity case, to review the facts as well as the law. The rule thus announced in effect, amounted to the exercise of no greater or different power in an equity case than was exercised in a law case. This rule was substantially departed from in the case of Wilson v. Cunningham, 24 Utah, 167, 67 Pac. 118, where, although the court repeated the language above quoted, it nevertheless said: "We do not wish to be understood,

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however, that we are concluded by the findings of the trial court," though there be a conflict in the evidence. "We do not mean that we have abdicated our supervision and control over facts in equity cases. . . . When the testimony preponderates on one side or the other in such a way as to convince this court that the court below has erred, its judgment will be reversed." The court there, however, further observed that when there is a great or irreconcilable conflict in the testimony, or where it is evenly balanced, the findings which the trial court made will ordinarily be sanctioned by this court by an affirmance. When there is a substantial conflict in the evidence upon which a finding of fact has been made by the trial court, in our review of the facts to determine whether the findings made were such as were called for by the evidence, proper consideration must be given to the trial court's opportunity to observe the conduct and demeanor of the witnesses in giving their testimony, to test their faculty of memory, and their intelligence and capacity to understand and comprehend the things testified to by them, and to observe other things which may affect the weight of the testimony and the credibility of the witnesses. But it does not follow that a finding made by the trial court, in an equity case, on a conflict in the evidence, necessarily requires our approval. The parties on appeal are entitled to our judgment on the facts, and it is our duty to give it. In the case in hand, all the testimony of the witnesses was given by deposition. The trial court's opportunity to pass on the weight of the testimony and the credibility of the witnesses was, therefore, no better than ours. Furthermore, the finding made by the trial court, that Conway was not authorized to receive the moneys in question for the plaintiff, was based on the finding that Conway was defendants', and not the plaintiff's, agent. In this regard the court found "that Porter J. Conway was not, at any time, the duly authorized or credited agent or representative of the plaintiff, and therefore was not authorized to act, and did not act, as the agent of the plaintiff, and that the payments made by the said defendants to said Conway were made voluntarily, and without authorization from plaintiff."

On the question whether the defendants were justified in believing that Conway had the apparent or ostensible authority to receive such payments for the plaintiff, and whether the plaintiff, by his acts and conduct in the premises, held Conway out in such manner as reasonably to induce the defendants to believe that Conway had such apparent or ostensible authority,—the very thing upon which the court ought to have made a finding,—it made no finding, unless it shall be said that, from the fact that Conway did not have the possession of the securities, it must be conclusively presumed, as matter of law, that he had no apparent or ostensible authority to receive payments of the principal for the plaintiff. But we have held no such conclusive presumption of law can properly be indulged. Treating the fact that Conway did not have the possession of the securities as matter of evidence, giving it due weight, and considering it in connection with all the other facts and circumstances in evidence, we are of the opinion, on the facts, that the defendants were justified in believing that Conway had the apparent or ostensible authority to receive the moneys in question for the plaintiff. In reaching this conclusion, we are influenced by the facts that, though the plaintiff had not given Conway express authority to act for him in the transactions referred to, he, nevertheless, had knowledge that Conway acted for him in the negotiation of the loan and in the collection of interest, and that the plaintiff ought reasonably to have expected that the defendants might well believe that Conway had the authority to do these things; that the plaintiff was notified that Conway was negligent and had failed to account with reasonable promptness for the moneys collected by him for the plaintiff, not only on account of the Gowans note, but also for moneys collected by him for the plaintiff from others, and that the plaintiff was warned not to trust Conway too far; and that, notwithstanding the plaintiff's knowledge that Conway was collecting money for him from the Gowanses, and that he failed to promptly account for it, nevertheless the evidence, without conflict, shows that the plaintiff remained silent and continued to permit Conway to participate in the transactions and to collect moneys for him without objection. The plaintiff, having received information of Conway's derelictions, ought to have taken some action in the premises, and should not have acquiesced in Conway's continuing to collect money for him. When the plaintiff, thus knowing of Conway's remissness, permitted him to act for him in these matters without objection, he ought not now to be heard to complain. We think, under the circumstances, the principle that, "when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," should be applied. In reaching this conclusion, we are also not unmindful that Milner, a witness for the plaintiff, testified that he wrote and mailed a letter to the Gowanses, requesting them not to pay Conway, but to pay the witness, as he was plaintiff's agent. He testi-

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fied that he did not keep a copy of the letter, and testified several times that he could not fix the date when he wrote and mailed it, but finally answered "Yes" to a leading question propounded to him by plaintiff's counsel, if it was not prior to July 12, 1899, the time when the Gowanses made the first payment on the principal. The mailing of a letter postpaid and properly addressed to a person shown to reside in a city or town to which the letter was addressed creates no legal presumption, but a presumption or inference of fact, that it reached its destination. 1 Elliott, Ev. § 107. The testimony of the witness Milner is therefore some evidence that the letter testified to by him was received by the Gowanses in the due course of mail. The defendants, however, testified that no such letter as testified to by Milner was received by them. On such question we think the evidence preponderates in favor of the defendants, and it is not reasonable to presume that they, after receiving such information, would have paid any part of the principal to Conway.

We are therefore of the opinion that the judgment of the court below ought to be reversed and the cause remanded, with directions to vacate the judgment entered in favor of the plaintiff, and to enter a judgment in favor of the defendants Hugh S. & Betsy Gowans, requiring the plaintiff to surrender and cancel the note and trust deed, and to satisfy the same of record, and to surrender and transfer the certificate of water right mentioned in the pleadings, and which also had been transferred to plaintiff by the Gowanses, as security for the debt. Costs to appellants.

It is so ordered.

McCarty, Ch. J., and Frick, J., concur.

NEW HAMPSHIRE SUPREME COURT

ARCHIBALD I. LAWRENCE
v.
OLIVER H. TOOTHAKER et al.

(75 N. H. 148, 71 Atl. 534.)

Public contracts — personal liability.

1. Members of a board of education, who, without authority, attempt to bind the city by a contract for services on a school building, do not render themselves personally liable for the services so rendered if the facts were equally within the cognizance of the other contracting party.

Same — limitation of power — imputed knowledge.

2. One entering into a contract with a board of education which attempts to bind the municipality is chargeable with knowledge of the official limitation upon the power of the members.

Same — implied warranty of power.

3. Members of a board of education undertaking to contract on behalf of the municipality do not impliedly guarantee that they have the requisite power, where all the facts and circumstances surrounding the case are known to the other contracting party.

(December 1, 1908.)

Case Note. — Personal liability of public officer on contract which he attempts to make for public in excess of his authority.

This note does not include those cases where, although it appeared that the person sought to be held liable was a public agent, it did not appear that the contract on which he was sought to be held liable was entered into without authority.

Whatever may be the rule as to the individual liability of persons who, as agents for private parties, enter into a contract which is not within the scope of their authority, without doubt it is the general rule that, when public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable unless the intent to incur personal responsibility is clearly expressed, although it should be found that, through ignorance of the law, they have exceeded their authority. Houston v. Clay County, 18 Ind. 396 (contract by township trustees for the erection of a bridge, who, without authority of law, provided for part of its payment by the proceeds of a tax thereafter to be collected by virtue of a vote of the township); Newman v. Sylvester, 42 Ind. 106 (contract for improvement of a street, which had been let by the common council under the misapprehension that the street was within the corporate limits of the city); Murray v. Carothers, 1 Met. (Ky.) 71 (contract for the building of a bridge, which the commissioners had no authority to enter into because order therefor was made by the county judge without the concurrence of a majority of the justices of the county); Southworth v. Flanders, 33 La. Ann. 190 (passing by mayor and administrators of city of ordinance unauthorized by law, by which the recorder of mortgages was authorized to obtain copies of all unrecorded and unexpired tax judgments and have them recorded); Humphrey v. Jones, 71 Mo. 62 (execution of note by director of school district, for the benefit of the district, in good faith believing himself authorized to bind the district); Sanborn v. Neal, 4 Minn. 126, Gil. 83, 77 Am. Dec. 502 (giving of note by trustees of school district in payment of debt); First Nat. Bank v. Becker County, 81 Minn. 95, 83 N. W. 468 (unauthorized issuing of orders by officers of organized county for

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EXCEPTIONS by defendants to rulings of the Superior Court for Coos County, made during the trial of an action brought to hold them personally liable on a contract made by them on behalf of a municipality. Sustained.

A fire destroyed a schoolhouse in the town of Berlin. Defendants, acting as a school board, requested plaintiff, an architect, to prepare plans for a new building as quickly as possible. A contract was agreed upon by which defendants attempted to bind the municipality for the value of plaintiff's services. Defendants subsequently canceled the contract, and plaintiff, having failed to hold the municipality liable for his services, brought this action to hold defendants personally liable.

Further facts appear in the opinion.

Messrs. **Matthew J. Ryan** and **Edmund Sullivan**, for defendants:

Public officers are not responsible on contracts entered into with a third person for the benefit of the corporation.

Brown v. Rundlett, 15 N. H. 363; Nickerson v. Dyer, 105 Mass. 323; Farnam v. Davis, 32 N. H. 302.

When the officers of a municipal corporation, acting in good faith, attempt to enter into a municipal contract, under an innocent mistake of law that they have legal authority to do so, in which mistaken impression the other party shares, no liability attaches to the officials personally.

Tiedeman, Mun. Corp. § 169; Stone v. Huggins, 28 Vt. 617; 1 Am. & Eng. Enc. Law, p. 1127.

When public officers act in good faith,

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official services, election expenses, jury fees, and other expenses of unorganized county); Henry v. Henry, 73 Neb. 746, 103 N. W. 441, 107 N. W. 789 (procuring of loan by administratrix and executing mortgage without authority of law); McCurdy v. Rogers, 21 Wis. 198, 91 Am. Dec. 468 (contract to pay bounty for enlistment in military service, which bounty was beyond the amount authorized); Olifiers v. Belmont, 12 Misc. 160, 33 N. Y. Supp. 275, reaffirmed without opinion in 159 N. Y. 550, 54 N. E. 1093 (contract by secretary of committee appointed by mayor for celebration of discovery of America, for manufacture and delivery of lampions); 23 Am. & Eng. Enc. Law, 2d ed. p. 381.

In Huthsing v. Bousquet, 2 McCrary, 152, 7 Fed. 833, it was held that supervisors who, without intending to bind themselves personally, and without authority of law, offer a reward for the apprehension of robbers and the return of the money stolen, cannot be held personally liable for such reward, since, as the court said, the person seeking to recover the reward must have had knowledge that the supervisors had no such authority. The court, in this case, also took occasion to say further: "It has been suggested that the defendants offered the reward without any formal meeting and resolution of the board authorizing it. This would be material if there had been any statutory authority empowering the board, at a regular or called session, to offer the reward in question; but since if, at an authorized session, a resolution of the board offering the reward would have been utterly without authority and void, it can make no kind of difference that the defendants acted without such formal meeting and authority. If there had been statutory authority, and the defendants had acted, in offering the reward, without actual authority conferred by the board, the plaintiff could charge them upon the contract as agents acting without or transcending their authority, because, in that case, the want of authority depending on a matter of fact, not law, notice of the absence of power to make the contract could not be imputed to the plaintiff."

A similar case, and holding to the same effect, is Schieber v. Von Arx, 87 Minn. 298, 92 N. W. 3, where county commissioners, without authority of law, offered a certain sum for the finding of a missing man.

For the same reason, commissioners of highways, who, in a proceeding to lay out a highway, had been unable to agree with a landowner as to the damages he would sustain, and who had, without authority of law, submitted the matter of damages to arbitration, were held, in Mann v. Richardson, 66 Ill. 481, not to be individually liable, although, in pursuance thereof, the commissioners had executed their bond in their individual names, containing an express covenant to abide by and perform the award, if it should be made in writing under the hands and seals of arbitrators and by the day stated, the court finding that the conditions of the bond were never fulfilled.

In McHenry v. Duffield, 7 Blackf. 41, an action was brought against the members of a building committee, founded on an instrument which, by its terms, showed that there was due a certain person a certain sum for work done on the building; this instrument being signed by the committee "in behalf of the trustees." The court, in holding that the action would not lie, said: "No suit on the instrument before us can be sustained against the defendants, because it does not contain any acknowledgment by them individually. If they were authorized by the trustees to execute it, the suit should be against the trustees. If they were not so authorized, they are liable in case for acting in the matter without authority."

In Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293, a county judge, without authority from the county, executed an instrument purporting, for value received, to bind the county to pay a certain sum of money to a certain person; the instrument was signed by the judge, describing himself as county judge of the county. In an action by the indorsee of the note to hold the judge lia-

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with parties who have equal means of knowledge with themselves to ascertain the extent of their authority, they do not become personally liable unless the intent to incur personal responsibility is clearly expressed, although it should be found that they have exceeded their authority.

Broadwell v. Chapin, 2 Ill. App. 511; 23 Am. & Eng. Enc. Law, pp. 380, 381; Richardson v. Crandall, 47 Barb. 335; Mechem, Pub. Off. § 806; Newman v. Sylvester, 42 Ind. 112; Waltham Bank v. Wright, 8 Allen, 121.

The defendants, being members of the school board, were quasi judicial officers, acting for the city, and could not become personally liable on contracts made by them unless it appeared that such contracts were made with a corrupt and malicious intent.

McDaniel v. Tebbetts, 60 N. H. 497; Odiorne v. Rand, 59 N. H. 504; 23 Am. & Eng. Enc. Law, p. 377.

If a public agent treating for the government neither asks nor receives credit for himself, he is altogether irresponsible on any contract he makes in that capacity.

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ble on the note, it was said: "We are inclined to think . . . that the contract is wholly void, and neither party can be held on it. Not the county, for they gave no authority to the judge to bind them; not the judge, for there are no apt words in it sufficient to bind him. If the defendant falsely represented himself as the agent of the county, and authorized to obtain this money, and did so obtain it, he may be reached by a special action on the case for the fraud, or in some other appropriate action; but not on the note itself. Or the county might be sued in assumpsit if they, in fact, received the money."

In Pine Bluff Water Co. v. Sewer Dist. No. 1, 56 Ark. 205, 19 S. W. 576, it was held that where the object of the organization of a sewer district, and the authority of its board of commissioners, are limited to the construction of sewers and to paying for the same, the commissioners have no authority to contract or bind themselves as a board, or the sewer district, for water furnished for flushing the sewers in the district.

In Lyon v. Irish, 58 Mich. 518, 25 N. W. 502, it was held that a contract made by village trustees as such, for the building of abutments to a bridge, does not bind the trustees personally for payment, they having acted bona fide and without concealment or fraud. In this case, the trial court found that the village was not bound, in that it had no power to make or authorize such a contract. The higher court, however, said that it was unnecessary to pass upon the legal liability of the village, but that it was difficult to see why the village should not be both legally and equitably liable.

In Schloss v. McIntyre, 147 Ala. 557, 41 So. 11, it was held that the members of a board of dispensary commissioners, acting under the supposed authority conferred upon them by an act establishing a liquor dispensary at a certain place, could not, upon the act being declared unconstitutional, be held personally liable for the liquors purchased under such act. The court said: "In this case, both parties were mistaken in supposing that the dispensary had a legal existence. It had been established under color of a statute duly enacted according to constitutional forms, although invalid because of the nature of some of its provisions, and the plaintiff had all the opportunity to know this infirmity which the defendant possessed. The defendants made no promise to pay for the liquors. It is not averred that from them they derived any personal benefit, and they neither made misrepresentations to the plaintiffs nor perpetrated any fraud upon them."

To the same effect is Perry v. Hyde, 10 Conn. 329, where agents appointed by the court for that purpose contracted for the building of a bridge, expressly stipulating that the bridge was to be built without any expense to them, or either of them, the decree or order of the court being subsequently declared invalid.

In Hall v. Lauderdale, 46 N. Y. 70, a board of supervisors of a certain county constituted each supervisor recruiting and disbursing agent for his respective town; under this authority, one of the supervisors appointed a subagent. In an action by the subagent to recover from the supervisor for services, it was said: "If it should be conceded that the action of the board of supervisors in appointing recruiting agents was not authorized by the law of 1864, as is claimed by the counsel for the plaintiff, it does not follow that the defendant is personally bound by the contract. . . . The defendant had authority in fact to make the contract. If the principal is not bound, it is not because the contract is not within the terms of the authority granted, but for the reason that it was *ultra vires*. The agent does not warrant the capacity of the principal to contract. If he acts within his instructions, and in good faith, especially when the facts are equally known to both parties, he is not personally responsible, although it may happen that the authority itself is void."

A case closely related to the above is Powell v. Heisler, 45 Minn. 549, 48 N. W. 411, where it was held that one who purchased town bonds issued under an unconstitutional law could not recover the price of the bonds of those who were mere agents to dispose of the bonds, and in which they had no personal interest.

However, in McClenticks v. Bryant, 1 Mo. 598, 14 Am. Dec. 310, it was held that commissioners who contracted for the building of a jail before the conditions of the act authorizing such building were complied with, and who gave their bond for the pay-

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Cook v. Irvine, 5 Serg. & R. 492, 9 Am. Dec. 397; Woodbridge Twp. v. Hall, 47 N. J. L. 388, 1 Atl. 492; Parks v. Ross, 11 How. 362, 13 L. ed. 730; Stinchfield v. Little, 1 Me. 231, 10 Am. Dec. 65; Hodgson v. Dexter, 1 Cranch, C. C. 109, Fed. Cas. No. 6,565; Nichols v. Moody, 22 Barb. 611; Brown v. Austin, 1 Mass. 208, 2 Am. Dec. 11; Gidley v. Palmerston, 3 Brod. & B. 275, 7 J. B. Moore, 91; Crowell v. Crispin, 4 Daly, 100; 1 Am. & Eng. Enc. Law, p. 1056.

It is presumed that governmental agents do not intend personally to assume the public burdens, and that persons dealing with them do not rely upon their individual responsibility.

Mechem, Pub. Off. pp. 804, 809; Knight v. Clark, 48 N. J. L. 23, 57 Am. Rep. 534, 2 Atl. 780.

Mr. **Scott Sloane**, for plaintiff:

An agent who acts without authority, or exceeds the authority delegated to him, is personally liable to the party with whom he contracted for or on account of his principal.

Story, Agency, 264; Evans, Agency, 301;

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ment of the money, were individually liable on such bond, both on the ground that they exceeded their authority, and because they used apt words to bind themselves. The court said: "The fourth section of said act provides that the land acquired shall be by the commissioners laid off into lots; that they shall, under the direction of the commissioners, be sold for ready money, or on a credit not to exceed twelve months; and that, when the purchase money is paid, and not before, the commissioners shall make title to the purchaser, and the proceeds of such sale shall be then applied, after paying for the land, first to the building of a jail, and then, if any surplus, to the building of a courthouse. The true and apparent construction of this act is, that the commissioners are not required to let out the building a jail till they have received the money for the lots; because, before that time, there can be no proceeds. If we take it, then, that the commissioners obeyed the act, they had the money when they let the jail; and, if they had it not, they ought to have had it, and builders had a clear right to expect the fact was so, for so was the law; and if they had it not, it was their own folly to make a premature contract; and the law nowhere authorizes them to pledge the faith of the county. Their funds were limited and special, and their authority to build founded on the fact of proceeds being in their hands in amount sufficient to build a jail. It is, therefore, clear, that the defendants have made the contract their own. They have made it their own because they have exceeded their authority; and secondly, because they have used apt words to bind themselves."

In Yulee v. Canova, 11 Fla. 9, an officer of the Confederate government was held individually liable where it appeared that, although he had the authority to purchase, and, when necessary, to impress, supplies, yet, in case of impressment, he had no authority to change by contract the mode and manner of fixing compensation. The court concluded by saying: "We are forced to the conclusion that the appellee, in entering into said contract, did not act within the scope of his authority; having done so, it is presumed he acted in his private capacity, and therefore became personally responsible."

In Paulding v. Cooper, 10 Hun, 20, affirmed in 74 N. Y. 619, where commissioners, as such, contracted for the erection of an iron bridge, and it appeared that, upon completion of the work, all the bonds authorized had been issued, and there was no fund with which to pay, in an action to hold the commissioners individually liable, it was said: "The defendants must assume one of two positions, and either will uphold this action. They either contracted with plaintiffs in excess of their power, or they contracted with sufficient funds, and suffered those funds to be appropriated to other purposes. It was a violation of duty in either case."

In School Directors v. Miller, 54 Ill. 338, it was held that where school directors executed promissory notes in their individual names, for the purpose of borrowing money for purchasing a site and building a schoolhouse, but which was not authorized by a vote of the people, as required by law, a remedy at law existed against the directors upon the notes as individuals.

So, where public agents attempt to bind their principal by executing a promissory note, which they have no authority to do, if they use apt words to bind themselves, they can be held individually liable on such note. Savage v. Rix, 9 N. H. 268; Weare v. Gove, 44 N. H. 196.

So, in State Bank v. Keinberger (Wis.) 122 N. W. 1132, members of a school board were held individually liable on a contract and order for school supplies, illegally entered into, it appearing in this case that, according to the contract, the members of the board assumed an individual liability as well as a liability as school officers.

In Exchange Bank v. Lewis County, 28 W. Va. 273, where money was borrowed by a county for the erection of a courthouse, which, without a special act, it had no authority to do, it was recognized that the note given for such money, and signed by the agent appointed by the county, in his own name, describing himself as the agent for the county, was the individual note of such agent, and the county could not be held liable on it.

In Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82, it was held that where selectmen bind themselves to pay selectmen of another town for the support of a pauper, they having no authority, without a vote of the people, to bind the town to do so, they are individually liable on such contract.

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Wharton, Agency, 524; 1 Parsons, Contr. 67; Thomson v. Davenport, 9 Barn. & C. 78, 2 Smith, Lead. Cas. 8th ed. 380; Weare v. Gove, 44 N. H. 196; Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82; Woodes v. Dennett, 9 N. H. 58; Pettingill v. McGregor, 12 N. H. 191; Savage v. Rix, 9 N. H. 268; Moor v. Wilson, 26 N. H. 336; Collen v. Wright, 8 El. & Bl. 647; Firbank v. Humphreys, L. R. 18 Q. B. Div. 54.

An agent who wishes to escape personal liability must make known to the third party what doubts there may be as to his power.

Lilly v. Smales [1892] 1 Q. B. 456; Arfridson v. Ladd, 12 Mass. 173.

If a person undertakes to contract as agent for an individual or corporation, and contracts in a manner that is not legally binding upon his principal, he is personally responsible, and, when sued on such contract, can exonerate himself only by showing his authority to bind those for whom he has undertaken to act.

Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506; Mott v. Hicks, 1 Cow. 536, 13 Am. Dec. 550.

Walker, J., delivered the opinion of the court:

The evidence is not sufficient to support a finding that, at the time the contract was made, the defendants intended to bind themselves personally, or that the plaintiff understood they did. No express promise on the part of the defendants was made, and it was not suggested by the plaintiff that the defendants were to be deemed the responsible contracting parties. Nor is there any evidence that the defendants suppressed any material facts relating to their authorization to bind the city. Both parties acted in good faith, upon the assumption that the defendants were authorized to make the contract as representatives of the city; and, in accordance with that understanding, the plaintiff gave credit to the city. It may be conceded that the defendants, as the board of education, had no authority to contract with the plaintiff for and in behalf of the city, and that the attempted exercise of such authority was futile. But it does not follow that the defendants bound themselves to pay for the plaintiff's services. Ogden v. Raymond, 22 Conn. 379, 384, 58 Am. Dec. 429. The board's want of statutory power to do what it attempted to do was as much within the cognizance of the plaintiff as that of the defendants. Richards v. Columbia, 55 N. H. 96, 99; Sprague v. Cornish, 59 N. H. 161. The plaintiff was chargeable with knowledge of their official limitations and, having voluntarily contracted with them in their official capacity, and given credit to the city for the performance of the contract, he is in no position to claim that the defendants are personally responsible on the contract, in the absence of an express promise by them to incur that responsibility, unless the law would imply a promise of guaranty that they had the requisite power. But, "where all the facts and circumstances surrounding the case are known to both the agent and third party, but there is a mutual mistake as to a matter of law,—as the principal's liability or the legal effect of the agent's written authority,—the agent cannot be held personally responsible by reason of the mere fact that the principal cannot be held, unless the agent, by some apt expression, guarantees the contract or assumes it himself." 2 Clark & S. Agency, 582b; Jefts v. York, 10 Cush. 392. And this principle of law is equally applicable when public officers, like the defendants, assume to bind the public by their contracts with third parties. Their authority is statutory; and whether their attempted exercise of it in a particular case is authorized is ordinarily a question of law, which the other contracting party has ample opportunity to investigate and decide for himself. If, for any reason, he is unwilling to incur that risk, an express guaranty by the other that he acts within the scope of his authority would be necessary to render the latter liable on the contract. Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82; Brown v. Rundlett, 15 N. H. 360; Farnam v. Davis, 32 N. H. 302. Cases like Weare v. Gove, 44 N. H. 196, do not conflict with this result. It was there expressly recognized (page 197 of 44 N. H.) that the agent cannot be held "where the promisee, being fully informed of the facts upon which the assumed authority rests, forms his own judgment, and contracts for and relies upon the engagement of the principal alone. In such a case it would be unjust that the agent should be bound, because such was not the contract."

As the reported evidence negatives the idea that the parties intended that the defendants should be individually liable on the contract, and as there is no evidence that they guaranteed their authority or were guilty of any fraud upon the plaintiff, the defendants' motion for a verdict should have been granted.

Exception sustained. Verdict set aside.

All concur.

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NEW YORK COURT OF APPEALS.

GEORGE W. SMYTH, Respt.,
v.
BROOKLYN UNION ELEVATED RAILROAD COMPANY et al., Appts.

(193 N. Y. 335, 85 N. E. 1100.)

Appeal — intermediate affirmance — effect.

1. The unanimous affirmance by the appellate division of what purports to be a finding of fact as to the legal effect of a legal instrument will not prevent a review by the court of appeals of the question of law involved in the construction of the instrument.

Grant — license — construction.

2. The execution by an abutting owner, who also owns the fee of the street, to a corporation operating an elevated railroad therein, of an instrument consenting to the maintenance and operation of the railroad, and releasing it on behalf of the grantor, his successors and assigns, from all demands for compensation for the maintenance and operation of the road, is a grant of an easement in the street, and not a mere license.

Estoppel — release.

3. A release by an abutting property owner who also owns the fee of the street, on behalf of himself and his successors in title, of a corporation operating an elevated railroad therein from any claim for compensation arising from the maintenance and operation of the railroad, estops such successors from claiming compensation for the operation of the road, either in eminent domain proceedings or in an equity suit to enjoin such operation until compensation is paid.

(Chase, J., dissents.)

(November 10, 1908.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for King's County, granting an injunction against the maintenance and operation of a railroad in front of plaintiff's premises until compensation was paid. Modified.

The facts are stated in the opinion.

Mr. Charles L. Woody, with Mr. George D. Yeomans, for appellants:

The consent to the construction and operation is a complete bar to injunctive relief.

White v. Manhattan R. Co. 139 N. Y. 19, 34 N. E. 887; Foote v. Metropolitan Elev. R. Co. 147 N. Y. 371, 42 N. E. 181; Ward v. Metropolitan Elev. R. Co. 152 N. Y. 43, 46 N. E. 319; Conabeer v. New York C. & H. R. R. Co. 156 N. Y. 482, 51 N. E. 402; Mattes v. Frankel, 157 N. Y. 611, 68 Am. St. Rep. 804, 52 N. E. 585; Heimburg v. Manhattan R. Co. 162 N. Y. 355, 56 N. E. 899, 19 App. Div. 180, 45 N. Y. Supp. 999; Paige v. Schenectady R. Co. 178 N. Y. 113, 70 N. E. 213; Storms v. Manhattan R. Co. 178 N. Y. 507, 66 L.R.A. 625, 71 N. E. 3; Hindley v. Manhattan R. Co. 185 N. Y. 342, 78 N. E. 276; Koehler v. New York Elev. R. Co. 9 App. Div. 451, 41 N. Y. Supp. 209; Kornder v. Kings County Elev. R. Co. 41 App. Div. 360, 58 N. Y. Supp. 518; Spink v. Corning, 61 App. Div.

Case Note. — Remedy of abutting owner as affected by his consent to the construction of a railroad or street railway in street.

A full discussion of the question of the remedy of an abutting owner as affected by his consent to the construction of a railroad or street railway in a street is found in a case note to Wolfard v. Fisher, 7 L.R.A. (N.S.) 991. Since the writing of that note, aside from SMYTH v. BROOKLYN UNION ELEV. R. Co., but little authority of value has been found.

In Taylor v. Erie City Pass. R. Co. 37 Pa. Super. Ct. 292, it was held that where an owner of land abutting on a road consents to the occupation of the road by a street railway, and licenses the company "to occupy and extend their line of railway with the necessary turnouts, and operate the same along such road," such license, after the construction of the railway, becomes irrevocable, and the railway company cannot be enjoined from subsequently extending the length of a switch, where it appears that such extension is not unreasonable under the circumstances, and is built in response to the growth of the community.

In Staton v. Atlantic Coast Line R. Co. 147 N. C. 428, 17 L.R.A.(N.S.) 449, 61 S. E. 455, it was held that one who delays seeking an injunction against the operation of a railroad in a public street for a period of seventeen years, until its removal would seriously affect public interests, will be denied such relief.

In Shaw v. New York Elev. R. Co. 187 N. Y. 186, 79 N. E. 984, the writing of the words, "I am in favor of an elevated road over the middle of the street, but not on the walk," upon a paper circulated among property owners, in behalf of the railroad company, underneath a heading which, if subscribed without any qualifications or limitations, would have amounted to a general consent to the construction of the road, was recognized, assuming it to be a consent, as merely a qualified and conditional one, which did not cut off a claim for damages for the subsequent construction and operation of the road upon the sidewalk.

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90, 70 N. Y. Supp. 143; Adee v. Nassau Electric R. Co. 65 App. Div. 539, 72 N. Y. Supp. 992; Shaw v. New York Elev. R. Co. 78 App. Div. 294, 79 N. Y. Supp. 915; Pape v. New York & H. R. Co. 74 App. Div. 182, 77 N. Y. Supp. 725.

The instrument was a grant and not a license, revocable at will.

White v. Manhattan R. Co. and Paige v. Schenectady R. Co. supra; Adee v. Nassau Electric R. Co. 65 App. Div. 529, 72 N. Y. Supp. 992, affirmed in 173 N. Y. 580, 65 N. E. 1113; Geneva & W. R. Co. v. New York C. & H. R. R. Co. 163 N. Y. 228, 57 N. E. 498; Heimburg v. Manhattan R. Co. 162 N. Y. 352, 56 N. E. 899; Southampton v. Jessup, 162 N. Y. 126, 56 N. E. 538; Valentine v. Schreiber, 3 App. Div. 238, 38 N. Y. Supp. 417; Mumford v. Whitney, 15 Wend. 393, 30 Am. Dec. 60.

The release from the payment of any compensation arising from or connected with the maintenance and operation of the railroad is, of itself, a complete bar.

Kirchner v. New Home Sewing Mach. Co. 135 N. Y. 182, 31 N. E. 1104; Jackson ex dem. Rosevelt v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Keane v. Keane, 86 Hun, 159, 33 N. Y. Supp. 250.

Mr. Cyrus V. Washburn, for respondent:

The instrument creates no interest in land, as it gives a more revocable license.

White v. Manhattan Elev. R. Co. 139 N. Y. 19, 34 N. E. 887; Arnold v. Hudson River R. Co. 55 N. Y. 661; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. 127, 81 N. Y. Supp. 1041; Nellis v. Munson, 108 N. Y. 453, 15 N. E. 739; Cronkhite v. Cronkhite, 94 N. Y. 323; Vandenburgh v. Van Bergen, 13 Johns. 212; Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60; Fargis v. Walton, 107 N. Y. 398, 14 N. E. 303; Winne v. Ulster County Sav. Inst. 37 Hun, 349.

The clause as to compensation is a release only of the past or rental damages arising from the maintenance and operation of the road up to the date of the instrument.

Pond v. Metropolitan Elev. R. Co. 112 N. Y. 186, 8 Am. St. Rep. 734, 19 N. E. 487; Uline v. New York C. & H. R. R. Co. 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536; Foote v. Metropolitan Elev. R. Co. 147 N. Y. 367, 42 N. E. 181.

Willard Bartlett, J., delivered the opinion of the court:

This is the familiar suit of a property owner for a conditional injunction against the maintenance of an elevated railroad and for damages incurred by reason of its past maintenance and operation. Two pieces of property are involved. As to one of them, the plaintiff's right to recover was undisputed, and it was conceded that he was entitled to an award of $1,000 on account of the damage to that piece. As to the other, however, the defendants relied upon a written instrument, executed by the plaintiff's predecessors in title, as a bar to the action; and the determination of the present appeal depends upon the effect which should be given to that instrument. If it is nothing more than a revocable license, as has been held at special term and by the appellate division, the defendants concede that the judgments below were right. If, on the other hand, this constituted an effective grant of the easements now claimed by the plaintiff, or an estoppel against the plaintiff's claim for relief, the judgment in his favor is too broad so far as the injunction is concerned, and is too large by the sum of $400.

The title of the plaintiff to the property in question, which is situated on Fulton street in the borough of Brooklyn, was derived from the Brooklyn City Railroad Company, and extends to the middle of the street. On the 3d of June, 1893, the Brooklyn City Railroad Company, as party of the first part, executed and delivered to the Kings County Elevated Railroad Company, the predecessor of the defendants, as party of the second part, an instrument in writing, under seal, which recited that the Kings County Elevated Railroad Company then maintained and operated its elevated railroad in front of the premises, and that the Brooklyn City Railroad Company had agreed that it might so maintain and operate the same, and further provided as follows: "Now, therefore, in consideration of the premises and the sum of $1, paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, said party of the first part doth hereby consent that the party of the second part may pass all depots, stables, power stations on the said above-described premises, and maintain its elevated railroad structure on and over said street, and operate its elevated railroad thereon, as the same is now constructed, without compensation therefor to the party of the first part. And the party of the first part, for itself, its successors and assigns, hereby releases and discharges the party of the second part, its successors and assigns, from any and all claims and demands for any such compensation arising from or connected with such maintenance of said structure, and the operation of its railroad, as now constructed and operated." The trial court found that the

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said consent "was not intended as a grant, and gave the defendant no easements or interests in the land involved in this case; that it created a mere license as between the parties thereto, and that the plaintiff is not thereby precluded from maintaining this action as to said premises, and that said elevated railroad was neither constructed nor put in operation upon the faith of said consent." The learned counsel for the respondent insists that, in view of the unanimous affirmance of this finding by the appellate division, the court of appeals is without jurisdiction to review this case. In other words, that we cannot pass upon the legal effect of the instrument of consent. As to this objection, it is only necessary to point out that the finding, although denominated a conclusion of fact, is, except the last clause therein contained, only a statement of conclusions of law. The exception to this finding, therefore, brings up a question of law which can be reviewed in this court.

We are unable to agree with the courts below in the construction which they have placed upon the instrument in question. When that instrument was executed and delivered, the Brooklyn City Railroad Company appears to have been in occupation of the property for its corporate purposes. The Kings County Elevated Railroad Company had erected its elevated railroad structure in front of the premises, and had operated its trains over the same for many years. If the instrument had been intended to be a mere license, revocable at will, it is difficult to perceive any adequate reason for its execution so far as the future was concerned. Thus viewed, it effected no change in the legal relation of the parties. The pre-existing oral license was just as good. When, however, we consider the situation of both parties to the instrument and the language of the paper itself, it seems to us quite clear that it was the intent of the property owner to give much more than a license. The party of the first part consented that the party of the second part might "maintain its elevated railroad structure on and over said street, and operate its elevated railroad thereon, as the same is now constructed, without compensation therefor to the party of the first part." This phrase is vitally significant. "Compensation" is the word used in the constitutional provision which regulates the taking of private property for public use. Const. 1894, art. 1, § 7. The term, as used in this consent, could have no natural application to the release of any claim for past damages. That was dealt with in a subsequent part of the instrument. The phrase indicates that the parties contemplated the continued invasion of the property owner's easements in the street without insisting upon the payment therefor to which the property owner would otherwise have been entitled.

We have here, as in the case of White v. Manhattan R. Co. 139 N. Y. 19, 34 N. E. 887, a full, unconditional, and absolute consent given by the property owner for the maintenance and operation of an elevated railroad in front of his premises. The learned court below, however, distinguished the effect of the release in this case from that in the White Case, in that the plaintiff there was a mere abutter, while, in the present case, the plaintiff's predecessor in title was the owner of the fee. There is doubtless a distinction between the two cases. The mere abutter has only an easement in the street; and, when he gives a consent for the construction and maintenance of the railroad, he releases or abandons so much of the easements as is interfered with or taken by the railroad. Where the abutter also owns the fee of the street in front of his land, the railroad takes from him an easement in the land in the street. But this distinction in circumstance leads to no difference in the effect to be attributed to the consents in the two cases. Both easements of the mere abutter and the fee of the street are alike within the constitutional protection, and neither can be acquired by a railroad company except by the procedure prescribed by the Constitution, unless the owner voluntarily seeks redress in a court of equity. The invasion of the easements of the abutter can be authorized only by grant or prescription for twenty years, and the easement in the fee of the street can be conferred only in the same manner. The same rule of construction should therefore apply to the instruments in both cases. The defendant, it is true, was, at the time of the execution of the instrument, merely a trespasser; but it was not in the situation of an ordinary trespasser. It had the power and authority to maintain its railroad provided it acquired by condemnation the necessary property rights. Of course, it did not intend to abandon its costly structure in the city streets. Neither the parties nor anyone else contemplated such a course of conduct. All understood that practically, though not in law, the abutters, whether owning the fee of the street or not, would obtain not the removal, of the structure, but compensation for their rights. What the plaintiff's predecessor intended to release was the right to compensation, not merely for any past entry, but for the acquisition of its property rights by the railroad company, which would otherwise be compelled to institute condemna-

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tion proceedings to ascertain the amount of that compensation. Assuming, but not conceding, that the instrument would be inoperative as a grant, certainly it was effective as an estoppel for any compensation that might be awarded in condemnation proceedings. The plaintiff can be entitled to no greater relief in this action in equity than he would have been had the defendant instituted proceedings to condemn the property.

The judgment should be modified by excluding from the operation of the injunction that portion of the defendant's railroad in front of the plaintiff's property, running 20 feet from the corner of South Portland avenue, and by reducing the award of damages from $1,400 to $1,000, with costs to the appellants in this court.

Cullen, Ch. J., and Gray, Vann, Werner, and Hiscock, JJ., concur. Chase, J., dissents.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

EMILY H. HATHORN et al., Respts.,
v.
NATURAL CARBONIC GAS COMPANY, Appt.

(194 N. Y. 326, 87 N. E. 504.)

Water — mineral reservoir — waste — injunction.

1. A landowner who has tapped, by wells located on his land, a reservoir of mineral water extending under a large area, will be enjoined from drawing it by means of pumps or other apparatus for the purpose of securing for the market a supply of gas arising from the water, thereby wasting great quantities of the water, and destroying or impairing its flow from springs located on the lands of others, and destroying or impairing the valuable character of the water for purposes for which it had been habitually used.

Same — estoppel.

2. That one has marketed water naturally flowing from springs on his land does not deprive him of the right to equitable relief against the forcible pumping of the water from the common reservoir, and letting it go to waste, for the purpose of securing for sale a gas connected therewith.

Subterranean water — pumping — injunction.

3. A landowner cannot constitutionally be forbidden by the legislature from pumping water or gas arising therefrom from wells located on his property, which reach a common reservoir, absolutely or merely because he thereby interferes with the flow of water from his neighbor's well.

Same — waste.

4. A landowner may constitutionally be forbidden by the legislature to pump from wells located on his property mineral water from a common reservoir reached thereby, for the purpose of securing gas arising therefrom for sale, and to waste the water to the injury of the interests of the public and of the owners of springs on neighboring lands.

Statute — partial invalidity.

5. Provisions of a statute forbidding a landowner to pump mineral water and a gas arising therefrom from wells on his property, absolutely or to the injury of the owners of springs connected with the common reservoir, or so that the flow or quality of the water in any spring or well is diminished, which are unconstitutional, are so disconnected from a provision forbidding the collecting of the gas from the water for sale by pumping it in unnatural quantities and wasting it, to the injury of the public interests, or those of the owners of neighboring wells, that the latter provision can be upheld although the others fall.

Subterranean water — rock wells — discrimination.

6. A statute forbidding the pumping of mineral water and gas arising therefrom from a common reservoir is not invalid as contravening the constitutional provision guaranteeing equal protection of laws, be-

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Case Note. — Constitutionality of statutes to prevent waste of subterranean water, natural gas, or oil.

One phase of the general question as to the constitutionality of legislation passed to promote the conservation of natural resources is touched upon in the note to Opinion of Justices, 19 L.R.A.(N.S.) 422. Another phase is presented by the opinion in HATHORN v. NATURAL CARBONIC GAS CO. and the present note. That opinion, in adopting the view that the landowner may constitutionally be forbidden by the legislature to pump, by means of wells located on his property, mineral water from a common reservoir, for the purpose of securing gas arising therefrom for sale, and the wasting of the water to the injury of the interests of the public and of the owners of springs on neighboring lands, has added much weight to the doctrine already maintained by a number of cases, that the public at large, as well as immediate adjoining landowners, have an interest which may be protected by statute, in those minerals and substances which, from their nature, gather in one subterranean reservoir, and the diminution or consumption of which, taken from any part, reduces correspondingly the common supply.

A case illustrative of this is State v. Ohio Oil Co. 150 Ind. 21, 47 L.R.A. 627, 49 N. E. 809, where it was held, following Townsend v. State, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19,—a case sufficiently set out in HATHORN v. NATURAL CARBONIC GAS CO.,—that a statute making it unlawful to permit the escape of natural gas into

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cause it is applied only to wells bored into rock, where the conditions are such that pumping in the rock wells is less needful than in those sunken in dirt, while it is much more exhaustive and destructive of common rights.

Statute — enforcement — mineral water.

7. The people may maintain a suit to restrain violation of a statute forbidding a wasteful pumping of water and a gas connected therewith from mineral wells, to the injury of the public interests.

Same — individual complainant.

8. Taxpayers who own springs connected with a common reservoir of mineral water have sufficient interest in the preservation of the public rights, apart from mere private relief which they may secure as individuals, to be entitled to maintain an action to enforce a statute forbidding the pumping of the water and gas for sale through well connected with such reservoir, to the injury of public interests, where the pumping results in a waste of an important and valuable natural product, imperils the value of a large amount of property, and interferes with a just and reasonable use by all members of the community of a common supply of the natural product, and tends to precipitate disputes and litigation.

Injunction — preliminary— conflicting evidence.

9. Although some of the facts stated in a complaint for an injunction are denied by affidavits presented on behalf of defendant, the court may, nevertheless, grant a preliminary injunction, if the questions of fact raised are purely for the consideration of the court.

(Haight, J., dissents.)

(February 23, 1909.)

the open air from a well for longer than two days after it is constructed is not unconstitutional. This case, after a second appeal, was affirmed *pro forma* on the authority of the above opinion, in Ohio Oil Co. v. State, 150 Ind. 698, 50 N. E. 1125, which was then taken to the Supreme Court of the United States, where it was affirmed in 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576,— a case also fully set out and reviewed in the HATHORN CASE.

In Com. v. Trent, 117 Ky. 34, 77 S. W. 390, 4 A. & E. Ann. Cas. 209, in construing a statute which was passed to prevent the wasting of petroleum, natural gas, salt water, and to provide for the plugging of all abandoned wells, the court said: "The position that the defendants may do what they please with the gas after it is reduced to possession by them cannot be maintained; for, as the gas goes out of the gasometer, its place is taken by other gas coming from the well. Property is the creation of law. The use of property may be regulated by law. The legislature may protect from waste the natural resources of the state, which are the common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of the gas would be to deprive the state and its citizens of the many advantages incident to its use: that the legislature may prevent this is well settled."

In Hague v. Wheeler, 157 Pa. 324, 22 L.R.A. 141, 37 Am. St. Rep. 736, 27 Atl. 714, it was said, *obiter*, that it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon the subject.

For a case upholding the constitutionality of a statute forbidding the use of natural gas for illuminating purposes in what are known as "flambeau lights," see Townsend v. State, supra, sufficiently reviewed in the HATHORN CASE.

In Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811, it was contended that an act passed for the prevention of the waste and flow of water from artesian wells, and prescribing penalties therefor, and also defining waste and artesian wells, was violative of the Constitution of the United States, and of those sections of the state Constitution which forbid the depriving of property without due process of law. It was held, however, that since the act related to waters the right to the use of which was common to a large portion of the community, and affected the general public right, and the right to legislate in regard to its use and conservation, referable to the police power of the state, the above constitutional provisions had no application. It was also contended that the statute was contrary to that part of the state Constitution forbidding the granting of special privileges or immunities, in that no provision was made as to waters pumped from subterranean sources. The court, in coming to the conclusion that this section of the Constitution was not violated, said: "As we have before attempted to show, no surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the exercise of a right, if, by such exercise, the rights of others are injuriously affected. Nor can an appropriator take more water than he can beneficially use. Hence, it follows that no discrimination is made between parties entitled to the exercise of a common right. Under the act in question, all may exercise their full legal right with reference to this water. As to the right to use any portion of that which belongs to the public, legislative control is applicable; and if, as a matter of fact, public rights are abused by the improper extraction of this public water by means of pumps, it is presumable that the legislature, in the exercise of its proper functions, will, in due time, arrest such waste." It was finally contended that the statute

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APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Third Department, modifying and affirming an order of a Special Term for Saratoga County, restraining defendant from using pumps, etc., for the purpose of increasing the flow of certain subterranean percolating waters and gas from certain deep wells situated on defendant's land. Affirmed.

Statement by Hiscock, J.:

This is an appeal, by permission, on certified questions, from an order of the appellate division, third department, entered September 25, 1908, modifying, and, as modified, affirming, an order of the special term, granting a preliminary injunction against the appellant during the pendency of this action. The action was brought by the respondents as owners of lands in the town of Saratoga Springs, New York, whereon were springs wherefrom naturally flowed waters holding in solution natural mineral salts and an excess of carbonic acid gas, to restrain appellant from accelerating and increasing, by means of pumps and other apparatus, the flow of similar water and gas from their deep wells in said town, and whereby, as claimed, the flow from the springs of the respondents and others was destroyed or diminished. A preliminary injunction was granted by the special term, restraining appellant from performing the acts complained of, and this order, after a modification not substantially affecting its results, was affirmed by the appellate division.

The appellant demurred to the complaint, and, under these circumstances, the appellate division granted leave to appeal, and certified to us the following questions:

(1) Is chapter 429, p. 1221, Laws 1908, a constitutional enactment?

(2) Does the complaint state a cause of action under Stat. 1908, chap. 429, p. 1221?

(3) Does the complaint state a cause of action other than that under the statute hereinafter mentioned?

(4) Did the supreme court have power to grant the preliminary injunction?

The complaint, which is involved in these questions, contains but one count, and is claimed by its framers to set forth a cause

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was violative of that state constitutional provision forbidding the passing of local or special laws, and of the provision that all laws of a general nature shall have uniform operation; but since, as the court said, the distinction between wells having a natural flow and those not so constituted is natural, and reasonably indicates the necessity or propriety of legislation restricting the former class, and the constitutional provision as to uniformity is satisfied when the law operates uniformly upon all persons standing in the same category, the statute was also not violative of the above two constitutional provisions.

However, that the police power does not justify legislation prohibiting the waste of water from artesian wells, to the injury of the wells of neighboring proprietors, was held, in Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354, a case sufficiently set out and reviewed in HATHORN v. NATURAL CARBONIC GAS CO. The court, in this case, after reviewing the Indiana cases (supra) said: "However sound this principle may be as applied to natural gas or oil, we have failed to find an authority in the books that holds that percolating waters in the ground are the common property of surface owners. On the other hand, the holdings are unanimous to the effect, either that such water is the absolute property of the landowner in whose land it happens to be, or that the right of the landowner to use or divert it while in his land is an absolute right." In noting this distinction between natural gas or oil and percolating waters, the court cited Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 155 Ind. 461, 50 L.R.A. 768, 57 N. E. 912, where, in holding in substance that the natural right of landowners in natural gas is simply to use such portion as will, by natural laws of flowage, rise in their wells, and not to increase that flow by artificial means, to the detriment of the flow of others, it was said: "Natural gas is a fluid mineral substance, subterraneous in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes: the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent. If it could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the rights of landowners and other persons interested in it should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar fluid." This distinction between natural gas and subterranean waters, as set out in this last Indiana case, if well founded, said the court, in Huber v. Merkel, supra, deprives all the prior Indiana cases on the subject of the control of the use of natural gas of any significance as applied to the use of subterranean waters.

As to constitutionality of legislation restricting or regulating the right to cut timber on private land, see case note to Opinion of Justices, 19 L.R.A.(N.S.) 422.

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of action both at common law and under the statute referred to. The substance of the material allegations purporting to set forth a cause of action at common law is as follows: Aside from formal matters, they assert the ownership by plaintiffs of certain premises in the village of Saratoga Springs, on which, for about forty years, there has been a spring of mineral water, holding in solution natural mineral salts and an excess of carbonic acid possessing great medicinal virtue and of high value, and that during all this time, and until the commission by the defendant of the alleged wrongful acts complained of, said spring naturally and freely flowed to the surface in a continuous stream; that plaintiffs, during many years, have been engaged in bottling and marketing the products of said spring, incurring great expense therein, and deriving great profit therefrom; that said carbonic acid gas is, for various specified reasons, a necessary and valuable element in said waters; that, prior to the commencement of this action, the defendant, being the owner of a tract of land situate in said village nearly a mile distant from plaintiffs' premises, drilled thereon several deep wells into the rock beneath the surface of its lands, and by means of "powerful pumps, suctions, and other artificial contrivances" accelerated and increased the flow from said wells of mineral waters and carbonic acid gas similar to those produced at plaintiffs' spring, whereby they were enabled to, and did, draw and secure an unreasonable amount of water and gas; that in each case such waters and gas were drawn from a supply percolating through the rocks under the surface of the land, and that the waters and gas thus percolating under the respective tracts of the parties to this suit, as well as through a large additional area where other springs were located, were part of a single system, and constituted one common source of supply for all the wells and springs; that the effect of defendant's acts in accelerating and forcing the flow of water and gas from its wells by such artificial means has been to seriously affect and decrease the flow of water and gas at the springs of plaintiffs, and of other people throughout the town, and to depreciate the character and quality of the water produced thereat; that defendant has not utilized the water and gas thus drawn by it from its wells in connection with or in increasing the enjoyment of its land, or for any purpose connected therewith, but has extracted from the water the carbonic acid gas, which it has marketed generally throughout the country, turning the water containing the other minerals in great quantities to waste; that, by reason of these various acts, the plaintiffs have been greatly damaged.

In addition to these allegations there are various others, which, in connection with them, are claimed to set forth a cause of action under chapter 429, p. 1221, Laws 1908. This act is entitled, "An Act for the Protection of the Natural Mineral Springs of the State, and to Prevent Waste and Impairment of Its Natural Mineral Waters." It contains, in substance, the following prohibitions: (1) Against pumping or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow, of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or, by any artificial contrivance whatsoever, in any manner accelerating the natural flow, or producing an unnatural flow, of natural carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock; (2) against performing the acts enumerated in the foregoing provision when the effect will be to diminish, retard, impair, etc., "the natural flow from any mineral spring or any mineral well belonging to any other person or corporation," or "the quality of its waters . . . or the quantity of its carbonic acid gas or mineral ingredients;" (3) against performing the acts enumerated in the first provision for the purpose of extracting, collecting, compressing, liquefying, or vending the carbonic acid gas as a commodity otherwise than in connection with the mineral water; (4) against "the doing of any act or thing whatsoever, whereby the natural flow from any spring or well" of the character described is diminished, retarded, etc.; said act further provides that any citizen of the state may maintain an action to restrain any person or corporation from committing any of the prohibited acts in any city or town in which said citizen is a taxpayer, etc. The substantial allegations, in addition to those already summarized, by which the plaintiffs seek to make out a cause of action under this statute, allege, in substance, their qualifications as taxpayers; a violation in terms by defendant of each of the prohibitions of the statute above quoted; that there is a special pressure of gas in the rock strata into which defendant's wells are bored, causing water and gas to flow to the surface, which is not exerted in the soil above the rocks, and that the withdrawal of gas from such strata tends to destroy the flow of the springs and impair the quality of the water; that, in consequence of the mineral springs of plaintiffs and other persons in

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said town, a large amount of money has been invested in Saratoga Springs, in the way of hotels and boarding houses, hospitals and sanitariums, for the accommodation of visitors seeking health from the use of said mineral waters, and employment has been given to a large number of people; that the people at large are interested in the maintenance and preservation of such springs; that, by the unlawful acts of the defendant, the flow of plaintiffs' spring and that of other springs throughout the town has been injuriously affected and the quality and value of the waters flowing therefrom impaired and a large amount of water wasted; that, by reason of these facts, many persons have been injured, and will continue to be injured unless said unlawful acts are stopped.

Mr. **Alton B. Parker**, with Messrs. **Morris & Plante**, for appellant:

The plaintiffs are not entitled to equitable relief because of the pumping for commercial purposes, as they have marketed the water flowing from their wells.

Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, affirmed in 160 N. Y. 357, 45 L.R.A. 664, 54 N. E. 787; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Brown & Bros. v. Illius, 27 Conn. 84, 71 Am. Dec. 49; Greenleaf v. Francis, 18 Pick. 117; Davis v. Spaulding, 157 Mass. 431, 19 L.R.A. 102, 32 N. E. 650; Frazier v. Brown, 12 Ohio St. 294; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Ocean Grove Camp Meeting Asso. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Southern P. R. Co. v. Dufour, 95 Cal. 615, 19 L.R.A. 92, 30 Pac. 783; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 250, 5 L.R.A. 731, 18 Atl. 724; People's Gas Co. v. Tyner, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59; Brown v. Spilman, 155 U. S. 670, 39 L. ed. 305, 15 Sup. Ct. Rep. 245; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 676; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 809; Ohio Oil Co. v. Indiana, 177 U. S. 208, 44 L. ed. 738, 20 Sup. Ct. Rep. 576; Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S. W. 328.

The enforcement of the statute against the defendant would deprive it of its property without due process of law, and without just compensation, and would impair a vested right.

Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. 25 Mont. 41, 63 Pac. 825; Cooley, Const. Lim. 7th ed. p. 507; Westervelt v. Gregg, 12 N. Y. 212, 62 Am. Dec. 160; Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Wright v. Hart, 182 N. Y. 341, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Frank L. Fisher Co. v. Woods, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836; People v. Gillson, 109 N. Y. 399, 4 Am. St. Rep. 465, 17 N. E. 343; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354.

The statute does not affect alike all persons engaged in the business of procuring mineral water and carbonic acid gas, as it applies only to those wells bored in rock.

State v. Hogan, 63 Ohio St. 202, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; People v. Gillson and Huber v. Merkel, supra.

The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations.

Mugler v. Kansas and Lawton v. Steele, supra; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Health Dept. v. Trinity Church, 145 N. Y. 39, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Colon v. Lisk, 153 N. Y. 196, 60 Am. St. Rep. 609, 47 N. E. 302; Frank L. Fisher Co. v. Woods, supra; Wynehamer v. People, 13 N. Y. 378; Wright v. Hart, 182 N. Y. 344, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263.

Mr. **Edgar T. Brackett**, by permission of court, for New York Carbonic Acid Gas Company et al.:

An owner of land may pump percolating waters without restraint.

Bloodgood v. Ayers, 108 N. Y. 405, 2 Am. St. Rep. 443, 15 N. E. 433; Gould, Waters, 3d ed. § 280, p. 555; Angell, Watercourses, 7th ed. 162, § 114a; Pixley v. Clark, 35 N. Y. 527, 91 Am. Dec. 72; Acton v. Blundell, 12 Mees. & W. 324; Delhi v. Youmans, 50 Barb. 318, 45 N. Y. 363, 6 Am. Rep. 100; Bliss v. Greeley, 45 N. Y. 675, 6 Am. Rep. 157; Johnstown Cheese Mfg. Co. v. Veghte, 69 N. Y. 22, 25 Am. Rep. 125; Van Wyckle v. Brooklyn, 118 N. Y. 428, 24 N. E. 179; Phelps v. Nowlen, 72 N. Y. 43, 28 Am. Rep. 93; Barkley v. Wilcox, 86 N. Y. 147, 40 Am. Rep. 519; Greenleaf v. Francis, 18 Pick. 117; Miller v. Black Rock Springs Improv. Co. 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; Lybe's Appeal, 106 Pa. 626, 51 Am. Rep. 542; Hanson v.

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McCue, 42 Cal. 303, 10 Am. Rep. 299; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 250, 5 L.R.A. 731, 18 Atl. 724; Brown v. Vandergrift, 80 Pa. 147.

The act is not a legitimate exercise of the police power.

Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Colon v. Lisk, 153 N. Y. 197, 60 Am. St. Rep. 609, 47 N. E. 302; Wright v. Hart, 182 N. Y. 344, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; People v. Gillson, 109 N. Y. 401, 4 Am. St. Rep. 465, 17 N. E. 343; Re Jacobs, 98 N. Y. 108, 50 Am. Rep. 636; Cooley, Const. Lim. 4th ed. 719; Com. v. Alger, 7 Cush. 84; Coe v. Schultz, 47 Barb. 69; People ex rel. Appel v. Zimmerman, 102 App. Div. 111, 92 N. Y. Supp. 497; Freund, Pol. Power, pp. 58. 61; Marbury v. Madison, 1 Cranch. 137, 2 L. ed. 60; Plessy v. Ferguson, 163 U. S. 550, 41 L. ed. 260, 16 Sup. Ct. Rep. 1138; Reagan v. Farmers' Loan & T. Co. 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Frank L. Fisher Co. v. Woods, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Brown v. Maryland, 12 Wheat. 439, 6 L. ed. 685.

The act is unreasonable, as being unduly oppressive upon the defendant.

Lawton v. Steele, supra; Colon v. Lisk, 153 N. Y. 196, 60 Am. St. Rep. 609, 47 N. E. 302; Wright v. Hart, supra; Miller v. Horton, 152 Mass. 547, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100.

The defendant will not be prevented from pumping at the demand of persons doing it themselves.

1 Pom. Eq. Jur. §§ 397, 398; York v. Searles, 97 App. Div. 331, 90 N. Y. Supp. 37; Johns v. Norris, 22 N. J. Eq. 110; Wilson v. Bird, 28 N. J. Eq. 353; Bachman v. Harrington, 184 N. Y. 458, 77 N. E. 657.

The statute cannot authorize a person not injured, the people, nor anyone else, taxpayer or otherwise, to maintain an action.

People v. Law, 34 Barb. 508; People v. Albany & S. R. Co. 57 N. Y. 161; Mt. Vernon v. New York Inter Urban Water Co. 115 App. Div. 662, 101 N. Y. Supp. 232; Park v. Modern Woodmen, 181 Ill. 235, 54 N. E. 932; People v. Lowe, 117 N. Y. 190, 22 N. E. 1016; People v. Ingersoll, 58 N. Y. 13, 17 Am. Rep. 178; People v. Booth, 32 N. Y. 397; People v. O'Brien, 111 N. Y. 13, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

The statute works an impairment of property rights, under the 14th Amendment.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Re Jacobs, 98 N. Y. 105, 50 Am. Rep. 636; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 52; Wynehamer v. People, 13 N. Y. 378; Freund, Pol. Power, § 602; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; Re Split Rock Cable Road Co. 128 N. Y. 408, 28 N. E. 506; Re Deansville Cemetery Asso. 66 N. Y. 569, 23 Am. Rep. 86; Re Burns, 155 N. Y. 27, 49 N. E. 246; Varner v. Martin, 21 W. Va. 556; 1 Lewis, Em. Dom. p. 405, § 157; Re Albany Street, 11 Wend. 151, 25 Am. Dec. 618; Embury v. Conner, 3 N. Y. 517, 53 Am. Dec. 325; Forney v. Fremont, E. & M. Valley R. Co. 23 Neb. 468, 36 N. W. 806; Gillan v. Hutchinson, 16 Cal. 153; Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378; Cary Library v. Bliss, 151 Mass. 364, 7 L.R.A. 765, 25 N. E. 92; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894; Coster v. Tide Water Co. 18 N. J. Eq. 63; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Hayes v. Missouri, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; Ritchie v. People, 155 Ill. 105, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 95; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 102, 46 L. ed. 106, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Messrs. **Charles C. Lester** and **J. Newton Fiero**, with Messrs. **Rockwood, Scott, & McKelvey**, for respondents:

The act does not invade any property rights of the defendants.

Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, affirmed in 160 N. Y. 357, 45 L.R.A. 664, 54 N. E. 787; Forbell v. New York, 47 App. Div. 371, 61 N. Y. Supp. 1005; affirmed in 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; Hathron v. Dr. Strong's Saratoga Springs Sanitarium, 55 Misc. 445, 106 N. Y. Supp. 553; Gagnon v. French Lick Springs Hotel Co. 163 Ind. 687, 68 L.R.A. 175, 72 N. E. 849; Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766; Richmond Natural Gas Co. v. Enterprise Natural Gas Co. 31 Ind. App. 222, 66 N. E. 782; State v. Ohio Oil Co. 150 Ind. 21, 47 L.R.A. 632, 49 N. E. 809; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Jones v. Forest Oil Co. 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074; Brown v. Vandergrift, 80 Pa. 142.

The use the defendant is making of the

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mineral water it pumps is outside the scope of its rights.

Forbell v. New York, 164 N. Y. 526, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10.

The act does not deny to persons the equal protection of the laws.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; State v. Hogan, 63 Ohio St. 202, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Jones v. Brim, 165 U. S. 184, 41 L. ed. 679, 17 Sup. Ct. Rep. 282; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; Soon Hing v. Crowley, 113 U. S. 705, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; Des Moines v. Keller, 116 Iowa, 648, 57 L.R.A. 243, 93 Am. St. Rep. 268, 88 N. W. 827; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697.

But, if the statute creates classes, its classification is reasonable, and neither unnecessary nor arbitrary.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Bacon v. Walker, 204 U. S. 316, 51 L. ed. 501, 27 Sup. Ct. Rep. 289.

The act is a valid exercise of the police power vested in the legislature, as its purpose and effect are to prevent the waste and destruction of the natural resources of the state.

Cooley, Const. Lim. 572; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 605, 1 Am. St. Rep. 893, 14 N. E. 820; Com. v. Alger, 7 Cush. 85; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 592 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Bacon v. Walker, 204 U. S. 312, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Hudson County Water Co. v. McCarter, 209 U. S. 355, 52 L. ed. 831, 28 Sup. Ct. Rep. 529; Kansas v. Colorado, 185 U. S. 142, 46 L. ed. 845, 22 Sup. Ct. Rep. 552, 206 U. S. 99, 51 L. ed. 975, 27 Sup. Ct. Rep. 655; Georgia v. Tennessee Copper Co. 206 U. S. 238, 51 L. ed. 1044, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; License Cases, 5 How. 504, 12 L. ed. 256; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; People ex rel. Hill v. Hesterberg, 184 N. Y. 135, 3 L.R.A.(N.S.) 163, 76 N. E. 1032, 6 A. & E. Ann. Cas. 353; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820, affirmed in 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; Smith v. Maryland, 18 How. 71, 15 L. ed. 269.

The plaintiffs have sufficient interest to maintain the action.

People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; Kansas v. Colorado and Georgia v. Tennessee Copper Co. supra.

Hiscock, J., delivered the opinion of the court:

The object of this action is to restrain the appellant from using pumps and other apparatus for the purpose of accelerating and increasing the flow of subterranean percolating waters and gas through deep wells which it has sunk upon its premises in the town of Saratoga Springs. The respondents insist that their complaint, which has been summarized in the foregoing statement, sets forth a cause of action, both at common law and under the provisions of the statute entitled, "An Act for the Protection of the Natural Mineral Springs of the State, and to Prevent Waste and Impairment of Its Natural Mineral Waters," being chapter 429, p. 1221, Laws 1908. The appellant, on the other hand, by demurrer, challenges it as not setting forth a cause of action on either theory. I shall endeavor, first, to apply to the pleading thus attacked the test of common-law principles, and the question whether, measured by them, it does set forth a cause of action, may be stated in a more concrete form applicable to

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the specific facts involved in this action. Thus stated, it will be whether a landowner has the right, by the use of pumps and other apparatus, greatly to accelerate and increase the natural flow of subterranean percolating mineral waters and gas through deep wells, bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed throughout the country, and with the result of wasting great quantities of mineral waters, and of destroying or impairing the natural flow of such waters and gas in and through the springs of other landowners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used.

The earlier decisions in this and other states laid down the general rule that a landowner might not be enjoined from doing an act on his own premises which resulted in diverting or even wholly destroying the flow of percolating waters from or upon his neighbor's lands. Ellis v. Duncan, 21 Barb. 230; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; Greenleaf v. Francis, 18 Pick. 117; Frazier v. Brown, 12 Ohio St. 294. In thus holding, they but followed the rule laid down in the leading case of Acton v. Blundell, 12 Mees. & W. 324, wherein was approved the principle "which gives to the owner of the soil all that lies beneath his surface . . . that the person who owns the surface may dig thereon, and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action." It will hardly be profitable to consider all of the different reasons which led the courts to adopt these principles, but it is important to bear in mind that they were invariably applying them to cases in each of which the party complained of had interfered with the enjoyment by another of percolating waters by some act which was directly and naturally connected with the improvement or enjoyment of his own land. Thus, in the Acton Case, the act which resulted in the interference complained of consisted in mining operations on a man's own land. In the case of Ellis v. Duncan, the person intercepting the flow of percolating waters on his neighbor's land had done so by digging a trench or ditch and opening a quarry on his premises. No question was presented in these cases of a landowner depleting or exhausting a common supply of underground waters by artificial methods for purposes not in any way connected with the enjoyment or use of his own lands.

But, with the increased demands upon natural resources, such as water, this question did begin to arise. It seems to have been first suggested in England, in the case of Chasemore v. Richards, 7 H. L. Cas. 349. There the question arose whether the flow of percolating waters on another's land might be diverted or destroyed by pumping for purposes of supplying a municipality with water; and, while it was finally held that this might be done, it was only after the right had been seriously questioned. In this state it was first discussed, though not actually involved, in Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, and it was there stated by Judge Hatch that the right in this state had never "been upheld in the owner of land to destroy a stream, a spring, or well upon his neighbor's land, by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land, or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture, or mining, or by structures for business carried on upon the premises." Finally, in the case of Forbell v. New York, 164 N. Y. 522, 526, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, the question reached this court, and the necessity was recognized, not for an alteration of the rules which had been applied by earlier cases to the facts then presented, but rather for an enlargement and extension of such rules, so that they would be applicable to new conditions. That case, for the first time in this state, at least, laid down the rule of the reasonable use of percolating waters, which I think is applicable to, and controlling of, the facts in this case. There the city of New York tapped waters percolating under some lands purchased by it, and which were part of a connected system or supply extending over a large area, and then, by powerful apparatus, so forced the flow of this water as to exhaust the supply which had formerly supplied plaintiff's land, and this was done for the purpose of furnishing a supply of water for the defendant. The court, reviewing many earlier cases passing upon the right of a landowner to enjoy the subsurface waters under his premises, said: "In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the inter-

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ference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells, and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach, that, from their base, the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and, by merchandising it, prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped and their value impaired." The principles thus adopted in the Forbell Case have been fairly upheld in the courts of other states. Gagnon v. French Lick Springs Hotel Co. 163 Ind. 687, 68 L.R.A. 175, 72 N. E. 849; Richmond Natural Gas Co. v. Enterprise Natural Gas Co. 31 Ind. App. 222, 66 N. E. 782; Willis v. Perry, 92 Iowa, 297, 26 L.R.A. 124, 60 N. W. 727; Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766.

The situation described by the complaint in this action is relatively of the same general character as that with which the court dealt in the case cited. One proprietor, by artificial and unusual methods, has so increased the flow of percolating waters and gas upon its lands that it is obtaining a greatly increased proportion of a common supply at the expense of its neighbors; and it is doing this in order to supply a public market for a portion of these products, while the others are wasted. The only important feature distinguishing the cases is the element of waste, present in this one and absent in the earlier one. If these facts, resting now merely on the allegations of a pleading, shall be established by evidence, the trial court will, in my opinion, be fully authorized to draw the conclusion that they disclose a case of unreasonable and improper conduct by the appellant in the premises, and make out in favor of respondents a sufficient cause for appeal to, and relief by, a court of equity. It has been suggested that the Saratoga waters are of a peculiar character, and more in the nature of minerals than waters, and that therefore the use of them by the landowner should be governed by different rules than those which ordinarily apply to the use of subterranean waters. It may be answered to this suggestion that subterranean waters have always been treated as a mineral in the decisions relating to their use and enjoyment, and that no distinction in this case can be predicated upon the peculiar character and quantity of the salts and gases which happen to be in solution. Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 249, 5 L.R.A. 731, 18 Atl. 724; People's Gas Co. v. Tyner, 131 Ind. 277, 280, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59.

The case of Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354, has been pressed on our attention by the appellant, both as sustaining its right at common law to draw water and gas as it has been doing, and also as denying the right of the legislature to pass the statute next to be considered. In that case the court was construing the constitutionality of a law providing, in substance, that any owner or operator of an artesian well, who permitted it to discharge more water than was reasonably necessary for his use, thereby materially diminishing the flow of water in any other artesian well in the same vicinity, should be liable for damages. In the course of its consideration of this law it was stated: "So it seems inevitable that, in this state, at least, the right of a landowner to sink wells, and gather and use percolating waters as he will . . . is a property right, which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of eminent domain, or by the police power;" and it was then held that the statute was not a proper exercise of police power, and was unconstitutional. It is to be said of this case, as greatly distinguishing it from the present one, that it was dealing with the natural flow of percolating waters, and not with a flow unnaturally forced by artificial means. If, however, some of the broad statements made in the opinion should be deemed pertinent to such facts as are disclosed here, and to sustain the right of a proprietor to use at will subterranean waters under the circumstances disclosed in this case, it must be said, as was intimated in the Wisconsin case itself, that the courts of this state and of that one disagree on this subject.

It also is especially urged that respondents have been forcing the flow of water through their springs, and marketing the

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same, and that therefore, under the doctrine of Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10, affirmed, 160 N. Y. 657, 55 N. E. 1097, relief should be denied to them. It is a sufficient answer to the first branch of this contention to say that we are now measuring respondents' rights by the allegations of their complaint, and that such allegations are to the effect that, before the acts complained of, they were enjoying a natural flow of waters through their springs to the surface of the ground, and that it is this which has been interfered with. So far as the second branch is concerned, if they were seeking to restrain the mere marketing of the products of appellant's well, it might be a sufficient answer to say that they were doing the same thing; but I fail to see how the sale of waters naturally flowing in their springs fairly or equitably forbids them from restraining appellant from continuing, by artificial means, the increased and wasteful flow of waters and gas, which is the thing complained of. In conclusion on this branch of the case is may be added that we have not been concerned with the inquiry whether the pleader originally intended to set forth a cause of action at common law, or whether, if he did, he has burdened his statement thereof with many superfluous and inapplicable allegations. The sole question presented to us is whether, between the beginning and end of the complaint, there may be found those allegations which, taken together, make out a case for relief under common-law principles; and that question, as already indicated, should, in my opinion, be answered in the affirmative.

We are next led to a consideration of the question whether respondents' complaint sets forth a cause of action under the statute which has been referred to. Independent of the query whether the respondents as taxpayers have an interest which, even under the authorization of the statute, will enable them to maintain this action, and which will be considered by itself, this question also largely resolves itself into a second one, and that is whether the statute is constitutional. If it be so, aside from the special question suggested, it is not, as I understand it, seriously contended that the complaint does not state a cause of action. In brief, and in addition to various facts already commented on, it alleges the situation of respondents as persons authorized by the statute to bring the action; the violation of each and all of the prohibitions of the statute; resulting waste of great quantities of mineral waters, and impairment, both of the quantity and quality, of the supply of water formerly flowing in the wells of respondents and other persons throughout the Saratoga area; and substantial and extensive injury, present and future, to property owners in that community and to the public. The underlying contention of the appellant with respect to this branch of the case is that the prohibitions of the statute are unconstitutional; first, because they unlawfully deprive it and others of the use and enjoyment of their property; and, second, because, being applicable only to wells driven into the rock, they create unlawful distinctions, and disregard that equality of rights which should prevail amongst citizens and property owners. I shall consider these objections in the order stated.

As already stated, these prohibitions are four in number, and in effect they, respectively, forbid accelerating or increasing the flow of percolating waters or natural carbonic acid gas, such as are found at Saratoga Springs, from wells bored into the rock, by pumping or any artificial contrivances whatsoever, first, absolutely and without qualifications; second, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; third, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same; and, fourth, prohibit the doing of any act whereby the flow or quality of the waters described, or of the carbonic acid gas or other mineral ingredients therein, in any spring or well, is diminished, etc. It was substantially admitted by the respondents that the last prohibition was so broad and unqualified as to be unconstitutional and inoperative, and that, therefore, may be eliminated from our consideration. The constitutionality of the other provisions must substantially be tested by reference to the rights of a landowner in underlying percolating waters, independent of this statute. Those rights have already been discussed; and, if proper conclusions have been reached, we have it that such a landowner may, by pumps or otherwise, draw on the waters percolating under the surface of his lands for a purpose naturally and legitimately connected with the improvement and enjoyment of his lands, even though it interferes with others; but that an unreasonable attempt to force and increase the flow of such waters, for the purpose of diverting them to some use entirely disconnected with such improvement and enjoyment, and whereby the flow of such waters under the lands of others is destroyed or diminished, may be restrained as unlawful. When these rules are applied, it seems to me that the first two prohibitions of the statute must be condemned and the third one upheld. The former not only prohibit pumping waters and gas described where the re-

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sult will be to interfere with the spring of another person, but forbid such acts absolutely, even though they interfere with nobody. Their application is not limited to waste or commercial uses, but, under them, as they are plainly and explicitly written, a landowner in any part of the state is prohibited from extracting, by means of the simplest and most modest contrivance, waters from a well bored on his premises for the most legitimate and natural purpose connected with the use of his premises, provided the well happens to strike rock, and provided the water contains mineral salts and carbonic acid gas; and this whether such act interferes or not, in an infinitesimal degree, with the supply of some other person. It seems to me that this is such a clearly unlawful interference with well-established property rights already discussed that amplification of the idea is unnecessary.

Of course, the principle is not overlooked that the presumption is in favor of the legislative act, although it must be admitted that this presumption is somewhat weakened at this point by the common concession that at least one unconstitutional prohibition has been incorporated into this statute. Nevertheless, applying this presumption to these provisions, and utilizing every reasonable rule of construction in furtherance of the presumption, I am unable to reach a conclusion favorable to them. It will not do to say that they simply contemplate, and have reference to, the particular conditions prevailing at Saratoga Springs, and do not mean what they seem to, for the statute is general, and applies throughout the state. But, even if we accept this view of legislative intent, there must be a limit to those processes of interpretation by which definite expressions may be squared with assumed purposes, and, in my judgment, this limit must be transgressed if we uphold what has been written here. We are bound to consider what may be, as well as what is presently being, effected under a statute. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. The present one, at best, and under a reasonable construction, may at times accomplish unexpected results, and it does not seem best at the outset to attempt to cure plain defects in it by amendments which are more properly a subject for legislative enactment than for creation by judicial interpretation.

The principles which lead to the condemnation of the two provisions just discussed lead to the approval of the third provision as constitutional and proper. As we have seen, the landowner has no vested right unnaturally and unreasonably to force the flow of percolating waters for the purpose of marketing them, or for any purpose not connected with the use or enjoyment of his land. This being so, it was entirely proper for the legislature to adopt the provision in question, defining and regulating the rights of persons desiring to use mineral waters like those at Saratoga Springs, and calculated to prevent such use thereof as would either result in waste of the natural resources of the land, to the injury of general and public interests, or in the unreasonable impairment of the rights of others entitled to draw from a common source. The allegations of the complaint establish that both of these injurious results have flowed from the use which appellant is making of its wells. But, of course, the right of the legislature to adopt such a provision as is now being questioned was not limited to a case of present demonstrated injuries from the acts prohibited. It had the power of discretionary and anticipatory legislation extending over a broad field, and the right, within its limits, to regulate such conduct of its citizens as, being inherently of a more or less indeterminate character, might still result in injury to the public. With the light thrown by the allegations of the complaint on the matter to which this provision relates, I should have no doubt that the latter was within the powers of the legislature, even if it were a new step in the realm of police or regulative legislation. But it is not of a new order, and, for the purpose of maintaining this proposition, I shall not discuss a great variety of legislative enactments held valid, which, by analogy, seem to sustain this one, but shall come immediately to authorities which directly sustain the present exercise of legislative power. In Cooley on Constitutional Limitations, 7th ed. (page 829), it is said: "The police power of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." This doctrine was quoted with approval in People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 605, 1 Am. St. Rep. 893, 14 N. E. 820. In Com. v. Alger, 7 Cush. 85, it is said: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the Con-

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stitution, may think necessary and expedient." In Townsend v. State, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19, there was subject to consideration a statute forbidding "the use of natural gas for illuminating purposes in what are known as 'flambeau lights,'" as a wasteful and extravagant use thereof and dangerous to the public good. The constitutionality of the statute was upheld, and it was said: "While our republican government guarantees the right to pursue one's own happiness, yet that government is charged with the duty of protecting others than appellant in the pursuit of their happiness, and hence the inalienable right to pursue one's own happiness must necessarily be subject to the same right in all others. Hence, when that right is asserted in such a manner as to conflict with the equal right to the same thing in others, it is not an inalienable right, nor a right at all, but is a wrong." In Ohio Oil Co. v. Indiana, 177 U. S. 190, 209, 44 L. ed. 729, 739, 20 Sup. Ct. Rep. 576, it was held that a statute making it unlawful for any person owning or controlling a gas or oil well to permit the flow of gas or oil from such well, except under certain restrictions tending to prevent waste and depletion of the general supply, was constitutional. Many things were said by Justice White in the discussion of that case which are applicable to the present one, but I shall only quote a single paragraph. After reviewing the many cases, he says: "On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right, which belongs to them, without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which, in the nature of things, are united, though separate. It follows from the essence of their right, and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste." Each of the provisions which have been discussed is so complete and independent of the others that there is no difficulty in upholding the statute in respect to one, although we condemn the others.

The second constitutional objection to the statute is that it violates the provision of the Federal Constitution prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws." This contention is based on the fact that the provisions of the statute affect only wells bored or drilled into the rocks. It is not, and of course cannot be, urged that these provisions do not affect equally all wells of a certain general description. The statute simply makes a classification of wells, and it is conceded that this may be done if such classification is based on some sufficient reason, and not on mere caprice or arbitrary election. The rule on this subject, cited with approval by appellant itself, is laid down in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255. Justice Brewer there says: "But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While as a general proposition, this is undeniably true . . . yet it is equally true that such classification cannot be made arbitrarily. . . . These [citing certain illustrations] are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Under the admitted allegations of the complaint, it seems to me clear that a proper basis existed for the classification made by the legislature with respect to wells sunk in the rocks, and prohibiting the pumping and forcing of water and gas to the surface through such wells. In the fifteenth and sixteenth paragraphs of the complaint are allegations that the excess of carbonic acid gas existing in and filling the cavities of the rocks underlying Saratoga Springs, by reason of its confinement therein, exerts a great pressure, which tends to expel the waters and gas from the cavities of said rocks, and cause them naturally to flow to the surface; and that, when the gas escapes from the rocks into the superincumbent soil, its power to exert such pressure is gone, and it ceases to possess any efficiency as an agent to effect the flow of said mineral water; that the mineral springs in said town are dependent for their existence upon the pressure of carbonic acid gas confined in said

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rocks, and the withdrawal of the gas from the latter tends to destroy the force which brings the water into the natural springs, and to destroy the conditions upon which the existence of said springs depend. It thus appears that the conditions prevailing in the wells bored into the rocks are very different from those prevailing in wells sunk into the dirt; that there is less need for pumping in the former than in the latter, and, conversely, that pumping in the former will be much more exhaustive and destructive of common rights than if applied to the shallower wells. The legislature was entitled to anticipate that the same conditions which apply to Saratoga Springs might be applicable to other wells tapping precisely similar springs in other parts of the state, and, within the broad discretion conferred upon it to prevent, not only existing, but anticipated, evils, it clearly was justified in making the distinction between different wells which it did make and the classification complained of. It may be suggested that it would have been legal and much safer to pass a special act dealing with known conditions at Saratoga Springs rather than a general act which may include unexpected situations elsewhere in the state. This was a question of policy, to be settled by the legislature, which may still prevent or cure any undesirable results by appropriate amendment of the present law.

I come next to that contention of the appellant which lies rather outside of the act itself, and which is, that the respondents as taxpayers have no such interest or standing as entitles them to maintain an action under it. They concededly are of the description of persons expressly authorized by the statute to maintain such an action, and I do not understand it to be questioned but that, if the people themselves might maintain this action, they may authorize any person such as the respondents to maintain it in their place and stead. Therefore the question becomes whether the people have a sufficient interest in these matters, so that they might maintain an action to enforce observance of the statute which the legislature, representing them, has passed. It seems to me that their right so to do must be affirmed on two grounds. In the first place, I understand it to have been held, in People v. Ballard, 134 N. Y. 269, 291, 17 L.R.A. 737, 32 N. E. 54, that the legislature by express provision may effectively authorize the people, or a person in their stead, to maintain an action like this, in the absence of some restriction in the Constitution, even though the action should be deemed to relate to private interests. That action was brought by the attorney general in the name of the people, against a domestic business corporation and its trustees, to remove the latter from their position for misconduct, and compel them to account for and pay over to the corporation the value of the property belonging to it, by them unlawfully transferred. One of the questions involved and discussed was whether the attorney general was authorized to bring the action in the name of the people, in his discretion, and this question involved a construction of certain provisions of the Code of Civil Procedure, for the purpose of determining whether they did expressly authorize such action. Judge Vann, writing the majority opinion, concluded "that the legislature intended to authorize the attorney general to bring such an action . . . [as has been described] whenever he was convinced not only that it could be maintained, but also that the interests of the public would be promoted thereby;" and that this question of what the public interests required was committed to the absolute discretion of the attorney general. Judge Landon, writing for the minority, queried: "Is it reasonable to suppose that the legislature, by the statutes in question, intended to authorize such governmental intervention?" and said: "I concede that it is within the legislative power, in the absence of constitutional restriction, to provide for governmental intervention in private affairs." Page 299 of 134 N. Y. It was held that the statute under review conferred upon the attorney general the absolute power, whenever he deemed it wise, to commence an action in the name of the people, although relating to the administration of the private business of a corporation; and that, this being so, the action was well brought. But, in the second place, if we should assume that an action may be brought by the people, or by some person authorized to act for it, only where it appears, as stated by Judge Landon, "that the public interests are thereby to be protected, or in some substantial way promoted, apart from the mere private relief to be awarded to individuals" (page 302 of 134 N. Y.), I think that the requirements of such rule would have been satisfied by the respondents under the admitted facts now before us.

Let us recall very briefly some of the things liable to result from the acts prohibited by the statute in question, as illustrated by experience at Saratoga Springs. The pumping of waters and gas for the purpose of extracting and vending the latter has resulted in the waste of great quantities of waters, and of all the minerals held in solution therein, except some or all of the gas. Thus, it has not only resulted in a waste of an important and valuable natural product, but, because of the connected sources of supply underlying a large area, the rights of

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other persons than the violators desiring to draw from this common source have been unreasonably and unjustly destroyed or diminished, and the value of a large amount of property imperiled. I have already endeavored to point out that this situation was one of sufficient public interest so that the legislature might deal with it, as it has done, by statute. It seems almost necessarily to follow that this protection of public interests would so continue as to permit the people to enforce obedience to its statutes after the same have been passed. But, as an independent proposition, as was pertinently asked by Judge Vann in the Ballard Case, supra, "While the people have no pecuniary interest . . . have they no interests that need protection?" Page 292 of 134 N. Y. Only one answer, in my judgment, can be made to this question when it is asked, and that is that they have a substantial interest in the enforcement of the statute, furnishing an all-sufficient basis for the maintenance of this action. They have an interest in the preservation of natural products like these mineral waters, and it fairly may be said that they have a substantial and enforceable interest in preserving the just and reasonable use, by all the members of a community, of a common supply of a natural product, and in so curtailing the attempts of one or a few to get an unjust proportion thereof that the rights of other members of the community will not be interfered with, and that disputes and litigation shall not be precipitated, and that large amounts of property shall not be endangered.

These principles do not seem to be novel, but, on the other hand, to be sustained by ample authority. The case of Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, has been referred to in other connections. It may be well here to call attention to the fact that the action was brought in behalf of the state by the attorney general, without any relator, to enforce a statute intended to prevent the waste of gas or oil. What was said, however, would amply sustain the right of the state, if questioned, to maintain an action both preventing waste and securing just distribution to collective owners of such mineral waters. Apparently no one doubted the authority of the state to maintain the action, for no such question seems to have been presented. In Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, an action was brought by the attorney general of New Jersey to enforce a statute prohibiting the transportation of water into any other state. Again, the right of the state to maintain such an action does not seem to have been questioned by anyone, but to have been fully affirmed, when it was said: "It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." Page 355 of 209 U. S. If these views are correct, a cause of action has been alleged under the statute.

Some argument has been made that causes of action have been improperly joined in the single count of the complaint before us. No such question is presented to us for consideration, or involved in the questions which are presented.

The fourth and final question which has been certified to us relates to the power of the supreme court to grant the preliminary injunction which issued herein. This order was granted on the pleadings, including the verified complaint, and numerous affidavits. While some of the affidavits presented in behalf of the appellant doubtless denied, and therefore raised an issue of fact with, some of the allegations of the complaint, such questions of fact were purely for the consideration of the court granting the injunction. Resolving them in favor of the respondents, as it was entitled to do, and manifestly did do, the court was fully authorized on the facts, and within the principles which we have approved, to grant the injunction in question.

These views lead to an affirmance of the order appealed from, with costs, and lead us to answer the second, third, and fourth questions which have been certified to us in the affirmative, and the first one in the affirmative to the extent hereinbefore indicated.

Gray, Edward T. Bartlett, Werner, and **Chase, JJ.,** concur.

Cullen, Ch. J., concurs in result.

Haight, J., dissenting:

The facts and history of this case are correctly stated in the opinion of Hiscock, J. This action was brought to restrain the defendant from pumping water from the wells upon its premises, and extracting therefrom the carbonic acid gas which is contained in such waters. At common law the owner of land is entitled to all of the solids that lie beneath the surface, and all of the liquids, other than surface streams, including gas, that percolate or flow through the soil or

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rocks, that he is able to reduce to possession, and to use the same for his own purposes, at his free will and pleasure; and if, in boring a well thereon, he intercepts an underground spring that destroys his neighbor's well, no cause of action arises on the part of his neighbor. Acton v. Blundell, 12 Mees. & W. 324, 351; Chasemore v. Richards, 7 H. L. Cas. 349; Ellis v. Duncan, 21 Barb. 230, affirmed, 26 How. Pr. 601; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Greenleaf v. Francis, 18 Pick. 117; Davis v. Spaulding, 157 Mass. 431, 19 L.R.A. 102, 32 N. E. 650; Frazier v. Brown, 12 Ohio St. 294; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93; Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 249, 5 L.R.A. 731, 18 Atl. 724; Hague v. Wheeler, 157 Pa. 324, 22 L.R.A. 141, 37 Am. St. Rep. 736, 27 Atl. 714; People's Gas Co. v. Tyner, 131 Ind. 277, 280, 16 L.R.A. 443, 31 Am. St. Rep. 450, 31 N. E. 59; Ocean Grove Camp Meeting Assn. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Southern P. R. Co. v. Dufour, 95 Cal. 615, 19 L.R.A. 92, 30 Pac. 783; Brown v. Spilman, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245; Ohio Oil Co. v. Indiana, 177 U. S. 190, 208, 44 L. ed. 729, 20 Sup. Ct. Rep. 576; Angell, Water Courses, §§ 109–114.

It will be observed from the cases cited that the foregoing rule obtains, not only with reference to water which is used for enriching the soil and for domestic purposes, but also to mineral waters, saline, alkaline, and sulphuric, including petroleum oil and gas which percolates or flows through the earth beneath the surface, with but a single exception. In the case of Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, the city of Brooklyn, before it became consolidated with the greater city of New York, had acquired 2 acres of land in the county of Queens, upon which it had constructed a station, in which was sunk a number of wells through which, by means of powerful suction pumps, it had drawn the waters in the earth, not only from its own land, but from a large territory surrounding it, and, by means of conduits, conveyed the water to the city of Brooklyn, where it was sold and distributed to the inhabitants thereof for domestic purposes. In that case it was found as a fact that the effect of the powerful suction pumps was to so lower the underground water table in the lands surrounding that owned by the defendant as to render such lands unfit for cultivation and the growing of crops, thus resulting in great damage to the owners of such lands. This court held, and I think properly, that the facts of that case were so exceptional that they presented a situation not contemplated by the common law or the prior cases recognizing the rights of the landowner to make such use of the water under the soil of the land as he saw fit, and that consequently the owner was entitled to damages; but, in so holding, the court was careful to limit the exception to the peculiar facts of that case, and to reaffirm the common-law rule as to other cases, in order that the owner may have "the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve." Page 526 of 164 N. Y.

Water, as it descends from the clouds, is nearly pure and consists of hydrogen and oxygen. It replenishes the earth, causes vegetation to grow, and becomes an essential part of animal life. It is evaporated by heat or the rays of the sun, becomes a part of the air we breathe, and when condensed it falls upon the earth, enriching the soil, and producing springs, brooks, creeks, and rivers that flow upon the surface. Pure water is colorless, odorless, tasteless, and a transparent liquid. These waters are distinguishable from those which are ordinarily known as "mineral waters," which are impregnated with foreign ingredients, such as gas, sulphur, iron, and salt, which give them a peculiar flavor. The mineral waters that are produced by the springs of Saratoga are impregnated with carbonic acid gas, and hold in solution salts which render them practically useless for domestic purposes, but which possess medical properties beneficial to health when taken in limited quantities. It therefore does not appear to me that the rule adopted in the Forbell Case has any application to that presented by the complaint in this action. The fundamental difference is that, in the former case, the land was dried up by reason of the suction of the water from it, and thus rendered incapable of producing vegetation, to the damage of the owner, while, in this action, the pumping of the water from the seams in the rock does not impair the usefulness of the soil for vegetation, but only tends to deprive the springs and wells upon the premises of the other owners of the gas necessary to make them flow. It is the gas, not the water, that is the bone of contention. It, like natural gas and petroleum oil, has become of great commercial value, and its production a prominent industry. If the rule in the Forbell Case does apply to the facts pre-

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sented in this case, and a person can be restrained from abstracting the gas from the waters which he pumps from his own premises, it would seem to follow that an owner might be enjoined from pumping salt water from his premises for the purpose of extracting the salt, or the pumping of wells for the purpose of extracting petroleum or gas. None of these products are beneficial to the soil, for they are destructive of vegetation, and their only value consists in their being separated from the soil, conveyed away, and marketed for other purposes. To hold that any citizen may so restrain the owner of lands may result in the destruction of many of our great manufacturing establishments, and operate to paralyze some of the most important industries of the country. I think that the rule which prevails with reference to salt water, petroleum, oil, and gas cannot be distinguished in principle from that which should control with reference to the mineral waters of Saratoga Springs. To my mind, the rule which obtains with reference to those commodities is settled by the authorities.

In the case of Hague v. Wheeler, 157 Pa. 324, 22 L.R.A. 141, 37 Am. St. Rep. 736, 27 Atl. 714, the defendant had bored a well upon his premises for the purpose of obtaining gas, but had failed in obtaining it in sufficient quantities to obtain a purchaser thereof for commercial use. The plaintiffs, who were operating gas wells upon adjoining premises, entered upon the defendant's lands and shut in the gas by closing the well. The defendant threatened to remove the cap and permit the gas to escape, and thereupon the plaintiffs brought an action to obtain an injunction to prevent him from so doing. At that time there was no statute in Pennsylvania regulating the use that should be made of gas. The court held that, in the absence of such a statute, an injunction would not issue; that the owner could make such use of the gas that flowed from his well as suited his pleasure; and, if he permitted it to waste, the plaintiff had no cause for complaint. Mr. Justice Williams, in delivering the opinion of the court, further says: "The owner of the surface is an owner downward to the center until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner and with the same results. He cannot estimate the quantity in place of gas or oil as he might of the solid minerals. He cannot prevent its movement away from him towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock, or the coarseness of the sand composing it; but, so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations: He must not disregard his obligations to the public; he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute."

In the case of Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, the state of Indiana, through its attorney general, had filed a complaint against the Ohio Oil Company, charging it with the violation of a statute of the state which required the confining of natural gas within the pipes of the company, and the prevention of its waste. The oil company claimed that the act was violative of the provisions of the Constitution of the United States. Mr. Justice White, in delivering the opinion of the court, states the general rule quoted from the case of Brown v. Spilman, 155 U. S. 665, 669, 670, 39 L. ed. 304–306, 15 Sup. Ct. Rep. 245, 247, to the effect that "petroleum, gas, and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal and other minerals which have a fixed situs cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it, or in it, or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property." He also quotes the rule from the case of Hague v. Wheeler, to which I have referred above, and numerous other cases, and reaches the conclusion that water, petroleum, and gas flowing in subterranean currents are not the subject of property until they are reduced to possession; and then proceeds: "As to gas and

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oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take, from a common source of supply, the two substances which, in the nature of things, are united, though separate. It follows from the essence of their right, and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste." 177 U. S. 190, 209. It is thus apparent that, while the legislature may regulate the use by statute, in the absence of such statute an injunction will not issue under the common law, even though there may be a waste of the product. If, therefore, the mineral waters of Saratoga Springs are subject to the rules which obtain with reference to the other mineral liquids to which I have referred, it would follow that, in the absence of a statute regulating the use of such waters, an injunction would not lie at common law to restrain a landowner from taking, through his own wells, upon his own premises, carbonic acid gas for the purposes of sale.

While the mineral waters of Saratoga Springs are not used for domestic purposes nor to aid vegetation, they, however, possess medical properties which are valuable; and the state, for the benefit of the whole people, may by statute regulate the production of such waters, to the end that the natural springs may be preserved from contamination or destruction. Take, for instance, the springs of Carlsbad, Wiesbaden, the hot springs of Arkansas and of Virginia, the springs of Mt. Clemens, as well as those of Saratoga, which are visited annually by thousands of people and some of whose waters are bottled and shipped broadcast over the land, and are used by thousands upon thousands of our inhabitants for medicinal purposes. Surely the state, under its police powers, may, in the interests of the people, protect such great gifts of nature to mankind. I am, therefore, fully in accord with the views expressed by Judge Hiscock in that portion of his opinion in which he discusses the police powers, and reaches the conclusion that the legislature may, by statute, regulate the use.

I am not, however, able to sustain the validity of chapter 429, p. 1221, Laws 1908. It does not attempt to regulate and preserve the production of the mineral waters of Saratoga Springs in order that the public may enjoy the medicinal properties contained in such waters; but the act, in most specific terms, absolutely prohibits, throughout the entire state, the pumping of waters from wells drilled into the rock for the purpose of extracting the carbonic acid gas contained therein, excepting only the salt reservation at Syracuse and the counties adjoining thereto. The industry is not regulated, but is absolutely prohibited, except as to the reservation mentioned. The defendant, as we have seen, is engaged in that business. It has purchased lands, and constructed a plant thereon, and has bored wells into the rock thereunder, from which it extracts the gas. Its wells do not flow, and consequently a pail of water cannot be taken therefrom, unless by the use of a pump or other artificial means. The water, after the extraction of gas, has no commercial value, and is consequently returned to the earth from which it was taken. If the defendant is prohibited from pumping water, it follows that it is also prohibited from extracting any gas therefrom, or of deriving any benefit from the use of its wells. The gas is of great commercial value, and the industry is an important one. Until the passage of this statute the business was lawful and legitimate. It was neither immoral, a nuisance, nor detrimental to public health, as was the case of Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, and other kindred cases; but was an absolute right of property, which the defendant in good faith had developed by constructing an expensive plant for the extraction of gas, which, after its establishment, the right of extraction has been prohibited by legislative act without any provision for compensation. This, I am of the opinion, should not be tolerated. As was said by Mr. Justice White in the Ohio Oil Co. Case, above referred to (page 209 of 177 U. S.): "The surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property." See also, People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965. Had the defendant's plant been located elsewhere than in the vicinity of Saratoga Springs, no court would

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v.
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(80 Ohio St. 367, 89 N. E. 14.)

License — use of streets — ordinance — validity.

An ordinance adopted by the council of the city of Columbus on the 20th day of March, 1905, "to license and regulate the use of the streets of the city of Columbus . . . by persons who use vehicles thereon," and which provides "that no vehicle shall be used upon the streets of the city of Columbus, Ohio, unless a license to use such vehicle upon said streets has been obtained in accordance with the provisions of this ordinance by the owner, user, or person having control of said vehicles,"—is unreasonable as to owners, users, or controllers of such vehicles who are nonresidents of said city, and who bring the same onto its streets for purposes of pleasure, or on their own private business, but not for hire, and the ordinance, as to such persons, is invalid and cannot be enforced.

(Spear, J., dissents.)

(June 8, 1909.)

ERROR to the Circuit Court for Franklin County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiffs' favor in an action brought to enjoin the enforcement of an ordinance requiring the payment of license fees on all vehicles. Reversed.

Statement by **Price, J.**:

On the 20th day of October, 1906, the plaintiffs in error, fifteen in number, commenced a civil action in the court of common pleas of Franklin county, against the city of Columbus, its mayor, city auditor,

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In Kentz v. Mobile, 120 Ala. 623, 24 So. 952, a vehicle license tax was held to be payable by a manufacturer of bricks, who lived outside the city limits, and who, without charging an extra fee, employed his wagons in hauling and delivering his bricks in the city to persons who bought them. The court said: "He was no more exempt from such a tax than peddlers, brokers, factors, hackmen, and others, who are required to procure a license to exercise their various callings and pursuits, all of whom are required to submit to reasonable exactions; and the city being required to keep its streets in repair, it is but reasonable and just that those who use them with their vehicles, in carrying on a business in the city, whether they reside in its corporate limits or not, shall contribute to their repair by submitting to a reasonable sum for a license."

So, in Mason v. Cumberland, 92 Md. 451, 48 Atl. 136, an ordinance in effect making it unlawful to drive vehicles over the streets of a certain city was held not invalid because it applied to nonresidents using the streets of the city as well as to residents, the complainant in this case being a farmer owning a milk wagon.

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and city treasurer, to enjoin the enforcement, as against the plaintiffs, of a certain ordinance passed by the council of said city on March 20, 1905, entitled: "An Ordinance to License and Regulate the Use of the Streets of the City of Columbus, State of Ohio, by Persons Who Use Vehicles Thereon, and to Repeal Certain Ordinances Therein Named." In their petition they aver that they are "farmers and gardeners owning lands and residing in Franklin county, Ohio, outside the limits of the city of Columbus, and that they are also citizens and electors of Franklin county, Ohio, and bring this action on their own behalf and on behalf of all others similarly situated." They further aver that each of them is the owner of real estate and chattel property in said county outside of said city, "on which they pay all taxes, and that they have paid road assessments for free turnpikes in said county, and that they pay in labor and cash, annually, all road taxes and assessments provided by law; that each of them owns a two-horse farm wagon drawn by two horses, which are occasionally driven into said city for the purpose of delivering farm products of their own raising, and for the purpose of transporting merchandise to their homes which they have purchased in said city for their family use; and that each of them owns a buggy drawn by one horse, and that it is necessary for plaintiffs to use their said vehicles occasionally on said streets, and it is also necessary for them occasionally to use their vehicles on said streets in passing

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under an ordinance declaring that no wagon, dray, or other wheel carriage shall be kept or employed in the city for hire, directly or indirectly, unless the owner or keeper thereof obtain a license therefor, such city could not impose a license tax upon the vehicles of a coal company located in another city, but which had come to the first-named city for the sole purpose of unloading a consignment of coal and delivering it to a party outside the city limits. The court said that to levy such a tax on vehicles of nonresidents whose business or pleasure casually carries them into or through the city would be in derogation of their reserved right to use the highways of the commonwealth, and impose intolerable conditions upon the public, and lead to absurd results.

In Dooley v. Bristol, 102 Va. 232, 46 S. E. 296, an ordinance of a city providing for a license for vehicles carrying freight over the city streets, and providing by another section that any person carrying on a business or profession for which a license is required, without obtaining it, should be fined, was held not applicable to merchants doing business in another state, but delivering merchandise by the use of their own team and vehicle to their customers and to the railway stations located in such city. The court said: "Conceding, for the purposes of this case, that the city of Bristol is authorized by its charter to impose a license tax upon persons hauling freight or passengers over its streets, and that § 78 of its ordinance does impose such tax, no penalty is provided for its violation unless the person charged with such violation is engaged in some business, occupation, or profession for the conduct of which a license is required by the defendant in error. The plaintiffs in error, not being engaged in any business or occupation for the conduct of which the defendant in error has imposed upon them a license tax, do not come within the provisions of § 80; and, as that is the only section authorizing a fine to be imposed upon persons using the streets of the defendant city in violation of the provisions of § 78, the judgment complained of was unauthorized, and should have been set aside by the corporation court, and the warrant dismissed."

A case closely related to the above, although, perhaps, not strictly in point in this note, is Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129, where an ordinance requiring a license of liverymen, and providing that it should include any persons making a contract for hire in town, or to "carry any person with a vehicle out of the town for hire," was held void and not enforceable against a liveryman of another town, who, under contract, went to the licensing city for the purpose of meeting a person and conveying him to another city. The court said: "It is found that the defendant is a resident of the village of Roper, North Carolina, where he is carrying on the livery business, having paid both the state and county tax. There is no allegation that he is carrying on the livery business at Plymouth, or that he is in the habit of taking people out of Plymouth. As far as we can see, this is his first passenger, and he was carrying him under a contract made at Roper, or at Elizabeth City; certainly while neither of the parties were at Plymouth. It seems there is no harm in taking people into Plymouth in a vehicle, provided you put them out and leave them there. People may pay a man to bring them into town, but must walk home unless they conclude to make the town their permanent residence, or can get some local inhabitant to take them away. This may sound like a *reductio ad absurdum*, but it is a plain statement of the possible operation of the ordinance if sustained and carried to its legitimate result. Suppose a man living in Roper were compelled to visit Plymouth for an hour or two on some business. He could hire the defendant to carry him into the town, but he could not return by the same vehicle. Again, a man might hire a conveyance to take him from Roper to some place beyond Plymouth. If Plymouth lay directly in the way, he would have to go out of his way to drive around the town, or get out and hire a Plymouth man to take him the rest of the way. Surely, the legislature never intended any such result, nor should the courts place such a con-

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through the city, and to convey their children to the public schools and university;" further, "that it is necessary for them to come to the city of Columbus semiannually for the purpose of paying their taxes, also for rendering jury services if their names be drawn from the jury wheel, or to market the products of their farms and gardens; and that the nearest, best, and only convenient market for the sale of the products of their farms, or for them to buy merchandise for their family use, is in the city of Columbus, and that it is necessary for them, in paying their taxes, or rendering jury services, or in passing through said city, or in attending said schools . . . or in purchasing and securing supplies for their own sustenance, to bring their vehicles within the corporate limits of said city of Columbus, and to use their vehicles on said streets."

The petition sets out the provisions of said ordinance, § 2 of which provides that "no vehicle shall be used upon the streets of said city of Columbus, Ohio, unless a license to use such vehicle upon the streets has been obtained in accordance with the provisions of this ordinance by the owner, user, or person having the control of said vehicle." Section 3 provides "that any person who shall use, or, being the owner or controller thereof, shall permit to be used, any vehicle upon the streets of the said city of Columbus, Ohio, contrary to the provisions of this ordinance, shall be guilty of an offense, and, upon conviction thereof, shall be punished in the manner hereinafter provided." Section 4 provides the steps to be taken to obtain a license to use the streets, and the certificate to be issued in pursuance of the payment of the license fee, and further provides that "each applicant for a license shall, before he is entitled to receive the same, pay to the city treasurer the proper annual license fee, or the proportion thereof, as hereinafter provided." The fifth (5) section fixes the annual license fee as follows:

1.—On each barouche, sulky, cab, coupé, buggy, runabout, carriage, trap, surrey, or phaeton drawn by one horse	$ 1 50
2.—On each one-horse vehicle not before mentioned	2 00
3.—On each runabout, cab, coupé coach, barouche, buggy, carriage, surrey, trap, or phaeton drawn by two horses	3 50
4.—On each two-horse vehicle not before mentioned	6 00
5.—On each vehicle drawn by three horses	8 00
6.—On each vehicle drawn by four horses	10 00
7.—On each vehicle drawn by more than four horses	10 00
8.—On each automobile, locomobile, autocar, or similar vehicle used by one or two persons	5 00
9.—On each automobile, locomobile, autocar, or similar vehicle, used by three or more persons	7 50
10.—On each automobile, locomobile, autocar, or similar vehicle, used in hauling goods or freight	7 00
11.—On each motorcycle or autocycle	2 00
12.—On each push cart	1 00
13.—On each bicycle	50
14.—On each vehicle hauling a street piano or street organ	1 00

Section 6: "That each license issued in accordance with the provisions hereof shall expire on the last day of December following its issuance." Provision follows for procuring license during the remainder of the current year, and the amount to be paid therefor. Tags or checks of certain material must be used by the licensee in a certain place or displayed in a certain manner. Section 12 provides that "the money paid into the city treasury from said license fees shall be credited to a fund to be known as the 'vehicle fund,' and shall be first applied to the expenses of issuing said licenses and furnishing said numbers and tags, and then,

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struction upon the law as to legalize such action. It would require a liveryman who had paid all the taxes at his home to pay an additional tax in every town to which he happened to send a vehicle, even if only once a year."

So, in New York v. Hexamer, 59 App. Div. 4, 69 N. Y. Supp. 198, an ordinance providing for the licensing of public cartmen, truckmen, hackmen, etc., was held not to apply to a person engaged in conducting a livery stable in another state, who, at intervals, sent his carriages to the licensing city for the sole purpose of meeting the steamers of a transatlantic line, and conveying the passengers to their respective destinations.

There is another class of cases, although not strictly in point in this note, in which it was contended that the particular ordinance was invalid because it failed to provide for the taxing of vehicles of nonresidents or a certain class of nonresidents who habitually use the streets of the city. Several cases, however, among possibly others, have held that the failure to include the vehicles of nonresidents or those of a class of nonresidents did not render the ordinance invalid. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027; Sterling v. Bowling Green, 26 Ohio C. C. 581; Ft. Smith v. Scruggs, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679.

For cases on validity of license tax on vehicles used in business for which a general occupation tax is required, see case note to Newport v. Fitzer, 21 L.R.A.(N.S.) 279.

Discrimination as to amount of tax or license fee on different vehicles, as affecting validity of tax, see case notes to Waters-Pierce Oil Co. v. Hot Springs, 16 L.R.A. (N.S.) 1035, and Fiscal Ct. v. F. & A. Cox Co. 21 L.R.A.(N.S.) 83.

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under an ordinance declaring that no wagon, dray, or other wheel carriage shall be kept or employed in the city for hire, directly or indirectly, unless the owner or keeper thereof obtain a license therefor, such city could not impose a license tax upon the vehicles of a coal company located in another city, but which had come to the first-named city for the sole purpose of unloading a consignment of coal and delivering it to a party outside the city limits. The court said that to levy such a tax on vehicles of nonresidents whose business or pleasure casually carries them into or through the city would be in derogation of their reserved right to use the highways of the commonwealth, and impose intolerable conditions upon the public, and lead to absurd results.

In Dooley v. Bristol, 102 Va. 232, 46 S. E. 296, an ordinance of a city providing for a license for vehicles carrying freight over the city streets, and providing by another section that any person carrying on a business or profession for which a license is required, without obtaining it, should be fined, was held not applicable to merchants doing business in another state, but delivering merchandise by the use of their own team and vehicle to their customers and to the railway stations located in such city. The court said: "Conceding, for the purposes of this case, that the city of Bristol is authorized by its charter to impose a license tax upon persons hauling freight or passengers over its streets, and that § 78 of its ordinance does impose such tax, no penalty is provided for its violation unless the person charged with such violation is engaged in some business, occupation, or profession for the conduct of which a license is required by the defendant in error. The plaintiffs in error, not being engaged in any business or occupation for the conduct of which the defendant in error has imposed upon them a license tax, do not come within the provisions of § 80; and, as that is the only section authorizing a fine to be imposed upon persons using the streets of the defendant city in violation of the provisions of § 78, the judgment complained of was unauthorized, and should have been set aside by the corporation court, and the warrant dismissed."

A case closely related to the above, although, perhaps, not strictly in point in this note, is Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129, where an ordinance requiring a license of liverymen, and providing that it should include any persons making a contract for hire in town, or to "carry any person with a vehicle out of the town for hire," was held void and not enforceable against a liveryman of another town, who, under contract, went to the licensing city for the purpose of meeting a person and conveying him to another city. The court said: "It is found that the defendant is a resident of the village of Roper, North Carolina, where he is carrying on the livery business, having paid both the state and county tax. There is no allegation that he is carrying on the livery business at Plymouth, or that he is in the habit of taking people out of Plymouth. As far as we can see, this is his first passenger, and he was carrying him under a contract made at Roper, or at Elizabeth City; certainly while neither of the parties were at Plymouth. It seems there is no harm in taking people into Plymouth in a vehicle, provided you put them out and leave them there. People may pay a man to bring them into town, but must walk home unless they conclude to make the town their permanent residence, or can get some local inhabitant to take them away. This may sound like a *reductio ad absurdum*, but it is a plain statement of the possible operation of the ordinance if sustained and carried to its legitimate result. Suppose a man living in Roper were compelled to visit Plymouth for an hour or two on some business. He could hire the defendant to carry him into the town, but he could not return by the same vehicle. Again, a man might hire a conveyance to take him from Roper to some place beyond Plymouth. If Plymouth lay directly in the way, he would have to go out of his way to drive around the town, or get out and hire a Plymouth man to take him the rest of the way. Surely, the legislature never intended any such result, nor should the courts place such a con-

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through the city, and to convey their children to the public schools and university;" further, "that it is necessary for them to come to the city of Columbus semiannually for the purpose of paying their taxes, also for rendering jury services if their names be drawn from the jury wheel, or to market the products of their farms and gardens; and that the nearest, best, and only convenient market for the sale of the products of their farms, or for them to buy merchandise for their family use, is in the city of Columbus, and that it is necessary for them, in paying their taxes, or rendering jury services, or in passing through said city, or in attending said schools . . . or in purchasing and securing supplies for their own sustenance, to bring their vehicles within the corporate limits of said city of Columbus, and to use their vehicles on said streets."

The petition sets out the provisions of said ordinance, § 2 of which provides that "no vehicle shall be used upon the streets of said city of Columbus, Ohio, unless a license to use such vehicle upon the streets has been obtained in accordance with the provisions of this ordinance by the owner, user, or person having the control of said vehicle." Section 3 provides "that any person who shall use, or, being the owner or controller thereof, shall permit to be used, any vehicle upon the streets of the said city of Columbus, Ohio, contrary to the provisions of this ordinance, shall be guilty of an offense, and, upon conviction thereof, shall be punished in the manner hereinafter provided." Section 4 provides the steps to be taken to obtain a license to use the streets, and the certificate to be issued in pursuance of the payment of the license fee, and further provides that "each applicant for a license shall, before he is entitled to receive the same, pay to the city treasurer the proper annual license fee, or the proportion thereof, as hereinafter provided." The fifth (5) section fixes the annual license fee as follows:

1.—On each barouche, sulky, cab, coupé, buggy, runabout, carriage, trap, surrey, or phaeton drawn by one horse	$ 1 50
2.—On each one-horse vehicle not before mentioned	2 00
3.—On each runabout, cab, coupé coach, barouche, buggy, carriage, surrey, trap, or phaeton drawn by two horses	3 50
4.—On each two-horse vehicle not before mentioned	6 00
5.—On each vehicle drawn by three horses	8 00
6.—On each vehicle drawn by four horses	10 00
7.—On each vehicle drawn by more than four horses	10 00
8.—On each automobile, locomobile, autocar, or similar vehicle used by one or two persons	5 00
9.—On each automobile, locomobile, autocar, or similar vehicle, used by three or more persons	7 50
10.—On each automobile, locomobile, autocar, or similar vehicle, used in hauling goods or freight	7 00
11.—On each motorcycle or autocycle	2 00
12.—On each push cart	1 00
13.—On each bicycle	50
14.—On each vehicle hauling a street piano or street organ	1 00

Section 6: "That each license issued in accordance with the provisions hereof shall expire on the last day of December following its issuance." Provision follows for procuring license during the remainder of the current year, and the amount to be paid therefor. Tags or checks of certain material must be used by the licensee in a certain place or displayed in a certain manner. Section 12 provides that "the money paid into the city treasury from said license fees shall be credited to a fund to be known as the 'vehicle fund,' and shall be first applied to the expenses of issuing said licenses and furnishing said numbers and tags, and then,

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struction upon the law as to legalize such action. It would require a liveryman who had paid all the taxes at his home to pay an additional tax in every town to which he happened to send a vehicle, even if only once a year."

So, in New York v. Hexamer, 59 App. Div. 4, 69 N. Y. Supp. 198, an ordinance providing for the licensing of public cartmen, truckmen, hackmen, etc., was held not to apply to a person engaged in conducting a livery stable in another state, who, at intervals, sent his carriages to the licensing city for the sole purpose of meeting the steamers of a transatlantic line, and conveying the passengers to their respective destinations.

There is another class of cases, although not strictly in point in this note, in which it was contended that the particular ordinance was invalid because it failed to provide for the taxing of vehicles of nonresidents or a certain class of nonresidents who habitually use the streets of the city. Several cases, however, among possibly others, have held that the failure to include the vehicles of nonresidents or those of a class of nonresidents did not render the ordinance invalid. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027; Sterling v. Bowling Green, 26 Ohio C. C. 581; Ft. Smith v. Scruggs, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679.

For cases on validity of license tax on vehicles used in business for which a general occupation tax is required, see case note to Newport v. Fitzer, 21 L.R.A.(N.S.) 279.

Discrimination as to amount of tax or license fee on different vehicles, as affecting validity of tax, see case notes to Waters-Pierce Oil Co. v. Hot Springs, 16 L.R.A. (N.S.) 1035, and Fiscal Ct. v. F. & A. Cox Co. 21 L.R.A.(N.S.) 83.

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if any remain, shall be used only for the actual repair of the streets of the said city of Columbus, Ohio." It is provided in § 15 that any person using any vehicle upon said streets without a license, or without a check or tag attached thereto, etc., as required by the ordinance, shall be guilty of an offense. Section 16 provides "that any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five dollars ($5) and not more than fifty dollars ($50), and shall pay the costs of prosecution."

The petition protests the validity of said ordinance on several grounds, among which are: (1) That it was enacted for the purpose of raising revenue, and not for the regulation of the use of the streets, and is therefore a tax for revenue. (2) It discriminates against farmers and gardeners who raise and sell the products of their own farms and gardens, in favor of brewery wagons, coal wagons, heavy drays, transfer wagons, and trucks carrying heavy loads and used constantly upon the streets, against the vehicles with light loads used occasionally upon the streets; that it is unjust, unfair, unreasonable, and exorbitant, in restraint of trade, and is against public policy. (3) It is unconstitutional and void, and is not of uniform operation. (4) That the defendants construe said ordinance so as to apply to the plaintiffs, and threaten to arrest plaintiffs if they use said streets without said license and paying for the same. The petition prays that defendants be enjoined from enforcing said ordinance against plaintiffs and against other farmers and gardeners similarly situated who market the products of their own farms and gardens in said city, etc.

The answer of the city admits the facts set out in the petition,—but not the legal conclusions therein,—and avers that, unless restrained, it will enforce said ordinance or so much as is valid, and that it had taken the official opinion of the city solicitor as to its enforcement against persons living outside said city, and as to whether any of them could be excepted from its operation. The city, so the answer says, being in doubt about the soundness of the opinion rendered by the solicitor, prays this court for a construction of said ordinance as to its validity and scope in relation to such nonresidents of the city as the plaintiffs. On hearing, the court of common pleas found the ordinance to be constitutional, but that it does not apply to or embrace nonresidents of the city, and that the plaintiffs and all farmers and gardeners similarly situated are entitled to the relief prayed for.

The case was taken on appeal to the circuit court and there tried. Besides the admissions found in the pleadings, the following facts were agreed upon: (1) The amount of public funds of the city of Columbus required per annum to furnish the necessary clerical services, the license blanks, tags, and numbers to issue the license, and to put into operation ordinance 21,927, will amount to $3,000 per annum, and no more. (2) Between August 13 and November 8, 1906, both dates included, licenses have been procured by owners of vehicles within the city limits as follows: One-horse buggy, 2,649; one-horse wagon, 3,167; two-horse buggy, 144; two-horse wagon, 1,294; three-horse wagon, 9; four or more horse wagon, 7; automobile, one or more persons, 212; automobile, three or more persons, 218; automobile for freight or goods, 8; motor or auto cycle, 7; push cart, 108; bicycle, 2,935; street piano or organ, 7. (3) When petition was filed, there were in Franklin county about 4,000 farmers and gardeners outside the limits of the city of Columbus who raise and market the products of their own farms and gardens, and that each owns on an average one two-horse wagon, and one buggy, pleasure carriage, or spring wagon drawn by one horse. There are other farmers and gardeners living in counties adjoining Franklin, who haul the products of their farms and gardens to the city of Columbus. (4) The use of vehicles mentioned in the ordiance tends to wear out said streets, and necessitates the constant care and repair thereof, the actual cost of which cannot be accurately determined, but will not be less than $50,000. (5) Money is required annually for police regulation, because of the use of said streets by vehicles, to prevent fast and reckless driving, blockades, and protect pedestrians at crossings, cost of same estimated at $30,000 per year. A license is not exacted from the owners of street cars operated in the city. Coal wagons and beer wagons drawn by two horses on said streets run on an average over ten hours per day and draw maximum loads at times exceeding 6 tons. Two-horse farm and garden wagons that are used on the streets draw maximum loads of about 2 tons. The circuit court found the foregoing to be the facts, and held as conclusions of law: "(1) That said ordinance does not contravene the Constitution of the state of Ohio or of the United States. (2) Its terms and conditions apply to nonresidents as well as residents of the city of Columbus, Ohio, according to the facts of each case; viz., to those who, in the sense of a continued or repeated practice 'use' the streets with the vehicle described; (3) The plaintiffs are not entitled to the relief sought." The petition was dismissed at costs of the plaintiffs. The

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case is here to obtain a reversal of the judgment so rendered.

Mr. **M. E. Thrailkill**, for plaintiffs in error:

Whenever a license is made to produce revenue, it becomes a tax.

State, North Hudson County R. Co., Prosecutors, v. Hoboken, 41 N. J. L. 71; Mays v. Cincinnati, 1 Ohio St. 274; Chicago v. Collins, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; Cooley, Tax. 3d ed. 1138; Re Wan Yin, 10 Sawy. 532, 22 Fed. 701; Cape May v. Cape May Transp. Co. 64 N. J. L. 80, 44 Atl. 948; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; Cooley, Const. Lim. 7th ed. p. 283; 1 Dill. Mun. Corp. 4th ed. §§ 357, 359; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; St. Louis v. Spiegel, 75 Mo. 145.

If the license produces a revenue beyond the cost of issuing the license, and keeping the records, and enforcing the ordinance, it becomes a tax, and is void.

Bennett v. Birmingham, 31 Pa. 15; Dill. Mun. Corp. §§ 357, 768; State, Benson, Prosecutor, v. Hoboken, 33 N. J. L. 280; Jackson v. Newman, 59 Miss. 385, 42 Am. Rep. 367; Kip v. Paterson, 26 N. J. L. 298; Ft. Smith v. Ayers, 43 Ark. 82; 2 Cooley, Const. Lim. 1141; Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642.

The city cannot, under the guise of a police regulation, impose a trammel on constitutional rights.

State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Re Tie Loy, 26 Fed. 611.

The right to engage in a lawful business is a constitutional attribute of citizenship, which cannot be infringed.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

If the ordinance does not operate equally upon all, and give to each person equal protection and benefit, it is void.

State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; Yensen v. State, 7 Ohio N. P. 18; Re Jacobs, supra.

An ordinance cannot be made to apply to farmers marketing the products of their own farms and gardens.

Lamentia v. Columbus, 74 Ohio St. 435, 78 N. E. 1130; St. Charles v. Nolle, 51 Mo. 122, 11 Am. Rep. 440; Davis v. Macon, 64 Ga. 128, 37 Am. Rep. 60; Collinsville v. Cole, 78 Ill. 114; Marmet v. State, 45 Ohio St. 65, 12 N. E. 463.

The city council has no power or jurisdiction to exact a license of nonresidents of the city.

East St. Louis v. Bux, 43 Ill. App. 278; St. Charles v. Nolle; and Collinsville v. Cole, —supra; Douglas v. Kansas City, 147 Mo. 428, 48 S. W. 851; Cary v. North Plainfield, 49 N. J. L. 110, 7 Atl. 42; Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; New York v Hexamer, 59 App. Div. 4, 69 N. Y. Supp. 198; Cairo v. Adams Exp. Co. 54 Ill. App. 87; Re Jacobs, supra; Garden City v. Abbott, 34 Kan. 283, 8 Pac. 473; Bennett v. Birmingham, supra; Western U. Teleg. Co. v. Fremont, 39 Neb. 692, 26 L.R.A. 698, 5 Inters. Com. Rep. 46, 58 N. W. 415.

If the ordinance is unreasonable, it is void.

Stull v. DeMattos, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; Ex parte Frank, supra; Sipe v. Murphy, 49 Ohio St. 536; State, Benson, Prosecutor, v. Hoboken, supra; Pegg v. Columbus, 5 Ohio N. P. N. S. 436.

Messrs. **George S. Marshall, Charles E. Carter, and John L. Davies**, for defendants in error:

Requiring owners of vehicles using the streets of a city to pay an annual license, and providing that the license moneys be placed to the credit of the street repair fund of the city, is not repugnant to the Constitution.

Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Tomlinson v. Indianapolis, 144 Ind. 142, 36 L.R.A. 413, 43 N. E. 9; Bogart v. State, 10 Ohio Dec. Reprint, 365; Ex parte Gregory, 20 Tex. App. 210, 54 Am. Rep. 516.

The ordinance applies to persons living outside the corporate limits of the municipal corporation.

Tomlinson v. Indianapolis, supra; Memphis v. Battaile, 8 Heisk. 524, 24 Am. Rep. 285; Kentz v. Mobile, 120 Ala. 623, 24 So. 952; Davis v. Macon, 64 Ga. 128, 37 Am. Rep. 60; Frommer v. Richmond, 31 Gratt. 646, 31 Am. Rep. 746; Mason v. Cumberland, 92 Md. 451, 48 Atl. 136; Heller v. Mobile, 48 Ala. 218.

Price, J., delivered the opinion of the court:

The city of Columbus and its executive officers rely on subdivision 9, § 1536-100, Rev. Stat., as authority for the passage of the ordinance involved in this proceeding. That subdivision reads: "(9) To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles and every description of carriages kept for hire or livery-stable purposes; and to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast

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driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways, and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction, and street railway cars within the corporation." Other subdivisions preceding and following, and which compose said section, furnish the general powers of municipalities. There are other powers mentioned in §§ 1536-100 and 1536-102, Rev. Stat., but they need not be quoted or considered in determining the law of this case. Under the above provision, it is claimed the council of the city of Columbus has passed and threatens to enforce an ordinance requiring any and every one who would enter upon and use any of the streets of such city with any vehicle described in the ordinance, either for hire or livery-stable purposes, as in the first clause of the above subsection, or for any purpose as specified in the second class, to apply for and obtain a license and pay the prescribed license fee before such person can lawfully use the streets, and to use such vehicles on the streets without the license is a misdemeanor (so says the ordinance), for which the owner or controller of the vehicle may be fined in a substantial sum with costs. The city authorities assert that this ordinance is enforceable not only upon resident users of the streets, but also against nonresidents of the city who may come in with vehicles named on business of any kind or for purposes of pleasure or social intercourse. In the case at bar, they would enforce the ordinance against farmers and gardeners who reside and conduct the farming and gardening outside the city, but who desire to market in the city part of the products of their farms and gardens; and who may visit the city to pay taxes or render jury service, or attend court as a litigant or witness. Or, if the spirit of visitation would lead the nonresident user of the vehicle to pass through Columbus on the proper way to reach another city, town, or county, he must obtain a license to use Columbus streets, or go around the city on some other route.

It is one of the findings of the circuit court, and also a fact agreed upon, that, when the action on review was commenced, there were 4,000 farmers and gardeners residing outside the city, but in Franklin county, who raise and market the produce of their farms and gardens, and that each owns on an average one two-horse wagon and one pleasure carriage or spring wagon, drawn by one horse. As it has been found that each of the 4,000 farmers owns on an average one two-horse wagon and a one-horse buggy or spring wagon, these farmers would be required to pay $32,000 of the estimated $50,000 to keep the streets in repair,—certainly a liberal draft on nonresidents who may use the streets often or seldom. There were and are other farmers and gardeners living in the counties adjoining Franklin county, who haul the products of their farms and gardens to the city of Columbus.

The petition alleges, and the answer admits, that the plaintiffs were required to pay taxes annually or semiannually in the said city as the county seat, and their vehicles were used at such times for that purpose, and at other times, as to some of them, at least, plaintiffs used the vehicles to convey their children to schools in the city. There is no exception or exemption of anyone, no matter how circumstanced, if he desires to use one or more of the designated vehicles on the streets of Columbus. "You must pay before you enter" is the warning displayed to every nonresident owner of vehicles. We do not mean that pay is exacted on each use of the streets; but there must be a license to cover the period of such use, be it for a year or part of a year. If he enters without a license, he is liable to a fine ranging from $5 to $50. When asked for a reason for such demands, it is said the use of the vehicles mentioned in the ordinance tends to wear out said streets, and necessitates constant care and repair thereof, and so the court found; but it is not and perhaps could not be found, how much the nonresident owners contributed to the improvement of the streets by means of general road taxation, yet they are classed with residents who may constantly use the streets with heavier vehicles bearing heavier burdens. It is further said in defense, and so found, that it will cost about $3,000 per annum to furnish necessary clerical services, the license blanks, tags, and numbers to issue the license and put the ordinance into operation, and it is also found that the care and repair of the streets will cost not less than $50,000 per annum. Does the statute quoted authorize the ordinance in this case if it applies to nonresidents, and is the ordinance reasonable? The plaintiffs are not tradesmen, draymen, hack drivers, peddlers, hucksters, or members of a profession within the city, but they are producers, living on their own farms, and operating farms or gardens outside of the city limits.

These farmers own real and personal property outside the city, on which they pay all taxes and assessments provided by law, and these vehicles are a part of such personal property so taxed, and both their real and personal property is subject to taxes to keep

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in repair the public highways in their vicinity, toward which property within the city contributes little if anything. Moreover, the owner of vehicles who resides in the city has free use of the country roads, and without let or hindrance may operate them on such roads whenever and as often as he may choose. The high-speed automobile or touring car of a city resident can rush along the country highway as a terror to the farmer, and nothing is exacted but what he pays the state at large for license, of the benefit of which the farmer can receive but a trifle, if anything. The big brewery wagon can be freely used to deliver beer to villages within or without the county, and heavy moving vans may traverse the country roads in pursuit of that line of business, and the country folk can put up no bars to prevent it, or exact a fee for the privilege. The ordinance therefore lacks the spirit of reciprocity, and imposes a burden upon the farmer in addition to the one he must bear alone.

Another observation is also in order. If the city of Columbus may enforce such ordinance against nonresidents, so may any other municipal corporation, of which there are several within Franklin county, and, if such measures should be adopted by them or some of them, a farmer whose way to Columbus lies through such town or city would be required to pay further tribute to repair streets. And, as it is found that farmers and gardeners living in counties adjoining Franklin county haul the farm and garden products to Columbus, each municipality through which such farmer would pass could demand the payment of a license fee for the use of the streets until license would become prohibition. What Columbus can legally do in this respect any other Ohio municipal corporation can do,—demand an entrance fee as a condition to the use of the public highway. If such farmer uses one of the vehicles named to pass through Columbus and Franklin county on a mission of business or pleasure, even occasionally or once in a year, he is required to obtain the license. While it may be within the law for a municipal corporation to require its resident citizens to pay a license fee for their use of the streets (but we do not so decide), we are not ready to hold that it can bar from its streets nonresidents, and that it may fine one who has the temerity to disregard the exaction of the fee. It has been said that it is but fair for the plaintiffs and others like them to pay something towards keeping up street repairs, because they market their farm and garden products in the city; Columbus being their nearest and best market. At first glance, this sounds rather plausible, and, if the city is self-sustaining and is independent of the trade and business of such farmers, the authority to demand license fee might be on better footing. But the city, shut up to itself, would die. It obtains most of its sustenance for man and beast from the farmers and gardeners without its limits, and it needs their trade, and to furnish what the city needs vehicles must be used on the streets. Merchants of all classes are largely patronized by such persons, and the commodities of one are exchanged for the commodities of the other, or money, the medium of exchange, is paid by one to the other. Therefore the city is not independent and self-sustaining. It needs the farmer as much as the farmer needs the city.

We are greatly impressed with the view that, as to the plaintiffs, the ordinance is unreasonable and unfair. We are not favored with a reference to any case in which this court was called upon to decide the present question. Counsel cite Marmet v. State, 45 Ohio St. 63, 12 N. E. 463, as some authority, but in that case an act of the legislature was under consideration. It was entitled: "An Act to Provide a License on Trades, Business, and Professions Carried on in Cities of the First Grade of the First Class, and Providing the Enforcement and Collection of Fines and Penalties for Carrying on Business without a License, and for Other Purposes." 80 Ohio Laws, p. 129. One of the questions discussed was the invalidity of the law because it was not of uniform operation, though on a general subject. Another claim was that it was invalid because the last clause of § 29, amended by 81 Ohio Laws, p. 78, excepted from its provisions farmers marketing the products of their farms in the city.

Marmet was a citizen of Cincinnati, and was arrested on the charge that he had used vehicles upon the streets of Cincinnati without first obtaining a license therefor. It is not necessary to review the points considered and decided in that case, because the contentions here are very different and on facts and under circumstances unlike those in the Marmet Case. This court sustained the act, including said exception as to the farmers. In the history of the case at bar, we observe that the court of common pleas held that the ordinance is constitutional, but that it does not apply to nonresidents of the city. The circuit court held that the ordinance is constitutional, and "applies to nonresidents as well as residents of the city of Columbus, according to the facts of each case; *viz.*, to those who, in the sense of a continued or repeated practice, 'use' the streets with the vehicles described." This line of demarcation is very vague and settles nothing, and it is reasonable that both par-

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ties now want the question squarely met and decided. We have light from decisions made in other jurisdictions, to which we will give some attention.

In Bennett v. Birmingham, 31 Pa. 15, it appears that, by an act of the legislature, the burgess and town council of Birmingham were authorized to direct all owners of carts, wagons, etc., using the paved streets of said borough, to pay such moderate license for such use as they might, by ordinance, direct. It was held that this did not authorize the imposition of a tax on drays, wagons, etc., owned by nonresidents of Birmingham, and used in carrying goods and produce through the borough from an adjoining township to Pittsburgh. "The act in question only authorizes the taxation of vehicles belonging to citizens of Birmingham, and those of other persons carrying on some business or occupation in the town of Birmingham, by means of such vehicles. Such statutes and ordinances are contrary to the usual course of taxation and embarrassing to the public, and ought to be strictly construed." The ordinance excepted travelers and also farmers bringing their own produce to market. In the opinion of the court, Lowrie, J., among other pertinent things, says: "There are, no doubt, inequalities in the burdens which different locations have to bear in regard to roads; but it is impossible to make any better of it by such ordinances as this. If Birmingham may tax all St. Clair township for passing on the streets to Pittsburgh, then St. Clair township ought to be allowed to tax all the people further out,—and so with all others similarly situated. There are six or eight municipal corporations at this place, and there is no justice in one more than another having such ordinances; and, if they all have them, what is the result? No man having his business in an adjoining township can drive to town in relation to it without paying a license for his cart or wagon to some one or more corporations, while the people of these corporations can drive through the country at pleasure and without license. And then a citizen in one town cannot get a bag of flour hauled across the line into another without finding a drayman who has been able to pay a license for both, nor hire a hack to drive out into the country, without seeing that it has a license for each of the towns through which it has to pass." The entire opinion is worth consideration, and is directly in point. In Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679, the supreme judicial court of Massachusetts had under consideration the validity of certain regulations made by the mayor and aldermen of the city of Boston. The first paragraph of the syllabus and opinion relate to the kind, size, etc., of vehicles that might be used on the streets, and the right to designate certain streets for certain kinds of vehicles, etc. In the second and third paragraphs it is held that the statute (which is copied in the report of the case) did not authorize the mayor and aldermen of Boston to require payment of money to the city by persons resident of Roxbury, who set up and drive omnibuses and stage coaches from Roxbury to Boston and from Boston to Roxbury, for the conveyance of persons for hire, as a tax or duty upon such vehicles, before using the same. In St. Charles v. Nolle, 51 Mo. 122, 11 Am. Rep. 440, we find the following proposition stated by the supreme court of that state: "So much of the ordinance of the city of St. Charles requiring a license tax for wagons used for pay as attempted to impose a tax upon wagons of outside residents engaged in hauling into and out of the city was void as not being authorized by the charter of that city, and the legislature could give the city council no authority to pass such an ordinance. The tax, being upon outside citizens, and for the benefit of those living in the city, would be in effect taking property for private use; that is, for the use of a particular community of which the outside citizens form no part."

The legislature of New Jersey enacted a statute authorizing the council or other governing body of a city, incorporated borough, etc., to make ordinances, to license and regulate cartmen, hacks, milk wagons, etc., carriages and vehicles used for transportation of goods of any kind, etc., and to fix the rate to be paid for license. Cary v. North Plainfield, 49 N. J. L. 110, 7 Atl. 42, is a case where the city of Plainfield, in that state, passed a license ordinance under favor of above statute. Cary was licensed for that city where he resided, and he was hired to go into the borough of North Plainfield for two loads of furniture, to be brought into said city of Plainfield. The borough of North Plainfield had a similar ordinance for license for that locality, which Cary did not observe, and he was arrested for its violation. In the opinion of the supreme court of that state, it is said: "The inconvenience attendant upon the exercise, by every municipality of the state, of the power of excluding from its limits all unlicensed vehicles engaged in transporting goods or passengers for hire, is manifest. Its legitimate operation would require the owners of such vehicles to obtain licenses, not only from the authorities of the place where their business has its headquarters, but also from every neighboring town into which their casual engagements might call them, or else to unload their vehicles at the border line. A general law having effects so burdensome or

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so absurd is not to be anticipated, etc. Its terms are satisfied by holding that license taxes are to be imposed only by that municipality in which the business or occupation is carried on or conducted." After citing Com. v. Stodder, supra, the court adds: "But, when a power to tax for revenue is claimed, something more than mere temporary presence in the borough must be shown. It must appear that the business to be taxed is carried on in the municipality; and occasional passage or transportation into, through, or out of the borough, incidental to the pursuit of a business elsewhere established, cannot fairly be regarded as localizing the business there," etc. The court held Cary not liable. In East St. Louis v. Bux, 43 Ill. App. 276, we find the following: "In a controversy touching the violation of a municipal ordinance requiring truckmen and other common carriers to be licensed . . . the penalty provided for was intended to be imposed upon those only who carried on a business within a given municipality without a license, and that defendant, who hauled goods from another city, wherein he was licensed, to a depot within the boundaries of complainant, could not be considered as having been guilty of a breach of said ordinance." The authority to license conferred upon municipalities by the statute is construed as limited to those who engage in or carry on business in East St. Louis. Bux, the defendant in error, resided in Bellville, and carried on his business there under a license. Another case from Illinois is Collinsville v. Cole, 78 Ill. 114, of which the headnote is the following: "An ordinance that 'there shall be levied upon every hackman, drayman, omnibus driver, carter, teamster, cabman, or expressman, and all others pursuing a like occupation, the sum of $10 for a license,' was held not to embrace a farmer driving his team through the city. The purpose and object of such an ordinance is to impose a tax upon a business, calling, or occupation, and not upon one who may occasionally haul a few loads, in an emergency, for another, when that is not his calling."

The charter of the city of East St. Louis gave the city power "to license, tax and regulate and control wagons and other vehicles conveying loads in the city; to prescribe the width and tire of the same, the weight of loads to be carried, and the rates of carriage." In Joyce v. East St. Louis, 77 Ill. 156, the supreme court of that state held that such authority as to license applied "only to such vehicles in respect of which it is proper and customary with municipal authorities to prescribe rates of carriage; *viz.*, those used by common carriers in the city for hire;" and "one using a vehicle not for hire, but only in the course of his ordinary private business, does not come within the reason or necessity of any such municipal regulation." Akin to this is the decision in Farwell v. Chicago, 71 Ill. 269. See also Chicago v. Collins, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907. The ordinance involved in the last case was said to be founded on authority conferred by the statute of Illinois known as the "general incorporation act," under which the city was organized. Clause 9, § 1, art. 5, chap. 24, Rev. Stat. 1893, confers power to regulate the use of streets. An ordinance was passed providing that all vehicles used upon the streets of the city, including those for private use, for pleasure, etc., should pay an annual license fee, and that anyone using a vehicle on the street without first obtaining a license should be fined. The parties who procured an injunction against the enforcement of that ordinance were owners of bicycles or carriages, not used for traffic or carrying merchandise for hire, but for private use and as a means of locomotion from place to place. The supreme court held the ordinance to be illegal. In the opinion, on page 455 of 175 Ill., supra, the court said: "The streets and alleys of a city are held in trust by the municipality for the use of the public, for purposes of travel thereon, and as a means of access to and egress from buildings abutting thereon or lots adjacent thereto. The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city in all their parts, the full width and length thereof. The municipality, which is a mere trustee of the public, and holds the streets and alleys in trust for that public, cannot deny the right of the public to use the streets and alleys. It cannot assume an exclusive ownership, and deny the rights of the beneficiaries under their trust, and arrogate to itself a power greater than that of a mere trustee, and prevent the use of the streets and alleys by individual members of the public. The right of the public to use the streets is the right to use them for purposes of travel in the recognized methods in which the public highways of the state are used. Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion, or even an extraordinary method, if it is not of itself calculated to prevent a reasonably safe use of the street by others. If a right exists in a city council to impose a license fee by way of tax on every person using wheeled

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vehicles thereon, it may in like manner impose such license fee for such use of the streets in every other manner of locomotion or travel, and reach the man on horseback or the pedestrian walking along the same." And on page 456 of 175 Ill., it is said: "The city council may regulate the use of the streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians, and exclude certain character of loads, and regulate the width of tires on vehicles used on a certain character of pavements, and provide that the rate of speed shall be much less on certain streets than on others, and otherwise regulate the use of the streets, having in view solely the welfare and safety of the public. The city may also regulate certain occupations, such as hackmen, draymen, expressmen, and the like, for such regulation is of a police character, having reference to the general welfare, as a means of preventing improper exactions and extortions; and, for the same reason, a license may be exacted for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic; but such license is an occupation license, and not one for the use of the streets. The license in the latter named case is designed to operate upon those who hold themselves out as common carriers, and a license may be exacted from such as a proper exercise of police power; but no reason exists why it should be applied to the owners of private vehicles used for their individual use exclusively, in their own business or for their own pleasure as a means of locomotion." See Garden City v. Abbott, 34 Kan. 283, 8 Pac. 473. There are other cases that can be cited to same effect, and there are also cases which hold somewhat at variance from principles heretofore laid down in this opinion. In a multitude of cases we have examined, the words "license" and "tax" are used interchangeably, and some courts treat of them as meaning the same thing. But, when they endeavor to sustain the law or ordinance requiring a license, they locate the authority under the police power of the state, and not its taxing power, for by such shifting of authority some constitutional limitations are avoided. In other cases the charter or enabling act of the city expressly defined the power to license or tax, as in Tomlinson v. Indianapolis, 144 Ind. 142, 36 L.R.A. 413, 43 N. E. 9. And it is but fair to say that the statutory authority for the ordinance, its terms and scope, must be consulted in order to properly weigh the force of numerous adjudications. Again, the right to exact a vehicle license tax or fee has been carefully distinguished from imposing a license on various trades and professions carried on within a municipal corporation, as is held in Chicago v. Collins, supra.

We have given this case that careful and patient consideration its grave importance demands, and we are unable to agree with the circuit court in its conclusions. Its judgment fixes no satisfactory or distinct line of demarcation as to who will be affected by the ordinance. It leaves open the way for new controversies, because no one can clearly determine whether he is of the number required to pay for a license or not. We make the ground clear in so far as the plaintiffs in error are concerned, and hold that the nonresident farmers and gardeners cannot be compelled to pay for a license to use the streets in going to and fro from their homes to the city for the purpose of marketing their products and trading with the merchants of the city, or in visiting the city on business or pleasure. As to them, the ordinance is unreasonable and invalid. The ambition should be for a "greater Columbus" rather than for a walled city.

Judgment reversed.

Crew, Ch. J., and Summers, Davis, and Shauck, JJ., concur.

Spear, J., dissenting:

The ordinance is to license and regulate the use of the streets of Columbus by persons who use vehicles thereon. The opinion of the circuit court, by Wilson, J., in Pegg v. Columbus, 10 Ohio C. C. N. S. 199, is to the effect that, construing the term "use" as a continued and repeated practice, the ordinance applies to those who, in the above sense, use the vehicles described. This construction would apply to nonresidents as well as to residents, and must be settled in each case according to the facts.

Applying this limitation as to the construction and enforcement thereof directed by the circuit court, I am of opinion that the ordinance is relieved of any charge of unreasonableness, and may be sustained. On this ground I favor an affirmance of the judgment of the circuit court, and dissent from the judgment of reversal.

UTAH SUPREME COURT.

JENNIE LARSON, Appt.,
v.
SALT LAKE CITY et al., Respts.

(34 Utah, 318, 97 Pac. 483.)

Physical examination — power to compel.

A court of law has no inherent power to compel a plaintiff in an action at law to

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recover damages for personal injuries to submit, in advance of trial, to a physical examination by defendant's physician.

(September 12, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. **G. M. Sullivan, W. A. Lee, and A. T. Sanford** for appellant.

Messrs. **Young & Snow** and **H. J. Dinniny** for respondents.

Straup, J., delivered the opinion of the court:

Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by her by the negligence of the defendants. It was alleged in the complaint that, by reason of the negligent acts, the plaintiff "was rendered unconscious, her left leg and ankle badly bruised and injured, her back, spine, and nervous system disordered, her face and nose scarred and disfigured, and that she was otherwise made sick, sore, and lame; that she was confined to her bed for many weeks, and required the services of a physician and surgeon; and that her injuries were permanent and lasting." The defendants filed general denials. Before trial, one of the defendants, the Big Four Advertising Company, applied to the court for an order requiring the plaintiff to submit to an examination by a competent physician and surgeon, to be appointed by the court, in order that the character and extent of plaintiff's injuries, and whether her disabilities, if any, were due to the causes set forth in the complaint, might be ascertained and determined. The name of such a physician was suggested and his appointment requested by the defendant. The

Case Note.—Power to compel plaintiff in a suit to submit to a physical examination.

This note supplements the note to McQuigan v. Delaware, L. & W. R. Co. 14 L.R.A. 466, where the earlier cases will be found. It was stated in that note that the decisions are in hopeless conflict upon the question of the right of defendant to demand, and the power of the trial court to enforce, a surgical examination of plaintiff's person, either before or during the trial of his action for personal injuries. This question has since been passed upon by the same and other courts many times with little advance, if any, toward common ground.

Examination before trial—personal-injury cases.

Since the preparation of the note referred to, it has been held that, in the absence of statutory authority, a court has no power to order a plaintiff, in a personal-injury action, to submit to a physical examination by a physician out of court, for the purpose of enabling the physician to qualify himself to be called as a witness by the defendant if the latter sees fit. Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Stack v. New York, N. H. & H. R. Co. 177 Mass. 155, 52 L.R.A. 328, 83 Am. St. Rep. 269, 58 N. E. 686; May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 A. & E. Ann. Cas. 605; Easler v. Southern R. Co. 60 S. C. 117, 38 S. E. 258.

Likewise it has been held that it has no power to make such order for the purpose of ascertaining the extent of the injuries of a plaintiff who has alleged that he was injured by the negligence of another. Kingfisher v. Altizer, 13 Okla. 121, 74 Pac. 107; Austin & N. W. R. Co. v. Cluck, 97 Tex. 172, 64 L.R.A. 494, 104 Am. St. Rep. 863, 77 S. W. 403, 1 A. & E. Ann. Cas. 261; Galveston, H. & S. A. R. Co. v. Sherwood (Tex. Civ. App.) 67 S. W. 776; Gulf, C. & S. F. R. Co. v. Brown (Tex. Civ. App.) 75 S. W. 807; St. Louis & S. W. R. Co. v. Lindsey (Tex. Civ. App.) 81 S. W. 87; International & G. N. R. Co. v. Butcher (Tex. Civ. App.) 81 S. W. 819 (reversed on another ground in 98 Tex. 462, 84 S. W. 1052); International & G. N. R. Co. v. Gready, 36 Tex. Civ. App. 536, 82 S. W. 1061; Missouri, K. & T. R. Co. v. Rogers (Tex. Civ. App.) 117 S. W. 939.

In Austin & N. W. R. Co. v. Cluck, supra, it was held that the enforcement of such an order would be a violation of the constitutional provision against unreasonable seizures and searches.

But in an equal number of other jurisdictions it has been held that trial courts have the inherent power to order a medical examination by experts, of the person of a plaintiff seeking a recovery for personal injuries, if the examination is applied for and made before entering upon the trial. Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 15 L.R.A.(N.S.) 663, 126 Am. St. Rep. 165, 94 Pac. 342; Denver City Tramway Co. v. Roberts, 43 Colo. 522, 96 Pac. 186; Wanek v. Winona, 78 Minn. 98, 46 L.R.A. 448, 79 Am. St. Rep. 354, 80 N. W. 851; Harvey v. Philadelphia Traction Co. 26 W. N. C. 231.

Pennsylvania Co. v. Newmeyer, supra, was expressly overruled in South Bend v. Turner, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271, where it was held that the power should be exercised in favor of defendant's motion, made before trial, where defendant had no other method of determining the extent of the injury, and the examination could be made without pain or danger to plaintiff. This view was reaffirmed in Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462.

An interlocutory order for an examination of a woman by medical experts appointed by the court may be made in her action to re-

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plaintiff objected to the granting of the order, on the grounds, principally, that the court was without authority to make or enforce the order, and that the physician suggested by the defendant was prejudiced and biased. In ruling on the objection, the court observed that both the plaintiff and the defendant had the right to select their own witnesses; that the plaintiff had the right to select a physician of her choice, and the same privilege ought to be extended to the defendant, unless the reputation of the physician was such that he ought not to be selected. The court, however, required a showing to be made as to the necessity for the examination, which showing was to the effect that the defendant applying for the order had no information, except as was alleged in the complaint, concerning the character or extent of the alleged injuries. Thereupon the court made an order requiring the plaintiff, at a time specified, and at her home, or at some place to be designated by her, to submit to an examination to be made by the physician and surgeon suggested by the defendant, the plaintiff's physician and attorneys, if she desired them, to be present at such examination. The plaintiff refused to comply with the order, whereupon the court, at a subsequent time, dismissed the case. Judgment was entered accordingly, from which this appeal is prosecuted by the plaintiff.

The questions presented, therefore, are whether the court had the power to make the order, and whether it was authorized

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cover damages for personal injuries. Dimenstein v. Reichelson, 2 Pa. Dist. R. 825; Lane v. Spokane Falls & N. R. Co. 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367.

Where plaintiff has alleged permanent injury to her uterus and bladder and fracture of the hip bone through negligence of defendant, the court has power, upon motion of defendant, seasonably made before trial, to order an examination of plaintiff's person by medical experts. Brown v. Chicago, M. & St. P. R. Co. 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153.

In Burns v. Toronto R. Co. 13 Ont. L. Rep. 404, 9 Ont. Week. Rep. 277, it was held that the court had no power to order a medical examination of plaintiff to enable defendants to pay into court such amount as they might think sufficient compensation for his personal injuries.

In Atlantic Coast Line R. Co. v. Dees (Fla.) 48 So. 28, it appears that, by statute, the trial courts in Florida, in actions to recover damages for personal injuries, are given the discretionary power to require the injured party, either before or at the trial, to submit to a physical examination.

In Lyon v. Manhattan R. Co. 142 N. Y. 298, 25 L.R.A. 402, 37 N. E. 113, it was held that a statute which authorized the court, in granting an order for the oral examination of the plaintiff before trial in personal-injury cases, to direct that he submit to a physical examination by one or more physicians or surgeons, to be designated by the court, if the defendant applies therefor, did not violate any of the express or implied restraints upon legislative power to be found in the fundamental law.

In McGovern v. Hope, 63 N. J. L. 76, 42 Atl. 830, it was held that a statute was constitutional which authorized a physical examination on or before the trial, and apart from, and independent of, an examination of the plaintiff as a witness before the trial.

—other cases.

In People ex rel. Mosher v. Roosa, 43 App. Div. 611, 60 N. Y. Supp. 244, it was held that, in a mandamus proceeding to determine relator's right to the office of chief of police, the court has no inherent power to order a physical examination of relator, although it is averred in the return to the writ that he is physically disabled and incapacitated to perform the duties of the office.

In Pitt v. Dunlap, 54 Misc. 115, 105 N. Y Supp. 846, an action for damages for breach of promise to marry, it was held that the court had no power to order a physical examination of plaintiff, although she had alleged that she was seduced and was pregnant by defendant.

In the absence of statute conferring upon a judge at chambers jurisdiction to hear and pass upon a motion asking for an examination of the person of the plaintiff, he has no such power at chambers. Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336.

Examination at the trial.

In the following cases it was held that the court had no power to make or enforce an order requiring plaintiff at the trial, in an action for personal injuries, to submit to a physical examination by a physician of the defendant's selection (Kellyville Coal Co. v. Moreland, 121 Ill. App. 410; Illinois C. R. Co. v. Downs, 122 Ill. App. 545); or by disinterested medical experts, to be designated by the court (Illinois C. R. Co. v. Griffin, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 278; Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583; Joliet Street R. Co. v. Call, 143 Ill. 177, 32 N. E. 389; Pronskevitch v. Chicago & A. R. Co. 232 Ill. 136, 83 N. E. 545; Pittsburgh, C. C. & St. L. R. Co. v. Story, 104 Ill. App. 132).

In Peoria, D. & E. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951, it was held that the power could not be exercised "for the purpose of ascertaining whether he is now in the condition to which he testified,—that is permanently ruptured."

But a decided majority of the cases hold that a court has the power upon the trial, in actions for personal injuries, to require the plaintiff to submit to a physical examin-

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to dismiss the case on plaintiff's refusal to comply with it. Upon these questions the authorities are in hopeless conflict. They are collected and referred to in note to § 4, p. 1022, 5 Current Law, 64 Cent. L. J. 428, 14 Cyc. Law & Proc. p. 364, and in the case of May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, where the power to make the order was denied; and in the cases of South Bend v. Turner, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271, and Johnston v. Southern P. Co. 150 Cal. 535, 89 Pac. 348, 11 A. & E. Ann. Cas. 841, where the power was asserted. Upon noting and reviewing the cases from the different jurisdictions in Current Law, supra, it is said: "If the last announcements of these several courts may be taken to indicate the law in their respective states, a review of the decisions discloses that the power of trial courts to compel such examination is asserted in Alabama, Arkansas, Georgia, Iowa, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin, and denied in the Federal and territorial courts and in Illinois, Massachusetts, and Texas, and was denied in New York until specifically granted by direct legislative enactment. The bare assertion that trial courts possess this power, in the absence of any legislation, and without common-law precedents, has led to the greatest possible confusion among the decisions of the very courts asserting it. (1) What is the source of the

ation by physicians selected by the court, for the purpose of ascertaining the location and extent of the injuries (Ottawa v. Gilliland, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252; Dickinson v. Kansas City Elev. R. Co. 74 Kan. 863, 86 Pac. 150; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 589); if no serious physical or mental injury is likely to be done plaintiff (United R. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379); if such examination can be had without danger to plaintiff's life or health, and without the infliction of serious pain (Belt Electric Line Co. v. Allen, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89); and it fairly appears that the ends of justice require it, and that knowledge of necessary and material facts can be brought to light only by such examination (Belle of Nelson Distilling Co. v. Riggs, 104 Ky. 1, 45 S. W. 99).

Thus, where plaintiff has alleged that his personal injury is permanent, the court has power to order him to submit his person to an examination of medical experts to ascertain if, in their opinion, his injury is permanent. St. Louis Southwestern R. Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

Where a plaintiff has alleged that his personal injury is permanent, and has had physicians of his own selection to testify as to the extent of the injury, the court has power, on the application of the defendant, to order a physical examination of plaintiff in the presence of plaintiff's physicians and reputable physicians named by defendant. Johnston v. Southern P. Co. 150 Cal. 535, 89 Pac. 348, 11 A. & E. Ann. Cas. 841.

The court has power to compel plaintiff to submit her injured hand to defendant's medical witness for examination in the presence of the jury on the trial of an action for such injury, since it would occasion no indecency or shock to plaintiff's sense of delicacy. Graves v. Battle Creek, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757.

In Camden & Suburban R. Co. v. Stetson, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617, it was held that, on the trial of an action for personal injury, after the jury had been impaneled, the circuit court of the United States, sitting in New Jersey, had the power, upon the application of the defendant, to order a surgical examination of the plaintiff, since a New Jersey statute conferred such power upon its courts, and § 721 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 581) provided that state statutes should be rules of decision in trials at common law in Federal courts in cases in which they apply. As appears in the note to 14 L.R.A. 467, this court had previously held, in Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, that courts were not inherently vested with such power.

Application of the rules.

In those jurisdictions where it is held that the court has the power to order a physical examination, it is generally held that the defendant has no absolute right to demand the enforcement of such an order, but that the motion therefor is addressed to the sound discretion of the trial court. St. Louis Southwestern R. Co. v. Dobbins, supra; Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 15 L.R.A.(N.S.) 663, 125 Am. St. Rep. 165, 94 Pac. 342; Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462; Ottawa v. Gilliland, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252; Belt Electric Line Co. v. Allen, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89; Belle of Nelson Distilling Co. v. Riggs, supra; United R. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379; Logan v. Agricultural Soc. (Mich.) 121 N. W. 485; Marler v. Springfield, 65 Mo. App. 301; Paul v. Omaha & St. L. R. Co. 82 Mo. App. 500; Murphy v. Southern P. Co. (Nev.) 101 Pac. 322.

As to when a refusal of an order for a physical examination amounts to an abuse of discretion, see case note to Western Glass Mfg. Co. v. Schoeninger, 15 L.R.A.(N.S.) 663.

Where plaintiff, in an action for an injury to his knee, voluntarily exhibits it to the jury while on the witness stand, the court, without the aid of any statute, has

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power? (2) To what extent may it be carried? (3) May the defendant demand the order as a matter of right? And (4) how will the court enforce obedience to its order? Singularly enough, the first of these questions appears to have received little or no consideration." The courts asserting the power have quite generally held that the defendant has not the absolute right to the order, but that the motion therefor is addressed to the sound discretion of the court, and that the application should be made before entering upon the trial; that the defendant has not the right to designate the physician by whom the examination is to be made, but that the examination should be ordered and conducted under the direction of the court whenever it fairly appears that important facts concerning the injury are only to be disclosed by such an examination, and that it may be made without injury to plaintiff's health, or the infliction of serious pain, or indignity to, or an unreasonable or indecent exposure of, his person: and that while the court has no right, in the enforcement of the order, to compel the plaintiff to actually submit to the examination, the court may, nevertheless, upon plaintiff's refusal to do so, dismiss the case or delay the proceeding until he complies with the order, or the court may decline to permit any evidence to be given to establish the injury. A few courts have held that, on plaintiff's refusal to comply with the order, the court may punish him as for a contempt.

In many cases where courts have asserted the power, it will be seen, as has been suggested, the existence of the power was either assumed or merely asserted. In others, the courts, instead of discussing the source of the power, or undertaking to state by what authority such a power is exercised, have undertaken to give reasons why trial courts ought to have such a power, and why it ought to be exercised by them. The same thing is true of some text writers. Thus, in § 859 of Thompson on Trials, the author

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inherent power, upon the motion of the defendant, to require him to submit to an examination by physicians before the conclusion of the trial. Chicago & N. W. R. Co. v. Kendall, 167 Fed. 62.

But, in Mills v. Wilmington City R. Co. 1 Marv. (Del.) 269, 40 Atl. 1114, where plaintiff had exhibited his injured leg to the jury, and, during the noon recess, voluntarily submitted to an examination by physicians selected by counsel for defendant, it was held that the court had no power, upon reconvening, to compel him to submit to a further examination before the jury, to aid the physicians in their explanations of the injury while on the witness stand.

Where the court is committed to the doctrine that it has no inherent power to order an examination, the plaintiff will not be held to have waived his right, or in any way affected the established rule, by voluntarily submitting to an examination by physicians of his own selection, and having them testify as to his condition at the time of such examination. Cole v. Fall Brook Coal Co. 159 N. Y. 59, 53 N. E. 670.

For earlier cases upon the question of waiver of right to object to physical examination, see case note to Houston & T. C. R. Co. v. Anglin, 2 L.R.A.(N.S.) 386.

In Whitaker v. Staten Island Midland R. Co. 76 App. Div. 351, 78 N. Y. Supp. 410, where it appeared that the court had appointed a physician to make a physical examination of plaintiff before trial, but, by stipulation of the parties, another physician was substituted, who made the examination, and testified at the trial without objection, it was held, upon a new trial of the action, that it was error to order another physical examination by a physician appointed by the court, since the physician who had examined plaintiff was still available as a witness, 23 L.R.A.(N.S.)

and the defendant had waived its statutory right to have plaintiff examined by a physician appointed by the court.

A case will not be reversed and a new trial granted merely because, upon a subsequent trial, defendant would have the right to have his physicians examine the plaintiff, under a statute which became operative after the trial. Cole v. Fall Brook Coal Co. supra.

Where a statute provided that, "where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of," the court or judge "shall" order that such physical examination be made, the court must make the order where such ignorance has been made to appear, if the affidavit is, in other respects, sufficient. Green v. Middlesex R. Co. 10 Misc. 473, 32 N. Y. Supp. 177, affirmed without opinion in 70 N. Y. S. R. 885, 35 N. Y. Supp. 1107; Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. Supp. 795.

Where it has been held that the court has no power to direct a physical examination, and a statute is subsequently passed giving the court such power, the statute will be strictly construed. Goldenberg v. Zirinsky, 114 App. Div. 827, 100 N. Y. Supp. 251; Bowe v. Brunnbauer, 13 Misc. 631, 34 N. Y. Supp. 919.

And where the statute authorizes the court to designate the physicians or surgeons who are to make the examination, the court cannot, in its order, permit defendant to have its own medical adviser present. Goldenberg v. Zirinsky, supra.

And the order cannot legally command the plaintiff's attorney to produce plaintiff for examination, where there is no authority in the statute authorizing the court to enforce such an order against the attorney. Bowe v. Brunnbauer, supra.

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says: "In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection. Other courts, taking the more enlightened view that the object of a judicial trial is to enable the state to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of sound discretion, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it." The same thought is expressed in less intemperate language in the case of South Bend v. Turner, supra, where it is said: "Courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence, from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." On page 3020, 3 Wigmore on Evidence, it is said: "There is and will be no end to the variety of frauds invented; and it will be an ill day for justice when the courts cease to meet new frauds by new applications of old remedies. Quite apart

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The court is without power to make an order requiring plaintiff to appear before the court for a physical examination, where the statute provides that the order shall require him to appear before the judge or a referee. Ibid.

The order cannot require that the examination be made on the day following the order, where the statute requires that not more than twenty, nor less than five, days, shall intervene between the granting of the order and the examination. Ibid.

And the order should not direct or permit the taking of the testimony before a trial of the physician who made the examination. Wood v. Charles W. Hoffman Co. 121 App. Div. 636, 106 N. Y. Supp. 308, affirming 56 Misc. 66, 106 N. Y. Supp. 940.

In Potter v. Hammondsport, 112 App. Div. 91, 98 N. Y. Supp. 186, it was held that a statute which provided for a physical examination of a female plaintiff "before physicians or surgeons of her own sex" meant that the examination should be made by female physicians, and not merely in their presence.

But, in Lawrence v. Samuels, 16 Misc. 501, 38 N. Y. Supp. 976, it was held that plaintiff had waived this right by making no effort to have the order modified so as to provide for an examination by a physician of her own sex. This was reversed, however, in 17 Misc. 559, 40 N. Y. Supp. 686, where it was held that a female plaintiff was entitled, as of right, to have inserted in the order the provision that a female physician make the examination, without making any special application for it as a favor or privilege.

The order authorized by statute will not be denied merely because plaintiff makes affidavit that he believes that its object is to annoy and harass him. Sewell v. Butler, 16 App. Div. 77, 44 N. Y. Supp. 1074.

The court will not order the examination authorized by statute if plaintiff stipulates, for use upon the trial, that he has entirely recovered from the injuries referred to in his complaint and from their effect. Ibid.

Enforcing the order.

Compliance with an order to submit to a physical examination may be enforced by staying the trial or dismissing the case. Lane v. Spokane Falls & N. R. Co. 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367; Western Glass Mfg. Co. v. Schoeninger, supra; Wanek v. Winona, 78 Minn. 98, 46 L.R.A. 448, 79 Am. St. Rep. 354, 80 N. W. 851; Smith v. New Jersey & H. River R. & Ferry Co. 123 App. Div. 493, 108 N. Y. Supp. 415.

In Wanek v. Winona, supra, the court said: "No one claims that he [plaintiff] can be compelled to submit to such an examination; but he must either submit to it or have his action dismissed."

At the examination, care should be exercised to avoid all unnecessary inconvenience and annoyance to the plaintiff (Lane v. Spokane Falls & N. R. Co. supra); or exposure of his or her person (McGovern v. Hope, 63 N. J. L. 76, 42 Atl. 830).

When desired, the examination should be made in the presence of the counsel and friends of the party to be examined. Lane v. Spokane Falls & N. R. Co. supra.

Both parties should be given an equal opportunity to have qualified witnesses present at the examination. McGovern v. Hope, supra.

The expense of such examination should be borne by the party requesting it. Lane v. Spokane Falls & N. R. Co. supra.

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from the general impolicy of granting to a party the license to conceal truth by any form of refusal, there is in this class of cases the added consideration that corporal injuries are to-day notoriously a subject of frequent fraud and misrepresentation; so that the privilege to withhold the exhibition of the alleged injury may amount in such cases to nothing less than a judicial license for fraud." In the case of Wanek v. Winona, 78 Minn. 98, 46 L.R.A. 448, 79 Am. St. Rep. 354, 80 N. W. 851, the court observes: "To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but, at the same time, deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment." And in other cases language may be found similar to that expressed by Mr. Justice Beck in the case of Schroeder v. Chicago, R. I. & P. R. Co. 47 Iowa, 375, and in the dissenting opinion of Mr. Justice Brewer in the case of Union P. R. Co. v. Botsford, 141 U. S. 258, 35 L. ed. 740, 11 Sup. Ct. Rep. 1003, to the effect that every party "has a right to demand the administration of exact justice;" that, "if truth be hidden, injustice will be done;" that "the end of litigation is justice, and knowledge of truth is essential thereto;" and that, since the plaintiff may make any, not indecent, exposure of his person in the court room in the presence of the jury, to show the extent of his injuries, and may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find,—to deny the defendant the right to make a similar examination permits the plaintiff to disclose the real facts to the jury, if his interests require, and to withhold such a disclosure if it is against his interest.

These may all be cogent reasons and appropriate addresses to be considered by legislative bodies why courts ought to have such a power, and why it ought to be exercised by them; but they are very far from pointing out anything which in any wise tends to show from what source such a power is derived, or by what authority it may be lawfully exercised. It is readily conceded that the "end of litigation is justice, and that knowledge of the truth is essential thereto," and that courts are organized "to establish and enforce equal and exact justice" between the litigants. Such plastic phrases and pointless truisms, however, do not argue anything, nor elucidate or answer the point of inquiry. To say that the action of courts may be invoked when, in their discretion, the exercise of a power will promote justice, is to say that courts are self-constituting and their power self-creating. No one would seriously contend that courts generally have the power to make and enforce orders which, in their discretion, will bestow equal and exact justice. The power of courts is not measured by so flexible a yardstick. There are many things over which it may be expedient on the part of courts to exercise a discretionary power, but concerning which courts have constantly refused to act because of a want of power. Courts are creatures of the law. The power of state courts is generally derived from Constitutions and laws of the state. The power of our courts is derived from the Constitution and the laws of this state, and the common law, so far as it is not repugnant to, or in conflict with, the Constitution and laws of the United States and the Constitution and laws of this state. Whenever the power of a court is invoked, in order that it may be lawfully exercised, it is essential to point to some constitutional provision or some legislative enactment or the common law authorizing it,—not necessarily to some express provision or enactment, but to some provision where the right to exercise the power invoked is fairly implied, or where it may be necessarily inferred from the nature and constitution of the tribunal itself. It is conceded that there is no constitutional provision nor legislative enactment giving the court power to make the order in question. The ruling of the court is not, nor can it be, defended on any such ground. It is also conceded, and it has been many times declared by the courts asserting the power, as well as by the courts denying it, that there is no common-law precedent where such action of the court was ever exercised by law courts. That no such power was possessed or exercised by the courts of common law is well pointed out by Mr. Justice Holloway in the case of May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, and by Mr. Justice Gray in the case of Union P. R. Co. v. Botsford, supra, and reaffirmed by Mr. Justice Peckham in the case of Camden & Suburban R. Co. v. Stetson, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617, where, in the case last named, it is said: "It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it." True, some courts have said that

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the exercise of the power is analogous to that exercised by courts in bills for discovery. But bills for discovery were brought in equity for the discovery of facts resting in the knowledge of the opposite party, or of deeds, writings, or other things in his custody or power, seeking no relief in consequence of the discovery, but seeking discovery merely to enable the party asking it to prosecute or defend an action at law in another court, arising out of contract or out of torts to property. The authorities are in conflict as to whether a bill of discovery, in the absence of a statute, will lie in aid of actions based on purely personal torts. 6 Enc. Pl. & Pr. p. 733. By an early English decision (Glynn v. Houston, 1 Keen, 329), and in Robinson v. Craig, 16 Ala. 50, it was held that the bill would not lie in aid of such actions. In a recent decision (Reynolds v. Burgess Sulphite Fibre Co. 71 N. H. 332, 57 L.R.A. 949, 93 Am. St. Rep. 535, 51 Atl. 1075), where the English and American cases are reviewed, it was held that the bill would lie in aid of such actions as well as actions of torts to property. To what extent the decision was influenced by statute need not now be considered; for, conceding that the bill, in the absence of a statute, would lie in aid of an action based on purely a personal tort, it nevertheless must also be conceded that law courts had not the authority to exercise the power of discovery in the law action, or in any proceeding supplemental thereto, but, to authorize the exercise of the power, it was essential to seek relief in a court of equity. Because it was necessary to resort to equity to exercise the power conclusively demonstrates that such a power was not possessed by the law courts. A power exercised by a court of equity is not a precedent for the exercise of the same power by a court of law. Says Mr. Best, in his work on Evidence, international ed. 1893-94, § 624: "The common law laid down as a maxim, *Nemo tenetur armare adversarium suum contra se*, and, in furtherance of this principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause." See also 2 Elliott on Evidence, § 1385, where the same principle is stated. Hence there arose the equitable remedy of bills for discovery to assist the prosecution or defense of an action pending in the law court. Such remedy being somewhat circuitous and expensive, the legislature, by 14 & 15 Vict. chap. 99, § 6, and by subsequent common-law procedure acts, empowered the superior and other courts of common law, on application made for such purpose by either party in any pending action, to order the inspection and production of any document or writing, or the inspection and examination of real or personal property, in the custody or under the control of the opposite party. And it is generally conceded that, in the absence of some legislative enactment, common-law courts were without power to compel the inspection or production of books and papers out of court, or the inspection of a document not counted or pleaded on, and not held in trust for the moving party, or the examination or survey of property. It is only in virtue of statutes that law courts now possess and exercise such powers. Such a power has been expressly conferred upon our courts by the laws of this state. The legislature has provided in what manner books, papers, documents, and other things may be inspected and produced, property examined and surveyed, property and premises viewed by the jury, oral examinations or interrogations of a party in action or proceeding may be had before trial, and has otherwise promulgated and established general principles and rules of evidence and means of its production in judicial investigations. It is not claimed that these enactments authorized the court to make the order, or that the order was made in virtue of them.

There can be no doubt that, in the absence of a statute, a law court is not authorized to compel the plaintiff, before trial, to appear before a notary public, or a commissioner appointed by the court, and there make answer to pertinent interrogatories propounded to him concerning his injuries, or concerning any other material issue in the case. If a statute is necessary to confer such a power upon the court, we do not see from what source it obtains the power to compel the plaintiff, before trial, to submit his person to a physical examination, and make answers to proper questions propounded to him by the physician making the examination. Or, if a statute is necessary to authorize a court to order an inspection and examination of property before trial, we see no good reason why a statute is not likewise necessary to authorize the court to compel a plaintiff in a personal-injury case to submit his person, before trial, to a physical examination. To say that the court has such a power in order to give the parties equal means to obtain information concerning the injury, and to afford them equal opportunity to lay before the jury the real facts, and to prevent fraud, and to promote justice, is merely asserting reasons why courts ought to have such a power. Such kind of argument could as appropriately have been made when, in the absence of

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statutes, the power of the court was invoked for the inspection and production of a paper or document which was in the possession and under the control of one of the parties, and which was secretly withheld by him, or for the inspection and examination of property. It may be that, in some instances, the plaintiff may have better means than has the defendant of ascertaining and producing the facts concerning the character and extent of the injuries. In other instances the defendant may have better means than the plaintiff of ascertaining and producing the facts concerning the alleged acts of negligence. It is not infrequent, in all kinds of suits, that particular facts in issue are peculiarly within the knowledge of one of the parties, or that one has better means than the other of ascertaining and producing the facts. The fact that a party having peculiar knowledge of a matter fails to bring it forward may raise a presumption or justify an inference in favor of his adversary's claim; or, if he withholds certain evidence with respect thereto, the inference may be justified that, if it had been produced, it would have been unfavorable to his cause; but it furnishes no basis authorizing the court to make an order requiring him to divulge his knowledge before trial to his adversary, or to supply him with the means of obtaining it. In the case of Reynolds v. Burgess Sulphite Fibre Co. supra, the doctrine was recognized that the defendant in an action at law to recover for a death caused by its alleged negligence could not be compelled to allow the plaintiff to inspect the broken parts of machinery, defects in which were alleged to have caused the death, but a bill of discovery was filed to obtain inspection of the fragments of machinery, to aid the action pending in the law court. It might as well be said that the court, in the absence of a statute, as well had the power to compel the defendant to allow plaintiff, before trial, to inspect his private records and documents, if relevant to the issue, or to examine machinery and devices in his possession and under his control, defects in which are alleged to have caused plaintiff's injuries, as the power to compel plaintiff, in the absence of some statute authorizing it, to submit his person, before trial, to an examination on behalf of the defendant, in order that he may ascertain the extent and character of the injuries and qualify witnesses to testify concerning them. The very courts which, in the absence of a statute, assert the existence of the power to compel the plaintiff to submit to such an examination, assert, with equal emphasis, that an order of court that a veterinary surgeon may be sent on the premises of a party against his will, to examine a horse whose condition was in dispute in an action brought to recover damages for breach of warranty in the sale of the horse, provided the owner or any person he might select would accompany such surgeon, was in excess of the power of the court. Says the learned court: "The mare in question was in possession of the plaintiff and upon his premises. The order compelled the plaintiff to permit the parties to enter upon his premises to make the examination, and by a party whom the plaintiff objected to as coming there. The court had no power to compel the plaintiff to submit to such an invasion of his premises. If the plaintiff refused to let the mare be examined at that time, or to have his premises visited for that purpose, it was his right." Martin v. Elliott, 106 Mich. 130, 31 L.R.A. 169, 63 N. W. 998. Why not here invoke the oft-repeated judicial pronouncements that the "end of litigation is justice," and that "courts are organized to enforce equal and exact justice between the parties;" that to permit the physical examination of the mare to be made by veterinary surgeons selected by plaintiff, and to leave the defendant "wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross . . . to be tolerated for one moment?" Why, in such instance, assert that compelling the plaintiff to allow a veterinary surgeon to enter his premises to make a physical examination of his horse was an unauthorized invasion of his rights, but to compel a plaintiff, especially a woman, to allow a physician and a stranger, against her will, to enter her home and there compel her to lay bare her body and submit it to his touch, and if, on her refusal to submit to such compulsory stripping and exposure, the doors of the courts shall be closed to her, is not also an unauthorized invasion of rights?

It might be considered a more advanced system of jurisprudence if, in judicial investigations, each litigant were required, before trial, not only to lay bare his respective claims and defenses, but also the particular kind of evidence by which it would be sought to support them, and to place each other in the same position with respect to ascertaining and producing evidence, not only as to a particular issue in a particular class of cases, but as to all material issues in all cases. But such a system does not now exist, nor has it ever existed. Litigants come before the court, not as "friends at court," who have, in advance of the trial, revealed to each other all the evidence possessed by them and the source and means of obtaining and producing it, but they come as opposing suitors, where neither is bound to arm his adversary against him-

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self, nor furnish him with an instrument to enable him to maintain or defend his cause; not as "belligerent combatants," but as legal adversaries, asserting and demanding rights, and seeking to have them vindicated and defended in accordance with law and the prescribed rules and principles which have been established for the orderly conduct of judicial investigations. Experience has demonstrated that truth will be better disclosed, and justice more evenly administered, by courts confining their powers within the bounds of prescribed authority, and by adopting the prescribed manner of presenting evidence, and following the well-established rules and principles affecting judicial investigations, than by assuming supposed inherent powers from mere judicial pronouncements to go forth in search of truth and to do equal and exact justice, or by conducting judicial investigations in such manner as the court may consider in its discretion will best disclose truth and promote justice. The one leads to an orderly and proper administration of justice; the other, to disorder and confusion. It is further said by Mr. Justice Brewer in his dissenting opinion in the Botsford Case, and repeated by other courts, that "it seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons." In the first place, the expression was not pertinent to the question then before the court. Furthermore, the power of the court to compel the plaintiff, in advance of the trial, to submit to a physical examination, in order that the defendant may ascertain the extent and character of the injuries, and thus qualify witnesses who may testify concerning them, is one thing. The power of the court, when the plaintiff has testified concerning his injuries, to compel him to exhibit the injured parts to the jury, when to do so does not involve an indecent exposure, is quite another and different thing. While such a question is not now before us, inasmuch as courts have given such instance as a reason why the power of the court in question ought to be exercised, it may not be out of place to briefly notice it. If, in the case supposed, a plaintiff testifies, concerning a wound on his arm, he may, in corroboration of his testimony, exhibit the wound to the jury. He may likewise be required to do so, at the request of the defendant, as a part of the cross-examination, and as affecting plaintiff's testimony. Though the plaintiff does not take the stand, but evidence has been given on his behalf concerning his injuries, he may nevertheless be called by either party and required, in a proper case, to exhibit the injured parts as corroborating or affecting the testimony which has been given concerning the injuries. It may be asked, why has not the court power to compel a physical examination in advance of the trial, but has the power to compel the plaintiff to exhibit his wounds and injuries to the jury at the trial? The answer is simple. It is for the same reason that courts of law could not compel the inspection or production of private papers or documents in the possession or under the control of a litigant, but, if he came into court with the document or paper about him, the court could compel him to produce it. In the one instance, the power to compel one suitor before trial to arm his adversary against himself, or to furnish him evidence to enable him to maintain or defend his cause, was not recognized; in the other, the right of each suitor was recognized to call any person possessed of facts as a witness, and to interrogate him concerning them. The plaintiff may be a witness in his own behalf. He may also be called as a witness on behalf of the defendant. He may be interrogated by either party concerning any fact within his knowledge. If he testifies concerning his injuries, and is asked by either party to exhibit the injured parts to the jury, he, when the disclosure does not involve an indecent exposure, may not, any more than a witness on the stand who has been ordered by the court to produce a document in his pocket, decline to do so. The power which a court has to compel a witness to answer all proper questions propounded to him may also be exercised to compel the plaintiff to exhibit the wound or injury of which he testifies, for the purpose of affecting his testimony. But to say that the plaintiff shall submit his person to a physical examination, in advance of the trial, in order that those examining him may become qualified as witnesses, and put in possession of facts theretofore unknown to them, is quite another and different thing.

In discussing the question whether there is authority for a law court to compel one litigant to furnish the means by which the other may procure evidence, except as has been provided by statute, the court, in the case of May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, well said: "The plaintiff may be compelled to go upon the witness stand and answer all proper questions put to him, or to produce books and papers in

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his control, or permit the examination of property in his possession, and, so far as the defendant may reap any benefit therefrom, it may be said that the plaintiff is compelled to furnish evidence for his adversary; but further than this there is no warrant in the law for our courts proceeding. From the authority directly conferred upon the district courts of this state, there cannot be implied this extraordinary power. There is no grant of power from which it could be implied. However, the assertion of the power by certain courts is no more extraordinary than the remedy proposed for violation of the order. To say that a court can make an order, but cannot enforce it, is remarkable, to say the least. To say that a court may refuse to permit a witness to testify, or dismiss his action if he refuse to comply with the order, is a doctrine which we cannot approve. Except in particular instances where the authority is directly conferred (and the present case does not present one of them), our courts have no authority to refuse to permit the plaintiff to testify, or to dismiss his action. For a trial court of this state to make an order of this character, and prescribe dismissal of the action as a penalty for noncompliance, would amount to a clear usurpation of authority in each instance. The order would be made without authority, and, in case of disobedience, the penalty inflicted without sanction of the law. The arguments advanced in favor of the assertion of this power might, with propriety, be addressed to a legislative assembly, but not to the courts, and we decline to resolve this court into a law-making body, even though it may be considered by text writers more enlightened to do so. We prefer to follow the doctrine announced by the supreme court of Massachusetts,—that it is a matter for legislative control, and, in the absence of legislation, the courts ought not to usurp the authority."

We are of the opinion that the court was not authorized to make the order, nor to dismiss the action because of plaintiff's refusal to comply with it. The judgment of the court below is therefore reversed, and the cause remanded to the trial court, with direction to reinstate it. Costs to appellant.

McCarty, Ch. J., concurs.

Frick, J., concurring:

I fully concur with Mr. Justice Straup in his statements of the law as contained in the opinion written by him, and in the conclusions there reached. I must confess, however, that I have been compelled to change my views with regard to the power of courts to require a plaintiff who seeks redress for personal injuries to submit to a physical examination of his body before trial, with a view of ascertaining the character, extent, and effect of his injuries. After a careful reading of the cases, and upon due consideration of the legal principle involved, I am convinced that the courts, in the absence of an express statute conferring it, have no such power. That such a power is necessary, and that injustice may, in certain cases, result because the courts are powerless to enforce it, is conceded. That such injustice may arise both through design and through ignorance of the injured party concerning the character, extent, and effect of his injuries is likewise admitted. But all this simply points to some good reasons why the power should exist, and is no proof whatever that it in fact does exist in the courts. Courts, no doubt, are the instruments through which the sovereign state seeks to impart and enforce equal and exact justice to all suitors, as nearly as this may be done by human instrumentalities. As a means to this end, courts are clothed with what are usually termed inherent powers, as well as with those that are expressly conferred. Those so-called inherent powers, however, cannot, in administering justice, be extended beyond what may be necessary to carry into full effect the jurisdictional powers of the courts, and which, by reason of the general scope and character of such power, cannot always be definitely stated. If, therefore, a general power is conferred, it may be said that a court has also the inherent or implied power to make the general power effective, in so far as this may be necessary in the administration of justice; and it may also, through such inherent power, defend and protect its own dignity, correct those who abuse its processes, and punish as for a contempt any interference with what is termed the due and orderly course of justice. As has been well said, a court is "a tribunal empowered to hear and determine issues between parties, upon pleadings, either oral or written, and upon evidence to be adduced under well-defined and established rules, according to settled principles of law." 11 Cyc. Law & Proc. p. 655. It is therefore not true that a court has the inherent power to compel a party to comply with all orders that the court may deem essential to bring about full and complete justice between the parties in a particular action. Unless such orders are sanctioned by some law, the court is powerless to enforce them. To say that a court has the inherent power to make and enforce all orders that it may deem necessary to administer justice would, in the end, lead to much greater injustice than

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such a rule could possibly prevent. To establish such a rule would leave the whole matter to the individual judgment of every court to say whether a particular order desired is essential or nonessential to the administration of equal and exact justice between the parties before the court. Under such an expansive rule, no one could say one day what would be required of him the next. When the proposition is put in this form, there are perhaps few, if any, courts that would defend it. Yet, when they are called upon to apply the matter concretely, courts are led away from correct principles by the seductive claim that every court possesses the inherent power to require either party to submit to such orders as may be deemed necessary to the due administration of justice between them. In connection with this argument, it is asserted that it is to obtain justice that the parties invoke the power of the court, and, if either one or both may in any way impede its attainment through the court, then a court is not what it is designed to be, but becomes a mere instrument in the hands of the one or the other to defeat rather than to attain full and complete justice. These arguments, no doubt, would be both sound and convincing if it were not for the fact that courts are but the creatures of the law, and, as such, must find authority for their orders and judgments in some law wherein it is either expressed or necessarily implied.

In requiring a party to submit to a physical examination before trial, to ascertain some fact or facts not then known to the adverse party, and which are deemed material to enlighten either the court or jury, the court does not exercise one of its inherent powers. It exercises a power purely legislative, in that it pertains to the manner of procuring and preserving evidence to be adduced at the trial of some issue. In what way the evidence is to be obtained before trial, and how it shall be preserved so as to be used at the trial, is not a judicial, but a legislative, function. The court may call attention to defects in the law in this regard, but it cannot supply them by judicial legislation. To do this is but a plain usurpation of power. The mere fact that the necessity for the exercise of the power is great, even palpable, is wholly insufficient to authorize a court to resort to it under the broad claim that it has the inherent power to administer equal and exact justice to all alike. Nor is the exercise of the power justified upon the ground that many other courts have and are exercising it under a claim of right. Usurpation is none the less so because it is frequently practised. It is quite true that judicial error is often recognized as law, binding upon all until overruled by the court, or until it is superseded by legislative enactment. Further, a repetition of a usurpation of power is as great a wrong as when it was first resorted to; and neither the necessity for its exercise nor the plea that it is in the interest of justice can ever become a valid excuse for those who usurp the power. A careful reading of the text-books and the many cases cited by Mr. Justice Straup which assert the power will disclose that neither the text writers nor the courts point to the source of the power, but they simply assume it to exist, because, as it is said, the exercise of it is essential in the administration of justice. The cases further disclose that the courts which assert the power are at great variance in applying it. Some enforce it in one way, while others do so in another; but the great majority of the courts agree that a failure to comply with the order of the court for a physical examination before trial cannot be punished as a contempt of court, but must be dealt with in some other way. If it be true that the court has the power to make such an order, it must necessarily follow that a wilful disobedience of it can be nothing but a contempt of court and should be punished accordingly. Nothing short of such a punishment will either comport with or maintain the dignity of the court making it. It is manifest that the courts are much more willing to assert and declare the power than they are to maintain and enforce it. If the power exists, it should not be dallied with, but should be rigorously enforced. If it is essential in the administration of justice and exists, there is—there can be—no excuse for its nonenforcement by the only prompt method known to the courts in vindicating their orders,—namely, punishment as for a contempt. The diversity of opinion with regard to how, when, and in what manner such orders shall be made and enforced, seems to me to be strong inherent proof that, while many courts assert the power, they entertain serious doubts with regard to its existence, and hence hesitate to pursue it to its logical results. Moreover, this diversity of opinion is a very strong reason why the legislature should confer the power, and with it prescribe some rule as to when, how, and in what manner it shall be applied and enforced. Quite true, if the power is once given, the right to enforce it will be implied; but it certainly would be much better if the legislature, which alone can grant it, would also define its scope and prescribe the manner of its enforcement.

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his control, or permit the examination of property in his possession, and, so far as the defendant may reap any benefit therefrom, it may be said that the plaintiff is compelled to furnish evidence for his adversary; but further than this there is no warrant in the law for our courts proceeding. From the authority directly conferred upon the district courts of this state, there cannot be implied this extraordinary power. There is no grant of power from which it could be implied. However, the assertion of the power by certain courts is no more extraordinary than the remedy proposed for violation of the order. To say that a court can make an order, but cannot enforce it, is remarkable, to say the least. To say that a court may refuse to permit a witness to testify, or dismiss his action if he refuse to comply with the order, is a doctrine which we cannot approve. Except in particular instances where the authority is directly conferred (and the present case does not present one of them), our courts have no authority to refuse to permit the plaintiff to testify, or to dismiss his action. For a trial court of this state to make an order of this character, and prescribe dismissal of the action as a penalty for noncompliance, would amount to a clear usurpation of authority in each instance. The order would be made without authority, and, in case of disobedience, the penalty inflicted without sanction of the law. The arguments advanced in favor of the assertion of this power might, with propriety, be addressed to a legislative assembly, but not to the courts, and we decline to resolve this court into a law-making body, even though it may be considered by text writers more enlightened to do so. We prefer to follow the doctrine announced by the supreme court of Massachusetts,—that it is a matter for legislative control, and, in the absence of legislation, the courts ought not to usurp the authority."

We are of the opinion that the court was not authorized to make the order, nor to dismiss the action because of plaintiff's refusal to comply with it. The judgment of the court below is therefore reversed, and the cause remanded to the trial court, with direction to reinstate it. Costs to appellant.

McCarty, Ch. J., concurs.

Frick, J., concurring:

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The action of the trial court in dismissing the action, being based on an order it had no power to make or enforce, cannot be sustained.

IOWA SUPREME COURT.

W. W. MORROW, State Treasurer, Appt.,
v.
CARRIE DURANT, Exrx., etc., of Henry Durant, Deceased.

(— Iowa, —, 118 N. W. 781.)

Pleading — demurrer — reasonableness of fund for tomb.

1. The question of the unreasonableness of the amount set aside by a testator for a tomb, compared with the value of his estate, so as to come within the operation of an inheritance tax which does not apply to amounts necessary for funeral expenses, cannot be decided on demurrer, since it involves a mixed question of law and fact.

Interitance tax — reservation for tomb.

2. The question whether or not an inheritance tax should be levied upon the amount reserved by testator for a tomb is not, where the estate, as a whole, is above the excepted class, governed by a statutory provision that all property shall be subject to a tax if over the sum of $1,000 after the payment of all debts, and including in the debts a reasonable sum for funeral expenses.

Same — construction.

3. A statutory provision that an inheritance tax shall be assessed against property of every kind which becomes subject to the jurisdiction of the courts of the state for distribution will not be construed to apply to the property so as to impose the tax on money reserved by testator for the erection of a tomb, since such construction would render the statute unconstitutional; but it will be held to designate the property to which the tax shall apply when passing by will or the inheritance laws.

Same — right of state — interference with will.

4. The state cannot, in the absence of fraud or collusion, question the reasonableness of the amount set apart by testator for a tomb for himself, for the purpose of throwing the portion held to be unreasonable into the residuary clause of the will, which will cause it to pass to collateral relatives, and render it subject to the inheritance tax.

(December 15, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Kossuth County in defendant's favor in a proceeding to collect an inheritance tax. Affirmed.

Statement by **Evans, J.**:

This is a proceeding by the plaintiff, as treasurer of state, to collect from the defendant, as executrix of the will of decedent, Henry Durant, a collateral inheritance tax. The court below ordered a recovery of such tax on certain bequests amounting to $3,980, and no more. The plaintiff appeals.

Messrs. **H. W. Byers**, Attorney General, and **George Cosson** for appellant.

Mr. **E. V. Swetting**, for appellee:

The bequest for a tomb or monument by

Case Note. — Is money set aside under will, or otherwise, for purposes of caring for grave, erection of tomb or monument, subject to inheritance tax.

Very little authority exists on the question when and under what circumstances money set aside for the purpose of caring for a grave, erecting a tomb or monument is subject to the collection of an inheritance tax; and no case has been found which has given the subject as much attention as MORROW v. DURANT.

In Re Vinot, 26 N. Y. S. R. 610, 7 N. Y. Supp. 517, it was held that a bequest of one half of the income of $2,000 for the maintenance of decedent's burial plot was exempt from the inheritance tax, as it should be looked upon as a personal expenditure for the benefit of the decedent, and as part of the funeral expenses.

So, in Re Fleck, 35 Pittsb. L. J. N. S. 67, it was held that a reasonable provision for the care of the graves of a testator and his family, and the cemetery lot, should be considered as part of the funeral expenses, and not subject to the collateral inheritance tax.

To the same effect is Middleton's Estate, 13 Pa. Dist. R. 811.

In Hurst v. Caernarvon Cemetery Asso. 1 Lanc. L. Rev. 60, so far, at least, as can be ascertained from the case as digested in Pepper & Lewis's Dig. vol. 21, cols. 36,966 and 36,968 (no report of the case being accessible), it was held that a bequest of a decedent to a cemetery association, for the purpose of caring for his own grave, was exempt from the collateral inheritance tax, while a bequest to the same cemetery association "to defray expenses for fences and keeping said cemetery in good order and repair" was held taxable.

In Re Edgerton, 35 App. Div. 125, 54 N. Y. Supp. 700, affirmed without opinion in 158 N. Y. 671, 52 N. E. 1124, a provision in a transfer of property for the erection of a monument and caring therefor upon the transferer's death was considered a part of the funeral expenses, and, as such, not subject to the inheritance tax.

So, a reasonable sum spent in the purchase and repairing of a burial lot for decedent has been regarded as a part of the funeral expenses, and therefore exempt from taxation. Re Liss, 39 Misc. 123, 78 N. Y. Supp. 969.

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the decedent was a bequest not to any collateral heir, and a collateral inheritance tax is a tax upon succession, and not upon property.

Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91; Re Stone, 132 Iowa, 136, 109 N. W. 455, 10 A. & E. Ann. Cas. 1033; McGhee v. State, 105 Iowa, 13, 74 N. W. 695; Herriott v. Bacon, 110 Iowa, 345, 81 N. W. 701; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101.

Evans, J., delivered the opinion of the court:

The decedent, Henry Durant, died testate in Kossuth county on December 1, 1904, leaving no widow nor direct heirs. By his will he made a number of bequests to collateral relatives, amounting to a sum total of $3,980. By the sixth paragraph of the will, he directed his executrix to "build for me in the cemetery at Algona, Iowa, a tomb which shall not exceed the cost of $2,000 and pay for same out of my estate, when same is completed, that my remains be placed therein to remain." In division 2 of her answer, executrix pleaded this paragraph of the will, and averred, in substance, that after the payment of all legacies and bequests, amounting to $3,980, and after the payment of the debts of the decedent and the expenses of administration, there would remain in her hands a sum less than $2,000, and that she desired and intended to expend it all in the erection of a tomb, in pursuance of such paragraph of the will. To this division of the answer, the plaintiff demurred on the following grounds: (1) That such sum proposed to be expended had not in fact been expended within fifteen months of the date of the death of testator. (2) That the sum of $2,000 is not a reasonable sum for a tomb in an estate of the valuation of the Henry Durant estate, and that only a "reasonable amount can be allowed as part of the funeral expenses in such an estate, and included in the debts to be deducted in accordance with the provisions of § 1467a of Code Supplement." (3) That the sum of $2,000, or any other sum for such purpose, "is a bequest not exempt from the payment of collateral tax, for the reason that it is of a purely personal and selfish nature, and is not a bequest to any person or society exempt from a tax, and that such bequest is void and against public policy." This demurrer was overruled by the lower court. The plaintiff refused to plead further. Thereupon the case proceeded to hearing, and decree was entered, wherein the court made a certain finding of facts, finding, in substance, that the plaintiff was entitled to recover a tax of 5 per centum, with interest, on the sum total of all the bequests amounting to the sum of $3,980. After such finding, the decree provided as follows: "The court further finds that the balance of said estate, aside from said bequests herein mentioned, after the costs and expenses of the settlement of said estate are paid, will be invested in a monument erected in the cemetery at Algona, Iowa, in accordance with the will of said Henry Durant, which was proved and probated in Kossuth county, and that said sum will be less than $2,000."

However, in Re Fay, 62 Misc. 154, 116 N. Y. Supp. 423, it was held, the court disapproving Re Vinot, supra, that a bequest to a cemetery association, the interest to be used in keeping testator's lot in good condition, was subject to the transfer tax. In this case a distinction was drawn between expenditures made by an executor in his own discretion, and a bequest made by a decedent in his last will, to a certain beneficiary, and for a certain specific purpose. The court said that, in the latter case, the property passed to the beneficiary by virtue of the provisions in decedent's will; and, as the statute provides that all property passing by will, with certain exceptions, is taxable, the bequest to the cemetery association would seem to be taxable.

So, in Walters's Estate, 3 Pa. Co. Ct. 447, it was held that a bequest to a church in consideration of the latter taking care, for all time, of testator's and his family's graves, was such a legacy as to be subject to the collateral inheritance tax.

In Long's Estate, 22 Pa. Super. Ct. 370, it was held that a legacy of $4,000 to the trustees of a cemetery, to be devoted to the care and repair of certain cemetery lots, as well as the care and repair of monuments to all her relatives, which incidentally involved the care of her own last resting place, could not be considered as in the nature of funeral expenses, and was therefore subject to the collateral inheritance tax. The court, in this case, said: "The interest of the trust fund is to be devoted to the care of two separate and distinct cemetery lots, the repair of the various monuments in said lots, the construction of a new monument to her father when the present one has passed beyond the condition for repair, and, under certain contingencies, for the purchase of new lots in another cemetery, and the removal of the remains of the testatrix and all her relatives, with the several monuments. The lot in which the remains of the grandparents of testatrix were buried was entirely separate from that in which was the grave of her father, beside which the remains of the testatrix are to rest. The manifest intention of the testatrix was to provide a fund, the income of which should be devoted to caring for the last resting place of all her relatives; that this involved caring for her own grave was a mere incident of the general purpose." And see Hurst v. Caernarvon Cemetery Asso. supra.

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The plaintiff was not allowed to recover any collateral inheritance tax upon the sum reserved and set aside for the purpose of erecting the tomb. Under the record as made here, this is the only question presented for our consideration, although a number of other questions appear to have been considered on the trial below. Plaintiff's theory is that the cost of erecting a tomb is a part of the funeral expenses, and that under the statute it is classified as a "debt," and that it can be only for "a reasonable sum," and that it must be allowed "within fifteen months from the death of decedent, unless otherwise ordered by the judge or court of the proper county." He contends that the reasonableness of the sum is to be determined by the amount of the estate, and that the amount provided by the will and ordered by the court in this case is unreasonable, in view of the size of the estate.

1. To our minds there are several insuperable obstacles in the way of plaintiff's recovery of a tax on this sum. Whether the amount reserved for the erection of a tomb is "reasonable" is a question of mixed law and fact, to be determined in the light of all the circumstances of the case. No evidence is presented to us in this record, and we have grave doubts whether the appellant is in any position to present such question for our consideration. A ruling on a demurrer can only present a question of law, and this question before us necessarily involves fact as well as law. If the burden was upon the defendant to show affirmatively that the sum reserved was "reasonable," it may be that the question could be raised by demurrer. An important fact in this case, which does appear in the defendant's pleading, is that the will of the decedent expressly provided for this expenditure. In the absence of the superior rights of creditors or of persons having some legal claim upon the decedent, it would seem reasonable to say that this provision of the will raises a presumption of reasonableness as far as the duties of the executrix are concerned. It is a matter of common observation that there are some people who prefer that their remains after death be laid in a "tomb," rather than in a grave. We cannot say that such a preference or desire is unreasonable, as a matter of law or fact. Nor can we say, without evidence, that a suitable tomb for such purpose could be built for a substantially less sum than $2,000. The appellant is under the further burden in this court that it does not appear from this record just what amount of money was reserved for the specific purpose, except that it was "less than $2,000." If the court below necessarily found that the sum reserved was "reasonable," we have before us no evidence from which we can review such finding, and, if we had such evidence, it could not avail the plaintiff, for the reasons appearing later in this opinion.

2. Appellant bases his contention upon the express terms of the statute. We do not think the statute will bear the construction contended for. So far as applicable to this case, § 1467, Code Supp., may be read as follows: "All property within the jurisdiction of this state, and any interest therein which shall pass by will to any person (other than to father, mother, etc.), shall be subject to a tax of 5 per centum of its value above the sum of $1,000 after the payment of all debts." The word "debts," as herein used, is defined in § 1467a as follows: "The term 'debts' in the eleventh line of § 1467 shall include, in addition to debts owing by decedent at the time of his death, and a reasonable sum for funeral expenses, court costs," etc. It has heretofore been held by this court that the clause, "above the sum of $1,000 after the payment of all debts," is descriptive of the estate as a whole, and determines the classification of the estate as a whole, as to whether it is exempt or nonexempt from the tax. Herriott v. Bacon, 110 Iowa, 345, 81 N. W. 701. It does not in any sense measure the amount of an exemption. If an estate does not contain "above $1,000 after payment of all debts," as above defined, it is wholly exempt from the operation of the law. If otherwise, all devises received by collateral persons are subject to the tax, without any exemption whatever. In the estate under consideration, it is undisputed that its value is "above $1,000 after the payment of all debts," and this is so even though the sum of $2,000 reserved for a tomb be deemed as a debt. There being no dispute over the classification of this estate as nonexempt, the clause, "above the sum of $1,000 after the payment of all debts," has no further function to perform, and has no applicability to the issues in this case. It necessarily follows that § 1467a is also without applicability to the issue under consideration, in so far as it defines the word "debts" as the same is used in the original section. The evident purpose of this latter section is that an estate whose value is near the dividing line shall not be carried into the exempt class by extraordinary charges under the guise of funeral expenses (which may properly include a monument, as plaintiff contends), or by the presentation of stale or fictitious claims which are not allowed within fifteen months. No such question is involved in this controversy. The question, therefore, whether the plaintiff is entitled to recover the tax upon the fund reserved for the tomb, is not governed by the language of this section.

3. It will be observed in § 1467 that the

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property subject to tax is that "which shall pass by will . . . to any person . . . other than to or for the use of father, mother," etc. The fund reserved in obedience to the will of decedent will not pass "to any person." On the face of the statute, therefore, plaintiff is not entitled to recover a tax upon it. His counsel have foreseen this difficulty, and they bring to our attention § 1467b, Code Supp., which is as follows: "Except as to property passing to the persons, corporations, and societies exempted by section fourteen hundred and sixty-seven (1467) of the Code from the collateral inheritance tax, and real property located outside the state, passing in fee from the decedent owner, the tax imposed under chapter four (4) of title seven (7) of the Code shall hereafter be assessed against, and be collected from, property of every kind which, at the death of the decedent owner, is subject to, or thereafter, for the purpose of distribution, is brought into this state and becomes subject to, the jurisdiction of the courts of this state for distribution purposes, or which was owned by any decedent domiciled within the state at the time of the death of such decedent, even though the property of said decedent so domiciled was situated outside of the state." It is apparent upon the face of this section that it has a much broader purpose than to reach a fund such as that now in controversy. We will not stop to discuss that broader purpose. The contention of the plaintiff is that, by its terms, it qualifies § 1467, in that it applies to "property of every kind," regardless of whether it passes "to any person" or not. It must be conceded that the language of this section will bear such construction; but, if we were to place such construction upon it, it would destroy § 1467 and render it unconstitutional. It has heretofore been held by this court that the constitutionality of our collateral inheritance tax law can be sustained only on the ground that it is not a tax on the property itself, but upon the right to succession to property; and that a tax on the property itself, on the ground that it was acquired by collateral inheritance (which tax was not imposed on other property), would be a violation of the Constitution. See Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91; Re Stone, 132 Iowa, 136, 109 N. W. 455, 10 A. & E. Ann. Cas. 1033. Section 1467b may be readily and naturally construed as supplemental to § 1467, and as not qualifying it in any such sense as to render it unconstitutional. Its principal purpose is manifestly to impose a tax upon the right to succession accruing to residents of this state in property situated in other states, which is brought into this state for distribution; and to impose a tax upon the right to succession to property situated without the state, which was owned by a decedent domiciled within the state at the time of his death. Cases of this kind were not expressly provided for in the original section. We hold, therefore, that § 1467b has no application to the case at bar.

4. We do not overlook the fact that, if the amount to be expended for a tomb were reduced, the amount remaining would pass under the residuary clause to collateral heirs, and would thereupon become subject to the operation of the statute; but, in the absence of fraud or collusion on the part of the residuary legatees, this does not furnish to the plaintiff a ground of complaint. It has been held by this court that a legacy to a collateral relative may be waived or renounced in its entirety. Upon such renunciation the right of the state to collect the collateral inheritance tax fails with the legacy itself. Re Stone, supra. In the case at bar, so far as appears here, the residuary legatees concede the propriety and reasonableness of the fund reserved for erecting a tomb to the testator. Their position in the matter is commendable, rather than blameworthy, and we see no ground upon which the plaintiff can stand to interfere therewith. We hold, therefore, that §§ 1467a and 1467b have no application to the issue presented in this case; that the plaintiff, as state treasurer, can collect the tax only upon the property which passes by succession to some of the persons included within the collateral class; that, in the absence of fraud or collusion, he cannot interfere with the waiver by any such person of his rights under the will; nor has he any right to try the question of the reasonableness of an expense under § 1467a, except for the purpose of determining the classification of an estate as exempt or nonexempt from taxation.

5. The last ground of plaintiff's demurrer is not pressed in argument here.

Our view above expressed indicates that we see nothing contrary to public policy in paragraph 6 of the testator's will. Whether it shall be regarded as selfish or not must depend upon the point of view. If it be so conceded, it determines nothing.

The decree of the court below is affirmed.

IOWA SUPREME COURT.

J. W. FRYER, Appt.,
v.
W. D. HARKEN.

(— Iowa, —, 121 N. W. 526.)

Estoppel — declarations — partnership.

1. Declarations as to absence of a partnership do not estop the one claiming its

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existence from asserting it against the other alleged partner if the latter did not know of, or act to his prejudice upon, them.

Partnership — illegality — accounting.

2. Although a partnership organized to represent both buyer and seller in real estate transactions is void as against public policy, a member is not precluded by that fact from compelling a division of commissions paid by parties having full knowledge of the fact that the concern represented both parties, and consenting thereto.

(June 2, 1909.)

APPEAL by complainant from a decree of the District Court for Clarke County dismissing a petition for an accounting of certain alleged partnership profits. Reversed.

The facts are stated in the opinion.

Mr. O. M. Slaymaker, for appellant:

The same person can be agent of both parties to a contract, and, if he first gets their consent, can collect commissions from each.

1 Am. & Eng. Enc. Law, 2d ed. pp. 1073, 1074; Leekins v. Nordyke, 66 Iowa, 471, 24 N. W. 1; Colwell v. Keystone Iron Co. 36 Mich. 51; Barry v. Schmidt, 57 Wis. 172, 46 Am. Rep. 35, 15 N. W. 24.

One partner cannot convert property even in an illegal business; and if he does, he is liable to his partner.

Gillam v. Brown, 43 Miss. 641; Howe v. Jolly, 68 Miss. 323, 8 So. 513.

If a partnership is partly legal and partly illegal, the legal part may be settled.

Anderson v. Powell, 44 Iowa, 20; Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 56 L.R.A. 479, 99 Am. St. Rep. 317, 66 S. W. 421.

Messrs. James H. Jamison, W. B. Tallman, and Lloyd Thurston, for appellee:

Complainant, by his conduct, is estopped to assert that a partnership existed.

11 Am. & Eng. Enc. Law, 2d ed. pp. 421, 422; Brown v. Lambe, 119 Iowa, 404, 93 N. W. 486.

Deemer, J., delivered the opinion of the court:

Plaintiff claims: That about April 1, 1907, he entered into a copartnership with

Case Note. — Power of court to require accounting between members of partnership which is illegal or void, or which has been engaged in illegal business.

This note is in the main confined to cases involving illegal partnerships or illegal business transacted by partnerships; but, as the same general rules are frequently applied in cases of ordinary contracts which are illegal, some cases not involving partnerships have been included because of their value as to the principles applicable to partnerships. For the same reason, some other cases as to which it is difficult to tell whether or not a partnership did exist between the parties to the contract have been included.

The question may arise in any one of three situations: First, where the partnership itself was illegal and the business transacted also illegal; second, where the partnership was illegal, but the transaction itself legal; third, where the partnership was legal, but the transactions involved illegal. However, there appears to be no distinction in the principles applicable to the situation, and no attempt will be made to show in what respect the illegality existed. In some cases a distinction is suggested between acts which were merely illegal, and acts which were criminal; but this distinction is not generally recognized, and is usually made for the purpose of avoiding some case which the court does not wish to follow. As is said in McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839, it is difficult to base a distinction of principle upon these differences.

General rule that courts will not consider illegal transactions.

The general rule, upheld by the great weight of authority, subject, however, to several important exceptions recognized by some courts, which will be noted later, is to the effect that the courts will not require an accounting of the affairs of an illegal partnership, or of the illegal transactions of a partnership. The law will leave the parties in the same condition as it found them; and, if either has sustained a loss by the bad faith of a confederate, it is to be deemed but a just infliction for his illegal acts, and he must not expect that a judicial tribunal will, by an exertion of its powers, degrade itself by shifting the loss from the one to the other, or by equalizing the benefits or burdens which have resulted from the illegal and fraudulent transactions.

This general rule has been applied in the following cases, and the language of the courts does not imply that the rule is not universal, although, in most of the cases, under the facts presented, one or the other of the exceptions noted hereafter might be applicable.

Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825; Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Boyd v. Barclay, 1 Ala. 34, 34 Am. Dec. 762; Chateau v. Singla, 114 Cal. 91, 33 L.R.A. 750, 55 Am. St. Rep. 63, 45 Pac. 1015; Miller v. Davidson, 8 Ill. 518, 44 Am. Dec. 715; Skeels v. Phillips, 54 Ill. 309; Neustadt v. Hall, 58 Ill. 172; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Shaffner v. Pinchback, 133 Ill. 410, 23 Am St. Rep. 624, 24 N. E. 867; Wright v Cudahy, 168 Ill. 86, 48 N. E. 39; Smythe v. Evans, 209 Ill. 376, 70 N. E. 906; Hunter

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defendant to do a general real estate brokerage and commission business in the city of Osceola, Iowa; that each was to give his entire time to the business and to share equally in the profits and losses; that this partnership continued until about December 1, 1907, when the venture was mutually abandoned. Plaintiff also claims that there has been no settlement or accounting between him and defendant, and that defendant has a large amount of money belonging to the partnership and some furniture, and he (plaintiff) asks an accounting. Defendant's answer was practically a general denial. The case was tried upon these issues, and the trial court found that there was no partnership, and that, if there had been one, according to plaintiff's testimony, such an one would have been contrary to public policy. The petition was therefore dismissed. For appellant it is contended that the trial court was in error in its finding of facts, that the contract of partnership was not contrary to public policy, and that, in any event, there was one deal in the transactions had while the partnership continued which was not in any manner affected by the alleged taint, and as to that plaintiff should have his share of the commission. Plaintiff and defendant at one time lived in the village of Russell, in Clarke county, and while there they entered into a copartnership arrangement for handling real estate in that town and vicinity. By the terms of the agreement they occupied the same office, but each had his separate desk, stationery, etc., and to the outside world there was nothing to indicate a partnership, save that they occupied the same room. The avowed object of this was so that, as they say, they might handle both ends of the deal; that is to say, so that one might represent the buyer and the other the seller, each getting a commission, which they were to pool or divide after the deal was closed. This partnership arrangement continued some five or six months, division and settlement of commissions being made from time to time, until the parties concluded to buy and conduct a clothing store in the town where they were operating, which was done, and this clothing business was conducted for some time. In the meantime, defendant had moved to the city of Osceola, where he

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So, in Wheeler v. Sage, supra, the court said that, generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account; but, if a party seeks relief in equity, he must show that on his part there has been honest and fair dealing; and if he has been engaged in an illegal business, and been cheated by his partner, equity will not help him.

And, in Shaffner v. Pinchback, supra, the court said: "Plaintiff . . . having embarked his money in an enterprise prohibited alike by the statute, by good conscience, and by public policy, placed himself and his money outside of the pale of the law, and, if he has been despoiled by the failure of his associate to account for the funds placed in his hands for the purpose of carrying on the unlawful business, then both good morals and public policy require that the law should not aid him."

So, in Hunter v. Pfeiffer, supra, it was held that persons who engage in forming partnerships the effect of which is to stifle or diminish competitive bidding on public works must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law.

And a partner cannot recover on a note given him by the other partner, the consideration for which was money advanced for the illegal purpose of betting on horse races as a partnership venture. Spies v. Rosenstock, supra.

Exceptions where the illegal transactions are complete.

Many cases recognize a distinction between those cases in which a court is asked to enforce an illegal contract and those in which a court is asked to deal with property which has been acquired as the result of the execution of such a contract, and hold that, in the latter situation, the court will act. It is claimed for this doctrine, that it does not violate that salutary principle of juridical ethics which declares that a court will never lend its aid in the enforcement of a contract founded in immorality or illegality, for, it is said, in such cases, the illegal transaction being fully completed, the court, in compelling the wrongdoers to divide, does not enforce the original contract between the parties, but proceeds upon an implied promise arising from the reception of the money, and that such implied promise is so entirely distinct from the original arrangement as to be, in legal estimation, free from its taint.

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Partnership — illegality — accounting.

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opened a real estate office, having associated with him one Houston. Finally, and about April 10, 1907, plaintiff moved to Osceola with the intention of engaging in the real estate business. He met defendant, and, Houston being then away from home, he (defendant) proposed to plaintiff that, if his former partner, Houston, did not come back, he (Fryer) should go into partnership with him (defendant). After waiting a few days, and it appearing to defendant that his relations to Houston were terminated, he proposed to plaintiff that he (plaintiff) come into his (defendant's) office, and that they engage in the real estate business there in Osceola on the same terms as they had theretofore had at Russell. Plaintiff accepted the offer, moved into defendant's office, paid $6 for one half of certain furniture which defendant proposed to sell, and it was agreed that each should pay one half the office and other expenses, and that they should divide the commissions earned. Defendant excepted one deal he then had on hand, but all other matters were taken into the partnership, and plaintiff commenceed to pay his part of the rent on May 1, 1907. From May 1st to about the first or middle of July three deals were made. In one, plaintiff received $200 and defendant $275; in another, defendant received $60 and plaintiff nothing; and in the third, plaintiff received $280 and defendant $175. Expenses, etc., down to July 1, 1907, were settled; each putting in his separate expense, and defendant allowing plaintiff $30 of the $60

473; Sharp v. Taylor, 2 Phill. Ch. 801; Burke v. Flood, 6 Sawy. 220, 1 Fed. 541; Western U. Teleg. Co. v. Union P. R. Co. 1 McCrary, 558, 3 Fed. 423; Wann v. Kelly, 2 McCrary, 628, 5 Fed. 584; Cook v. Sherman, 4 McCrary, 20, 20 Fed. 167; Crescent Ins. Co. v. Bear, 23 Fla. 50, 11 Am. St. Rep. 331, 1 So. 318; Oldham v. Hume, 4 Ky. L. Rep. 355; Harvey v. Varney, 98 Mass. 118; Willson v. Owen, 30 Mich. 474; Gilliam v. Brown, 43 Miss. 641; Howe v. Jolly, 68 Miss. 323, 8 So. 513; Attaway v. Third Nat. Bank, 15 Mo. App. 577; Lewis v. Alexander, 51 Tex. 578; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348.

Thus, in Planters' Bank v. Union Bank, supra, which was an action on the alleged balance of account received for the illegal sale of Confederate bonds, the court said: "It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

So, in Sharp v. Taylor, supra, it was held that one of two parties to a contract to import goods into England in a foreign-built ship owned by Englishmen, in violation of the English navigation laws, cannot, after receiving the property, set up the evasion of such laws as a defense to an action for an accounting by the other, as the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what is asked to do as between the parties. The court said that the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly acted upon in Tenant v. Elliott, 1 Bos. & P. 3, and Farmer v. Russell, 1 Bos. & P. 296, and recognized and approved in Thomson v. Thomson, 7 Ves. Jr. 473.

So, in Crescent Ins. Co. v. Bear, supra, the court, after citing a number of the above cases, said: "The authorities referred to maintain not only that when, in an illegal venture, there have been profits made, an account may be had in equity of them by one partner against the other, who has them and is seeking to appropriate them to himself, but also that where there has been a loss in the venture, and an adjustment of the accounts between the partners, and an obligation given by the debtor partner to the other, that an action may be maintained on such obligation."

And in Lewis v. Alexander, supra, the court said that it is not clear that either the ends of public justice or any great public policy will be subserved by permitting one of the parties to a scheme to defraud the government, who may be so fortunate as to obtain possession of the illegal gains, to add to his public wrong by excluding the other party from all participation in the proceeds. The court said: "True it is, the law negatively permits this by refusing to lend its aid to either party; but the courts are not inclined to extend the rule beyond the immediate parties or subject-matter of the illegal contract itself." And this case was cited with approval and followed by Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631. And to the same effect was Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154, in which it was held that after an illegal contract made by a man and a woman to live together without marriage had been fully executed, and property had been acquired for the community, the courts would recog-

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commission. Thereafter plaintiff collected $181 on another deal and defendant $453. Thereafter defendant had what has been called the "Morton and Bosserman Bros. deal," in which defendant, with the consent of both vendor and purchaser, represented both parties, collected $400 from one party and $200 from the other. In connection with this deal, plaintiff having nothing actively to do with it, defendant entered into an office book kept for that purpose an account of his expenses, amounting to $35.15, and upon the same book plaintiff entered some of his office expenses after July 1st. Thereafter defendant had another deal, known as the second "Morton-Bosserman deal." This last was about the middle of August, 1907. There is some doubt about this deal, but, as we understand it, defendant received $300 from one of the parties as commission. Thereafter there was a third and final deal, known as the "Shenandoah light plant transaction." This fell through, as we understand it; but defendant was paid $250 for his services in connection therewith. After July plaintiff was not in the office a great deal, for the reason that he was then engaged in building a house for himself, and he did nothing much for the partnership; and, while he claims one half the commission earned after July 1st, he has never been very insistent upon anything more than his share of the $600 earned on the first Morton-Bosserman Bros. deal.

Defendant denies that he ever entered

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nize their respective interests in the property.

So, in McDonald v. Lund, supra, it was held that an action for money had and received might be maintained by one partner in a gambling firm against another, where the partnership no longer existed, and the determination of the money due to the plaintiff from the defendant had been reached.

The case of Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732, is frequently cited as an authority for this proposition, and the language of the court would seem to uphold it, but it has been frequently distinguished upon the ground that not only had the transaction been completed, but there had been other investments of the money, and an accounting on the subsequent express promises could be had without in any way bringing into the case the illegal transaction. Under the facts of the case, the decision need not necessarily be referred to the exception to the general rule here discussed, and the bearing of this much-cited case upon the subject will be more fully discussed later.

Exception as to completed transaction repudiated, or limited.

In a number of decisions, however, this doctrine as to an implied promise where the transaction has been completed has been expressly repudiated; and it has been held that a partner is not entitled to an accounting of the affairs of an illegal partnership or of illegal transactions by showing merely that the partnership or transaction has been concluded, and the profits arising therefrom are in the hands of another partner, thus asserting the general rule set out above.

McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 56 L.R.A. 479, 99 Am. St. Rep. 317, 66 S. W. 421; Snell v. Dwight, 120 Mass. 9; Dunham v. Presby, 120 Mass. 285; Morrison v. Bennett, 20 Mont. 560, 40 L.R.A. 158, 52 Pac. 553; Todd v. Rafferty, 30 N. J. Eq. 254; Watson v. Murray, 23 N. J. Eq. 257; Sykes v. Beadon, L. R. 11 Ch. Div. 170.

Some of these decisions go to great length in explaining and distinguishing, or rather, in attempting to distinguish, Brooks v. Martin and Planters' Bank v. Union Bank, supra. But apparently these cases went further than the other courts are willing to go, and, being of such high authority, they cannot be ignored or overruled. The effect of the decisions is limited, however, in numerous cases, and even by a later decision in the same court.

Thus in McMullen v. Hoffman, supra, it was held that if a court distributed the profits of an illegal contract or partnership between the members thereof, it practically enforced the illegal contract, and this the court refused to do; and the court held that the doctrine of Brooks v. Martin and Planters' Bank v. Union Bank, supra, should not be extended beyond the facts presented in those cases, and it did not apply where the action was between the original parties, and there was no collateral contract, and no new consideration, and no liability of a third party.

And in Central Trust & S. D. Co. v. Respass, supra, it was held that the decided weight of authority is that a court of equity will not entertain a bill for an accounting of a partnership in a business confessedly illegal, notwithstanding the fact that the partnership has terminated, whatever may be the doctrine where there has been a new contract in relation to, or a new investment of the profits of, such illegal business, or whatever may be the doctrine as to the rights and liabilities of a third person who assumes obligations with respect to such profits.

So, in Snell v. Dwight, supra, it was held that a bill for an accounting of the profits of an illegal venture was founded upon the contract itself, and would not be sustained, although the contract had been carried out. To the same effect was the decision in Dunham v. Presby, supra.

So, in Morrison v. Bennett, supra, it was held that men who associate themselves for the purpose of cheating cannot ask the courts to distribute their booty by adjudging the demands of one against the other,

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into a partnership with plaintiff, although he admits the sharing of expenses and the division of commission while the parties were engaged in business both at Russell and at Osceola down to July 1, 1907. He says that there was a pool between them as to business where they represented both parties, which, under the circumstances, would clearly amount to a partnership as to these transactions, and that there was to be and in fact was no division of commissions where but one side was represented in the office. The testimony negatives this thought, however, for defendant did, prior to July 1st, divide a commission which he in fact earned representing but one side of the transaction. Moreover, in the first Morton-Bosserman deal, in which defendant, with consent of the interested parties, represented both sides, defendant entered upon an expense book kept for that purpose his traveling and other expenses connected with that deal and some other expenses incurred prior thereto on another deal. The matter cannot be explained upon any other theory than that of partnership. Defendant's oral explanation thereof is not satisfactory. Each party has some corroborating testimony; plaintiff producing witnesses who testified to admissions of defendant that plaintiff was his partner, and defendant some who testified to admissions of plaintiff that he was not in partnership with defendant. There is also some testimony as to the acts and conduct of each party which it is claimed tends to support

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arising out of their quarrels over the plunder; and the court followed the Snell Case, in holding that the doctrine of Brooks v. Martin does not apply, although the transaction is complete, where the action is merely one to divide the profits of the illegal contract, and there are no subsequent or collateral contracts and transactions.

And in Watson v. Murray, supra, it was held that a bill for the accounting of the profits of a firm engaged in the business of lottery would not be sustained. In speaking of McBlair v. Gibbes, 17 How. 232, 15 L. ed. 132, infra, and Brooks v. Martin, supra, the court said: "The distinction between enforcing the execution of an agreement to do an illegal act, and the distribution of the realized profits of the act, made use of in those cases to do justice between the parties, is obviously not to be regarded as one of universal or general application. It would seem needless to say that it cannot be invoked to apportion among criminals the gains resulting from their crimes. No case has been referred to, and none, I am sure, can be found, where the illegal act has been also a misdemeanor, punishable by fine and imprisonment, for the protection of the public safety and morals."

And in Todd v. Rafferty, supra, the doctrine of Watson v. Murray was applied where the profits were made by one of the partners fraudulently acting for both vendor and purchaser in certain transactions.

So, in King v. Winants, 71 N. C. 469, 17 Am. Rep. 11, it was held that the court would not help partners in a scheme to defraud the government by not bidding against each other on a public contract, by dividing the profits of their illegal transaction. The court distinguished Brooks v. Martin, supra, upon the ground that, in that case, the court could determine the rights of the parties without reference to the illegal transactions, but, in the case at bar, the court said, "we must hear the proof that, if the plaintiff would not bid against the defendant, as he had intended to do, so as to enable the defendant to get 70 cents a day instead of 40, which he was getting to feed and nurse the sick, then the defendant would give the plaintiff half the profits. And then we are asked to compel the defendant to perform that promise." This decision was affirmed when the case came before the court again upon a petition for rehearing in 73 N. C. 563.

And in Sykes v. Beadon, supra, it was held that it is no part of a court of justice to aid either in carrying out any illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that contract; and, in the opinion of the court, no action can be maintained for the one purpose more than for the other.

Exception as to an express promise or reinvestment.

Another exception to the general rule that courts will not grant relief in respect of illegal transactions is recognized by numerous courts of high authority, which have held that where there is a new express promise, as when the profits from an illegal partnership have been reinvested in a legal business, it is no defense to an action for an accounting by one partner that the source of the profits so invested was illegal. Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Lea v. Cassen, 61 Ala. 315; Lestapies v. Ingraham, 5 Pa. 71; Boggess v. Lilly, 18 Tex. 200; De Leon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101; Floyd v. Patterson, 72 Tex. 202, 13 Am. St. Rep. 787, 10 S. W. 526; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769.

The leading case of this character is Brooks v. Martin, supra, in which it was held that where soldiers' claims for land warrants, which had been illegally purchased by a partnership with money advanced by one partner for that purpose, had been converted into warrants, and the warrants had been sold or located, and there remained in the hands of the other partner lands, money, notes, and mortgages, the results of such illegal partnership business, a bill by the partner furnishing the fund against the other, for an accounting and a division of the proceeds, would be sustained. The reason for the decision is given by the court as follows: "When the bill in the

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the contention of each. As to these matters we may say that, although defendant argues an estoppel on plaintiff, due to his admissions to third parties, the case lacks one of the essential elements of such an estoppel; that is to say, there is no showing that defendant knew of these declarations, or that he acted thereon to his prejudice. So that the element of estoppel is out of the case. We are constrained to hold that there was a partnership between these parties substantially as claimed by plaintiff. No other conclusion is consistent with the acts and conduct of the parties. We are also constrained to hold that plaintiff practically abandoned the partnership about August 1st, and when he asked for a settlement with defendant he made no claim, as we understand it, to anything more than his share of the first Morton-Bosserman deal.

Our first inquiry of law is, then, assuming that such a partnership is established, was it so inimical to public policy that plaintiff should be denied relief? It will be observed that no commission is now in controversy where these parties represented both sides of the transaction out of which it grew. The defendant represented both parties of the Morton-Bosserman deal, but this was with consent of each party to the transaction, and, in such circumstances, the commission was properly earned and became a legitimate asset of the firm, if there was a partnership. The two subsequent commissions were as free from taint as this first one. So that we may assume for the pur-

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present case was filed, all the claims of soldiers, thus illegally purchased by the partnership with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it and notes and mortgages given for the remainder. There were then in the hands of defendant lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds and a division of these proceeds that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner, or what rule of public morals will be weakened by compelling him to do so. The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

It will be noted that the court suggests as one reason why the action would be sustained that the transactions had become established facts and could not in any way be affected by the action of the court. As was suggested, this decision has been followed upon this point by numerous cases, but it should be noted that, as shown above, many courts have refused to follow the decision upon this ground, and distinguish it upon the fact that there had been a reinvestment of the funds, so that the rights of the parties could be determined without any reference to the illegal transactions.

The same principle is applied in Lea v. Cassen, 61 Ala. 316, where it was held that the voluntary rescission of an illegal contract, which is an attempt to place the parties in *statu quo*, is a new and independent agreement, unaffected by the original agreement, and will be enforced by the courts.

Where an illegal contract has been executed by the parties themselves and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. Lestapies v. Ingraham, supra.

And in Boggess v. Lilly, supra, it was held that an injunction would not issue to enjoin the sale of real estate under a deed of trust given by one partner as security for money advanced by the other to pay his share of a gambling debt owed by the firm. The court said that the loan was a new contract, untainted by the illegality of the claim to settle which the money was advanced. To the same effect were the decisions in Patty v. City Bank, 15 Tex. Civ. App. 484, 41 S. W. 173, and Watson v. Fletcher, 7 Gratt. 1.

So, in De Leon v. Trevino, supra, after referring to Brooks v. Martin, the court said: "Now, surely, if the court will lend its aid to compel an accounting, and enforce the payment of the amount found to be due by one partner to the other, it cannot be that it should interpose to relieve one of the partners from a contract resulting from his voluntary accounting, on the ground of the illegality of the original partnership enterprise, which, after completion, had been thus voluntarily settled and adjusted."

The illegality of a wheat deal wherein a partnership made a large profit will not release one of the partners from making an accounting of the profits of subsequent investments made with such profits. Wells v. McGeoch, supra.

A partner whose firm had, during the occupation of that section of the country by the Confederate army, accumulated a large quantity of Confederate money, was required

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poses of the case that the original contract of partnership was void as being contrary to public policy. Still, as to the three transactions last involved, there was no fraud, no double dealing, and nothing contrary either to law or public policy. It is a fundamental rule of law that, if there be a contract legal in part and illegal in part, and the legal can be settled without reference to the illegal, recovery may be had on the legal part thereof. Conceding, then, that the partnership was, in so far as it contemplated the representation by the firm of both sides of a real estate transaction, illegal or contrary to public policy, still this illegality would not effect transactions where the firm represented but one side and earned its commission lawfully. As to this, defendant cannot be heard to say that because it conducted other illegal transactions, he will withhold from plaintiff his share of the money lawfully and properly earned. Anderson v. Powell, 44 Iowa, 20; Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 56 L.R.A. 479, 99 Am. St. Rep. 317, 66 S. W. 421; Leekins v. Nordyke, 66 Iowa, 471, 24 N. W. 1.

Let us for a moment see whether this transaction be such as to deprive plaintiff of his part of the commissions earned. It is a well-known rule of agency that an agent cannot represent both parties,—cannot serve two masters. But this rule is for the protection of the principals, and not for the benefit of the general public. If the principals agree to it, that is the end of the

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in Anderson v. Whitlock, 2 Bush, 398, 92 Am. Dec. 489, to account for the profits which he made by taking such money, with the consent of the firm, farther south, and investing it where such money was current. The court said that to refuse to require him to account because the transactions were illegal would not only be permitting him to profit by his own wrong, but would be aiding him in the perpetuation of a fraud.

A plaintiff was allowed to recover in an action on a bond given by a partner to his copartner for differences paid in a stock-jobbing transaction prohibited by act of Parliament, in Faikney v. Reynous, 4 Burr. 2069. This was a case of an express agreement to pay a debt which could not have been recovered of the firm. Petrie v. Hannay, 3 T. R. 419, was a similar case, except that the partner plaintiff had paid the differences by a bill on which there had been a recovery against him, and his action against his copartner for contribution was sustained. This was an action on an implied contract.

The celebrated case of Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468, is much cited and quoted as authority for this exception to the general rule. This was an action in assumpsit to recover a sum of money paid by the plaintiff on account of goods, the property of the defendant, consigned to the plaintiff, which the government had seized and libeled as having been imported contrary to law. The goods were delivered to the defendant upon the plaintiff's giving security for the appraised valuation, which he afterwards was obliged to pay. The jury found that the plaintiff had nothing to do with the illegal importation, nor any interest in the particular goods, although he himself had also illegally imported goods upon the same vessel. In sustaining the action, the court said that the point of law decided was, that a subsequent independent contract, founded on a new consideration, was not contaminated by the illegal importation, although such illegal importation was known to the plaintiff when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation. It will thus be seen that the case is not authority upon the question of an accounting of an illegal partnership, although it is cited as such authority in numerous cases.

McBlair v. Gibbes, 17 How. 232, 15 L. ed. 132, is also frequently cited as authority for this proposition, although the case did not involve any question of partnership. It was an action upon an assignment of a fund arising from an illegal business; but, as the assignment was subsequent to and independent of the illegal transaction upon which the contract was founded, it was held not to be tainted by the illegality of the contract.

In each of the following cases the court recognized the rule as laid down by Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732, that where the profits of an illegal partnership have been reinvested, or have been made the subject of a new express promise, the courts will sustain an action for an accounting, yet held that, under the facts of the case, there was no new promise, and consequently the rule was not applicable: Dent v. Ferguson, 132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Lane v. Thomas, 37 Tex. 157; Read v. Smith, 60 Tex. 379; Wiggins v. Bisso, 92 Tex. 219, 71 Am. St. Rep. 837, 47 S. W. 637.

So, in Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706, it was held in an action for goods sold, that the defendant was not entitled to a counterclaim for the amount which he was to receive as the profits of an illegal partnership with the plaintiff, which the latter had received. The court said that the defendant must rely wholly upon the illegal acts, which the courts would not consider. The court quoted the following statement of the general rule from Gray v. Hook, 4 N. Y. 449; "The distinction between a void and valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not

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transaction. The partnership, viewed in its worst aspect, was not to defraud the public generally, but to take advantage of prospective customers who might or might not consent. Without consent, commissions could not be collected from either party; but, with it, they could be collected from both. Leekins v. Nordyke, supra; Seymour v. Shea, 62 Iowa, 708, 16 N. W. 196; Norton v. Blinn, 39 Ohio St. 145. The commissions having been earned and collected, and, so far as now involved, with the consent of both principals, the question of dual agency arises collaterally, and it should not be held a defense to plaintiff's suit. Bibb v. Miller, 11 Bush, 306; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732. The Brooks Case, last cited, is closely in point on this proposition, and, as there pointed out, there is a wide distinction between the enforcing of illegal contracts and asserting title to money which has arisen from them. We quote the following from that case: "It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what

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be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of considerations may be sustained."

And following Woodworth v. Bennett, it was held in Goodrich v. Houghton, 55 Hun, 526, 9 N. Y. Supp. 214, that an action will not lie to recover money won on a lottery, which had been sent to another person who was jointly interested in the venture. And to the same general effect was the decision in Kelly v. Devlin, 58 How. Pr. 487.

So, where an unlawful plot to advance the price of lard was entered into, it was held in Leonard v. Poole, 114 N. Y. 371, 4 L.R.A. 728, 11 Am. St. Rep. 667, 21 N. E. 707, that one of the parties thereto could not be aided by the court to an accounting against another party to the contract, even if the latter was only an agent of the former, where there had been no accounting or admission of indebtedness or promise to pay since the completion of the illegal scheme.

In Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993, it was held that one of two parties to an agreement between railroads to divide the profits arising therefrom, which agreement amounted to a contract to suppress traffic, could not maintain an action to secure a division of the proceeds, where it had failed to do anything more than assign the contract, such an action amounting in legal effect to nothing more than a bill to compel a specific performance of the illegal contract. The court said: "The case of Brooks v. Martin, supra, is not in point. In that case the defendant set up an illegal contract which had been fully performed and executed, as a defense against a demand that existed independently of the contract: whereas, in this case, the illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action: leave it in, and it states an illegal and void cause of action. Courts will not

lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them."

Where there are both legal and illegal transactions.

In a number of cases, as in FRYER v. HARKEN, it has been held that where there have been both illegal and legal transactions by the firm, one partner cannot set up as a defense to an action for an accounting of the legal transaction, the fact that some other transactions were illegal, especially where the transactions are distinct, and are not so connected as to require the court to pass upon the illegal transactions.

Thus, in Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 56 L.R.A. 479, 99 Am. St. Rep. 317, 66 S. W. 421, a partner in a legal partnership was held entitled to an accounting upon certain legal transactions, although there were certain illegal transactions as to which an accounting was refused. It appeared from the facts of this case that the legal and the illegal transactions were entirely distinct.

So, in Anderson v. Powell, 44 Iowa, 20, it was held that if a part of a business be legal and a part illegal, an account of that which is legal may be directed.

Where both parties were claiming under valid portions of their contract, the court in Wishek v. Hammond, 10 N. D. 72, 84 N. W. 587, said that it would not consider the effect upon the whole contract of a provision which was void both under the statute and as against public policy.

A contract of partnership, legal when entered into, will be enforced as to transactions conducted before the contract was made illegal by statute, even if there were subsequent illegal transactions. Bennett v. Woolfolk, 15 Ga. 213.

But, in Lane v. Thomas, 37 Tex. 157, it was held that an action for the recovery of the profits of a partnership, the transactions of which were chiefly conducted in Confederate money, would not lie, even for the le-

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rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case." We also quote the following from the opinion in Sharp v. Taylor, 2 Phill. Ch. 801: "The answer to the objection appears to me to be this: That the plaintiff does not ask to enforce any agreement adverse to the provision of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor [the defendant] received the money, and the plaintiff is now only seeking for payment of his share of the realized profit. . . . As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other? . . . Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision of some act of Parliament has been violated or neglected? . . . The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties." McBlair v. Gibbes, 17 How. 232, 15 L. ed. 132, is also in point, and contains an elaborate review of the authorities. We quote the following from the syllabus in that case: "If the fund be paid for the other party to a third person, the latter cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself, or, if paid to one of the parties, he cannot withhold the share going to his associate." See also Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Harvey v. Varney, 98 Mass. 118.

We are impressed with the thought that, defendant having received the money for the partnership, he cannot set up the illegality of the transactions with the landowners as a defense to an action for an accounting; but, however that may be, the transaction now involved—that is, the first Morton-Bonserman deal—is in no sense tainted. This legal transaction may be separated from the illegal, if there were any such, and recovery had thereon. The result of the whole matter is that defendant received $600 on this transaction for which he should account. He paid out $35.15 on account thereof, leaving $564.85, one-half of which is $282.42. Plaintiff confessedly had one-half of $27 more than his share in his possession on prior deals. One half of this is $13.50, which, deducted from the $282.42, leaves $268.92, for which amount plaintiff should have had judgment, with interest from the time of the trial in the court below.

The case will be reversed for a decree in harmony with this opinion, or plaintiff, at his option, exercised within twenty days, may have such a decree here.

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gal transactions, if the legal and the illegal were so blended as to make it impossible to separate them.

Accounting at instance of innocent partner.

The fact that the profits were made in illegal transactions is not a defense to an action for an accounting at the instance of a partner who is innocent of any connection with the wrongdoing.

Thus, in Pennington v. Todd, 47 N. J. Eq. 569, 11 L.R.A. 589, 24 Am. St. Rep. 419, 21 Atl. 297, it was held that when an innocent member of a firm established for the conduct of a lawful and moral business calls upon his partner for a share of profits made in partnership transactions, the partner will not be absolved from the duty of dividing, on showing that he realized the profits by cheating the customers of the firm. And this case is cited with approval and followed in Van Tine v. Hilands, 131 Fed. 124. To the same general effect were the decisions in Blalock v. Copeland, 23 Ky. L. Rep. 1455, 65 S. W. 349, and Thwaites v. Coulthwaite [1896] 1 Ch. 496.

So, one partner cannot set up the illegality of an act by which a large sum was earned for the firm as a defense to an action by the other partner, who was not implicated in the illegal act. Jones v. Davidson, 2 Sneed, 447.

And in Corralitos Co. v. Mackay, 31 Tex. Civ. App. 316, 72 S. W. 624, it was held that although it was illegal for a corporation to form a partnership with an individual, where an attempt had been made to enter into such a partnership, a court of equity would not permit the value of the services or the property of the individual to be taken from him because the corporation could not legally enter into a partnership.

Where the evidence did not tend to prove that the object or purposes of the partnership or the business in which it was to engage was either illegal or immoral, nor that the peculiar manner in which the business was conducted was at all contemplated in the formation of the partnership, the court said in Shriver v. McCloud, 20 Neb. 474, 30 N. W. 535, that it would not permit a member of the firm to avoid his share of the loss through the consideration of a mere sharp practice used in the manner of prosecuting the business, which he himself devised and suggested.

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MASSACHUSETTS SUPREME JUDICIAL COURT.

MICHAEL MABARDY et al.
v.
PATRICK McHUGH et al.

(202 Mass. 148, 88 N. E. 894.)

Deceit — sale of realty — estimate of quantity.

An action for deceit will not lie against one who, when pointing out the true boundaries of a tract of land he is about to sell, fraudulently overstates its area, there being no trust relation between the parties, if he does not dissuade full examination and measurement, and the estate is not so extensive or of such character as to be reasonably incapable of inspection and estimate.

(May 22, 1909.)

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Middlesex County, made during the trial of an action brought to recover damages for deceit in the sale of certain realty, which resulted in a verdict for defendants. Overruled.

The facts are stated in the opinion.

Messrs. **James T. Connolly and John Louis Sheehan**, for plaintiffs:

The plaintiffs were justified in relying upon the statements of the defendant, and were not wanting in due diligence in failing to measure land which the defendant himself promised to measure for them, and thus prove to them that his positive statement of the size of the tract was accurate.

Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454, 24 N. E. 52; Roberts v. French, 153 Mass. 60, 10 L.R.A. 656, 25 Am. St. Rep. 611, 26 N. E. 416; Cawston

Case Note.* — *Is fraudulent representation by vendor as to area within boundaries correctly pointed out actionable.

It is not intended to include herein actions for breach of covenant or warranty as to quantity, or breach of contract to convey a designated quantity of land; nor is it intended to include cases of misrepresentation of quantity not fraudulent, or cases wherein the question considered was the effect of a deficiency in the quantity of land contracted to be conveyed on the right to specific performance. Only cases are included wherein the question was whether or not a fraudulent representation as to the quantity of land conveyed or contracted to be conveyed was actionable, where the boundaries were correctly pointed out. As to the effect of a mistake as to the quantity of land to be conveyed on the right to the specific performance of a contract to convey, see note appended to Rudisill v. Whitener, 15 L.R.A. (N.S.) 81.

Generally, misrepresentation as to quantity of land, if made in the belief that it is true, is not actionable, where both the vendor and vendee had substantially equal means of knowledge, as where the boundaries were correctly pointed out to the vendee. In such cases, in most jurisdictions, in the absence of a fraudulent intent, the liability of the vendor for such misrepresentations depends upon the application of essentially different principles of law than does his liability for such a misrepresentation where made with the fraudulent intent of deceiving the purchaser, although the boundaries are correctly pointed out. For this reason, the only cases included herein are those wherein the misrepresentation as to quantity was found to be fraudulent.

Most of the cases within the scope of this note are cited in MABARDY v. McHUGH. It is conceded in that case that they enunciate a doctrine contrary to that applied therein.

As a general rule, a fraudulent representation of a material fact relating to the subject-matter of a sale, made to induce, and which does induce, the sale, if relied upon, is actionable. This rule, however, does not apply to fraudulent representations which come within the doctrine of *caveat emptor*. It has often been sought to bring within the latter doctrine misrepresentations as to the quantity of land contained within correctly designated boundaries. Generally, however, although the boundaries of a tract of land may be correctly designated or pointed out, so that the purchaser knows the land he is getting, yet a false and fraudulent representation as to the amount of land within such boundaries is actionable, if relied upon by the purchaser. He is not expected to judge or estimate the quantity contained within the boundaries pointed out from appearances, and where the vendor states the area as a fact, he may rely thereon without causing a survey or measurement to be made. Such reliance is not negligence which will preclude relief for fraud practised upon him by the vendor in this regard.

One of the leading cases supporting this doctrine is Starkweather v. Benjamin, 32 Mich. 305, wherein a defense to an action for deceit in misrepresenting the quantity of land conveyed rested mainly on the ground that the purchaser saw the land, and was as able to judge of its size as the vendor. In denying this contention, the court, speaking through Campbell, Judge, said: "We do not think the doctrine that, where both parties have equal means of judging, there is no fraud, applies to such a case. The maxim is equally valid that one who dissuades another from inquiry, and deceives him to his prejudice is responsible. It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. When any approach to accuracy is needed, there must be measurement. When a positive assurance of the area of a parcel of land is made by the vendor to the vendee, with the design of making the vendee believe it, that assurance is very material, and equiva-

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v. Sturgis, 29 Or. 331, 43 Pac. 656; Estes v. Odom, 91 Ga. 600, 18 S. E. 355; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691.

A statement as to the quantity of land in a farm is not an expression of opinion, but of fact.

Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313.

Mr. **Philip Mansfield**, with Messrs. **Vahey, Innes, & Vahey**, for defendants:

If the boundaries were pointed out to the plaintiffs, misrepresentation as to the acreage would be immaterial.

Mooney v. Miller, 102 Mass. 217; Gordon v. Parmelee, 2 Allen, 212.

Plaintiffs cannot seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove.

Sugden, Vend. & P. 6, 7; Scott v. Hanson, 1 Sim. 13; Medbury v. Watson, 6 Met. 246, 39 Am. Dec. 726; Brown v. Castles, 11 Cush. 348; Noble v. Googins, 99 Mass. 231; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Lewis v. Jewell, 151 Mass. 345, 24 N. E. 52; Gordon v. Parmelee, supra; Roberts v. French, 153 Mass. 60, 10 L.R.A. 656, 25 Am. St. Rep. 611, 26 N. E. 416; Mooney v. Miller, 102 Mass. 217; Savage v. Stevens, 126 Mass. 207; Brown v. Leach, 107 Mass. 364; Salem India Rubber Co. v. Adams, 23 Pick. 256; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215; Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627; Farrar v. Churchill, 135 U. S. 609, 34 L. ed.

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lent to an assurance of measurement. In this case, the testimony goes very far, and shows that the assertions and representations, which the jury must have found to be true, were of such a nature that, if believed, as they were, a resurvey must have been an idle ceremony. They were calculated to deceive, and, as the jury have found, they did deceive . . . and he had a clear right of action for the fraud."

Applying this doctrine in Cawston v. Sturgis, 29 Or. 331, 43 Pac. 656, a false representation as to the size of an irregular-shaped lot, claimed to have been based on a survey, was held actionable. The court said: "To turn him [a vendee] out of court under such circumstances because he did not go to the trouble and expense of having the area of the land ascertained by actual measurement, but chose to rely upon defendant's representations, would be offering a premium upon fraud and deceit. Mere knowledge of the boundaries did not charge him with knowledge of its area, so as to relieve the defendant from responsibility for his false and fraudulent representations in reference thereto."

And in Pringle v. Samuel, 1 Litt. (Ky.) 43, 13 Am. Dec. 214, in denying the contention that the maxim *Caveat emptor* applied to such a state of facts and barred relief, it was said: "We do not remember any case where the maxim quoted has been used by the chancellor in such manner as to compel him to shut his ears against false representations, or to give latitude to a vendor of real estate to state facts untruly, without any responsibility. This maxim will and ought to have more influence in the sale of real estate than that of a chattel. The former, from its nature, is open to a less prearious inspection as to quality, and, from its permanent and inanimate character, cannot hide many defects which may be concealed in a chattel. For instance, misrepresentations of its fertility and productions, or even the validity of its title, may be more easily detected; but to ascerain its quantity requires a greater skill and a larger proportion of science than even in this age is acquired by a majority of men. Almost every rational man may be capable of deciding on the quality of land, while but few can ascertain its quantity with accuracy."

So, in Antle v. Sexton, 137 Ill. 410, 27 N. E. 691, where timber land sold was of peculiar shape and contiguous to other timber land, false representations by the vendor as to acreage were held actionable, although the timber was pointed out to the vendee. The court said that it was manifest that, without a knowledge of the boundaries and an actual measurement, no person could tell the number of acres in the tract. It is not clear just what the court meant by this statement, as it is also stated in the opinion that the land was pointed out to the vendee. The doctrine was enunciated, however, that "where a misrepresentation is made as to a material fact, and such misrepresentation is made knowingly, and for the express purpose of deceiving and defrauding, and the party injured relies upon the statement made, and under circumstances which should induce a reasonably prudent man to so rely, there must be a right of action at law for fraud and deceit. To throw a purchaser out of court in such case, upon the plea he did not avail himself of the means of knowledge open to him, would be offering a premium on fraud, and would be destructive of confidence in business transactions."

And in Estes v. Odom, 91 Ga. 600, 18 S. E. 355, the court said that previous knowledge by the vendee of the boundaries of a tract of land purchased would not hinder recovery for the fraud, if he was deceived by the false representation as to quantity, made wilfully by the vendor, and added: "Knowledge of boundaries need not involve knowledge of acreage or superficial area, and was not, in itself, notice of what the tract contained." The tract involved in this case contained about 33 acres, and was represented to contain about 41 acres.

See, also, Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212, wherein the court held that the fact that the boundary corners were pointed out to a purchaser of land, and that he went from corner to corner of the land, and knew its boundaries, did not show that, in purchasing, he did not rely upon the

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246, 10 Sup. Ct. Rep. 771; Farnsworth v. Duffner, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; Brownlie v. Campbell, L. R. 5 App. Cas. 925.

Rugg, J., delivered the opinion of the court:

This is an action of tort sounding in deceit. There was evidence tending to show that the plaintiffs went upon a certain irregular-shaped tract of land (for false representations inducing the purchase of which this action was brought) with one of the defendants, who pointed out the true boundaries and fraudulently stated that the tract contained 65 acres, when in fact it contained 40¾ acres. Upon this aspect of the evidence, the trial court instructed the jury that "if the plaintiffs . . . were taken over the farm by the defendants, . . . or [and] were shown the bounds so that the plaintiffs knew where the farm was and what was comprised within the bounds, it would not be of any consequence that representations may have been made by the defendant in relation to the acreage." The evidence being conflicting as to whether the boundaries were shown, the jury were further instructed that, if the defendant who talked with the plaintiffs "knew that there were not 65 or nearly 65 acres, or if he didn't know anything about it, and stated it as a fact within his personal knowledge, then it would be a false representation for which he would be liable,

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representations of the vendor as to the area. The court said that such an investigation did not offer the purchaser the means of readily ascertaining how many acres there were in the tract, for although he knew the corners and boundaries thereof, he could only ascertain the number of acres therein by a survey, which he was not bound to make.

This doctrine was also applied in Eichelberger v. Mills Land & Water Co. 9 Cal. App. 628, 100 Pac. 117, as to a fraudulent representation of the area of a lot, although the boundaries were correctly pointed out. This lot was a small lot about 1,400 ft. by 170 ft., and it was represented to be about 1,400 ft. by 270 ft.

And see for application of doctrine Boggs v. Bush (Ky.) 122 S. W. 220.

The doctrine was also recognized in McCandless v. Young, 96 Pa. 289, wherein relief was denied a purchaser under circumstances very similar to those herein, on the ground that he had failed to allege and prove *scienter*.

So, in Boddy v. Henry, 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771, and again before the court in 126 Iowa, 31, 101 N. W. 447, a vendor was held liable in an action of deceit for false representations knowingly made as to the area of a large tract of land, although the vendee was upon the land, and the boundaries thereof were correctly pointed out to him. In this case the size of the tract apparently influenced the decision, as the court said it was manifestly impracticable for any person, however experienced, to ride over or around a body of 25 or more square miles of land, surveyed in irregular tracts, and estimate with any reasonable degree of exactness the number of acres therein, and added that it was well settled that a buyer who examined land before purchasing might nevertheless rely upon the representations of the seller as to measurements.

As shown in MABARDY v. McHUGH, the doctrine formerly held in Missouri was very similar to that of Massachusetts; but, in Judd v. Walker, 215 Mo. 312, 114 S. W. 979, the court, referring to this doctrine, said it was too harsh as a general proposition, and added: "Of course, if the vendor and vendee have equal opportunities to know the acreage, and no false representations are made and acted on, the rule is well enough. But, if the rule be construed to mean that a vendee must survey the land and measure it, no difference as to the size of the tract, or whether its boundaries are irregular or not, and cannot rely on the positive assurance of the vendor as to his knowledge of the number of acres in his own land, then we do not agree to it as good doctrine. Such defect as a deficiency in acreage is not a patent defect, to be got at by the use of natural faculties and the exercise of ordinary diligence in a land sale. Due diligence does not require that the vendee should suspect the vendor of lying, nor that the vendee should survey and measure the land to prevent being deceived by the lies of the vendor. It has sometimes been loosely said that the negligence of the vendee will prevent recovery for the fraud of the vendor. The word 'negligence,' used in that connection, as we understand its meaning in the law of negligence, is an unhappy expression. Fraud is a wilful, malevolent act, directed to perpetrating a wrong to the rights of another. That such an act in a vendor should not be actionable because of the mere negligence or inadvertence of the vendee in preventing the fraud ought to be neither good ethics nor good law."

The Massachusetts doctrine also found support in Credle v. Swindell, 63 N. C. 305, which held that a vendor who fraudulently represented a tract of land included in designated boundaries to contain 420 acres, when in fact there was only 210 acres, was not liable to the vendee in deceit for such misrepresentation, since whatever loss the vendee had sustained was attributable to his own negligence and indiscretion. The court said: "He has not exercised that diligence which the law expects of a reasonable and careful person, but was wilfully ignorant of that which he ought to have known. He might have ascertained the fact by an actual survey, or taken a covenant as to quantity. *Vigilantibus non dormientibus jura subveniunt.*" This case was, however, disapproved in Walsh v. Hall, 66 N. C. 233, and also in May v. Loomis, 140

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provided" the other elements essential to a recovery were found to exist.

The correctness of the first of these instructions is challenged. It is in exact accordance with the law as laid down in Gordon v. Parmelee, 2 Allen, 212, and Mooney v. Miller, 102 Mass. 217. The facts in the case at bar are similar in all material respects to these cases. An attempt is made to distinguish them on the ground that the present plaintiffs were Syrians, ignorant of our language, and that hence a trust relation existed between them and the defendant. But, whatever else may be said of this contention, it fails because they were accompanied by two of their own countrymen, who were thoroughly familiar with our language, and acted as interpreters for them. In effect, the contention of the plaintiffs amounts to a request to overrule these two cases. They have been cited with approval in Roberts v. French, 153 Mass. 60, 10 L.R.A. 656, 25 Am. St. Rep. 611, 26 N. E. 416, and as supporting authorities, without criticism, in other opinions. The court, however, has refused to apply the rule of those decisions to other facts closely analogous. See Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454, 24 N. E. 52; Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442, 37 N. E. 350, 52 S. E. 728, wherein the doctrine of that case was said to be contrary to the trend of modern decisions, and it was said that it had been expressly disapproved as to this point in Walsh v. Hall, supra, and had since been ignored as authority.

The rule of Tennessee was stated in Rich v. Scales, 116 Tenn. 57, 91 S. W. 50, as follows: "Where land is sold by the acre, it is a matter of course to grant relief for either an excess or a deficiency; and, in determining whether the sale was by the acre, the deed will not control, but the parties may go behind it, and prove the contract of which the deed was intended by the parties as an expression. Where the sale is in gross, the rule is that no compensation will be granted for either an excess or a deficiency; but this is subject to the following exceptions: If the deed recite the number of acres, and it subsequently turn out upon survey, or be otherwise accurately ascertained, that there is an excess or deficiency over or under the acreage stated, so great as to justify an inference of fraud, or of a mistake equivalent in its effect to fraud, relief will be granted. If, however, the vendee has inspected the land, and has obtained the very tract he intended to buy, and all the vendor intended to sell, he can have no relief, although the deed purport to state the number of acres, unless the difference between the number stated and the actual number of acres contained be so great as to shock the conscience of the court. Relief will then be granted on the ground of fraud."

The English doctrine, as stated in Joliffe v. Baker, L. R. 11 Q. B. Div. 255, is that, after the purchaser has taken a conveyance and the purchase money has been paid, no action can be maintained, either at law or in equity, for damages or compensation on account of errors as to the quantity of land sold, unless the misrepresentation amounts to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit have been practised upon the purchaser. A representation as to quantity of land inclosed within boundaries correctly pointed out, made by the vendor in good faith, and without any intention to deceive, was held not fraudulent within this rule.

It has also been held that a purchaser is not entitled to compensation for a deficiency in the quantity of land actually received or conveyed over its represented area, where he was well acquainted with the land he was buying. Corbett v. Locke-King, 16 Times L. R. 379. In this case, like the preceding one, there was no evidence of fraud, aside from the bare fact of misrepresentation.

Mooney v. Miller, 102 Mass. 217, Gordon v. Parmelee, 2 Allen, 212, and Medbury v. Watson, 6 Met. 246, 39 Am. Dec. 726, apply the doctrine of *caveat emptor*, without restriction or limitation, to false representations by a vendor as to quantity of land conveyed, where the boundaries are correctly pointed out. But, in Roberts v. French, 153 Mass. 60, 10 L.R.A. 656, 25 Am. St. Rep. 611, 26 N. E. 416, the court said that, notwithstanding the purchaser's knowledge of how the land looked, the jury might have found that the statement as to the length of one of the boundary lines deceived him and induced him to buy, and that it materially varied from the truth, and added: "It is true that the agreement was to buy a lot with known boundaries, and very likely, in the absence of fraud, the rule would apply that monuments govern distances." But this, the court said, was only a rule of construction; "it does not mean that measurements are not material, or that a man who knows the monuments cannot be deceived about them." In referring to Gordon v. Parmelee and Mooney v. Miller, the court said: "We do not mean to question these decisions in the slightest degree, but it is obvious that there must be a limit beyond which fraudulent representations cannot be made with impunity. . . . When a man conveys 'the notion of actual admeasurement,' . . . still more when he says that he has measured a line himself, and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry . . . than a statement of the contents of a lot, without giving grounds for the estimate. If false, it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate, which the other leaves open."

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E. 755; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262, 51 N. E. 1084; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108. This court, in recent years, by pointed language and by conclusions reached, has indicated a plain disposition not to extend legal immunity for the falsehood of vendors in the course of negotiations for sales beyond the bounds already established. Dawe v. Morris, 149 Mass. 188–192, 4 L.R.A. 158, 14 Am. St. Rep. 404, 21 N. E. 313; Way v. Ryther, 165 Mass. 226, 42 N. E. 1128; Kilgore v. Bruce, supra; Andrews v. Jackson, 168 Mass. 266–268, 37 L.R.A. 402, 60 Am. St. Rep. 390, 47 N. E. 412; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262, 51 N. E. 1084; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; Arnold v. Teel, 182 Mass. 1–4, 64 N. E. 413; Adams v. Collins, 196 Mass. 422, 82 N. E. 498; Long v. Athol, 196 Mass. 497–504, 17 L.R.A.(N.S.) 96, 82 N. E. 665; Gurney v. Tenney, 197 Mass. 457, 84 N. E. 428; Lyons Burial Vault Co. v. Taylor, 198 Mass. 63, 84 N. E. 320; Rollins v. Quimby, 200 Mass. 162, 86 N. E. 350.

This judicial attitude perhaps reflects an increasingly pervasive moral sense in some of the common transactions of trade. While the science of jurisprudence is not, and under present conditions cannot be, coextensive with the domain of morality, nor generally undertake to differentiate between motives which mark acts as good or bad, yet it is true, as was said by Mr. Justice Brett, in Robinson v. Mollett, L. R. 7 H. L. 802, 817, that "the courts have applied to the mercantile business brought before them what have been called legal principles, which have almost always been the fundamental ethical rules of right and wrong." This is only a concrete expression of the broader generalization that law is the manifestation of the conscience of the commonwealth.

In many other jurisdictions the rule of Gordon v. Parmelee and Mooney v. Miller has not been followed, and false representations as to area of land, even though true boundaries were pointed out, have been held actionable. McGhee v. Bell, 170 Mo. 121, 135, 150, 59 L.R.A. 761, 70 S. W. 493; May v. Loomis, 140 N. C. 350, 52 S. E. 728; Boddy v. Henry, 113 Iowa, 462–465, 53 L.R.A. 769, 85 N. W. 771; Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691; Estes v. Odom, 91 Ga. 600–609, 18 S. E. 355; Lovejoy v. Isbell, 73 Conn. 368–375, 47 Atl. 682; Cawston v. Sturgis, 29 Or. 331, 43 Pac. 656; Starkweather v. Benjamin, 32 Mich. 305; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Walling v. Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496. See also Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755.

Other cases, apparently opposed to the Massachusetts rule, on examination prove to go no further than to decide that misrepresentations as to area, when there is no evidence that boundaries were shown, constitute deceit. Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Coon v. Atwell, 46 N. H. 510; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 744; Perkins Mfg. Co. v. Williams, 98 Ga. 388, 25 S. E. 556; Sears v. Stinson, 3 Wash. 615, 29 Pac. 205; Hill v. Brower, 76 N. C. 124; Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212. This is the substance of the latter part of the instruction given in the superior court, and is the law of this commonwealth.

The rule of Mooney v. Miller seemingly has been approved or followed in Lynch v. Mercantile Trust Co. (C. C.) 5 McCrary, 623, 18 Fed. 486; Crown v. Carriger, 66 Ala. 590, and Mires v. Summerville, 85 Mo. App. 183, although the last case has been overruled in Judd v. Walker, 114 Mo. App. 128–135, 89 S. W. 558. If the point was now presented for the first time, it is possible that we might be convinced by the argument of the plaintiffs and the great weight of persuasive authority in its support, especially in view of Lewis v. Jewell, supra. But there is something to be said in support of the two earlier decisions now questioned. A purchase and a sale of real estate is a transaction of importance, and cannot be treated as entered into lightly. People must use their own faculties for their protection and information, and cannot assume that the law will relieve them from the natural effects of their heedlessness, or take better care of their interests than they themselves do. Thrift, foresight, and self-reliance would be undermined if it were the policy of the law to attempt to afford relief for mere want of sagacity. It is an ancient and widely, if not universally, accepted principle of the law of deceit that, where representations are made respecting a subject as to which the complaining party has at hand reasonably available means for ascertaining the truth and the matter is open to inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of the falsehoods of the other party. Salem India Rubber Co. v. Adams, 23 Pick. 256–265; Slaughter v. Gerson, 13 Wall. 383, 20 L. ed. 628; Long v. Warren, 68 N. Y. 426–432; Baily v. Merrell, 3 Bulst. 94. This rule, in its general statement, applies to such a case

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as that before us. It is easy for one disappointed in the fruits of a trade to imagine, and perhaps persuade himself, that the cause of his loss is the deceit of the other party, rather than his own want of judgment.

It is highly desirable that laws for conduct in ordinary affairs, in themselves easy of comprehension and memory, when once established, should remain fast. The doctrine of *stare decisis* is as salutary as it is well recognized. Rogers v. Goodwin, 2 Mass. 475–478; Holmes v. Hunt, 122 Mass. 505–516, 23 Am. Rep. 381; Smith v. Worcester, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40; Com. v. Walsh, 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 A. & E. Ann. Cas. 642; Spicer v. Spicer, Cro. Jac. 527; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 574, 638, 39 L. ed. 759, 816, 839, 15 Sup. Ct. Rep. 673; Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471–478, 13 L. ed. 220–223; Minnesota Min. Co. v. National Min. Co. 3 Wall. 332, 18 L. ed. 42. While perhaps it is more important as to far-reaching juridical principles that the could should be right in the light of higher civilization, later and more careful examination of authorities, wider and more thorough discussion, and more mature reflection upon the policy of the law, than merely in harmony with previous decisions (Barden v. Northern P. R. Co. 154 U. S. 288–322, 38 L. ed. 992, 1000, 14 Sup. Ct. Rep. 1030), it is nevertheless vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration. Parties should not be encouraged to seek re-examination of determined principles, and speculate on a fluctuation of the law with every change in the expounders of it. As to many matters of frequent occurrence, the establishment of some certain guide is of more significance than the precise form of the rule. It is likely that no positive rule of law can be laid down that will not at some time impinge with great apparent severity upon a morally innocent person. The law of gravitation acts indifferently upon the just and the unjust. A renewed declaration of law that is already in force, supported by sound reason, and not plainly wrong, in the long run probably works out substantial justice, although it may seem harsh in its application to some particular case. These considerations are regarded as so weighty by the House of Lords that it cannot overrule any of its own decisions. London Street Tramways Co. v. London County Council [1898] A. C. 375.

The conclusion is that we do not overrule the decisions whose soundness has been debated at the bar, although we do not extend their scope, but confine them strictly to their precise point; namely, that where the seller of real estate shows upon the face of the earth its true boundaries, to the purchaser and does not fraudulently dissuade him from making full examination and measurement, and the estate is not so extensive or of such character as to be reasonably incapable of inspection and estimate, and there is no relation of trust between the parties, the purchaser has no remedy for a misrepresentation as to the area alone.

The instruction as to the difference between representation and expression of opinion was adequate and adapted to the testimony.

The charge is not reported in full. No requests for rulings were presented, and the only exceptions relate to the statement of the rule of Gordon v. Parmelee and Mooney v. Miller. It does not appear, therefore, that full instructions were not given as to the effect of fraudulent dissuasion by the defendants (of which there was some evidence) from a full examination of the farm by the plaintiffs.

Exceptions overruled.

MISSOURI SUPREME COURT.

(Division No. 1.)

AMALGAMATED ZINC & LEAD COMPANY, Appt.,
v.
BAY STATE ZINC MINING COMPANY, Respt.

(221 Mo. 7, 120 S. W. 31.)

Foreign corporation — right to sue — compliance with law.

1. A foreign corporation which has engaged in mining within the state without complying with its laws, which compliance is a statutory prerequisite of the right to maintain an action in the state courts, cannot secure the right to maintain a suit instituted to restrain interference with its mine by complying with the local law after its institution.

Same — compliance after litigation.

2. A foreign corporation which attempts to engage in mining within a state under an assignment of a lease made and to be executed there, without complying with the re-

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Case Note. — Effect upon right of foreign corporation to maintain suit of compliance with local law after suit is instituted.

The earlier cases upon this subject are collected and discussed in a case note to National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 14 L.R.A.(N.S.) 561, which is cited in the foregoing opinion. There are one or two recent cases upon the subject not included in the earlier note.

Under a statute providing that no foreign corporation shall be permitted to maintain an action, either at law or in equity,

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quirements of the statutes necessary to give it the right to do business there, by reason of which its contracts are void under the statute, cannot validate the assignment so as to maintain an action upon it by complying with the statute several years after it began to do business, and after it had brought an action to protect its rights under the lease.

(May 31, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jasper County dismissing a bill filed to enjoin defendant from mining on certain property in violation of plaintiff's alleged exclusive right to mine such property under a lease thereof. Affirmed.

The facts are stated in the opinion.

Mr. **Thomas Dolan**, for appellant:

Shortly after bringing suit, and long prior to the term for which said suit was brought, plaintiff was duly and regularly licensed to do business in Missouri, and this is sufficient to entitle it to maintain the action.

Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L.R.A. 420, 31 S. W. 772.

A failure of a corporation to comply with the statutory requirements does not put its property outside the protection of the law, and, though it may not sue on a contract, it may take legal steps to protect or recover its property.

St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia, 60 Ark. 325, 28 L.R.A. 83, 30 S. W. 350; Western U. Teleg. Co. v. Union P. R. Co. 1 McCrary, 418, 3 Fed. 423; Tenant v. Elliott, 1 Bos. & P. 3; Clements v. Yturria, 81 N. Y. 285; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631; Beale, Foreign Corp. § 252.

Messrs. **Cole, Burnett, & Williams**, for respondent:

All contracts entered into in this state by foreign corporations which have not complied with the statute are void, and no action can be instituted thereon.

Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 192 Mo. 404, 4 L.R.A.(N.S.) 688, 111 Am. St. Rep. 511, 90 S. W. 1020, 4 A. & E. Ann. Cas. 808; State ex rel. Atty. Gen. v. Standard Oil Co. 194 Mo. 124, 91 S. W. 1062; Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Wilson-Moline Buggy Co. v. Priebe, 123 Mo. App. 521, 100 S. W. 558; Roeder v. Robertson, 202 Mo. 522, 100 S. W. 1086; United Shoe Machinery Co. v. Ramlose, 210 Mo. 649, 109 S. W. 567.

If a right of action did not exist at the time the suit was brought, subsequent transactions by the plaintiff cannot be invoked to relieve the plaintiff from the result of its premature conduct or its premature action in the court.

Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. supra.

Graves, J., delivered the opinion of the court:

Plaintiff, a corporation under the laws of New Jersey, on December 27, 1905, filed a petition in the circuit court of Jasper, the purpose of which was to enjoin and restrain the defendant from mining on the E. ½ of a certain tract of ground know and described as lot 107 in the N. E. ¼ of section 4, township 27, range 33, in Jasper County, Missouri, as shown by a certain plat of said ground for mining purposes as made out and posted by the Granby Mining & Smelting Company, the owner in fee of said ground. Plaintiff claimed the right to mine said E. ½ of lot 107 by virtue of mesne assignments of a license to mine that tract and other lots, given by the said Granby Mining & Smelting Company. The petition then charged that defendant had been mining on said tract, and, although notified not so to

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in the courts of the state, until the provisions of the statute have been complied with, it was held in Kendrick & Roberts v. Warren Bros. Co. (Md.) 72 Atl. 461, that a compliance with the statute after the institution of the suit entitled a foreign corporation to prosecute the action, as the word "maintain," as used in the statute, meant to support what had already been brought into existence; and the statute could not be held to forbid the institution of the suit until such compliance.

And the court in this case cited with approval the decision in Wetzel & T. R. Co. v. Tennis Bros. Co. 75 C. C. A. 266, 145 Fed. 458, 7 A. & E. Ann. Cas. 426, in which the court said, *obiter*, that they thought it was quite apparent that the omission to comply with the statute on the part of the plaintiff corporation did not operate to end a suit otherwise regularly instituted, or to destroy a right in other respects validly existing, and that the greatest effect of the omission, so far, at least, as the Federal courts were concerned, would be to suspend the prosecution of such suit until compliance should be had with the statute.

As to right of foreign corporation which has not complied with the local laws to defend action, see case note to American De Forest Wireless Teleg. Co. v. Superior Ct. 17 L.R.A.(N.S.) 1117.

As to right to cancelation of contract made with foreign corporation because it has not complied with the laws entitling it to do business within the state, see case note to Tarr v. Western Loan & Sav. Co 21 L.R.A.(N.S.) 707.

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do, was still mining thereon; and, after charging irreparable injury and damages and inadequate legal remedies, prayed for an injunction as aforesaid. By the answer the defendant pleaded: (1) That plaintiff was a foreign corporation, and had not complied with the laws of this state by filing with the secretary of state a copy of its charter or certificate of incorporation, and had no license to transact business in this state, and had no right to commence or maintain a suit such as this, or any other, in the courts of this state. (2) Defendant admitted its corporate capacity, admitted that it was in possession of that part of the premises described in plaintiff's petition, specifically describing the same by metes and bounds, admitted that it was mining on the same at the commencement of this suit, admitted that it had been so engaged long prior to the filing of the suit, and purposed to continue said mining, but denied all other matters not specifically admitted. (3) Defendant further pleaded that it was mining on such disputed tract by virtue of an agreement with plaintiff, which agreement is described in detail, as well as defendant's conduct thereunder, and this portion of the answer concludes by a plea of estoppel. (4) Defendant avers that the petition does not state facts sufficient to entitle plaintiff to injunctive relief. Reply was a general denial.

At the trial evidence was heard subject to objections, and at the close of the plaintiff's case the court sustained a demurrer to the testimony. Over the objection of the defendant, the plaintiff put in the following documentary evidence: (1) Certificate and license issued to plaintiff by the secretary of state of Missouri, of date January 25, 1906; (2) mining license from Granby Mining & Smelting Company, of date March 1, 1899, to Rafael Estrada, and covering the land in dispute; (3) written transfer of the above-named mining license or lease from Rafael Estrada to W. W. Lowe, trustee, of date May 31, 1904; (4) written transfer of the first-named license, of date October 14, 1904. By oral proof it was shown: That in March, 1906, the plaintiff got a new license or lease from the Granby Mining & Smelting Company; that plaintiff had been mining on the property covered by the Estrada lease since 1902; that W. W. Lowe was trustee for the plaintiff in the instrument made to him and described above, that plaintiff notified defendant to cease mining on the disputed tract, which was done for about three weeks; that then mining was resumed and continued until the granting of the injunction; that the ore was 6 per cent ore, and valuable; that defendant purposed further operations on this land unless restrained by injunction. Such are the facts of the case. Counsel seem to agree that the court, nisi, dismissed plaintiff's bill on the theory that it had no license to transact any business in this state prior to January 25, 1906, and therefore could not maintain this suit; but, whatever may have been the views below, we have detailed an outline of the facts, and can, as we have the right, proceed to determine the merits. Contentions of counsel both pro and con will be noted in the course of the opinion, so far as may be required.

1. There are two questions presented by this record: (1) Can plaintiff, a foreign corporation, without license to do business in this state, but having actually been resident in the state, and transacting its charter business therein for some years, be permitted to bring an action in our courts, and, after having so brought the action, be permitted to maintain and prosecute it, by taking out the required license before trial? And (2) if it can thus give itself a status or standing in our courts, can it further enforce contracts which it has made and which are to be fully performed in this state? Of these questions in their order.

We are inclined to think that both contentions must be answered in the negative; but they are so closely related that a discussion of the one necessarily involves the discussion of the other. That a foreign corporation can sue in Missouri on contracts made outside of Missouri, or made by salesmen traveling for them in Missouri, can sue in the courts of the state without license from the secretary of state, is unquestioned; but the question here is: Can a foreign corporation come into this state, open up a place of business, and actually do a part of the business authorized by its charter in violation of our law, and, without taking out a license, and otherwise complying with our statutes, have the doors of our courts open to them, to protect the unlawful business? We think not. If the petition in such case disclosed the facts aforesaid, it would be demurrable. Whilst we have held that the plaintiff in such cases does not have to plead that it has a license to do business, and that the failure so to plead does not make the petition demurrable (United Shoe Machinery Co. v. Ramlose, 210 Mo. loc. cit. 649, 109 S. W. 567), yet there can be no question that if it appeared upon the face of the petition that the plaintiff, a foreign corporation, had established a place of business in the state, and had actually been doing business in the state, without a license, such a petition would be demurrable, because of the fact that it would disclose that the party plaintiff had no right to sue. Now, advancing a step, if the party was

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incapacitated to sue at the institution of the suit, can such party cure such incapacity by taking out a license thereafter and before trial. We think not. There is diversity of opinion among the courts. *Vide* note to case of National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 14 L.R.A.(N.S.) 561 et seq. The annotator, in discussing the right to maintain a suit before license is issued, but in which license was procured before trial, says: "Of course, in those jurisdictions in which it is held that any contract entered into by a foreign corporation before complying with the requirements of the local statute is void, the particular question presented in the foregoing case could not arise; for, if the contract is void from the beginning, subsequent compliance with the requirements of the statute, either before or after bringing suit, would not remedy the defect. In those jurisdictions, however, which hold that such contracts are not invalid, but merely unenforceable by the corporation before its compliance with the statutory requirements, there is much difference of opinion as to the effect of a compliance after the commencement of the suit, but before judgment."

In this state we hold, as we shall show in a subsequent paragraph, that the unlawful contract cannot be validated by taking out a license after the making of the contract. Hence our state falls within that class of jurisdictions mentioned in the first paragraph of the quotation, supra. For that reason we suggested in the beginning that the two questions were much intertwined in the case at bar. We are not unaware that in Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L.R.A. 420, 31 S. W. 772, this court held that where a foreign corporation had filed an attachment suit prior to taking out license, and, between the time of bringing the suit and a motion to dismiss the case, for the reason that it had not taken out license, it did comply with our law, and take out the license, that it could maintain said suit, and the judgment of our Brother Valliant then in the court, nisi, was reversed; but, as pointed out by Goode, J., in the recent case of Handlan-Buck Mfg. Co. v. Wendelkin Constr. Co. 124 Mo. App. loc. cit. 362, 101 S. W. 702, the Carson-Rand Case has in effect been overruled in the case of Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 192 Mo. 404, 4 L.R.A.(N.S.) 688, 111 Am. St. Rep. 511, 90 S. W. 1020, 4 A. & E. Ann. Cas. 808. We did not expressly overrule it, but when, upon examination of the record in that case, it is seen that, by an agreed statement of facts, upon which the motion to dismiss was submitted, as Judge Goode, in the case, supra, says, "contained, among other things, the agreement that plaintiff had for a long time conducted a lumber yard in St. Louis, that the notes in suit were made and executed in the city of St. Louis, were payable in St. Louis, and that the sales of lumber for which the notes were given were made in St. Louis," then it is apparent that it has been in effect fully overruled by not only the case in 192 Mo. 404, supra, but in all subsequent decisions. The effect of Judge Barclay's decision was to hold that the subsequent taking out of the license validated the notes sued on in that case, and he, accordingly, reversed and remanded the case "for further proceedings."

Not only have our courts discredited the doctrine of the Carson-Rand Case, but in Minnesota, wherein they have practically the same statute as ours, the court refused to follow that case. The Minnesota court, in G. Heileman Brewing Co. v. Peimeisl, 85 Minn. loc. cit. 124, 88 N. W. 442, says: "Counsel for the plaintiff practically concede that by virtue of this provision it could not maintain any action in our courts upon such a demand until it complied with the statute, but claim that the statute does not prohibit the commencement of the action, and that the plaintiff may, after its noncompliance has been pleaded as a defense, comply with the statute and maintain the action. The case of Carson-Rand Co. v. Stern, supra, is cited in support of this contention. The case is in point, for the statute there under consideration was similar to our own; but we cannot accept this construction of the statute, for a prohibition against maintaining an action implies a prohibition against beginning it, for the beginning of the action is one of the necessary steps in maintaining it. More than that, the construction of the statute urged on behalf of the plaintiff would invite and foster the very evil it was intended to prevent. It would enable foreign corporations to do business in this state in defiance of our laws until some party, perchance, pleaded its noncompliance in an action brought by it to enforce a demand against him. Then it would comply, and the action would proceed. Such a construction is contrary to the letter and spirit of the statute, and, if adopted by the court, would directly tend to defeat the public policy sought to be enforced by its enactment. The most efficient way to compel obedience to this statute is to enforce it as it reads, and not amend it by judicial construction so as to enable foreign corporations to avoid the consequences of a noncompliance with its terms by complying after the penalties have been incurred. We therefore hold that a foreign corporation doing business in this state without first complying with the statute cannot maintain an

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action in the courts of this state upon any contract or demand growing out of such business. Nor will compliance by it with the statute after the making of such a contract, or after the commencement of an action thereon, remove the bar of the statute. This conclusion is supported by the decisions of the courts of other states having a similar statute. J. Walter Thompson Co. v. Whitehed, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; Ehrhardt v. Robertson Bros. 78 Mo. App. 404."

In Halsey v. Henry Jewett Dramatic Co. 114 App. Div. 424, 99 N. Y. Supp. loc. cit. 1124, the court says: "The language of § 181 of the tax law [Laws 1896, chap. 908, p. 856] is that every foreign corporation not excepted, authorized to do business under the general corporation law, shall pay a license fee within the time prescribed, or else it shall not maintain any action in the courts of the state. The answers demurred to allege that this fee had not been paid when the action was commenced, and, if that be true, then the action cannot be maintained. The fact that the fee was paid after the action was commenced does not change the situation. The plaintiff had no right to bring the action, and, having brought it without right, he cannot, notwithstanding the payment of the fee thereafter made, continue and maintain an action which he, in the first instance, had no right to bring."

We quite agree with the Minnesota court, in that the beginning of a suit is but one step in maintaining it. The construction of the word "maintain," as given in the Carson-Rand Case, is too narrow when we consider the purpose of the statute wherein it is used, *i. e.*, Rev. Stat. 1899, § 1026 (Anno. Stat. 1906, p. 890). The plaintiff in the case, being incapacitated to sue in the first place, did not so change its status by taking out the license as to be permitted to further prosecute a suit brought in defiance of the statute. These statutes, §§ 1025 and 1026, Rev. Stat. 1899 (Anno. Stat. 1906, pp. 888, 890), have been so often quoted in the cases hereinafter cited that a reproduction here would be superfluous.

2. But going to the contract which is the basis of plaintiff's right to maintain this suit, *i. e.*, the license or lease which, by mesne assignments from Estrada, came to plaintiff, how stands the plaintiff? It is only by this instrument that plaintiff has any standing in court. This is a Missouri contract, assigned in Missouri to a foreign corporation. This assignment to Lowe, trustee, was but an assignment to the corporation, under the undisputed evidence. The plaintiff was in Missouri actually transacting its business in 1902, nearly two years before the assignment of the contract or license. The contract was to be wholly performed in Missouri, and the plaintiff was working its mines under this contract, and had been for months prior to this suit. All this it did in open violation of our statutes. When it assented to this assignment, it undertook to make and perform a Missouri contract relative to the business it was authorized by its charter to do in its native state. It established its business in Missouri, with a superintendent in charge, all in violation of law. It was here in open violation of law before it made this contract, and so continued thereafter. Under such circumstances its contract is absolutely void, and no act of it thereafter by taking out license and otherwise complying with our statutes can validate it. Rev. Stat. 1899, § 1026; United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567; Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. supra; Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344; Roeder v. Robertson, 202 Mo. 522, 100 S. W. 1086; Handlan-Buck Mfg. Co. v. Wendelkin Constr. Co. 124 Mo. App., loc. cit. 349, 101 S. W. 702; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Wilson-Moline Buggy Co. v. Priebe, 123 Mo. App. 521, 100 S. W. 558.

Without a valid contract, the proof failed to show that the plaintiff was entitled to any relief at the hands of a court of equity, nor, for that matter, in a court of law. We conclude that it neither had the right to bring or maintain the suit, nor did it show facts to make a case. Taking out a license after bringing the suit neither validated the theretofore illegal contract, nor did it change the status of the plaintiff at the time of the institution of the suit. Being an outlaw at the beginning of the case, it must so continue throughout.

The judgment nisi is correct, and is affirmed.

All concur.

ALABAMA SUPREME COURT.

T. W. O'BYRNE, Appt.,
v.
JOHN C. HENLEY et al.

(— Ala. —, 50 So. 83.)

Lease — saloon — prohibition law — effect.

A lease of property solely for saloon purposes is not terminated by the taking effect during the term of a prohibitory liquor law, where, by construction of the parties, the right was conferred upon the lessee

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of selling upon the property nonintoxicating beverages and tobacco, so that the right of the lessee was not totally destroyed.

(May 20, 1909.)

APPEAL by defendant from a judgment of the City Court of Birmingham in plaintiffs' favor in an action brought to recover the rent of a building accruing after the going into effect of a prohibitory law which was alleged to have terminated the use of the property. Affirmed.

The facts are stated in the opinion.

Messrs. **Powell & Blackburn** for appellant.

Mr. **R. B. Smyer**, for appellees:

A lease of premises for use as a saloon is not terminated, nor has the lessee the right to terminate it, by reason of a statute prohibiting the sale or disposition of intoxicating liquors, enacted subsequent to the execution of the lease contract.

3 Am. & Eng. Enc. Law, p. 955, note 6; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966; Houston Ice & Brewing Co. v. Keenan, 99 Tex. 279, 88 S. W. 197; San Antonio Brewing Asso. v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368; Taylor v. Finnigan, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203; Kerley v. Mayer, 10 Misc. 718, 31 N. Y. Supp. 818.

A lessee of premises destroyed during the term of lease by unavoidable accident is not relieved from the payment of rent unless he protects himself by stipulation in the lease, or unless there is a destruction of the entire subject-matter of the lease, so that nothing remains capable of being held or enjoyed.

Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; Phillips & B. Mfg. Co. v. Whitney, 109 Ala. 645, 20 So. 333; Chamberlain v. Godfrey, 50 Ala. 530; Cook v. Anderson, 85 Ala. 99, 4 So. 713.

Mayfield, J., delivered the opinion of the court:

There is but one material question raised by this appeal, which is this: Did the prohibition law in this state *ex proprio vigore* terminate leases of premises which were let only for saloon purposes? If it did, the judgment for plaintiffs below is erroneous and must be reversed. If it did not, the judgment was correct and must be affirmed.

The rule of the common law was that the destruction of the leased premises during the term by fire, inevitable accident, the violence of nature, the act of a public enemy, did not relieve the tenant from express covenant to pay rent, unless it was stipulated in the lease that there should be a cessation of the rent in such case, or unless the lessor had covenanted to rebuild in such case. Chamberlain v. Godfrey, 50 Ala. 530; Cook v. Anderson, 85 Ala. 99, 4 So. 713; Taylor, Land. & T. § 377; 3 Kent, Com. 603. A limitation or exception to this rule is that, if the destruction of the lease or premises is complete,—nothing remaining, the subject-matter or thing leased no longer existing,—then the liability of the tenant for rent ceases. This because rent is a profit issuing out of the lands or tenements as compensation for the use or occupation. Hence, if the principal is gone, the interest or incident cannot continue to exist. To illustrate: If a farm is leased, and the buildings are during the term destroyed by fire, the tenant is still liable for rent; but, if a room only of that house had been rented, or one story only, and the house was destroyed completely, the tenant would not thereafter be liable for rent. If the room or story rented was only partially destroyed or injured, however, the rule would be different. McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Chamberlain v. Godfrey, supra. An eviction of the tenant by the landlord, or any interference by the latter which deprives the former of the right of enjoyment of the premises to the full extent of the lease, will authorize the tenant to abandon the premises, and will exonerate him from further liability for rent. Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Chamberlain v. Godfrey, supra. But the act of a third person which impairs the

Case Note.* — *Effect upon lease of property for saloon purposes of passage of prohibitory laws during the term.

The earlier cases upon this subject will be found collected in the note to Heart v. East Tennessee Brewing Co. 19 L.R.A.(N.S.) 964, those herein cited having been decided since the date of that note.

Where a lease for a term of five years includes every portion of a hotel, including the barroom, the passage during the term of the lease of a law prohibiting the sale of intoxicating liquors will not, in the absence of any provision in the lease to that effect, entitle the lessee to a reduction or proportional abatement of the agreed rental. Lawrence v. White, 131 Ga. 840, 19 L.R.A.(N.S.) 966, 63 S. E. 631.

However, it was held in Hooper v. Mueller (Mich.) 123 N. W. 243, that the adoption of a local option law, prohibiting the sale of intoxicating liquors in a county, avoids a lease of premises for the express purpose of being used for the sale of liquor, where the lease provided that it should be void if the lessor should fail to secure for the lessee the sureties required by law, as the adoption of such prohibitory law rendered a performance upon the lessor's part impossible.

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usefulness of the premises, but which does not amount to an eviction by the landlord or paramount title, or to a breach of his covenants, or where the premises are impaired or removed by public authority, there is no eviction by the landlord which will exonerate the tenant from the payment of rent, in the absence of a contract to that effect. 24 Cyc. Law & Proc. pp. 1132, 1133.

Some of the courts of the United States have held that there is no limitation or exception to the rule that the tenant remains liable for rent notwithstanding there is an entire destruction of the premises and of the lease, even where only a room, a story, or a certain apartment is let, which carries no interest in the land itself. Helburn v. Mofford, 7 Bush, 169. Some of the Western states, however, have adopted an intermediate rule of prorating or apportioning the loss between the vendor and the vendee by abating a part of the contract price. In the case of Wattles v. South Omaha Ice & Coal Co. 50 Neb. 251, 36 L.R.A. 424, 61 Am. St. Rep. 554, 69 N. W. 785, the majority of the court hold that where a substantial part of the leased premises is destroyed pending the lease, without fault on the part of the lessee, he is entitled to an apportionment of the rent contracted to be paid which accrues thereafter, in the absence of an express assumption by him of the risk, and that the common-law rule that the tenant in such case was liable for the contract price after partial destruction of the premises did not prevail in that state. The majority opinion in the above case held that the common-law rule of making the tenant bear the entire loss was a harsh and technical one; that since it was first announced the conditions of the race had changed; that its conscience and intellect had quickened; and, however meritorious the rule originally, that it was now opposed by the genius and spirit of this age, and in conflict with its judgment and conscience. The rule of thus apportioning the loss was first announced by Justice Brewer in the case of Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277, and the Nebraska court approved the rule announced by Justice Brewer, "because it is a magnificent protest against slavish devotion to antiquated rules, and . . . because it breathes the spirit of humanity and equity, and is based on a thought of the nineteenth century." In a dissenting opinion in this Nebraska case, supra, written by Justice Irvine and concurred in by Chief Justice Post and Justice Ryan, the above proposition announced by the majority opinion is answered thus: "It is not for the court to abrogate or to reform contracts because of apparent inequity or injustice in their provisions. If the nineteenth century has advanced . . . so far as to require the disregard of established legal principles merely because they are antiquated, this modern enlightenment must certainly have extended so far as to justify a presumption that the parties to a contract have sufficient intelligence to anticipate probable disasters and provide therefor if they so desire. . . . Rules settled by a long and uniform course of judicial decisions should not be lightly disregarded." Mr. Freeman, the great annotator and text writer, commenting on this rule of apportioning the loss, says the rule is asserted "with much charity and some logic."

If we were disposed to follow the Western rule of apportioning the loss (which we do not decide or consider), we could not do so in this case, because there was no attempt so to do in the lower court, and there is absolutely no pleading or evidence on which to base such a judgment. Where the question or rule is regulated by statute,—which is the case in some states,—or where it is provided for in the lease, then, of course, the statute or contract will control. In this state we have no statute regulating this subject, and the contract of lease does not attempt to provide against a law prohibiting the sale of intoxicants. The contract or lease in question leases the premises to appellant for two years from October 1, 1907, "for occupation by him as a saloon, and not otherwise." It would seem that a destruction of the business or trade which, by the contract, was to be carried on in the premises, should be analogous to a destruction of the premises themselves. While, of course, they may not be and are not strictly analogous in all respects, yet we think that they are so in so far as is necessary to a decision of the questions involved on this appeal.

It is therefore necessary for us to inquire: Was the business for which the premises were leased wholly or partially destroyed? This will depend upon the construction given to the word "saloon," as used in the lease. Webster defines "saloon," as follows: "(1) A spacious and elegant apartment for the reception of company or for works of art; a hall of reception, especially a hall for public entertainments or amusements; a large public room or parlor; as the saloon of a steamboat. (2) Popularly, a public room for specific uses; especially, a barroom or grogshop,—as a drinking saloon; an eating saloon; a dancing saloon." Mr. March defines it as "an apartment or hall devoted to some specific use; a place where liquor is retailed." The word as used in the lease in question has, we think, acquired a more particular and restricted meaning than it had when Mr. Webster defined it.

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It is now often used as synonymous with "barroom," "grogshop," or "dramshop." We think it was used in this contract to include the sale of intoxicants, liquors, but not to exclude the sale of everything except intoxicating liquors. The word appears to have been construed differently, where used in municipal ordinances and charters, acts of the legislature, etc., from the interpretation accorded it where used in contracts, leases, etc. 7 Words & Phrases, p. 6312. It has been held by the supreme courts of Illinois and Michigan that it may or may not mean a place for the sale of intoxicating liquors; and hence, where premises were, by the terms of the lease, to be occupied as a saloon, and for no other purpose whatever, the word "saloon" in such lease will not be understood, as matter of law, to mean a place where intoxicating liquors only were to be sold, and not a place for the sale of soda water, etc. Brewer & H. Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49. It has been held, also, to include a place to which persons can go to get refreshments, to eat or drink, and to include a place where ginger ale, cider, etc., are served; and that it does not necessarily import a place where intoxicating drinks alone are sold. Kitson v. Ann Arbor, 26 Mich. 325; State v. Mansker, 36 Tex. 364; Snow v. State, 50 Ark. 557, 9 S. W. 306; Goozen v. Phillips, 49 Mich. 7, 12 N. W. 889.

Our construction of the word "saloon," as used in this lease, is borne out by the evidence of the parties in this particular case. The lessee testified that he used the premises for a saloon under the lease from October 1, 1907, until the prohibition law went into effect, January 1, 1908; that the word "saloon," as used in the lease, meant a place for the sale of intoxicating drinks and beverages; that he also sold and dispensed to the public in said premises under said lease other drinks, such as soda water, lemonade, and soft drinks, and cigars, cigarettes, and tobacco. This use to which the lessee put the premises seems to have been known to the landlord, and no objection was made by him; hence, we think that the business he is shown to have carried on was the business which the lease contemplated. It is conceded that the sale or dispensing of intoxicating liquors or beverages was prohibited in Birmingham, Alabama (the situs of this property), on and after January 1, 1908, during the life of this lease. It is also conceded that the rent was paid up to this date, and that thereafter the tenant refused to pay rent, and offered to surrender the premises to the landlord, which offer the landlord declined, insisting upon payment, but proposed to release the lessee from the provision that the premises should be used only for a saloon, and allow him to use the premises for any other legitimate purpose not more injurious than would be the liquor business, and not constituting a nuisance to other tenants in the same building. The lessee declined this offer, saying that it was a modification of the first lease, to which he did not consent; that the prohibition law terminated the lease and dissolved the relation of landlord and tenant, and released him from further liability for rent. This was evidently a partial, and not a total, destruction of the business for which the premises were leased. If we apply to the destruction of the business the same rule that we invoke as to the destruction of the premises,—and we think this would be just and proper in the case at bar,—it follows that the tenant was not discharged from liability by reason of the prohibition law. He could in law and in fact have continued to use the premises as a saloon, though he could not have sold intoxicating drinks or beverages. His business might not, and, as it was shown by the evidence, would not, have continued to be as profitable as if he could sell intoxicants; nevertheless, he could have continued to sell soft drinks, cigars, cigarettes, tobacco, etc., as he did before. That his business would not be as good after as before the law went into effect was no more the fault of the landlord than it was of the tenant. The contract of lease not having provided against such a contingency, which both parties knew could happen, as it provided against other contingencies, we must leave the liability and loss, if any, where the law leaves it; to wit, upon the tenant.

We are referred by counsel for appellant to a recent decision said to have been rendered by some court of Georgia upon this identical question. We have not been furnished with, and are not able to see what even purports to be a copy of, that decision, but only what purports to be an excerpt from the opinion, which may be said to indicate the reverse of what we hold in this case. It may be that the statutes of Georgia regulate or provide for such conditions, or it may be that the contract or facts of that case differentiate it from this case. This, of course, we cannot know without an inspection or examination of the opinion and decision in full. But, if it be different from and holds the converse of this, we would not be willing to follow it or apply the rule in this state while our law remains as it now is. The nearest cases in point which we have been able to find where the question was not regulated by statute are decisions from the state of Texas, and they support the rule as announced above in so far as they are in point. Houston Ice &

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Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; San Antonio Brewing Co. v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368. The rule is, of course, different where the parties contract to carry on a business which is unlawful at the time the contract is made, or where they contract to do an unlawful act. So long as the contract is executory, it cannot be enforced by either party. The contract made in the case at bar was not unlawful when made, nor would it be unlawful *in toto* now because it might authorize the selling of intoxicants as a part of the business of a saloon, and the contract will now, by letter and spirit, authorize the tenant to sell soft drinks, cigars, cigarettes, tobacco, or anything sold or dispensed in a saloon, not intoxicating. The landlord certainly could not have terminated this lease because the tenant would not or could not sell intoxicants. There was nothing in the lease which required this, though it did allow it. If the landlord was still bound after the law went into effect (and we think he was), then the tenant also ought to be bound. Both parties ought to be bound by the law, or neither. The mere fact that the law might cause the tenant to suffer a loss when, without it, he would have made a profit, is no more reason to annul the contract on that account, or to allow the tenant to avoid it, than the passage of a law which increased the tenant's profits, and thereby made the lease more valuable, would authorize the landlord to annul the lease, and require a new one under the new law.

On the case as shown by this record, the plaintiffs were clearly entitled to recover the judgment rendered. We can find no error in the record, and the judgment must be affirmed.

Dowdell, Ch. J., and **Anderson** and **McClellan**, JJ., concur.

Petition for rehearing denied June 30, 1909.

KANSAS SUPREME COURT.

JACOB L. CRIGLER et al., Plffs. in Err.,
v.
C. V. SHEPLER.

(79 Kan. 834, 101 Pac. 619.)

Interstate commerce — intoxicating liquors — state regulation.

1. Section 2479 of the General Statutes of 1901 is not repugnant to the provisions of the Federal Constitution giving Congress the power to regulate interstate commerce.

Same — operation.

2. The owner of intoxicating liquors in another state cannot, by virtue of this provision of the Federal Constitution, come into this state or send his agent here, and, in defiance of the laws of this state, carry on the business of soliciting orders or proposals for the purchase of such intoxicating liquors, to be shipped from such other state, without incurring the penalties of such laws.

Contracts — illegal consideration — enforcement.

3. The courts will not enforce payments promised in consideration of services rendered in criminal transactions.

Courts — reversal of former decision — effect.

4. The fact that, under a former decision in an action to which the plaintiff was not a party, this court held that the statute above cited was, in its application to the particular facts, repugnant to the Federal Constitution, and that the services were rendered after such decision was announced, does not affect the result.

Same — contract right in erroneous decision.

5. A person who is not a party or privy in an action cannot have a vested right in an erroneous decision made therein.

(April 10, 1909.)

Case Note. — Effect of change of judicial decisions to impair the obligation of a contract.

As shown in the note to Swanson v. Ottumwa, 5 L.R.A.(N.S.) 860, the United States Supreme Court in Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80, expressly declared that, in order to come within the provision of the Federal Constitution against impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of the judicial department only; and this doctrine has been frequently reiterated by that court, and was restated even as late as the case of National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532. It may, however, be thought that the recent case of Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, in connection with the case of Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686, indicates a disposition on the part of that court to recede from the doctrine of the Laidley Case. A careful study of the opinions in those two cases, however, leads to the conclusion that they are not irreconcilable with the doctrine of the Laidley Case; and that they merely hold on this point that the United States Supreme Court may, for the purpose of determining the obligation of the contract alleged to be impaired by a *statute*, regard the position held by the court of last resort of

Headnotes by BENSON, J.
23 L.R.A.(N.S.)

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ERROR to the District Court for Barton County to review a judgment in plaintiff's favor in an action brought to recover commissions for the sale of intoxicating liquors. Reversed.

The facts are stated in the opinion.

Mr. **James W. Clarke**, for plaintiffs in error:

The state law which places substantial restrictions upon the taking or soliciting of orders by a nonresident salesman for intoxicating liquors, to be purchased in and imported from another state, where such orders are subject to approval or rejection at the election of the nonresident merchant, is not a burden upon interstate commerce, and is not repugnant to the provision of the Federal Constitution giving Congress the power to regulate interstate commerce.

Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733.

Messrs. **Frank L. Martin** and **Walter F. Jones**, for defendant in error:

The contract having been entered into pursuant to the former adjudication, the law as subsequently laid down cannot be given a retrospective operation, and thus impair the obligations of the contract.

Taylor v. Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Ralls County v. Douglass, 105 U. S. 728, 26 L. ed. 957; Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; 26 Am. & Eng. Enc. Law, 2d ed. p. 179.

Benson, J., delivered the opinion of the court:

The defendants Crigler & Crigler, wholesale liquor dealers at Covington, Kentucky, employed the plaintiff, Shepler, as a traveling salesman to solicit in Kansas orders for whisky to be shipped from Kentucky to the persons so ordering it. He sued for commissions. The court found that the orders

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the state in which the statute was passed at the time the contract in question was made, and is not, for this purpose, bound to regard the position subsequently taken by the state court, modifying or overruling its earlier position. This position, it will be observed, does not involve a denial of the doctrine of the Laidley Case, that, to come within the inhibition of the constitutional provision, the impairment of the contract must be by some act of the legislative power, and not by a decision of the judicial department. The Muhlker Case came up on a writ of error to review a decision of the New York court of appeals to the effect that an abutting owner in the city of New York, who acquired his title in 1888, was not entitled to compensation for injuries to his easements of light, air, and access by the substitution by a railroad company, at the command of the state as expressed in the act of 1892, of an elevated structure in lieu of its surface or partly depressed roadbed, which occupied the street at the time of his purchase. As stated in the opinion of Mr. Justice McKenna, the question presented to the Supreme Court was as to the effect of the deed to the plaintiff and to the city as constituting a contract, and "the effect of the act of 1892 as an impairment of that contract, or as taking the plaintiff's property without due process of law." In this form the question was clearly one which gave the Supreme Court jurisdiction, and did not fall within the principle of the Laidley Case, since it assumed that it was the statute, and not the change of judicial decision, that was claimed to have impaired the contract. It appeared, however, that up to the time the plaintiff had acquired his title there had been no express limitation of the doctrine laid down by the court of appeals in the elevated railroad cases (so-called), and that doctrine was then generally supposed to cover such a situation as was presented in the Muhlker Case. In fact, that doctrine was—though subsequently to the time the plaintiff in the Muhlker Case acquired his property—practically extended to such a situation by the decision of the court of appeals in Lewis v. New York & H. R. Co. 162 N. Y. 202, 56 N. E. 540. Subsequently, however, the court of appeals in Fries v. New York & H. R. Co. 169 N. Y. 270, 62 N. E. 358, a case substantially like the Muhlker Case, expressly overruled the decision in the Lewis Case, and distinguished the elevated railroad cases by holding in effect that the doctrine there laid down did not apply to a change of the grade of the railroad and the construction of a viaduct for the purpose of improving the street; and the doctrine of the Fries Case was followed by the court of appeals in the Muhlker Case. Consequently, if the United States Supreme Court, in determining the contract rights of the plaintiff in the Muhlker Case, had merely regarded the doctrine of the court of appeals as laid down in the Fries Case and the Muhlker Case, there would have been no contractual right in favor of plaintiff to be impaired by the act of 1892. Mr. Justice McKenna, however, was of the opinion that the doctrine of the elevated railroad cases (which, as already shown, had not been modified at the time the plaintiff acquired his property), did not admit of the distinction attempted to be made in the Fries and Muhlker Cases, and therefore held that to deprive plaintiff of compensation for the damages to his easements in consequence of the change in the conditions pursuant to the act of 1892 would involve the impairment of the obligation of his contract. Justice McKenna said: "We are not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property, or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract, and have come under the protection of the Constitution of the United States. *And we determine for*

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were taken in contravention of § 2479 of the General Statutes of 1901, but that this section was unconstitutional, and gave judgment for the plaintiff for the amount of such commissions.

The defendants contend that the statute is valid, and that the plaintiff, having been engaged in an unlawful act, should not be aided by the court in collecting pay therefor. The statute is: "Any person who shall take or receive any order for intoxicating liquors from any person in this state, other than a person authorized to sell the same as in this act provided, or any person who shall directly or indirectly contract for the sale of intoxicating liquors with any person in this state, other than a person authorized to sell the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished therefor as provided in this act for selling intoxicating liquors." In State v. Hickox, 64 Kan. 650, 68 Pac. 35, it was held that a state law which places substantial restrictions upon taking orders by a nonresident salesman for intoxicating liquors to be imported from another state, when such orders are subject to the approval of the nonresident vendor, is a burden upon interstate commerce, and, in so far as the act in question applied to such cases, it was repugnant to the provisions of the Federal Constitution, giving Congress the power to regulate interstate commerce. Recent decisions of the Supreme Court of the United States have, however, interpreted the Wilson act (act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177) so as to permit

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ourselves the existence and extent of such contract." (Italics ours.)

In view of the fact that the question before the court, as stated by him, was whether the act of 1892 constituted an impairment of contract, it seems possible to reconcile his position in this case with the doctrine of the Laidley Case by assuming that he merely meant to decide that, in determining what was the obligation of the contract which was claimed to have been impaired by the act of 1892, the position taken by the court of appeals in the elevated railroad cases must be considered, and not the position subsequently taken after the plaintiff had acquired his property. It is significant that his opinion makes no reference to the Laidley Case and the other decisions following the doctrine of that case. It seems hardly possible that there could have been any intention to overrule the doctrine of those cases without referring to them, especially as the opinion in the Laidley Case, as shown in the earlier note, had expressly distinguished and explained away still earlier cases which had been supposed to support a doctrine opposed to that of the Laidley Case. It is also to be noted that, so far as the report of the case shows, the majority of the court did not concur in Mr. Justice McKenna's opinion. Mr. Justice Brown concurred in the result only, and the Chief Justice and Justices Holmes, White, and Peckham dissented.

The opinion in the Sauer Case seems rather to support the view above expressed of the effect of Justice McKenna's position in the Muhlker Case. In the Sauer Case, a New York statute authorizing the construction of a viaduct in the street for the use of the general public, though interpreted by the court of appeals not to require compensation to an abutting owner whose title was acquired while the doctrine of the elevated railroad cases was in full force, was held not to impair the obligation of his contract. The case was distinguished from the Muhlker Case on the ground that, before the plaintiff had acquired his title, the New York courts had plainly drawn a distinction between interference with easements of the abutting owner by structures designed for general public use, as in the Sauer Case, and structures designed for the exclusive use of the railroad, as in the Muhlker Case; so that, under the doctrine of the New York cases at the time the plaintiff in the Sauer Case acquired his title, and even apart from the subsequent decisions in that state, he had no contract right against interference with his easements by a structure designed for the general public use. Mr. Justice Moody, who wrote the prevailing opinion, said that the Muhlker Case held that "when the court of appeals has once interpeted the contract existing between the landowner and the city, that interpretation becomes a part of the contract, upon which one acquiring land may rely; and that any subsequent change of it to his injury impairs the obligation of the contract." As the question before the court in the Sauer Case, as stated by Justice Moody, was whether the law, *i. e.*, the statutes which authorized the construction of the viaduct, as interpreted by the court of appeals, impaired the obligation of a contract, it is not unreasonable to assume that, by the phrase in the above quotation, "any subsequent change of it," he meant only any subsequent change by *statute*. In this view the position imputed by him to the court in the Muhlker Case would, as already stated, be merely that, in determining whether the *statute* has impaired the obligation of a contract, the obligation of the plaintiff's contract is to be determined in the light of the position of the court of appeals at the time the property was acquired and not with reference to its position at a subsequent time; and this position does not conflict with the doctrine of the Laidley Case, that the contract cannot, in a constitutional sense, be impaired by a decision of the judicial department only.

As suggested in the earlier note, however, the doctrine of the Laidley Case, even assuming that there has been no departure therefrom by the United States Supreme

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the effective operation of such state legislation. A statute of South Dakota imposed a license tax upon the business of selling or offering for sale intoxicating liquors by traveling salesmen. Construing this statute, it was said: "It would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can, by virtue of the commerce clause, go himself or send his agent into such other state, there, in defiance of the law of the state, to carry on the business of soliciting proposals for the purchase of intoxicating liquors." Delamater v. South Dakota, 205 U. S. 93, 99, 51 L. ed. 724, 729, 27 Sup. Ct. Rep. 447, 448, 10 A. & E. Ann. Cas. 733. Our statute prohibits such business, and within the principles of this decision is not obnoxious to the Federal Constitution, as finally determined by that tribunal whose decisions upon that question, as stated in the Hickox Case, we feel impelled to follow. The plaintiff contends, however, that the opinion in that case was the law of this state when the services were rendered, and that they were not therefore performed in violation of law. As stated in his brief his claim is: "The contract having been entered into pursuant to the adjudication of this court in State v. Hickox, the law cannot be given a retrospective operation, and thus impair the obligations of the contract." Decisions of the Supreme Court of the United States are cited in support of this proposition. Mr. Chief Justice Taney stated the doctrine thus: "And the sound and true rule is that, if the contract when made was valid by the laws of the

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Court, leaves it optional with the state courts to abide by the position originally taken upon a particular subject, and to refuse to follow that subsequently adopted, so far as contracts made prior to the change of position are concerned. Nor does it seem to make any material difference whether the state court in such a case bases its conclusion to abide by the first position and to disregard the second, upon the ground that to do otherwise would involve an unconstitutional impairment of the obligation of a contract; since a decision of a state court in favor of a contention based on a provision of the Federal Constitution presents no ground of jurisdiction for the Supreme Court.

A case in point is Thomas v. State, 76 Ohio St. 341, 10 L.R.A.(N.S.) 1112, 118 Am. St. Rep. 884, 81 N. E. 437, holding that, the court having affirmed the constitutional validity of a legislative act passed to authorize contracts for services to be rendered to the public, and such a contract having been entered into and services performed towards its execution, the party performing them was, notwithstanding a subsequent decision that the act was unconstitutional and void, entitled to receive the stipulated compensation for such services as he had performed before the filing of the petition in an action challenging the validity of such contracts, the court not having in the meantime qualified or overruled the decision upon which the party relied. The court was clearly of the opinion that adherence to the later position in this case would involve an unconstitutional impairment of the obligation of a contract, in violation of the constitutional provision; relying for this point on Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968, which was one of the cases that were distinguished by the Laidley Case. Unless the Laidley Case is to be regarded as overruled by the Muhlker Case, it is apparent that the Ohio court was under a misapprehension when it rested its conclusion upon the supposed position of the United States Supreme Court on the question of the impairment of the obligation of the contract. But, even so, there is no apparent reason why the Ohio court should not adhere to the rule adopted by it on this point, since it is under no compulsion to abide strictly by the letter of the rule *stare decisis*, and disavow its spirit, nor even to refrain from resting its position on this point on the constitutional provision in question. In other words, the only effect of the doctrine of the Laidley Case, assuming that it has not been disturbed by the Muhlker Case, is to enable the state court, if it sees fit to do so, to adhere to the last position taken by it, even as applied to a contract entered into while the previous position was in force, without coming into conflict with the provision of the Federal Constitution against impairing obligation of contracts. There are many cases not coming within the scope of this note in which the state courts have applied the doctrine in force at the time the contract in question was entered into, rather than the doctrine subsequently adopted, and in some of these cases, as in the Ohio case already referred to, the decision may have been influenced to some extent by the impression that the contrary course would involve an unconstitutional impairment of the obligation of the contract.

The court in Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386, 4 A. & E. Ann. Cas. 89, cited and approved the doctrine of the Laidley Case, though the decision was merely to the effect that neither the doctrine of *stare decisis* nor the provision as to impairing the obligation of contracts required a court of last resort to abide by the doctrine as laid down by an inferior court at the time the contract in question was entered into. Obviously, even if it were to be conceded that a change by a court of last resort of its own position would involve an unconstitutional impairment of the obligation of a contract if applied to a contract entered into before the change, that doctrine would not necesarily apply to the refusal of a court of last resort to follow an erroneous doctrine of an inferior court.

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state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law." Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 432, 14 L. ed. 997, 1004. It was expressly stated in the opinion, however, that the majority of the court did not agree upon the principles upon which the judgment should be maintained, and that the views thus expressed were those of the Chief Justice and Mr. Justice Grier. Nevertheless, this declaration was referred to and adopted in several cases following in that court, and in some of the state courts, and in some instances by text writers. In Douglass v. Pike County, 101 U. S. 677, 687, 25 L. ed. 968, 971, after citing the foregoing case, it was said that "after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." This doctrine was approved and followed in other opinions of the same court. Also in Haskett v. Maxey, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358; Center School Twp. v. State, 150 Ind. 168, 49 N. E. 961; and in Farrior v. New England Mortg. Secur. Co. 92 Ala. 176, 12 L.R.A. 856, 9 So. 532. In Volume 2 of the second edition of Lewis's Sutherland Statutory Construction, § 485, the opinion of Mr. Chief Justice Taney in the Debolt Case, and other opinions of that court based upon it, are given as authority for the following statement in the text: "A judicial construction of a statute becomes a part of it, and, as to rights which accrue afterwards, it should be adhered to for the protection of those rights. To devest them by a change of the construction is to legislate retroactively." Vol. 2, p. 906. The subject is referred to and the opinion in Douglass v. Pike County, supra, is quoted from in Endlich on the Interpretation of Statutes, § 1, note 1, but the views of the author are not expressed.

The first judicial remonstrance against the broad declaration of the chief justice in the court in which it was announced was in the dissent of Mr. Justice Miller in Gelpcke v. Dubuque, 1 Wall. 175, 207, 17 L. ed. 520, 526, wherein he said: "But he [Chief Justice Taney] clearly shows that there was in his mind nothing beyond the case of a writ of error to the supreme court of a state; for he says in the midst of the sentence cited, or in the immediate context: 'The writ of error to a state court would be no protection to a contract if we were bound to follow the judgment which the state court had given, and which the court brings up here for revision.' Besides, in the opinion thus cited, the chief justice says, in the commencement of it, that he only speaks for himself and Justice Grier. The remarks cited, then, were not the opinion of the court, were outside the record, and were evidently intended to be confined to the case of a writ of error to the court of a state, where it was insisted that the judgment sought to be revised should conclude this court." Pages 216, 217 of 1 Wall. In several later cases that court has limited the application of the doctrine, and has held that the provisions of the Federal Constitution forbidding the enactment of laws impairing the obligation of contracts do not apply to judicial decisions overruling former adjudications, upon the faith of which contracts have been entered into. The following excerpts will show how the subject is now regarded by that court: "In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only." Central Land Co. v. Laidley, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep. 80, 82. In this and cases following (Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532), the proposition that the decision of a state court overruling its former adjudications can be held to impair contracts within the meaning of the constitutional provision is denied. The real ground, as we believe, upon which that court has refused in some cases to follow the latest deliverance of a state court was stated by Mr. Justice Swayne in the opinion of the court in Gelpcke v. Dubuque, supra. It appeared that the supreme court of Iowa had by several decisions held that a statute of that state authorized the issuance of bonds in aid of certain railroads. Afterwards the same court decided that the statute did not give that authority. After referring to these conflicting opinions, the court said: "It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions we think are sustained by reason and authority." It appears that the Federal Supreme Court, in case of a conflict in state decisions construing a stat-

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ute, will not be bound to follow the latest opinion,—not because of the supposed impairment of contracts,—but will adopt in cases affecting the rights of the holders of commercial paper, at least, the rule best sustained by reason and authority; and, in the language of a recent opinion: "They [the Federal courts] have also at times applied a sort of equitable doctrine, and held to a rule which sustains a contract legal when entered into according to the then-existing decisions of the state court, but which afterwards, on further reflection, were held illegal by the state court." Swanson v. Ottumwa, 131 Iowa, 540, 549, 5 L.R.A. (N.S.) 860, 106 N. W. 9, 12, 9 A. & E. Ann. Cas. 1117.

This question has been carefully considered in several state courts, and claims such as that made by the plaintiff here have been rejected after a review of the Federal authorities upon which they were supposed to rest. It was originally held in California that a conveyance of land, absolute in form, but intended as a mortgage, did not pass the legal title. Afterwards it was decided that the legal title did pass by such conveyance. It was contended in the last case that a deed executed after the first decision could only have effect in accordance with the rule first declared. The court stated: "The courts cannot make or repeal a law. 'They can say what a law means; and, if afterwards they see that they have made a mistake, they can correct their error by an overruling of a former decision, the consequence of which overruling is that the blunder is thenceforward deemed never to have been law.' Bishop, Contr. § 569. It has been held here that, although it appears the parties have entered into a contract relying upon a previous decision of the supreme court, they would not be relieved from the obligations thereof because of a subsequent decision by the same court, overruling the former one, and declaring a different rule upon the same subject. Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137. There are some cases in which the Supreme Court of the United States has held that the construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct so far as contracts made under the act are concerned, and no subsequent decision altering the construction can impair their validity. The construction becomes a part of the statute, —as much so as if it were an amendment made by the legislature. . . . These cases, however, all involved the question as to the validity of negotiable securities." Allen v. Allen, 95 Cal. 184, 199, 16 L.R.A. 646, 30 Pac. 213, 216. This rule was followed in Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460. In Swanson v. Ottumwa, supra, where a statute was construed differently than it had been interpreted in prior decisions, it was said: "Again, it is argued that prior to the decisions in the Heins and Witter Cases (102 Iowa, 69, 71 N. W. 189, and 112 Iowa, 380, 83 N. W. 1041), which were decided after the bonds in this case were issued and delivered, this court was committed to the doctrine that a city might issue negotiable bonds in such cases as this, and that to now hold to the contrary would be in violation of the constitutional provision with reference to the impairment of the obligations of contracts. Many cases are cited in support of this contention, although none of them, as it seems to us, go so far as to hold that the constitutional limitation applies to a judicial decision, unless that decision be the construction of a particular statute, under which the bonds or contracts in each case were executed." Page 548 of 131 Iowa. In a note to the report of this case in 5 L.R.A. (N.S.) 860, it is suggested that the principle decided covered also a change in the construction of a statute, which, in the opinion, is referred to as a possible exception to the rule stated. We concur with the annotator in this view.

This question was very carefully considered in Texas in a clear and forceful opinion affecting the constitutional provisions relating to homesteads. Concerning the contention that a former decision precluded the assertion of the claim to exemption, the court said: "Under the proposition contended for by the appellant, this court is called upon to hold that a decision of the supreme court of a state, although erroneously made, could give validity to a statute which the legislature had no power to enact, and thereby deprive the citizens of Texas of their constitutional right of exemption of their homesteads from this class of charges. . . . If the supreme court had the right to say that those people upon whose property burdens had been placed, as in this case, under the decision referred to, must bear that burden and be deprived of the constitutional protection, then this court had as much authority to say that the people in all future time should suffer the same deprivation of their constitutional rights. Such a decision as that sought would be violative of the fundamental principles of our jurisprudence, and an assumption of power forbidden to be exercised by the court, and would involve the administration of justice in many and insurmountable difficulties." "When courts speak of the obligation of contracts, they mean the legal obligation or binding force of such contracts; and, if the law upon which the validity of the contract depends

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be unconstitutional, it is not a law, and never was a law, and the pretended contract is void, and has no legal obligation to be violated." Storrie v. Cortes, 90 Tex. 283, 35 L.R.A. 666, 669, 670, 38 S. W. 154. The same conclusion is briefly stated in Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386, 4 A. & E. Ann. Cas. 89.

In considering this subject, the rule of *stare decisis* has sometimes been confounded with the constitutional provision inhibiting laws impairing the obligation of contracts. Under this rule, courts will not overrule decisions which have settled property rights where greater mischief would be caused by departing from the decisions than by following them, but will leave the correction of a possibly erroneous interpretation to the legislature. This, however, is only a rule of policy, and has no application here. The legislature has already enacted this law, and the court is under no legal or moral obligation to perpetuate an erroneous construction placed upon it through an imperfect understanding of the views of the Federal Supreme Court. Courts do not and cannot change the law by overruling or modifying former opinions. They only declare it by correcting an imperfect or erroneous view. The law itself remains the same, although interpretations may have differed. Alferitz v. Borgwardt, supra; Ray v. Western Pennsylvania Natural Gas Co. 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065; Pierce v. Pierce, 46 Ind. 86; Taliaferro v. Barnett, 47 Ark. 359, 1 S. W. 702. An erroneous ruling may in some circumstances become the law of the particular case, but this will not prevent the court in another action from holding to the contrary. A person who is not a party or privy in the action cannot acquire a vested right in an erroneous decision made therein. The conclusion that the statute under consideration in State v. Hickox, 64 Kan. 650, 68 Pac. 35, was inoperative so far as it applied to the controversy then presented was declared after a careful examination of the decisions of the Supreme Court of the United States affecting the question. Since that opinion was written, by progressive adjudications of the Federal tribunal, the commerce clause of the Federal Constitution and the Wilson act have been so construed as to permit the effectual operation of that statute to punish the acts therein prohibited. Measured by these later opinions, this statute is valid; and we now conform our decisions to these controlling interpretations. State ex rel. Jackson v. Wm. J. Lemp Brewing Co. (Kan.) 102 Pac. 504. The supreme court of Iowa in a recent opinion followed the Delamater Case, and overruled previous decisions wherein it had held that a similar statute of that state was in conflict with the Federal Constitution. The court said: "But . . . when we have held a state statute to be unconstitutional because in supposed conflict with the Constitution of the United States, and the Supreme Court of the United States has so interpreted the Federal Constitution that the supposed conflict is found not to exist, there is no good reason why we should not change our rulings so as to sustain the policy of the statutes of the state." McCollum v. McConaughy (Iowa) 119 N. W. 539, 541. We conclude that § 2479 of the General Statutes of 1901 is valid; that a promise to pay for services in criminal transactions will not be enforced; that the former decision between other parties, holding the statute invalid, does not give the plaintiff a right to recover; and that he must fail in the action.

The judgment is reversed and the cause remanded, with directions to enter judgment for the defendants on the findings.

All the Justices concur.

MICHIGAN SUPREME COURT.

OSCAR K. BUCKHOUT, Appt.,
v.
BENJAMIN F. WITWER et al.

(—Mich. —, 122 N. W. 184.)

Monopoly — contract not to engage in business — validity.

1. The transferee of stock in a manufacturing company is within the operation of an exception to a statute making illegal agreements not to engage in business, to the effect that the act shall not apply to any contract where the only object of the

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Case Note. — Contract by selling shareholder not to engage in business in competition with the corporation.

Cases where stockholders who do not sell their stock on the sale of the assets of the corporation individually agree not to engage in a competing business with the purchaser are excluded from this note.

It was held in Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 46 L.R.A. 143, 71 Am. St. Rep. 94, 57 Pac. 468, that a stockholder cannot transfer the good will of the corporation with his stock, within the meaning of a statute permitting one who sells the good will of a business to agree to refrain from carrying on a similar business within a limited territory for a specified time, and an agreement by the vendor not to engage in a competing business in a city so long as the vendee or any person deriving title to the good will from him should carry on a like business is void, as in re-

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restraint is to protect the vendee or transferee of a trade or business sold and transferred for a valuable consideration, in good faith, without intent to create a monopoly, and he can enforce such contract against his transferer.

Contract — construction — penalty.

2. A provision in a contract obligating one party not to compete in business with another, that, if he does so, he shall forfeit a certain amount per annum for a specified period, is for a penalty, and not liquidated damages.

Specific performance — penalty — effect.

3. Specific performance of a contract is not defeated by a provision for a penalty in case of its breach.

(July 6, 1909.)

APPEAL by complainant from an order of the Circuit Court for Kalamazoo County sustaining a demurrer to a bill filed specifically to enforce a contract not to engage in the baking business in Kalamazoo for five years, and to recover damages for alleged breach of such contract, and to enjoin further breach thereof. Reversed.

The facts are stated in the opinion.

Messrs. **Osborn & Mills**, for appellant:

The purchase by an individual of a stockholder's interest in a corporation affords a sufficient consideration for a contemporaneous agreement by the seller not to engage in the business carried on by the corporation.

Up River Ice Co. v. Denler, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Bradford v. Montgomery Furniture Co. 115 Tenn. 610, 9 L.R.A.(N.S.) 979, 92 S. W. 1104.

The penalty which is expressed in the contract, whether regarded as in the nature of a stipulation for liquidated or unliquidated damages, does not affect the complainant's right to relief in equity.

Ropes v. Upton, 125 Mass. 258; 2 High, Inj. p. 1175; Harris v. Theus, 149 Ala. 133, 10 L.R.A.(N.S.) 205, 123 Am. St. Rep. 17, 43 So. 131; McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; Wilkinson v. Colley, 164 Pa. 35, 26 L.R.A. 114,

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straint of trade, under a statute declaring void every contract by which one is restrained from exercising his lawful profession, trade, or business of any kind, except where he sells the good will of his business. And this doctrine is recognized in Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

But, on the other hand, the contrary has been held in the absence of any statute, in the following cases:

Thus, an agreement by the seller or corporate stock not to engage in a competing business with the corporation in a designated city or adjacent thereto, although unlimited as to time, is based upon a sufficient consideration and is valid. Up River Ice Co. v. Denler, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157.

A man who agrees to refrain from engaging in a competing business with a corporation as principal, agent, or employee will be restrained from carrying on a competing business in his wife's name. Ibid.

An agreement entered into by husband and wife, upon the sale of corporate stock owned by the latter, as well as certain real property owned by both husband and wife, which was occupied and used by the corporation in its business, that neither of the vendors would, jointly or individually, directly or indirectly, engage in a competing business with the corporation so long as it should continue its business in a small village, is based upon a sufficient consideration as to both husband and wife, and is not void as being in restraint of trade; and the husband will be restrained from engaging in a competing business. Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892.

An agreement by the vendor of shares of corporate stock that he will not, either directly or indirectly, in his own name or as stockholder or agent, engage in a similar business, at wholesale or retail, in a city for a period of five years, does not impose a restraint larger than is reasonable for the protection of the purchasers, and is, therefore, valid. As the purchasers, who own the stock of the corporation, are interested in the success thereof, and as they bought the vendor's stock and paid him his price, they are entitled to the protection given by the vendor's agreement. Kradwell v. Thiesen, 131 Wis. 97, 111 N. W. 233.

And the fact that the sale of the corporate stock did not transfer any title to the good will of the business—that being the property of the corporation itself—did not render such agreement invalid. Ibid.

So it was held in Fleckenstein Bros. Co. v. Fleckenstein (N. J.) 71 Atl. 265, that an agreement by the seller of shares of stock of a corporation of which he was manager, not directly or indirectly to engage in a competing business within 500 miles from the city where its business was carried on, for a period of twenty years, was valid as to the city, even though it might be unenforceable as to the territory described. The court said that such a contract, although in partial restraint of trade, is not objectionable to public policy unless it goes further than is reasonably required for the protection and enjoyment of the business sold, or the restraint is so great as to interfere with public interests; and the trend of opinion at the present day is that such a contract is not injurious to the public interests so long as the area within which the business is restrained is no greater than is covered by the business the good will of which has been sold.

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30 Atl. 286; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

Mr. **L. T. Flansburg**, with Mr. **Marvin J. Schaberg**, for appellees:

The contract upon which the bill of complaint is founded is absolutely void under the statute.

Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 46 L.R.A. 142, 71 Am. St. Rep. 94, 57 Pac. 468.

The contract itself provides a full, adequate, and complete remedy at law in damages so far as complainant individually is concerned.

Osius v. Hinchman, 150 Mich. 603, 16 L.R.A.(N.S.) 393, 114 N. W. 402; H. W. Gossard Co. v. Crosby, 132 Iowa, 155, 6 L.R.A.(N.S.) 1115, 109 N. W. 483; Dills v. Doebler, 62 Conn. 366, 20 L.R.A. 432, 36 Am. St. Rep. 345, 26 Atl. 398; Shiell v. M'Nitt, 9 Paige, 101; Pom. Eq. Jur. § 447.

Hooker, J., delivered the opinion of the court:

The Witwer Baking Company is a corporation doing business in Kalamazoo. It was organized July 18, 1906, to take over the business of Benjamin F. Witwer, of that place, who had established a lucrative baking business. Its capital stock was $100,000, of which Benjamin F. Witwer subscribed for $39,000, Etta Witwer, $1,000, Lorenzo T. Bennett, $49,000, and Oscar K. Buckhout, the complainant, $11,000. The good will of said business was put in at $10,000.

On February 26, 1908, Roy Witwer, a son of Benjamin F. Witwer, acquired 100 shares of the capital stock of said company. On March 9, 1908, complainant purchased from Benjamin F. Witwer, who was authorized to and did act for Etta Witwer and Roy Witwer, his wife and son, respectively, all of the capital stock of said company owned by them for an agreed price of $14,000. Said Benjamin F. Witwer, with the knowledge and assent and upon the behalf of his said wife and son as well as himself, executed the following writing:

B. F. Witwer, President; O. K. Buckhout, Vice President, L. T. Bennett, Sec'y and Treas. Bakers of "Buster Brown," "Mother's" and "Butter Bread." The Witwer Baking Company, Wholesale Bakers. Corner Church and Eleanor Streets.
Telephone 1629.

Kalamazoo, Mich., March 9th, 1908.

B. F. Witwer,
City.

Dear Sir:—

I will pay you thirty-five cents, 35c., on the dollar, for $40,000 stock in The Witwer Baking Company, incorporated, which amounts to $14,000, it being understood that the stock above referred to shall be all of the stock now held in your name, also in the name of Etta Witwer; said stock shall be indorsed by those whose name it is now in, and delivered to me free from all encumbrances within five days from date. In making you this offer and purchasing your interest in this company, it is subject to the condition that the good will of yourself and family follows the purchase; also, that you will not, directly or indirectly, in any way, shape, or manner, engage in the baking business in Kalamazoo for a period of five years. If you do so, and do not fulfil on your part, both in the spirit and language of this letter, you shall forfeit me one thousand dollars, $1,000, per annum until the end of the five years from the time you shall not have acted in good faith in performing the terms of this sale. You shall resign your position as an officer of this company at once or upon the delivery of stock in this company above referred to.

Yours truly,
O. K. Buckhout.

Accepted by B. F. Witwer.

The bill in this cause is filed to specifically enforce said contract, to recover damage for an alleged breach, and to restrain further breaches of said contract by Benj. F. and Roy Witwer, for five years.

In addition to the foregoing facts, the bill alleges that before said sale to the complainant the defendants were secretly arranging to enter into a new business similar to that carried on by the Witwer Baking Company, in competition with it, and with the design and intention of undermining it for their own benefit and profit, contrary to their contract; and that, in furtherance of such design, have entered upon such a business, contrary to their said contract, and are now conducting it, to the injury and serious damage of complainant. The defendants demurred to said bill, and, the demurrer having been sustained, the complainant has appealed.

Two important questions arise upon this record:

First. Was the contract a violation of §§ 1, 6, pp. 507, 508, act No. 329, Pub. Acts 1905, which provide:

"Section 1. All agreements and contracts by which any person, copartnership, or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession, or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

"Sec. 6. This act shall not apply to any

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contract mentioned in this act nor in restraint of trade, where the only object of the restraint imposed by the contract is to protect the vendee or transferee of a trade, pursuit, avocation, profession, or business, or the good will thereof, sold and transferred for a valuable consideration, in good faith and without any fraud, intent to create, build up, establish, or maintain a monopoly."

Second. Does the contract by its terms provide for stipulated damages to the exclusion of a right to specific performance? It is contended by the appellees that this statute expressly forbids all contracts in restraint of trade, except in favor of the transferee of a business, and that the corporation was the only transferee of the business here, complainant being only a purchaser of stock; hence, that he is not within the terms of the statute. We should have no doubt of the validity and binding effect of this contract in the absence of the statute, under the cases of Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Beal v. Chase, 31 Mich. 490; Doty v. Martin, 32 Mich. 463; Timmerman v. Dever, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230; Up River Ice Co. v. Denler, 114 Mich. 303, 68 Am. St. Rep. 480, 72 N. W. 157; S. Jarvis Adams Co. v. Knapp, 58 C. C. A. 1, 121 Fed. 34; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Bradford v. Montgomery Furniture Co. 115 Tenn. 610, 9 L.R.A.(N.S.) 979, 92 S. W. 1104. All of them appear to turn upon the common-law rule. The present case involves a statute which has changed the common-law rule, and made invalid all such contracts, with certain exceptions, and this case must turn on the question of its being within the exception; and, as said in Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 46 L.R.A. 142, 71 Am. St. Rep. 94, 57 Pac. 468; "It is not a question whether the holder of shares of a corporation should be permitted to enhance their vendibility by agreeing to abstain from carrying on business similar to that of the corporation . . . but it is a question whether such an agreement is not by law [i. e., statute] declared to be void." The corporation succeeded to all of the defendant Benj. Witwer's rights in this business, after which he had no right to the good will except as a stockholder. His wife and son never had any except as owners of stock. At the time of complainant's purchase of stock, he was not thereby technically made a transferee of a trade, pursuit, avocation, or business, or the good will thereof, but he was made a transferee of the same so far as a stockholder could have such interest, for the defendants did make a sale of their interest, in the corporation and the good will of themselves in the business, and defendants promised to refrain from engaging in such business upon a consideration which was adequate.

Technically, the sale to the corporation did carry the good will to it, but the stockholders who constituted the corporation became the real owners of the business and good will in proportion to their shares, for they were the owners of the artificial body which they were permitted to erect. That this may have been a qualified right, so far as control is concerned, may be admitted; but, such as it was, they attempted to sell it to the complainant, and we are of the opinion that it was within the exception of the statute, reasonably construed. In this we are aware that we are at variance with the view taken by the learned court of California, and it is not without hesitation that we have felt constrained to reach a different conclusion. Counsel seek to distinguish that case from the present, but we think that it cannot fairly be distinguished. We cannot disapprove of the logic of that opinion, if its premises be admitted, but we think that it may reasonably be said that a stockholder in a corporation has such an interest in its business and good will within this statute, as to make a purchaser of such interest and good will a transferee of the same, —which appears inconsistent with the view taken in that case.

We are of the opinion that the provision in the contract, "if you do so and do not fulfil on your part, both in the spirit and language of this letter, you shall forfeit to me one thousand dollars, $1,000, per annum until the end of the five years from the time you shall not have acted in good faith in performing the terms of this sale," should be construed to provide for a penalty, and therefore that it does not preclude complainant from filing a bill for specific performance. It is within the rule stated in Daily v. Litchfield, 10 Mich. 29, followed in Powell v. Dwyer, 149 Mich. 145, 11 L.R.A.(N.S.) 978, 112 S. W. 499.

The other points discussed by counsel do not require elaboration. It is enough to say that we cannot sustain them upon this record.

The order is reversed, with costs, and the cause is remanded for further proceedings.

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MINNESOTA SUPREME COURT.

HENRY HOLLAND, Appt.,
v.
T. D. SHEEHAN et al., Respts.

(— Minn. —, 122 N. W. 1.)

Contract — litigation — procurement — public policy.

1. A contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void.

Same — parties — relation.

2. In such contracts the parties are *in pari delicto.*

(July 9, 1909.)

APPEAL by plaintiff from an order of the District Court for Ramsey County denying a new trial after verdict in defendants' favor in an action for an accounting as to certain alleged partnership assets. Affirmed.

The facts are stated in the opinion.

Messrs. **Edward G. Rogers** and **George Nordlin**, for appellant:

Having received benefits under the contract, and having often recognized its validity, defendant is, under the doctrine of equitable estoppel, prohibited from raising such question after the accumulation of a large amount of money thereunder, and simply because, having said money in his possession, he imagined it was for his interests so to do.

Irwin v. Curie, 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161; Tracy v. Talmage 14 N. Y. 162, 67 Am. Dec. 132; Anheuser-Busch Brewing Asso. v. Mason, 44 Minn. 318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 46 N. W. 558.

The contract is not void on the ground of public policy.

Irwin v. Curie, supra; Re Fitzsimons, 174 N. Y. 15, 66 N. E. 554; Brown v. Bigne, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11; Sherley v. Riggs, 11 Humph. 53; Kelerher v. Henderson, 203 Mo. 498, 101 S. W. 1083; Casserleigh v. Wood, 14 Colo. App. 265, 59 Pac. 1024; Wood v. Casserleigh, 30 Colo. 287, 97 Am. St. Rep. 138, 71 Pac. 360; Bocke v. Peters, 58 Ill. App. 338; Candler v. Candler, Jacob, 225; Bunn v. Guy, 4 East, 190; Renshaw v. First Nat. Bank (Tenn. Ch. App.) 63 S. W. 194; Joy v. Metcalf, 161 Mass. 514, 37 N. E. 671.

The parties are not *in pari delicto.*

Irwin v. Curie, supra.

Mr. **Thomas C. Daggett** for respondents.

Headnotes by BROWN, J.

Brown, J., delivered the opinion of the court:

On the 30th of November 1906, plaintiff and defendant entered into the following contract in writing, namely:

This agreement, made and entered into this 30th day of November, 1906, by and between T. D. Sheehan and Henry Holland, witnesseth: It is hereby agreed by and between each of the parties above named, respectively, that in reference to all claims and cases handled by suit or settlement by the said T. D. Sheehan or Henry Holland, from the date of this instrument, that the proceeds of all litigation, either by settlement or suit, shall be divided equally, one half, between the said parties to this said agreement. It is also further agreed all expenses, including said Holland's expenses on the road, and all the expenses that may be incurred by office, and legitimate expenses necessary to carrying on the said business, shall be shared equally by and between the said parties, and that the expenses shall first be deducted from all the settlements made in the carrying on of said business.

[Signed] T. D. Sheehan.
Henry Holland.

The agreement, as illuminated by the evidence, discloses the following facts: Plaintiff is a layman, following, so far as involved in this case, the occupation of discovering persons who had received personal injury at the hands of railroad companies and others, and inducing them to intrust their claims for compensation to him and his associate, Sheehan, for suit, adjustment, and settlement, upon the basis of a division of the amounts received from the railroad or person liable. Sheehan is an attorney and counselor at law, practising in the city of St. Paul, and the terms of the contract required of him the prosecution of all claims brought in by plaintiff upon the agreement that each should share equally in the profits resulting from litigated or settled cases. When clients were brought in, Sheehan made an independent contract with them, specifying the terms of his employment and the proportion of the recovery to be allotted to him for his services, usually from one fourth to one half. Plaintiff, by the agreement, was to assist in the preparation of

Note. — For cases passing upon this question, as well as upon the right of an attorney at law to solicit business, see the case note to Ingersoll v. Coal Creek Coal Co. 9 L.R.A.(N.S.) 282.

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the cases for trial, in looking up evidence and other necessary details, though, not being an admitted attorney, he was not required or expected to take part in the court proceedings. A large number of persons with grievances against railroad companies were discovered by plaintiff, and, acting under the agreement, he conducted them to the office of defendant, who thereafter managed their cases with success, collecting and receiving large sums of money as compensation for their injuries, dividing with plaintiff the compensation received for his services. Finally, however, defendant repudiated the contract and declined further to be bound by it, and plaintiff brought this action for an accounting respecting moneys received by defendant prior to the repudiation. The trial court found the facts substantially as here outlined, held that the contract was illegal and void, and directed judgment for defendant. Plaintiff appealed from an order denying a new trial.

The only question presented is whether the court below rightly held the contract void and unenforceable. The findings of the trial court are all sustained by the evidence. Illegality vitiates contracts of every description, and the courts decline to enforce them. Illegality, within the rule, includes agreements in violation of some prohibitive statute, in violation of the express rules of the common law, or contrary to public policy. The second and third are so closely related as to be in particular instances indistinguishable; for the common law and public policy, other than that evidenced by statutory enactments, are often inseparably blended together. Parsons v. Trask, 66 Am. Dec. 506, note. Formerly a distinction was made in determining the question whether contracts were illegal between acts *mala prohibita* and those *mala in se;* but the old rule no longer obtains. Either, under all modern authorities, nullifies the contract. Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Swanger v. Mayberry, 59 Cal. 91. Contracts *mala in se* include all those of an immoral nature, iniquities in themselves, and those opposed to sound public policy; and where both parties are *in pari delicto*, neither, as a general rule, will be accorded relief by a court of justice. The exceptions to the rule are well defined. 9 Cyc. Law & Proc. p. 551, and cases. The term "public policy," as applied to this subject, is comprehensive, and covers a wide range, whether evidenced by the trend of legislation, judicial decisions, or the principles of the common law. It embraces all acts or contracts which "tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Goodyear v. Brown, 155 Pa. 514, 20 L.R.A. 838, 35 Am. St. Rep. 903, 26 Atl. 665.

The contract in the case at bar is one between an attorney and a layman; and without stopping to consider whether expressly prohibited by statute, either as to the attorney or the layman, we take up the question whether it is void as against public policy. That it is we entertain no serious doubt. That conduct by a layman in stirring up litigation, searching out persons who have received some injury to their person or property, and inducing them to intrust their cause to the solicitor, or an attorney of his selection, on a contingent fee basis, tends to disturb confidence in the administration of justice and to undermine that sense of security for individual rights which every citizen has the right to feel, and is as obnoxious to sound public sentiment as when champerty was a crime at common law, is too obvious to require extended discussion. As remarked by Judge Mitchell in Gammons v. Johnson, 76 Minn. 81, 78 N. W. 1035: "The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy." It becomes all the more odious when participated in by a lawyer and a layman; the latter agreeing to "find the cases" and the former to conduct them through the courts. In such cases both are equally guilty and neither should be permitted, in a court of justice, successfully to assert alleged rights accruing from the iniquitous agreement. Huber v. Johnson, 68 Minn. 76, 64 Am. St. Rep. 456, 70 N. W. 806; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779.

The precise situation has been presented to other courts of the country with different results; but the weight of reason and principle sustains our view. In Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899, it appeared that defendant, in consideration that plaintiff would procure his appointment to prosecute certain cases, and in consideration, also, of plaintiff's assistance in the litigation, agreed to pay plaintiff one half of what he should receive for services rendered in the litigation. The court held the contract contrary to public policy

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MINNESOTA SUPREME COURT.

HENRY HOLLAND, Appt.,
v.
T. D. SHEEHAN et al., Respts.

(— Minn. —, 122 N. W. 1.)

Contract — litigation — procurement — public policy.

1. A contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void.

Same — parties — relation.

2. In such contracts the parties are *in pari delicto.*

(July 9, 1909.)

APPEAL by plaintiff from an order of the District Court for Ramsey County denying a new trial after verdict in defendants' favor in an action for an accounting as to certain alleged partnership assets. Affirmed.

The facts are stated in the opinion.

Messrs. **Edward G. Rogers** and **George Nordlin**, for appellant:

Having received benefits under the contract, and having often recognized its validity, defendant is, under the doctrine of equitable estoppel, prohibited from raising such question after the accumulation of a large amount of money thereunder, and simply because, having said money in his possession, he imagined it was for his interests so to do.

Irwin v. Curie, 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161; Tracy v. Talmage 14 N. Y. 162, 67 Am. Dec. 132; Anheuser-Busch Brewing Asso. v. Mason, 44 Minn. 318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 46 N. W. 558.

The contract is not void on the ground of public policy.

Irwin v. Curie, supra; Re Fitzsimons, 174 N. Y. 15, 66 N. E. 554; Brown v. Bigne, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11; Sherley v. Riggs, 11 Humph. 53; Kelerher v. Henderson, 203 Mo. 498, 101 S. W. 1083; Casserleigh v. Wood, 14 Colo. App. 265, 59 Pac. 1024; Wood v. Casserleigh, 30 Colo. 287, 97 Am. St. Rep. 138, 71 Pac. 360; Bocke v. Peters, 58 Ill. App. 338; Candler v. Candler, Jacob, 225; Bunn v. Guy, 4 East, 190; Renshaw v. First Nat. Bank (Tenn. Ch. App.) 63 S. W. 194; Joy v. Metcalf, 161 Mass. 514, 37 N. E. 671.

The parties are not *in pari delicto.*

Irwin v. Curie, supra.

Mr. **Thomas C. Daggett** for respondents.

Brown, J., delivered the opinion of the court:

On the 30th of November 1906, plaintiff and defendant entered into the following contract in writing, namely:

This agreement, made and entered into this 30th day of November, 1906, by and between T. D. Sheehan and Henry Holland, witnesseth: It is hereby agreed by and between each of the parties above named, respectively, that in reference to all claims and cases handled by suit or settlement by the said T. D. Sheehan or Henry Holland, from the date of this instrument, that the proceeds of all litigation, either by settlement or suit, shall be divided equally, one half, between the said parties to this said agreement. It is also further agreed all expenses, including said Holland's expenses on the road, and all the expenses that may be incurred by office, and legitimate expenses necessary to carrying on the said business, shall be shared equally by and between the said parties, and that the expenses shall first be deducted from all the settlements made in the carrying on of said business.

[Signed] T. D. Sheehan.
Henry Holland.

The agreement, as illuminated by the evidence, discloses the following facts: Plaintiff is a layman, following, so far as involved in this case, the occupation of discovering persons who had received personal injury at the hands of railroad companies and others, and inducing them to intrust their claims for compensation to him and his associate, Sheehan, for suit, adjustment, and settlement, upon the basis of a division of the amounts received from the railroad or person liable. Sheehan is an attorney and counselor at law, practising in the city of St. Paul, and the terms of the contract required of him the prosecution of all claims brought in by plaintiff upon the agreement that each should share equally in the profits resulting from litigated or settled cases. When clients were brought in, Sheehan made an independent contract with them, specifying the terms of his employment and the proportion of the recovery to be allotted to him for his services, usually from one fourth to one half. Plaintiff, by the agreement, was to assist in the preparation of

Headnotes by BROWN, J.

Note. — For cases passing upon this question, as well as upon the right of an attorney at law to solicit business, see the case note to Ingersoll v. Coal Creek Coal Co. 9 L.R.A.(N.S.) 282.

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the cases for trial, in looking up evidence and other necessary details, though, not being an admitted attorney, he was not required or expected to take part in the court proceedings. A large number of persons with grievances against railroad companies were discovered by plaintiff, and, acting under the agreement, he conducted them to the office of defendant, who thereafter managed their cases with success, collecting and receiving large sums of money as compensation for their injuries, dividing with plaintiff the compensation received for his services. Finally, however, defendant repudiated the contract and declined further to be bound by it, and plaintiff brought this action for an accounting respecting moneys received by defendant prior to the repudiation. The trial court found the facts substantially as here outlined, held that the contract was illegal and void, and directed judgment for defendant. Plaintiff appealed from an order denying a new trial.

The only question presented is whether the court below rightly held the contract void and unenforceable. The findings of the trial court are all sustained by the evidence. Illegality vitiates contracts of every description, and the courts decline to enforce them. Illegality, within the rule, includes agreements in violation of some prohibitive statute, in violation of the express rules of the common law, or contrary to public policy. The second and third are so closely related as to be in particular instances indistinguishable; for the common law and public policy, other than that evidenced by statutory enactments, are often inseparably blended together. Parsons v. Trask, 66 Am. Dec. 506, note. Formerly a distinction was made in determining the question whether contracts were illegal between acts *mala prohibita* and those *mala in se;* but the old rule no longer obtains. Either, under all modern authorities, nullifies the contract. Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Swanger v. Mayberry, 59 Cal. 91. Contracts *mala in se* include all those of an immoral nature, iniquities in themselves, and those opposed to sound public policy; and where both parties are *in pari delicto*, neither, as a general rule, will be accorded relief by a court of justice. The exceptions to the rule are well defined. 9 Cyc. Law & Proc. p. 551, and cases. The term "public policy," as applied to this subject, is comprehensive, and covers a wide range, whether evidenced by the trend of legislation, judicial decisions, or the principles of the common law. It embraces all acts or contracts which "tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Goodyear v. Brown, 155 Pa. 514, 20 L.R.A. 838, 35 Am. St. Rep. 903, 26 Atl. 665.

The contract in the case at bar is one between an attorney and a layman; and without stopping to consider whether expressly prohibited by statute, either as to the attorney or the layman, we take up the question whether it is void as against public policy. That it is we entertain no serious doubt. That conduct by a layman in stirring up litigation, searching out persons who have received some injury to their person or property, and inducing them to intrust their cause to the solicitor, or an attorney of his selection, on a contingent fee basis, tends to disturb confidence in the administration of justice and to undermine that sense of security for individual rights which every citizen has the right to feel, and is as obnoxious to sound public sentiment as when champerty was a crime at common law, is too obvious to require extended discussion. As remarked by Judge Mitchell in Gammons v. Johnson, 76 Minn. 81, 78 N. W. 1035: "The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy." It becomes all the more odious when participated in by a lawyer and a layman; the latter agreeing to "find the cases" and the former to conduct them through the courts. In such cases both are equally guilty and neither should be permitted, in a court of justice, successfully to assert alleged rights accruing from the iniquitous agreement. Huber v. Johnson, 68 Minn. 76, 64 Am. St. Rep. 456, 70 N. W. 806; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779.

The precise situation has been presented to other courts of the country with different results; but the weight of reason and principle sustains our view. In Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899, it appeared that defendant, in consideration that plaintiff would procure his appointment to prosecute certain cases, and in consideration, also, of plaintiff's assistance in the litigation, agreed to pay plaintiff one half of what he should receive for services rendered in the litigation. The court held the contract contrary to public policy

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and void, and though plaintiff fully performed his part of the agreement, and defendant received something like $30,000 for his services, refused to require him to account. The case is directly in point. In Langdon v. Conlin, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 A. & E. Ann. Cas. 834, the Nebraska supreme court held that a contract between an attorney and a layman by which the latter agreed to procure the employment of the former by third persons for the prosecution of suits in the courts, and also to assist in looking up the necessary evidence, in consideration of a share in the attorney's fees, was against public policy and void. In the course of the opinion the court referred to the state statutes, and therefrom declared that it was the plain policy of the legislature to exclude all persons not licensed attorneys from directly or indirectly practising in any of the courts of the state, and that for one not an attorney to attempt to break into the practice by a silent partnership with an attorney was a violation of the policy of the law. The same may be said of our own statutes on the subject of admission to the bar. Rev. Laws, 1905, §§ 2279, 2280. A similar conclusion was announced by the California supreme court in Alpers v. Hunt, 86 Cal. 78, 9 L.R.A. 483, 21 Am. St. Rep. 17, 24 Pac. 846. The supreme court of New York in numerous cases has so declared the law of that state, though the court of appeals took the opposite view in Irwin v. Curie, 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161. For supreme court citations, see note to Langdon v. Conlin, 2 A. & E. Ann. Cas. 836. The court of appeals held such a contract valid, and placed the ruling upon the ground that the parties were not *in pari delicto*; that, though a violation of the law on the part of the attorney, as to the layman, the contract was valid and enforceable. The court, it seems to us, overlooked the important fact that the layman was bound to know the statutory prohibition against the attorney, and those restricting the right to practise law to those duly licensed to do so. Guilty intent is not necessary, in order that both parties be *in pari delicto*. 9 Cyc. Law & Proc. p. 569. And it seems clear that, where two persons conspire together to do an act forbidden by law to one of them, the doing of it by joint agreement is a violation of the law as to both. The Colorado and Illinois courts seem also to have adopted the rule laid down by the New York court of appeals (Dunne v. Herrick, 37 Ill. App. 180; Vocke v. Peters, 58 Ill. App. 338; Casserleigh v. Wood, 14 Colo. App. 265, 59 Pac. 1024), though in both states the participation in such a contract would be objectionable, under their statutes, so far as concerns the attorney, and in New York an attorney was disbarred for entering into a similar agreement (Re Clark, 184 N. Y. 222, 77 N. E. 1). The case of Brown v. Bigne, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11, involved a contract between laymen by which plaintiff advanced money to assist defendant in conducting certain litigation of his own, and is not in point. The Missouri court, in Kelerher v. Henderson, 203 Mo. 498, 101 S. W. 1083, sustained a contract similar to that in the case at bar, though, at the same time, holding the contract with the client procured by the layman champertous and void. The two positions are inconsistent. The layman who procured the client and indueed the champertous contract with the attorney was equally culpable with the attorney. The rule of the supreme courts of the United States and of California and Nebraska is in line with the policy adopted by this court in the Huber Cases, supra, and seems to us more in harmony with consistent legal principles than the position of the other courts cited.

We are not required to look exclusively to statutory enactments in determining questions of public policy. Constitutions and statutes are evidence of the general policy of a state; but when confronted with questions of general public policy, as defined in the books, the courts go beyond express legislation and look to the whole body of the law,—statutory, common, and judicial decisions. Public policy requires of courts of equity protection from unjust and unconscionable bargains, though no statutory authority be granted by legislation. For instance, the right of redemption is inseparably connected with every mortgage, and the courts have held stipulations therein waiving the right void as contrary to public policy. Pritchard v. Elton, 38 Conn. 434; Shobe v. Luff, 66 Ill. App. 414. Statutes of limitations are designed to bring an end to strife and litigation by fixing a time within which resort to the courts must be made, and it has been held that an agreement forever to waive the right to interpose the defense is void. Green v. Coos Bay Wagon Co. 10 Sawy. 625, 23 Fed. 67; Wright v. Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116; Kellogg v. Dickinson, 147 Mass. 432, 1 L.R.A. 346, 18 N. E. 223. Also contracts not to resort to the courts for relief, contracts in restraint of marriage, in restraint of the right of alienation, contracts tending towards a breach of confidence or of contractual relations between third persons, and in may other respects. 15 Am. & Eng. Enc. Law, pp. 943 et seq., and cases cited. Contracts or acts tending in the directions just indicated are

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not expressly prohibited by statute, but, on the broad ground of the general public good, are not enforced. The intermeddler, the fomenter of litigation, has always been obnoxious, and he has received scant treatment at the hands of the law. The business of bureauing personal-injury litigation by a layman under agreement with an attorney to share in the profits is too clearly at variance with and in violation of sound morals and the general policy of the administration of justice to receive our sanction or approval. Such is the contract sought to be enforced in this case, and we hold it contrary to public policy and void.

Order affirmed.

NEW YORK COURT OF APPEALS.

JOHN P. EAST, Appt.,
v.
BROOKLYN HEIGHTS RAILROAD COMPANY, Respt.

(195 N. Y. 409, 88 N. E. 751.)

Carrier — boarding moving train — statutory penalty.

Boarding a moving car in good faith to become a passenger thereon is not within the operation of a provision of a statute under a caption, "Riding on Freight Trains," which makes it a misdemeanor to get on any train or car while in motion, for the purpose of obtaining transportation thereon as a passenger.

(June 1, 1909.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Richmond County, dismissing the complaint, and an order denying a new trial, in an action brought to recover damages for alleged malicious prosecution. Reversed.

Statement by **Gray, J.:**

This action was brought to recover damages of the defendant for the false arrest and for the malicious prosecution of the plaintiff. Upon the trial it appeared by the testimony of the plaintiff, a lawyer, that he was intending to return from Coney Island upon one of the defendant's trains. The train had already started from the station, and was proceeding slowly, at about the speed of a person walking. The plaintiff hurried his gait, and boarded one of the cars by stepping upon the lower step of the platform. The platform gate was closed, but the guard opened it and allowed him to enter. The guard then called a special officer, employed by the defendant, who arrested the plaintiff for getting on the train while in motion. The train was stopped, the officer and the plaintiff descended from it, and the latter, being taken to a station house, was there detained by a police sergeant under a charge of "disorderly conduct in getting on a moving car." The plaintiff subsequently procured his release under bail, and on the following day, after examination before the magistrate, was discharged. Upon this, and other evidence bearing upon the arrest, the trial court, upon the motion of defendant's counsel, dismissed the complaint, and denied the request of the plaintiff to go to the jury, to which ruling the plaintiff excepted. Upon appeal to the appellate division, in the second department, the judgment of the trial term and an order denying a motion for a new trial were affirmed.

Messrs. Louis Marshall and Samuel H. Evins, for appellant:

The act of boarding a moving car by a legitimate passenger is not in violation of subd. 2, § 426, of the Penal Code, and is not unlawful.

Burks v. Bosso, 180 N. Y. 341, 105 Am. St. Rep. 762, 73 N. E. 58; Distler v. Long Island R. Co. 151 N. Y. 424, 35 L.R.A. 762, 45 N. E. 937.

Mr. D. A. Marsh, with Mr. **George D. Yeomans,** for respondent:

The plaintiff was guilty of a misdemeanor in getting on the train while in motion, for the purpose of obtaining transportation thereon as a passenger.

Anglo-American Provision Co. v. Davis Provision Co. 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587; McCluskey v. Cromwell, 11 N. Y. 593; People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; New York v. Wineburgh Advertising Co. 122 App. Div. 748, 107 N. Y. Supp. 478.

The title of a statute cannot be used to extend or restrain any positive provisions contained in the body of the act, and is

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Case Note — Construction and effect of statute making it an offense to get on a moving car or train.

Aside from EAST v. BROOKLYN HEIGHTS R. Co. the only case found upon this question is that of Diddle v. Continental Casualty Co. (W. Va.) 22 L.R.A.(N.S.) 779, 63 S. E. 962, in which it was held that § 4282, W. Va. Code 1906, making it criminal for persons not passengers or employees of railroads to jump on or off of railway engines, cars, or trains, being a penal statute, was to be strictly construed; and, as thus construed, did not inhibit such conduct in an employee of a railway company whose duties were confined to work in its shops, and did not require him to go upon or about its engines, cars, or trains when in use on its tracks or yards.

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of little weight even when the meaning of such provision is doubtful.

Howe's Cave Lime & Cement Co. v. Howe's Cave Asso. 88 Hun, 554, 34 N. Y. Supp. 848, affirmed in 147 N. Y. 721, 42 N. E. 723; Goodlett v. Louisville & N. R. Co. 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1054; United States v. Oregon & C. R. Co. 164 U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383.

Gray, J., delivered the opinion of the court:

There is no ground upon which the dismissal of the plaintiff's complaint could be justified, unless his arrest was authorized by the statute. If he, in boarding the train while in motion, had committed an act which the law, as declared by some statute of the state, had made a punishable offense, then his arrest was justified, and his cause of action failed. If that act, however, was not prohibited by law, then he was entitled to maintain his action, and to have the issue determined by the jury. The defendant claims that § 426 of the Penal Code made the act of the plaintiff a misdemeanor. That section has for a caption, "Riding on Freight Trains." The first subdivision of the section reads: "A person who (1) rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company, or of the person in charge of the car or engine; or (2) who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger; or (3) who wilfully obstructs, hinders, or delays the passage of any car lawfully running upon any steam or horse or street railway,—is guilty of a misdemeanor."

It is contended that the second subdivision of this section is applicable to the plaintiff's conduct. If this contention is correct, then an act of such common occurrence as to be almost a characteristic trait of our human nature, without distinction of class or calling, is stamped with criminality. There is probably not an hour of the day when the statute is not offended against by persons in boarding cars while in motion, if it has the meaning contended for. That the legislature ever intended such an application of its enactment I do not believe. If there is any doubt as to the proper construction of the statute, then it should receive that which would not lead to unreasonable, if not absurd, consequences. Being penal in its nature, it should not be construed to be applicable to an act otherwise innocent and natural, and of common occurrence, unless such a legislative intent is clear and unmistakable. If it be conceded that the general language in which the legislative purpose is expressed, upon its face raises a doubt as to what was intended, that doubt should be resolved in favor of a construction which will accord with a just notion of what was to be forbidden. I think that it is resolved by a consideration of the legislation which preceded, and apparently led to, the enactment. If it be true that, when regarded in the light of the classification of the section, of its possible origin, and of the peculiar wording of the law, the legislative intent is equivocal, we should not hesitate to restrict it so as to negative an application which would make that unlawful which, in the common belief, is natural and innocent.

The first enactment by the legislature upon the general subject is to be found in chapter 261, p. 331, Laws 1878. That statute made it a misdemeanor for any person to "get on or off a freight car or engine while in motion," or to "ride on any wood or freight car, unless employed by or with permission from the proper officers of such railroad, or the person in charge of such car or engine." Subdivision 1 of § 426 of the Penal Code is plainly a codification of that enactment. By chapter 474, p. 520, Laws 1879, it was made a misdemeanor for any person to "obstruct, hinder, or delay the passage or running of any car lawfully running upon any horse or street railroad." Subdivision 3 of § 426 of the Penal Code is quite as plainly a codification of that statute. By chapter 370, p. 551, Laws 1880, it was made a misdemeanor for a "minor or other person, not a passenger," to climb, stand upon, or in any way to attach himself to, a locomotive or car, unless it is done in compliance with law, or by permission, under the lawful rules and regulations of the railroad. The same chapter made it also a misdemeanor to "invite or solicit any such minor or other person" to come, or to be, or to consent to his remaining upon, any engine or any freight or baggage car, unless rightfully there by law, or with permission under the rules and regulations of the corporation. Thus these three statutes had for their object the prevention of the unauthorized riding or being upon cars or engines, and of the obstruction or delaying of cars upon surface railroads. In the following year, when the Penal Code was established (chapter 676, p. 913, Laws 1881), § 426 was enacted as it stands at present, with the exception that, by an amendment in 1890 (chapter 458, p. 824, Laws 1890), subdivision 3 was made to apply to steam railways, as well as to horse and street railways, and the caption "Riding on Freight Trains" was added. It is reasonable to infer that the Penal Code, in the respect which we are now considering

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was intended as a codification of, and to resume within its provisions, existing laws. If subdivision 2 of the section, in its precise terms, is not found in any pre-existing statute, from its situation it is fair to suppose that it was intended to be supplemental to legislation having for its object such unlawful acts as the getting or being upon a car or train unauthorizedly. The caption of the section is certainly not appropriate to all of its subdivisions; but is it probable, if the legislature had intended to change and to add to the law with the view of preventing accidents, by making the common practice of getting on a car or train, while in motion, a misdemeanor, that it would have embodied that intention in a section whose apparent source was in statutes for the prevention of unauthorized riding upon, or the obstruction of the passage of, a car? Had the legislature been moved to this enactment by the occurrence of accidents to the traveling public, its purpose would have been better and more completely expressed in prohibiting persons from getting off, as well as from getting on, a car while in motion. It seems more consonant with the reason of the thing that this subdivision should have been intended to provide for the punishment of any person who sought to get on a car or train unauthorizedly, or intending to obtain transportation as a passenger surreptitiously. That is to say, we could find a reasonable purpose in the enactment when reading it as a prohibition against stealing or getting a free ride by getting and standing upon the train, or some part thereof. The practice of stealing rides upon cars or trains by boys and tramps was notorious, and its suppression had furnished adequate reason for a statute upon the subject. In my opinion we should construe this part of this section as applicable to such unauthorized and mischievous acts, and not to the innocently impulsive acts of persons intending, in good faith, to become passengers. To give it that construction makes the provision one in harmony with a policy declared in the statutes prior to the Code revision. If the construction given below to the subdivision is correct, it is certainly remarkable that, since its enactment in 1881, no case is brought to our attention in which the courts have so held.

I am not able to agree with the opinion of the appellate division that the enactment of subd. 2 in § 426 was such a general and comprehensive change of the law as to exclude a doubt of the legislative intent being to punish a person who gets on a car while in motion. I think that the language is sufficiently significant of an intent to make the prohibition apply, not to the person endeavoring to ride upon the car lawfully as one of its passengers, but to the person endeavoring to obtain transportation as a passenger by surreptitious means, and not intending to comply with the rules as to such. In giving that interpretation we reach a result more satisfactory to the mind, and one which supports a salutary legislative measure. If the legislature intended to make of an ordinary and innocent act a penal offense, I think it should have declared that intention in a way where, by reading or context, it would be plain.

If the plaintiff, though intending to be a passenger upon the train, was defiant of rules, or if he was disorderly, and gave any justification for the treatment he received from the defendant's servants, those were matters for the consideration of the jurors upon a submission to them of the case.

There were errors committed in the exclusion of testimony offered by the plaintiff, which need not be referred to, inasmuch as, upon the retrial which is ordered, they may not recur.

For these reasons, I advise the reversal of the judgment, and that a new trial be ordered, with costs to abide the event.

Vann, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur. Cullen, Ch. J., absent.

OHIO SUPREME COURT.

EDWARD C. MADER et al., Plffs. in Err.,
v.
MARY C. APPLE et al.

(80 Ohio St. 691, 89 N. E. 37.)

Will — signature — "at the end."

The will of B. was written upon a blank form folded in the middle, and containing three ruled pages. In said will, after the printed heading, there are written, and consecutively numbered, numerous testamentary clauses and a clause naming the executor of said will. These occupy the whole

Headnote by the COURT.

Case Note. — When will deemed to have been signed or subscribed at the end.

The earlier cases upon this question are collated in the case note to Sears v. Sears, 17 L.R.A.(N.S.) 353, this note being merely supplemental thereto.

It was held in Re Swire, 225 Pa. 188, 73 Atl. 1110, that a codicil to a will was sufficiently signed "at the end thereof" where the testator's signature followed paragraphs 1 to 8 thereof, while paragraphs 9 to 12 were written in the margin, beginning on a line opposite and just below the testator's

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of the first and a portion of the second page of said form. Then a blank space is left of about 23½ inches between the last of said above clauses and the testimonium clause, which latter clause is found at or near the bottom of page 3. Immediately beneath and at the end of said testimonium clause, in the space and on the line left and provided for that purpose, B., the testatrix, signed her name. Then follows immediately the attestation clause, signed by two witnesses. No testamentary provision of any kind is found in said will after the signature of the testatrix. Held, that said will is signed at the end thereof, as required by § 5916, Revised Statutes.

(June 25, 1909.)

ERROR to the Circuit Court for Shelby County to review a judgment reversing a judgment of the Court of Common Pleas, setting aside the probate of the will of Hannah M. M. Baumgarten, deceased. Affirmed.

Statement by Crew, Ch. J.:

The facts of this case, so far as pertinent to the present inquiry, are as follows: On August 8, 1907, a paper writing purporting to be the last will and testament of Hannah M. M. Baumgarten, deceased, was admitted to probate by the probate court of Shelby county, Ohio, and letters testamentary were issued thereon to Henry A. Apple as executor. On the 6th day of September, 1907, the present plaintiffs in error, Edward C. Mader et al., commenced an action in the court of common pleas of said Shelby county to contest said will. Thereafter an issue was made up as required by § 5861, Rev. Stat., and the following order was entered upon the journal of said court of common pleas: "And now, to wit, this 17th day of February, A. D. 1908, this cause came on for hearing, and it appearing to the court that the plaintiffs seek to set aside a certain paper writing purporting to be the last will and testament of Hannah M. M. Baumgarten, deceased, late of Shelby county, Ohio, which has been admitted to probate in said county, and no issue being made by the pleadings, it is now ordered the validity of said will be and hereby is put in issue between the parties hereto, and that it be ascertained by the verdict of a jury whether said writing is or is not the last will and testament of the said Hannah M. M. Baumgarten, deceased." On the trial of said issue in the court of common pleas,

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signature. The court said that the end meant by this provision of the statute is logically the end of the language used, which shows that the testamentary purpose has been fully expressed, and the position of the signature with regard to the bottom or end of the page is only evidence on the question whether the testator has completed the expression of his intention. Prima facie, however, that is the natural place for the signature to be placed to show the full expression of the testator's wishes, and therefore is presumptively the right place for it; but it is only evidence, and must give way to evidence of a different intent; and in the present case the connected sense of the text is entirely clear, although not following the usual order of arrangement, and the full substance of the testator's intent and its expression are there, and the signature is at what he intended and regarded as the end of the will; where that is manifest, the continuity of sense, and not the mere position on the page, must determine the statutory "end thereof" as the place for the signature.

It was held in Re Gibson, 128 App. Div. 769, 113 N. Y. Supp. 266, that a will was signed "at the end," where certain marginal interlineation, which disposed of property in certain events in the manner it would be distributed by law, extended below the testator's signature, and that portion written above the signature was admitted to probate on the ground that, such interlineation being immaterial, it might be ignored.

However, an entire will is refused probate where a material portion follows the testator's signature, on the theory that he would not wish his will to stand with a material part omitted; but, where the portion following the subscription is wholly immaterial, that presumption does not exist. Ibid.

In the last case an appeal was dismissed by the court of appeals on grounds other than the merits. See Re Gibson, 195 N. Y. 466, 88 N. E. 1100.

In Re Schlegel, 62 Misc. 439, 116 N. Y. Supp. 1038, a will was denied probate because not signed at the end, where written upon a printed blank consisting of two pages, with the testator's name written in a space intended for a recital thereof, at the top of the first page, and in the body thereof were written the words "continued on the other side," and at the end of the printed form, at the bottom of the first page, a notary public, who supervised the execution of the will, signed his own name in the place intended for the testator's signature, following which was the attestation clause, while on the second page were written the directions for the disposition of the testator's estate, which were followed by his signature.

And for the same reason, in Re Diehl, 112 N. Y. Supp. 717, a will was denied probate where the testator's signature was on the first page, which also contained printed matter, and a portion of a written paragraph, the second page being entirely blank, while the third and fourth pages contained the conclusion of the paragraph begun on the first page, the testator's signature not being there repeated.

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the proponents offered and introduced in evidence the will, the record thereof, and the order of probate, and rested. Thereupon the contestants—plaintiffs in error here—moved the court to direct the jury to return a verdict in said cause that said paper writing was not the valid last will and testament of Hannah M. M. Baumgarten, deceased, for the reason that the same was not signed by her at the end thereof as required by the statute. The court sustained said motion, and directed the jury to return such verdict, which was accordingly done. A motion for new trial was made and overruled, and the court entered judgment upon said verdict "that the said paper writing produced at the trial, purporting to be the last will and testament of the said Hannah M. M. Baumgarten, deceased, is not the last will and testament of the said Hannah M. M. Baumgarten, deceased." The proponents of said will—the defendants in error here—prosecuted error to the circuit court of Shelby county, where the judgment of said court of common pleas was reversed, and the cause remanded to that court for a new trial. The present plaintiffs in error now ask that this judgment of the circuit court be reversed, and that the judgment of said court of common pleas be affirmed. Some additional facts are stated in the opinion.

Messrs. Percy R. Taylor, Charles C. Marshall, and Andrew J. Hess, for plaintiffs in error:

The reason for the requisition that the will be signed at the end is to prevent fraud.

Sears v. Sears, 77 Ohio St. 104, 17 L.R.A. (N.S.) 353, 82 N. E. 1067, 11 A. & E. Ann. Cas. 1008; Glancy v. Glancy, 17 Ohio St. 134; Baker v. Baker, 51 Ohio St. 217, 37 N. E. 125; Re Conway, 124 N. Y. 455, 11 L.R.A. 796, 26 N. E. 1028; Ayers v. Ayers, 1 Rob. Eccl. Rep. 466; Irwin v. Jacques, 71 Ohio St. 395, 69 L.R.A. 422, 73 N. E. 683.

The will, because of the space between the last testamentary clause and the testimonium clause, which would permit of interpolations, is not signed at the end, within the meaning of the statute.

Smee v. Bryer, 6 Moore, P. C. C. 404; Re Fults, 42 App. Div. 593, 59 N. Y. Supp. 756; Soward v. Soward, 1 Duv. 126; Re Seaman, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700, 2 A. & E. Ann. Cas. 726; Sisters of Charity v. Kelly, 67 N. Y. 409; Re O'Neil, 91 N. Y. 516; Re Whitney, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272; Re Blair, 152 N. Y. 645, 46 N. E. 1145; Re Andrews, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529; M'Guire v. Kerr, 2 Bradf. 244; Re Corder, 1 Rob. Eccl. Rep. 669; 30 Am. & Eng. Enc. Law, 2d ed. p. 583.

Messrs. O'Donnell & Billingsley, Hoskins & Mills, and **J. D. Barnes,** for defendants in error:

The will was signed at the end, as required by statute.

Sears v. Sears, 77 Ohio St. 104, 17 L.R.A. (N.S.) 353, 82 N. E. 1067; Re Gilman, 38 Barb. 364; Re Dayger, 47 Hun, 127; Re Murphy, 48 App. Div. 211, 62 N. Y. Supp. 785; Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156; Re Collins, 5 Redf. 20; Morrow's Estate, 204 Pa. 479, 54 Atl. 313; Re Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827; Underhill, Wills, § 185; Beach, Wills, p. 31; Rood, Wills, § 259; Schouler, Wills, § 312; Page, Wills, § 183.

Crew, Ch. J., delivered the opinion of the court:

The instrument here in controversy was written upon a blank form containing three ruled pages, and in language and arrangement is as follows:

In the name of the Benevolent Father of All, amen:

I, *Hannah Mary Magdaline Baumgarten*, of the *township* of *Loramie*, county of *Shelby*, and state of *Ohio*, being of lawful age, and being of sound and disposing mind and memory, do make, publish, and declare this my last will and testament, hereby revoking all former wills made by me.

First:—My will is that all my just debts and funeral expenses shall be paid out of my estate as soon after my decease as shall be found convenient.

Second:—I give, devise and bequeath to *my sister, Mary Catherine Apple, the following described real estate, situated in the county of Shelby, state of Ohio, and in the township of Loramie, described as follows: Being part of section number twenty-four (24), town number ten (10), range four (4) east, and being the west half of the south half of the northeast quarter of said section number 24, containing 40 72/100 acres; also a second tract, same being the west half of two hundred acres of the east side of the south half of said section twenty-four (24), said half herein devised containing 100 acres; both tracts containing 140 72/100. To have and to hold in fee simple to her and her heirs forever.*

Third:—The remainder of my estate, both real and personal, I desire converted into money by my executor hereinafter named as soon as convenient, and the same after payment of debts and costs of administration of my estate be divided into six equal parts, one part to be paid to each of the following named person or their heirs, viz.: Mary Christena Batty one share, Mary Catherine Apple one share, Frederick Baumgarten one

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share, Rosanna Roagner one share, Minnie B. Roath one part, and to the children of my deceased sister, Dorette Upperman, one share or part.

Fourth:—I hereby nominate and appoint my respected brother-in-law, Henry A. Apple, executor of this my last will and testament, hereby empowering him to collect or compromise all debts due or owing to me, to sell at public or private sale upon such terms as he may see fit any real estate of which I may die seised, which is not hereinbefore devised to my sister, Mary Catherine Apple, and deeds to the purchaser to make the same as I could if living, and after having converted my estate, not specifically devised, into money, distribute same among legatees named. I hereby request that my said executor be not required to give bond as such.

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In testimony whereof I have hereunto set my hand at ——— this *tenth* day of *November*, in the year of our Lord one thousand nine *hundred* and *three*.

her
Hannah Mary Magdaline X Baumgarten.
mark

The foregoing instrument was signed by the said —— in our presence and by *her* published and declared as and for *her* last will and testament; and we have hereunto subscribed our names as attesting witnesses, at *her* request, and in *her* presence, and in the presence of each other, this *tenth* day of *November*, A. D. 1903.

J. A. Wehneman.
....
Wm. Freshour.
....

The written parts of the foregoing will we have italicized, and that which is not in italics was printed matter. On the first page of said paper there was a printed heading, and under this heading, on the same page, were written all the dispositive clauses of said will. Immediately following these was the clause nominating an executor of said will, the whole of which latter clause was also written upon said first page except the words, "executor be not required to give bond," which, for want of space on said first page, were written at the top of the second page, occupying all of the first and a part of the second line on said second page. The remainder of said second page was entirely blank, and the third page was also blank down to the testimonium clause, a space of about 23½ inches. The testatrix signed her name, by mark, immediately after and beneath said testimonium clause on the blank line obviously left for the signature of the person executing such will. Then follows immediately, in due form, the attestation clause, signed by two witnesses. Nothing further appears upon said will.

The present record presents for our determination but a single question, namely: Is the foregoing instrument, purporting to be the last will and testament of Hannah Mary Magdaline Baumgarten, signed by her at the end thereof as required by § 5916, Rev. Stat., which provides as follows: "Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and may be handwritten or typewritten, and such will shall be signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge, the same." It is the contention of counsel for plaintiffs in error that, because of the blank space left in said will between the clause nominating the executor and the testimonium clause, said will is not signed by testatrix at the end thereof, as enjoined and required by the above statute. Such claim, we think, upon the undisputed facts of this case, is without merit, and should not be sustained. The result of the authorities upon the subject of what constitutes a signing at the end of the will is summed up, and the rule correctly stated, in Underhill on Wills, § 185, where it is said: "In construing statutory requirements that the will shall be signed by the testator 'at the end thereof,' the courts have held that a will is signed at the end when the signature follows all disposing portions of the will. The fact that a blank space is interposed between the dispositive portion of the will and the signature of the testator is never material. The signature of the testator need not immediately follow the last word of the will. It is required, however, that the signature of the testator shall come after all the dispositive portions of the will; and, where this is not the case, the will is not signed at the end." In Beach on Wills, § 31, it is said: "Formerly a blank space between the dispositive portion of the will and the testator's signature invalidated the instrument; but, as the law now stands, neither an hiatus between the dispositive

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parts, nor between them and the subscription, will affect its validity." If then, space between the dispositive clauses of a will does not invalidate it, certainly a blank space intervening between the last dispositive provision of the will and the testimonium clause cannot and should not have that effect. While the leaving of a blank space such as found in this will was imprudent, in that it afforded an opportunity for fraudulent practice, nevertheless, the leaving of such blank is not, of itself, sufficient to invalidate the will. By usage and custom in every orderly constructed will the testimonium clause is universally recognized and adopted as the formal conclusion and end of such will, unless, from the instrument itself, a contrary intent appears; and it is only the space between this testimonium clause and the signature of the party executing such will that the law regards, and that the statute was intended to regulate; it being perfectly manifest from such instrument itself, when so constructed, that the testimonium clause is intended as the end thereof. Sears v. Sears, 77 Ohio St. 104, 17 L.R.A.(N.S.) 353, 82 N. E. 1067. When, therefore, as in the present case, the testatrix has adopted, as she had perfect right to do, the testimonium clause as the end of her will, and has signed her name immediately thereunder, in the space and on the line provided for that purpose, and there is no provision as to the disposition of property, or testamentary provision of any kind, after her signature, such signing must be taken and held to be at the end of the will.

Judgment affirmed.

Summers, Spear, Davis, Shauck, and Price, JJ., concur.

WASHINGTON SUPREME COURT.

JOHN W. CUPPLES, Appt.,
v.
J. A. LEVEL, Sheriff of Lincoln County, et al., Respts.

(— Wash. —, 103 Pac. 430.)

Writ — levy — growing crop — sufficiency.

1. A levy on a growing crop by posting notices of sale and delivering a copy of the execution and notices to the judgment debtor is not sufficient to prevent a subsequent valid sale of the property by such debtor.

Lease — assignment — consent — necessity.

2. The assent of the lessor to an assignment of the lease is not necessary in the absence of any provision in the lease forbidding such assignment.

Same — nonassent — effect.

3. The nonassent of a lessor to an assignment of the lease will not defeat the title of a purchaser of the growing crop from the assignee as against an execution creditor of the tenants, assignor and assignee, if, at the time the question is tried, the crop has been harvested and marketed.

Same — assignment — waiver.

4. Nonaction will waive an implied right to regain leased property for assignment of the lease without the consent of the lessor.

(July 29, 1909.)

APPEAL by plaintiff from a judgment of the Superior Court for Lincoln County in defendants' favor in an action in claim and delivery, brought to recover an alleged interest in a growing crop of grain which the defendant sheriff had sought to seize under an execution. Reversed.

The facts are stated in the opinion.

Messrs. **Martin & Wilson**, for appellant:

In order to make a valid levy on personal property, the officer should take actual possession, and must be in actual control and in view of the property.

Rorer, Judicial Sales, 2d ed. p. 456; State v. Poor, 20 N. C. 519 (4 Dev. & B. L. 384) 34 Am. Dec. 387; Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 613; Nighbert v. Hornsby, 100 Tenn. 82, 66 Am. St. Rep. 738, 42 S. W. 1060; Jones v. Howard, 99 Ga. 451, 59 Am. St. Rep. 231, 27 S. E. 765; Hemmenway v. Wheeler, 14 Pick. 408, 25 Am. Dec. 413; Meyer v. Missouri Glass Co. 65 Ark. 286, 67 Am. St. Rep. 928, 45 S. W. 1062; Jones Lumber & Mercantile Co. v. Faris, 6 S. D. 112, 55 Am. St. Rep. 814, 60 N. W. 403; Lowry v. Coulter, 9 Pa. 349.

A growing crop of wheat is not subject to levy under an execution.

Tipton v. Martzell, 21 Wash. 275, 75 Am. St. Rep. 838, 57 Pac. 806; Burleigh v. Piper, 51 Iowa, 649, 2 N. W. 520.

The title to a crop follows actual possession, and not the right to possession merely.

Churchill v. Ackerman, 22 Wash. 231, 60 Pac. 406; Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710; Johnson v. Walker, 23 Neb. 736, 37 N. W. 641.

Messrs. **Merritt, Oswald, & Merritt**, for respondents:

In the absence of the right of a landlord to select his tenant, or some special rights or circumstances in a particular case, a growing crop is subject to levy.

Polley v. Johnson, 52 Kan. 478, 23 L.R.A.

Note. — The question presented in the above decision as to the proper mode of levying on growing crops is treated in a note to National Bank v. Duff, 16 L.R.A.(N.S.) 1047. No additional cases have been found. 23 L.R.A.(N.S.)

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258, 35 Pac. 8; Throop v. Maiden, 52 Kan. 258, 34 Pac. 801; Voils v. Battin, 6 Kan. App. 742, 50 Pac. 940; Preston v. Ryan, 45 Mich. 174, 7 N. W. 819; Sparrow v. Pond, 49 Minn. 412, 16 L.R.A. 103, 32 Am. St. Rep. 571, 52 N. W. 36; Erickson v. Patterson, 47 Minn. 525, 50 N. W. 699; Gillitt v. Truax, 27 Minn. 528, 8 N. W. 767; Johns v. Kamarad, 2 Neb. (Unof.) 157, 96 N. W. 118; Sims v. Jones, 54 Neb. 769, 69 Am. St. Rep. 749, 75 N. W. 150; Johnson v. Walker, 23 Neb. 736, 37 N. W. 639; Pattison's Appeal, 61 Pa. 294, 100 Am. Dec. 637; Edwards v. Thompson, 85 Tenn. 720, 4 Am. St. Rep. 807, 4 S. W. 913; Willis v. Moore, 59 Tex. 628, 46 Am. Rep. 284.

The lease could not be assigned without the consent of the lessor.

Tipton v. Martzell, 21 Wash. 276, 75 Am. St. Rep. 838, 57 Pac. 806; Randall v. Chubb, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429.

Gose, J., delivered the opinion of the court:

The appellant, on July 17, 1908, commenced this action under the claim and delivery statute (2 Ballinger's Anno. Codes & Statutes, § 5262 [Pierce's Code, § 854]) by filing his affidavit and serving a copy thereof upon the respondent sheriff, and by giving to the sheriff the statutory bond; whereupon the appellant took possession of a growing crop which the sheriff had theretofore sought to seize under an execution on an ordinary money judgment. Upon the maturing of the crop, it was harvested and marketed by the appellant. The case was tried to a jury. From a judgment upon a verdict in favor of the respondents, this appeal is prosecuted.

The appellant has assigned numerous errors, but the view we take of the case limits the principal inquiry to the single question whether the sheriff had made a legal levy upon the property. A brief statement of the facts as they appear in the record will suffice: On March 7, 1907, the respondent O'Connor leased to Frank P. Bell and John M. Bell section 35, in township 22, range 35, in Lincoln county. The lease provided that the lessees should deliver to the lessor as rental "one third, free of charges," of all the grain grown upon the leased premises. It contained no covenants against assignment. On February 15, 1908, the lessees assigned the lease to one Sadie Wareham, stipulating in the assignment that it was "subject, nevertheless, to the rents and covenants in the said indenture contained." The lease, together with the assignment, was filed for record on the last-named date. On April 7, 1908, the respondent O'Connor recovered a judgment against the Bells and Wareham, and on the 13th day of June following an execution was issued thereon and placed in the hands of the sheriff for enforcement. On the 16th day of June, the respondent sheriff sought to levy on all the right, title, and interest of the execution defendants in the crop of grain then growing upon the leased premises. His return states: "Said levy being made by delivering to the within-named defendants a true copy of the within execution, and therewith a true copy of a notice of sale, setting forth that the above-described property would be sold on the 27th day of June, 1908." Prior to the date set for the sale, the sheriff was restrained from making the same. The restraining order was dissolved on the 7th day of July, 1908, and on the following day the sheriff, without a further levy, posted notices stating that the sale would occur on the 18th day of July. Before the last-named day, the affidavit and bond were served. On July 7th Sadie Wareham, for a recited consideration of $1,600, conveyed to the appellant by an instrument in writing an undivided two thirds of all the wheat then growing on the leased land. This instrument was filed for record July 8th. The appellant was not a party to the proceeding in which the judgment was entered upon which the execution was issued and the attempted levy made. The court, *inter alia*, instructed the jury as follows: "It is undisputed in this case that a valid levy was made upon this property by the sheriff. You have nothing to do with how the sheriff makes a levy, whether he goes out and puts up notices, or how. Therefore it must be taken as affirmed by the evidence that a valid levy was made somewhere back in June; that testimony is here before you, and not disputed. The evidence is undisputed that the sale under that levy was restrained by this court; that after that time that restraining order was set aside; and I instruct you that, after the first levy, the property was in the custody of the law, and that during that time no person could acquire any title as against the sheriff, and, as against that title, could not acquire any title." At the conclusion of the instructions, in answer to an inquiry by a juror, the court further instructed: "He can't be the owner now if not prior to the levy in June. He can't be the owner now unless before that time." Appellant properly excepted to these instructions, and has assigned error upon them.

It will be observed that the appellant acquired his interest in the subject-matter in litigation after the attempted levy. We have seen that the sheriff did not actually seize the property, and that he did nothing in the way of executing the writ except to post notices of sale and deliver a copy of the execution and notices to the judgment debt-

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ors. Did this constitute a constructive seizure? We think not. The Code (2 Ballinger's Anno. Codes & Statutes, § 5362 [Pierce's Code, § 522]) provides that "personal property capable of manual delivery shall be attached by taking into custody;" and § 5269 (§ 864) provides that "property shall be levied on in like manner and with like effect as similar property is attached [and] until a levy, personal property shall not be affected by the execution." We think these are the only provisions of our statute touching the levy of a writ of execution upon personal property. The return does not show that the sheriff went upon, or even saw, the property; nor did he constitute the judgment debtors, or either thereof, or any other person, his agent to keep possession of it. In fact, he had no possession, either actual or constructive, to intrust to another.

In State v. Poor, 20 N. C. 519, (4 Dev. & B. L. 834) 34 Am. Dec. 387, a constable, having a writ of attachment in his possession, sought to levy upon a growing crop without going on the land upon which the same was growing. He returned the writ indorsed: "Levied on a field of growing grain of Thomas Poor." Speaking to the legal effect of the attempted levy, it is said: "We think that it was correctly held by his Honor that the constable, by indorsing on the writ of attachment in the manner set forth in the case, that he had levied on the growing crop of the defendant in the attachment, did not acquire the legal possession thereof. To the levy of a writ upon personal property—whether a writ of attachment or of execution—the law requires a seizure. If, in the nature of the thing, actual seizure be impossible, then some notorious act as nearly equivalent to actual seizure as practicable must be substituted for it. The least that can be required in the levy on a growing crop is that the officer should go to the premises, and there announce that he seizes the same to answer to the exigency of his writ." In Tafts v. Manlove, 14 Cal. 47, 50, 73 Am. Dec. 610, 612, 613, the court, in construing the acts necessary to constitute a levy on personal property, said: "It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ when it would not be good as to third persons. . . . But it cannot be necessary to pursue this inquiry. It is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking house as to stand in a store door at midnight, and claim that merely by standing there and preventing any person from coming into the store he had levied on the contents, whatever they were, of the store; and this, without having any knowledge of the general nature of the stock, much less of the particular description or value." In Nighbert v. Hornsby, 100 Tenn. 82, 86, 66 Am. St. Rep. 736, 738, 42 S. W. 1060, 1061, the sheriff was about to sell a certain lot of corn under execution when a replevin action was instituted to recover possession and prevent the sale, on the ground that no levy had been made. In holding the levy effectual the court said: "It was sufficient if, as indicated by the evidence mentioned, he went into the presence of the property in question with the power and purpose then and there to seize it under a valid execution, and, by virtue of the writ, really assumed control of the property, as upon a manual seizure, with the plaintiff's knowledge; and, having done that, then left the property in the plaintiff's custody, by his consent and with his promise to keep it safely until demanded for sale, first noting the fact of the levy upon another paper, and subsequently, in due season, making proper indorsement on the execution itself." In Jones v. Howard, 99 Ga. 451, 456, 59 Am. St. Rep. 231, 235, 27 S. E. 765, 767. The court, defining a levy upon personal property, said: "To the completion of a levy, seizure, either actual or constructive, is absolutely indispensable. Actual seizure is accomplished by a mancupation of the thing intended to be seized. A constructive seizure is accomplished by the actual reduction by the officer of the property intended to be seized to his own control. He must have brought such property so far under his subjection that he could exercise control over it. He must exercise, or assume to exercise, dominion by virtue of his writ. He must do some act for which he could be successfully prosecuted as a trespasser if it were not for the protection afforded him by the writ." "In general it may be said that it [the levy] shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn or taken by another without his knowing it." Hemmenway v. Wheeler, 14 Pick. 408, 25 Am. Dec. 411, 413. See also Meyer v. Missouri Glass Co. 65 Ark. 286, 67 Am. St. Rep. 927, 45 S. W. 1062.

It is not necessary for us to decide whether a growing crop can be levied upon on a writ of execution, or, if so, how or under what circumstances it can be subjected to such process. In this case there was no levy made, and at the close of the trial the court should have directed a verdict for the appellant. He had shown that he was the owner of the grain. There was no evidence to the contrary. The respondents contend

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that no rights were acquired by the assignment to Sadie Wareham, it not appearing that it was made with the lessor's consent. This position is untenable for three reasons: (1) Because there is no nonassignment clause in the lease; (2) at the time of the trial the crop had been harvested and marketed; (3) if the lessor had an implied right of re-entry in case of assignment without his consent, the right was lost by nonaction. This case is therefore distinguishable from Tipton v. Martzell, 21 Wash. 273, 75 Am. St. Rep. 838, 57 Pac. 806.

The judgment will therefore be reversed, with directions to the trial court to enter judgment for the appellant for the grain and its proceeds, and for costs of suit.

Rudkin, Ch. J., and **Chadwick, Fullerton, and Morris**, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES BERNS, Appt.,
v.
A. E. SHAW.

(— W. Va. —, 64 S. E. 930.)

Equity — jurisdiction — gaming contract — recovery of money.

1. Courts of equity have concurrent jurisdiction with courts of law in suits to recover back money lost in gaming contracts, regardless of the question of necessity for discovery.

Gaming — partnership.

2. As a general rule, there can be no partnership in an illegal business. This includes the business of gambling.

Same — participants — liability.

3. Where two or more person engaged in the business of gambling, by whatever arrangement the business is conducted, if all are to share in the profits, and money is lost to them, they are all joint tort feasors, and liable jointly or severally, and may be sued jointly or severally by the loser to recover the money lost to them.

Same — recovery of money — cross answer.

4. In a suit in equity by one to recover back money lost by him to another in a gambling contract, the defendant may, by a cross bill or a cross answer, also recover back money lost by him to plaintiff in such gambling contract.

(May 11, 1909.)

APPEAL by plaintiff from a decree of the Circuit Court for Marion County dismissing a bill filed to recover money lost in a gambling transaction. Reversed.

The facts are stated in the opinion.

Messrs. **Cornwell & Abbatichio** for appellant.

Messrs. **C. Powell** and **Harry Shaw** for appellee.

Miller, P., delivered the opinion of the court:

This is a suit in equity under §§ 3435 and 3437, Code 1906, to recover $335 alleged to have been lost by plaintiff to defendant in March, 1904, in playing the game called "roulette." The suit was commenced in the intermediate court of Marion county, where on bill, answer, and proof the plaintiff's bill was dismissed on the ground, as recited in the decree appealed from, that the suit could not be maintained against defendant alone, the evidence showing that D. E. Thomas was a partner with Shaw in the transaction and a necessary party to the suit; and upon his petition, presented to the circuit court, the plaintiff was denied an appeal and supersedeas to said decree, and he has brought the case here.

The appellee claims that, regardless of the

Headnotes by MILLER, P.

Case Note. — Liability of one party to an arrangement to share profits from gambling, for money lost by a third person to the other party.

This note does not include cases involving the liability of person whose only interest in the gambling or betting was a percentage of the winnings for the use of his house, paraphernalia, etc.

The few reported cases upon this subject seem to be unanimous in holding that where several parties enter into a conspiracy to win the money of a third person by gambling or betting, each member of the conspiracy is jointly and severally liable to the person losing the money, under statutes allowing the recovery of money lost by gambling. Although, as pointed out in BERNS v. SHAW, a partnership cannot, strictly speaking, exist for the conduct of an illegal business, yet the courts hold the conspirators jointly and severally liable as if a partnership did in fact exist between them.

Thus, where the statute provided that the person losing by means of a wager or bet may recover from the "winner or winners," the court said in Lear v. McMillen, 17 Ohio St. 464: "If the plaintiffs in error were in fact jointly engaged in maintaining and carrying on an illegal business of gaming, it is not for them to set up the illegality of the business, or of the contract between them, to defeat their joint liability. It is a well-known rule of law that when an illegal conspiracy is proven, the acts of each conspirator are held as the acts of all. It is true their illegal contract is not binding between them, but it is binding upon them. It gives them no legal rights, but it imposes upon them legal liabilities. Having estab-

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reason given by the intermediate court therefor, the decree dismissing the bill was clearly right for want of equity, and it should have been dismissed on demurrer. This presents the question argued here on both sides, whether the remedy in equity given by § 3437 is cumulative of the remedy at law given by the preceding § 3436, or is available only where some discovery is necessary and the remedy at law inadequate. Said § 3437 provides: "Such loser may file a bill in equity against such winner, who shall answer the same, and upon discovery and repayment of the money or property so won, or its value, such winner shall be discharged from any forfeiture or punishment which he may have incurred for winning the same." The appellee insists that, as the bill shows no necessity for discovery, but, on the contrary, that plaintiff has an adequate remedy at law, given by § 3436, a court of equity is without jurisdiction. The allegations of the bill in effect simply charge that plaintiff lost to defendant the said sum of money, and prays for a discovery by defendant of the money so won by him from plaintiff, and for a decree for the money.

These statutes have come down to us through Virginia, practically unchanged, from Stat. 9 Anne, chap. 14, 2 Kelly's Rev. Stat. Anno. (W. Va.) p. 646; White v. Washington, 5 Gratt. 645. Story says (1 Story, Eq. Jur. § 303, p. 307), referring to jurisdiction in equity to suppress gaming contracts: "No one has doubted that

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lished their joint proprietorship, the defendant in error, by proving the receipt of money by one, proved its receipt by all, and entitled himself to a joint recovery against all. The real 'winners' of the money are the proprietors of the business, who by the terms of the contract between them,—no matter if it be an illegal contract,—are to furnish the funds, pay the losses, and receive the winnings."

And where the jury found that the defendant and two others gambled with the plaintiff under a secret agreement to divide the money won from him between them, it was held in Preston v. Hutchinson, 29 Vt. 144, that the defendant was liable for the money won by a confederate. The court said that all were principals, and each was liable for the acts of the other, and they might be sued jointly or severally; and a judgment against one was not, while unsatisfied, a bar to an action against the others.

So, in McGrew v. City Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771, 4 S. W. 38, it was held that when it appeared that several had unlawfully combined and confederated to gamble with and defraud another through a selected party, each confederate participating was liable for the entire amount received, as the money was received for all and by all, according to the devised illegal method under which they were all jointly operating.

And the McGrew Case was followed in Dunn v. Bell, 85 Tenn. 581, 4 S. W. 41, although it does not appear in this case that there was any conspiracy. It was held that where a number of individuals are associated together to gamble on the rise and fall of the grain, cotton, or stock market, they are liable individually and jointly to the persons who lose money to them.

So, in Bynum v. Brady, 82 Ark. 603, 100 S. W. 66, a joint verdict against all of the defendants was sustained, where the evidence showed and the jury found that they had conspired to win the plaintiff's money, although it passed into the hands of one man.

The following instruction, given to the jury and approved by the court in the Bynum Case, well expresses the distinction recognized in the majority of cases between the liability of persons who conspire to cheat another of his money, and of those who merely participate in the game: "But, if the money was won by somebody else besides these men, or if there is any one or more of the defendants who did not win any of it, then you cannot find a verdict against all of the defendants, only against the men that won the money; that is, if you find that the money was won from the plaintiff by one or more of the defendants, then you can find for the plaintiff against such number of defendants, naming them, as won the money; and you will find for these defendants who didn't win the money, unless you find there was some concerted plan among them to deprive this man of his money in a poker game; then you will find against all who participated in it."

And in Laytham v. Agnew, 70 Mo. 48, it was held that if, in a game of poker, each man plays for himself, and there is no conspiracy of two or more to cheat another playing in the game, and no agreement to divide between them any amount they should win from him, each party in the game is liable to the loser only for the amount of the money he may win from him.

If the defendant bets money to which others have contributed, it has been held in some cases that he is liable for the whole amount lost.

Thus in Garrison v. McGregor, 51 Ill. 473, the court said that what private arrangements the defendant might have had with outside parties as to the distribution of the winnings could not affect the right of the plaintiff to recover back the amount from the party to whom he lost it and with whom the bet was made.

And to the same general effect was the decision in Wilson v. Gardner, 28 Ind. 188, where the liability was incurred under the statute by receiving the money won on the bet.

But, in Zielly v. Warren, 17 Johns. 192, where others were concerned in the bet, and contributed to it, and received part of the winnings, it was held that, in an action to recover back the money, the plaintiff was

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under such circumstances a bill in equity might be maintained to have any gaming security delivered up and canceled; but it was at one time held that, if the money were actually paid in a case of gaming, courts of equity ought not to assist the loser to recover it back, upon the ground that he is *particeps criminis*." And in § 304 he says: "But it is difficult to perceive why, upon principle, the money should not be recoverable back, in furtherance of a great public policy, independently of any statutable provision. It has been decided that, if money is paid upon a gaming security, it may be recovered back, for the security is utterly void. Why is not the original gaming contract equally void? And, if it be, why is it not equally within the rule, and the policy on which the rule is founded?" To the same effect is 2 Pom. Eq. Jur. 3d ed. § 941. It would thus seem that, independently of statute, such cases were within the domain of original equity jurisdiction, and that the statute was unnecessary to confer jurisdiction; but, in states like ours, which have adopted the provision of the statute of Anne, the question of equity jurisdiction, it seems, is no longer a subject of doubt or controversy. White v. Washington, supra; Boner v. Montgomery, 9 B. Mon. 123; 20 Cyc. Law & Proc. p. 955, and other cases cited in notes. As, before the statute, jurisdiction to recover back money paid in execution of a gaming contract was in equity alone, it is by virtue of the statute that courts of law now have concurrent jurisdiction. In the well-considered case of McKinney v. Pope, 3 B. Mon. (Ky.) 93, the policy and purposes of these statutes is considered, and the previous case of Downs v. Quarles, Litt. Sel. Cas. 489, 12 Am. Dec. 337, is referred to, in which latter case the bill alleged the necessity of a discovery, which the courts say possibly might have been deemed a ground for taking jurisdiction if there had been a legal remedy under the statute. "But," says the court, at page 96 of 3 B. Mon., "the question formally stated by the court, after showing that there was no remedy under the statutes, seems to relate to the general power and jurisdiction of a court of equity to decree the restitution of money paid on a gaming contract, which question is unaffected by the mere fact that a discovery might or might not be necessary in the particular case. The solution of the question is made to turn, not upon the want of jurisdiction in the court to decree the money to the loser, if he had been equitably entitled to it, but upon the absence of a right to recover, arising from the equality of his guilt, and upon the doubtful propriety, with a view to the policy of suppressing the vice of gaming, of restoring to the loser the money which he has paid." The case of Downs v. Quarles was decided before the statute of Kentucky of 1833. In considering the effect of the statute, the Kentucky court in this case further says: "Then the question whether the objects of the statute will be promoted by restoring to the loser his losses is closed, and the courts, both of law and equity, are bound to advance the object by using their appropriate powers in advancement of the means adopted by the legislature." And the court in that case, in deciding the exact question we have here in favor of the concurrent jurisdiction in equity to recover back money lost in gaming, says: "The court, then, has jurisdiction to grant this relief in the case of gaming, by analogy, and because it has jurisdiction in like cases. And it is not too liberal a construction of the statute, which gives the right to sue 'in any court having jurisdiction in like cases,' without intimating any preference for the remedy at law, to say that, as the court of equity had jurisdiction in like cases, the right of suing in that forum, as well as in the court of law, is expressly given by the statute. It may be added that it has been maintained by eminent jurists that, independently of any statutory provision for the recovery of money lost at gaming, it should be recoverable back, because it is in furtherance of a great public

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entitled to no more money than the defendant actually gained upon the event of the race. The court said that the object of such statutes is to put the parties *in statu quo*, and this would not be the result if the defendant was held liable for the whole amount.

One of several parties who had put money into the hands of another, to bet upon a primary election, was held in Motlow v. Johnson, 145 Ala. 373, 39 So. 710, 8 A. & E. Ann. Cas. 188, not to be liable jointly with the other contributors for the full amount of the loss. The court, citing the Zielly Case, said that to permit a recovery for the full amount would not put the parties *in statu quo*. It should be noted that in this case the defendant did not receive the whole amount of the winnings, and was not the person who made the bet. In this way the case may be distinguished from Garrison v. McGregor, supra.

No recovery can be had in an action for money won by gambling where there is no proof that the money actually came into the defendant's possession, it being shown merely that the money was received by the defendant's copartner. Marine & F. Ins. Bank v. Megar, Dudley (Ga.) 83.

Where by statute the action is one upon contract, it was held in Bristow v. James, 7 T. R. 257, that a plea in abatement that, if the money was due at all, it was due from others as well as the defendant, was good.

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policy (1 Story, Eq. 303); and consequently that the court of equity should have granted such relief."

We think this case states the law correctly. But has the plaintiff made out a case entitling him to relief? The intermediate court evidently thought Thomas a partner, and therefore a necessary party to the suit, and denied relief on that ground. As a general rule, there can be no partnership in an illegal business. This includes gambling. Parsons, Partn. § 8, and note; George, Partn. 25. Illegality of a partnership, however, affords no reason why it should not be sued on a transaction with it that is legal in itself. 1 Lindley, Partn. 4th ed. *200. There was no plea in abatement, however, nor is there any defense in the answer on account of the nonjoinder of Thomas. The answer of defendant is not that the claim sued for is a partnership obligation, and that the action should abate because of nonjoinder of Thomas, but that the money alleged to have been lost by plaintiff was lost to Thomas, and not to him. Shaw denies the partnership, and claims that Thomas, and not himself, was engaged in the gambling business. So we need not consider the question of partnership or partnership liability. The question does not fairly arise.

The statute gives right of action against the person to whom the money is lost. The question then is: To whom did plaintiff lose his money? It is admitted that he lost it, and that, when he lost it, Thomas was in charge of the roulette wheel on which the game was played, and the evidence shows that the money plaintiff lost was paid to Thomas, and put in a drawer belonging to defendant. It is admitted the place where the gambling was done was the place of business of defendant, and that the wheel on which the game was played and all the furniture and other paraphernalia belonged to him. And Thomas, when asked on cross-examination in whose name the business was being run, said that he did not know whether there was any name attached to it, that there hardly ever is; that nobody is anxious to assume it, that the contract between defendant and himself was that Shaw was to furnish the room, lights, and the money to back the games with, and that he should take the place, manage it, and divide the proceeds. He says he was supposed to handle the money, and that Shaw was incompetent to run the gambling room. But the evidence shows that, a night or two after plaintiff lost his money, Shaw was himself in charge of the wheel, when defendant lost to plaintiff between $250 and $300, and gave to plaintiff his check on a bank for $246.75, part thereof, but on which he stopped payment before the check could be presented for payment. True it is defendant undertakes to explain his management of the wheel on this particular night by saying that, in the absence of Thomas, plaintiff persuaded him to open the wheel; but plaintiff denies this. Both defendant and Thomas admit that they were to share in the profits. This being so, plaintiff lost his money as much to defendant as he did to Thomas. By the terms of their agreement they both must have shared in the money which plaintiff lost, and, whether we treat them as copartners or as standing in the relation of principal and agent, the law makes them joint tort feasors, and liable either jointly or severally to plaintiff. Preston v. Hutchinson, 29 Vt. 144; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744; 20 Cyc. Law & Proc. p. 959. In 1 Page on Contracts, 839, it is said: "If the wager is illegal as well as void, the agent cannot recover for services or advances, since, properly speaking, there is no agency in illegal acts, but all are joint wrongdoers." While these authorities make Shaw and Thomas joint conspirators or joint tort feasors and liable jointly, they also make them liable severally, and each is liable, we think, under the statute.

But, in the answer of the defendant, he seeks a cross recovery against plaintiff for $40 alleged to have been lost by him to plaintiff on the night he operated the wheel. Plaintiff, in his reply thereto, denies this, and his counsel contends that no such right is available in this suit. Why not? If he has made out a case against plaintiff by proof, the Kentucky case of McKinney v. Pope, supra, is direct authority that a defendant may recover on a cross bill for money lost to plaintiff. Code 1906, § 3855, we think, gives him the same right by a cross-answer.

But has the defendant made out by proof a case for cross relief? He testifies that he paid this money to plaintiff through Thomas the night he gave plaintiff his check for $246.75. Plaintiff admits that the defendant paid him $40 at that time, but says positively that this was money he had paid defendant for checks. Shaw claims the $40 lost by him to plaintiff was covered by $100 paid by him at the time through Thomas to plaintiff's brother, and Thomas says that the way he came to pay the brother was that he had checks to cash in calling for $100. He says, moreover, that the plaintiff and his brother were betting together; but whether these checks represent winnings, or part winnings and part money paid in for checks, is not clear. If plaintiff and his brother were playing together, and the $40 represented winnings, we think both would be liable to defendant, upon the principles already announced. Both would then be joint tort

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feasors. But plaintiff positively swears that the $40 he got personally was the amount he had paid for checks. He admits that he furnished some checks to his brother, but he thinks his brother lost some money before he went into the game. Inasmuch as Thomas gave the $100 to plaintiff's brother, and inasmuch as he declared the game off as having been played unfairly, and defendant stopped payment on his check, the evidence as a whole supports the claim of the plaintiff, rather than that of defendant, that the plaintiff got back only the money he had actually paid for checks, and that the money paid him and his brother did not represent losses of defendant to them. As the burden was on defendant to make out his case by a clear preponderance of the evidence, we find the fact against him on this issue.

We are therefore of opinion, upon the whole case, to reverse the judgment below, and to pronounce the decree here which we think the intermediate court should have pronounced,—that the plaintiff recover of the defendant the sum of $388.80, being the principal sum lost, with interest to the date of the judgment appealed from, with interest thereon from the 28th day of November, 1906, the date of said decree, together with his costs by him in this court and in the intermediate court in this behalf expended.

IOWA SUPREME COURT.

MERCHANTS' NATIONAL BANK v. MARION R. CRIST et al., Exrs., etc., of Mary E. Crist, Deceased, et al., Appts.

(— Iowa —, 118 N. W. 394.)

Will — provision for support — trust.

1. No trust, but merely a personal liability of the children, is created by a will directing them to provide testator's husband with necessities and take good care of him the remainder of his life, and making such support a lien on property devised to them.

Equity — bill to reach trust property.

2. A judgment creditor of one whose support is made a lien upon property devised to persons charged with the duty of furnishing it may maintain a bill in equity to subject the property so far as necessary to the payment of whatever amount should be paid towards the satisfaction of it by such persons.

Husband — statutory rights — surrender — rights of creditor.

3. The surrender by a husband of his statutory rights in his wife's estate, and his acceptance of a provision for support in lieu thereof, contained in her will, does not entitle his creditors to subject the benefit accruing to him under the will to the payment of their claims if it could not otherwise be reached by them.

Creditors' bill — duty to furnish support.

4. The duty imposed upon children by their mother's will to furnish care, support, and necessaries to their father, which is made a charge on property devised to them by her, is not to pay money which can be reached by the father's general creditors, until the children have failed to perform it.

(November 23, 1908.)

APPEAL by defendants from a judgment of the District Court for Wright County in plaintiff's favor in a suit to subject a duty to furnish support to the payment of a judgment against the beneficiary. Reversed.

Case Note. — May provision in will for support of a person, which is made a lien or charge upon property devised or bequeathed to others, be reached by his creditors.

Cases where a trust is created out of which the support is payable, and also cases concerning wills which provide for the payment of annuities, have been expressly excluded from this note.

Aside from MERCHANTS' NAT. BANK v. CRIST and the cases therein cited and sufficiently reviewed, but one case has been found passing directly on the question here annotated. However, this case is practically on all fours with MERCHANTS' NAT. BANK v. CRIST. The case noted is Garner v. Wills, 92 Ky. 386, 17 S. W. 1023, where it was held that devises to children in a will by their mother, and a further provision that it was her desire that they should give to her husband a sum sufficient to support him in a comfortable manner and furnish to him a comfortable home and maintenance until his death, conditional that, upon their refusal to do so, the devises should become void, do not vest such an estate in the father as will permit the creditors of the latter to recover a sum equivalent to such support. The court in this case said: "It is to be observed that no estate in trust or otherwise is willed to B. W. Wills. The expression, 'a sum sufficient to support him,' etc., taken in connection with the subsequent clauses, was evidently intended to measure the duty imposed upon the devisees, and not to give him an estate in said sum, for the subsequent clause is mandatory upon them to furnish him a comfortable home and maintenance during his life, which includes everything, and upon their failure to support and maintain him the will is to be void, etc. It will be seen that no estate whatever is given to him, but it is all given absolutely to the devisees, except, by their failure to support and maintain their father during his life, the will is to be void and the estate distributed according to the statutes of distribution. . . . Suppose they

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Statement by McClain, J.:

The plaintiff, a judgment creditor of John M. Crist, brings this suit in equity to subject to the payment of its judgment a claim for support against M. R. Crist, D. E. Crist, and Olive Nail, who are the children of his deceased wife and the executors of her estate. There was a decree for plaintiff, and the defendants appeal.

Messrs. **Sylvester Flynn** and **Wesley Martin**, for appellants:

A trust was created in favor of the beneficiary named in the will.

Lee v. Enos, 97 Mich. 281, 56 N. W. 550; Meek v. Briggs, 87 Iowa, 610, 43 Am. St. Rep. 410, 54 N. W. 456; Colton v. Colton, 127 U. S. 300, 32 L. ed. 139, 8 Sup. Ct. Rep. 1164; Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; Bennett v. Bennett, 217 Ill. 434, 4 L.R.A.(N.S.) 470, 75 N. E. 339; Olsen v. Youngerman, 136 Iowa, 404, 113 N. W. 938; Podhajsky v. Bednar, 137 Iowa, 742, 115 N. W. 590; Seymour v. McAvoy, 121 Cal. 438, 41 L.R.A. 544, 53 Pac. 946.

If a husband consents to, or elects to, accept a provision for support and maintenance in lieu of his statutory rights in the deceased wife's property, his creditors cannot deprive him of the support, or take it for the payment of debts.

Seymour v. McAvoy; Nichols v. Eaton; and Meek v. Briggs,—supra; Steib v. Whitehead, 111 Ill. 247; Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Roberts v. Stevens, 84 Me. 325, 17 L.R.A. 266, 24 Atl. 873; Garland v. Garland (Day v. Slaughter) 87 Va. 758, 13 L.R.A. 212, 24 Am. St. Rep. 682, 13 S. E. 478; Maryland Grange Agency v. Lee, 72 Md. 161, 19 Atl. 534; Olsen v. Youngerman, supra; Piekenbrock v. Knoer, 136 Iowa, 534, 114 N. W. 200.

Where a person bequeaths property to trustees for the support of another, without reserving any beneficial interest in the property so bequeathed, the creditors of the *cestui que trust* cannot deprive him of his support.

Garland v. Garland, supra; Leigh v. Harrison, 69 Miss. 923, 18 L.R.A. 49, 11 So. 604; Nichols v. Eaton, supra; Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Meek v. Briggs, supra; Pope v. Elliott, 8 B. Mon. 56; Campbell v. Foster, 35 N. Y. 361; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Tolland County Mut. F. Ins. Co. v. Underwood, 50 Conn. 493; Hall v. Williams, 120 Mass. 344; Russell v. Milton, 133 Mass. 180; Broadway Nat. Bank v. Adams, supra; White v. White, 30 Vt. 338; Wallace v. Campbell, 53 Tex. 229; Lampert v. Haydel, 96 Mo. 439, 2 L.R.A. 113, 9 Am. St. Rep. 358, 9 S. W. 780, 20 Mo. App. 616; Slattery v. Wason, 151 Mass. 266, 7 L.R.A. 393, 21 Am. St. Rep. 448, 23 N. E. 843; Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719; Sherman v. Skuse, 166 N. Y. 345, 59 N. E. 990, 45 App. Div. 335, 60 N. Y. Supp. 1030; Barnes v. Dow, 59 Vt. 530, 10 Atl. 258.

Messrs. **McGrath & Archerd** and **Nagle & Nagle**, for appellee:

The surviving husband took not as a beneficiary under the will, but as a purchaser; and what he thus acquired is property in fact purchased by him, and is subject to the payment of his debts.

Re Qua v. Graham, 187 Ill. 67, 52 L.R.A. 641, 58 N. E. 357; Bank of Commerce v. Chambers, 96 Mo. 459, 10 S. W. 38; Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040; Blatchford v. Newberry, 99 Ill. 11; Isenhart v. Brown, 1 Edw. Ch. 413; Hubbard v. Hubbard, 6 Met. 50; 2 Scribner, Dower, 2d ed. p. 527.

The mere obligation to pay money or to furnish support in consideration of a transfer of property or a conveyance of land does not create a trust.

Maxwell v. Wood, 133 Iowa, 721, 111 N. W. 203; Riddle v. Beattie, 77 Iowa, 168, 41 N. W. 606.

McClain, J., delivered the opinion of the court:

The deceased wife of John M. Crist died possessed of property of the value of about

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had entered voluntarily into an obligation to support him during life,—could the benefit secured by that obligation be subjected to his debts? We think not, unless the fruit of the obligation was shaped into an estate in him, then, in that case, it could be subjected to his debts. So, here, the obligation to support him was, as far as he is concerned, voluntary, the consideration for that obligation moving from one who was under no obligation to support him, and the donation made is not an estate that may be subjected to his debts unless he receives it and puts it together as an estate. To further illustrate, suppose he declined to receive a support from the devisees, and supported himself,—would a sum equivalent to such support be regarded as a trust fund for his benefit? We think not, because the obligation to support him is entirely personal, and, if he refuses to accept it as needed, it belongs to the devisees."

A case closely related to the above is Gifford v. Rising, 51 Hun, 1, 3 N. Y. Supp. 392, where it was held that an annuity given by will to a son and his wife, payable out of an absolute devise of land to another son, was subject to the claims of the creditors of the annuitant, and the statement that it was for support did not render it exempt.

For cases on the right of one's creditors or personal representatives to make or control election for or against a will, or between different provisions of a will or statute, see case note to Re Fleming, 11 L.R.A. (N.S.) 379.

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$12,000, which by her will was devised and bequeathed to the defendants, her children, subject to the following provision: "My beloved husband, John M. Crist, being now over seventy-two years of age, and incapable of taking an active part in business affairs of any kind, I hereby obligate and direct my said children to provide him all of the necessaries and take good care of him for the remainder of his life, and I hereby make his support and care for life a lien upon the property above mentioned. This provision in favor of my husband is made in lieu of his distributive share in the property that I own at the time of my death." The three children were by the will designated as executors of the estate, and authorized to sell and convey real or personal property without order of court. The surviving husband, being duly served with notice of the provisions of the will, filed his written election to accept such provisions in lieu of his distributive share in his wife's estate. Plaintiff asked to have the provision made in the will in behalf of the surviving husband subjected to the payment of its judgment, and the court found that the care and support which the defendants were, by the will, bound to provide for their father, was of the value of at least $325 per year during the remainder of his life, and decreed that defendants, as executors, pay to the clerk of the district court, to be applied on plaintiff's judgment, semiannually, the sum of $162.50 so long as their father should live, until plaintiff's judgment should be satisfied.

It will be noticed from the paragraph of the will above quoted that the executors are not made trustees for the purpose of carrying out its provisions in behalf of the surviving husband, but their duty is to settle the estate, and to distribute the property among themselves as devisees and legatees; the duty to support and care for their father being a duty imposed upon them individually, and the charge therefor being made a lien on the property devised and bequeathed to them. We think that the court erred in entering a decree evidently contemplating the control of the property by the executors so long as the husband should survive, and thus in effect creating a trust fund, the proceeds of which should be applied so far as necessary to make the payments upon plaintiff's judgment. No complaint of the decree on this ground is made by the appellants; but, for the purpose of properly disposing of the questions argued by counsel, it is necessary to consider the law in this respect, and we find that the will does not create any trust, but imposes a duty upon the three children, as devisees, to support and care for their father. This duty would become obligatory upon them by the acceptance of the provisions of the will in their behalf. Inasmuch, however, as the charge for care and support was made a lien upon the property, plaintiff has properly proceeded in equity to subject the property so far as is necessary to the payment of whatever amount should be paid by defendants individually toward the satisfaction of plaintiff's judgment.

That the provision for the surviving husband is not in the nature of a trust is decided in Riddle v. Beattie, 77 Iowa, 168, 41 N. W. 606, wherein the plaintiff, who had conveyed real estate to one Townsend in consideration of Townsend's agreement to furnish support to plaintiff during life, asked to have such agreement enforced in equity as against the defendant, who had taken a conveyance of the land from Townsend, assuming the obligation to furnish the agreed support of plaintiff. In that case the court said: "The facts alleged in the petition do not establish a trust, arising either between plaintiff and Townsend, or plaintiff and Townsend and defendant. The petition shows that Townsend undertook to support plaintiff, and, in consideration of such agreement, the land was conveyed to him. There is not a word in the petition showing a trust arising in the transaction. Defendant held the absolute title, free from any trust, and became liable to plaintiff as upon any other contract, in case he failed to perform his obligation to support her. Defendant assumed and undertook to carry out Townsend's contract, and, of course, became bound just as he was bound by the obligation of the contract, and not as a trustee." So in this case, the children, by accepting their mother's property,—and we assume that they have accepted the provisions of the will in their behalf by becoming executors thereof,—have become bound to perform the duty imposed upon them by the will to support and care for their father, and the only substantial difference in principle between the case before us and the case cited is that here the charge is made a lien upon the property.

As the will creates no trust, the argument for appellants, based on the doctrine of spendthrift trusts, so called, which is that, where property is left to a trustee, the proceeds to be used for the support of a designated beneficiary, the interest of such beneficiary may not be subjected to the payment of his debts, is not pertinent, and we need not stop to discuss the question, as to which many authorities are cited, whether, in the absence of a specific provision terminating the rights of a beneficiary in case of bankruptcy or insolvency, a limitation will be implied such as will deprive his creditors of

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any claim upon the proceeds which would otherwise be paid to the beneficiary. This court has given some recognition to the doctrine of spendthrift trusts in Olsen v. Youngerman, 136 Iowa, 404, 113 N. W. 938, where it is held that the trustee and beneficiaries cannot, by mutual agreement, terminate such trust, and defeat the purpose of the donor to give to the beneficiary a support which shall be free from the claims of creditors. The courts in this country seem generally to have held that creditors cannot deprive such a beneficiary of the support provided for him out of trust property, at least, so long as it is in accordance with his station in life. Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Seymour v. McAvoy, 121 Cal. 438, 41 L.R.A. 544, 53 Pac. 946; Johnston v. Zane, 11 Gratt. 552, 569; Wales v. Bowdish, 61 Vt. 23, 4 L.R.A. 819, 17 Atl. 1000; Roberts v. Stevens, 84 Me. 325, 17 L.R.A. 266, 24 Atl. 873; Lee v. Enos, 97 Mich. 276, 56 N. W. 550; Moore v. Simmons, 2 Head, 545; Stow v. Chapin, 21 N. Y. S. R. 38, 4 N. Y. Supp. 496; Wilder v. Clark, 33 N. Y. S. R. 143, 11 N. Y. Supp. 683. In some of these cases, emphasis is laid on the fact that the provision for the beneficiary is a mere gratuity, from which creditors should have no advantage; and in this respect the present case is materially different from those cited. Here the surviving husband was entitled to a one-third interest in his wife's estate of which no will of hers could deprive him without his consent; and the share of her property which he might have taken would have become liable to be subjected to satisfaction of the claims of creditors. It is very justly urged by counsel for appellee that the provision which the surviving husband accepted in lieu of his statutory share in his wife's estate was practically purchased by the surrender of such statutory share, and, if the benefit accruing to him under the will is of such nature that it can be subjected to the payment of his debts, there is no reason why it should not be thus subjected.

On the other hand, the surviving husband had a perfect right to relinquish his statutory share and accept the provision made in the will. This kind of an election cannot be controlled by creditors, although it may result to their disadvantage. Shields v. Keys, 24 Iowa, 298; Brightman v. Morgan, 111 Iowa, 481, 82 N. W. 954. Thus we have recently held that the election of a surviving husband to take the homestead for life, exempt from liability to his creditors, in lieu of a distributive share, which might have been subjected to the payment of his debts, is valid as against the creditors. Piekenbrock v. Knoer, 136 Iowa, 534, 114 N. W. 200. The fact, then, that the husband surrendered a right to property which might have been subjected to the payment of his debts, in exchange for the benefit which would accrue to him under the provision for his support, would not entitle his creditors to subject the benefit accruing to him out of such provision to the payment of their claims, unless the nature of the right accepted by him under the will is such that it may be reached by creditors.

We therefore reach the final question in this case, unencumbered by other considerations: and that is whether the provision in the will for the support of the surviving husband of testatrix, father of the defendants in this action, is such in its nature that his creditors may subject it to the satisfaction of their claims. It is to be noticed that testatrix obligates and directs her children to provide their father with all of the necessaries, and to support and take good care of him for the remainder of his life. By way of security for the performance of such obligation and direction, she makes his support and care for life a lien upon the property devised by her to her children. The duty imposed is broader than that of providing for support. It involves the care of the father; and, as reasonably interpreted, such care as children owe to an aged and infirm parent. It may be that, so far as the care required goes beyond the furnishing of necessaries and support, the duty could not be enforced in courts of law by reason of the impracticability of measuring the value of such care in money; and it follows that some of the benefits, at least, which the surviving husband was to receive under the provisions of this will, could not be discharged by paying to his creditors the cost of his support.

It is to be borne in mind that the question now before us is as to the right of plaintiff to compel defendants to pay money to be applied in the satisfaction of their father's debt as a full or partial discharge of their obligations to their father; and plaintiff's claim to have defendants' obligations converted into money and applied to the satisfaction of its judgment cannot be greater in extent than the father's right to enforce payment of money in satisfaction, wholly or in part, of defendants' obligation, in the absence of any claim by creditors. In other words, it is not for the plaintiff, a creditor, by intervening between the beneficiary under this provision of the will and the devisees, to convert the duty of the latter into an obligation to pay money, unless such an obligation could be enforced by the beneficiary himself. To put it in another way, the rights of creditors, in the absence of any allegation and proof of fraud, cannot be higher than the rights of the ben-

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eficiary, for we are now concerned only with determining the pecuniary liability of the defendants. The question at once suggests itself whether the father could, by his own act, and without any breach of the duty imposed on his children by accepting the property under the will, convert his claim against them for support and care into a claim for money. We have frequently had occasion, in cases arising out of a claim for care and support for life in consideration of a conveyance of property, to recognize the principle that only when such care and support is not furnished as contemplated in the conveyance can the grantor have relief in the courts. Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Walker v. Walker, 104 Iowa, 505, 73 N. W. 1073; Lewis v. Wilcox, 131 Iowa, 268, 108 N. W. 536; Gardner v. Lightfoot, 71 Iowa, 577, 32 N. W. 510; Johnson v. Johnson, 52 Iowa, 586, 3 N. W. 661; Kent v. La Rue, 136 Iowa, 113, 113 N. W. 547. Thus, in Newman v. French, 138 Iowa, 482, 18 L.R.A.(N.S.) 218, 116 N. W. 468, it is said that only when the obligation to support, which has been contracted for as the consideration of an agreement to convey, has been fully performed, can the contract be enforced in an action for specific performance, and it is suggested that only when the person to be supported has had reason for declining to receive the support provided or tendered in performance could he insist that the continuing obligation had been broken.

In the light of these cases, we think it clear that the duty to furnish care and support to an aged and infirm parent is not primarily a duty to pay money for that purpose, but rather a duty to give the care and support in the family which is usually given to parents without other home; and that no duty to pay money arises until there is a failure to furnish to the parents such a home as the natural relations of the parties would suggest as the proper performance of the obligation. This is the obligation which was clearly contemplated in the provision of the will now under consideration, and we think that, until defendants have failed to furnish such support, no duty to pay money can be implied either in favor of the father himself or of his creditors. The duty was a personal one, involving services rather than compensation, and convertible into an obligation to make compensation only by a failure to render such services. Plainly, the father could not have assigned to another his right to receive care and support during his life. The service required was so distinctly a personal service to the father that it could not be converted by him into a money claim. Why, then, should plaintiff be allowed to convert it into a money claim and compel defendants to pay money by way of substitution for the rendition of the personal services which they are willing and able to render? What is said in Slattery v. Wason, 151 Mass. 266, 7 L.R.A. 393, 21 Am. St. Rep. 448, 23 N. E. 843, with reference to the claim of a creditor to subject the interest of a beneficiary who, under the provisions of a will, was entitled to support from a child who was devisee, seems peculiarly applicable here: "One answer to this is that the court will not interfere to change the relations of the parties at the request of a stranger. The owner of the fund is not a trustee, and his mother is not a *cestui que trust*, who, or whose representatives, can call him to account as a trustee. He is the absolute owner of the fund, subject to the charge of his mother's support. He owes a duty to his mother, and she has a right against him. So long as the parties are satisfied, there is no occasion for any court to interfere with them. If he fails to perform his duty, the court, on her application, will in some way protect her rights. It may require him to give security, or it may organize a trust fund and make him or some other person trustee, and thus change the relation of the parties and the character of the fund; but the court ought to thus interfere and act only at the instance of the party in interest, and to protect her rights under the will by carrying out the intention of the testator. It will not, without her complaint, and against her wishes, interfere at the suit of a third party to institute a trust, and to change the character of the fund and the relation of the parties to it, in order to defeat the intention of the testator, not only as to his daughter-in-law, but also as to his grandson. The whole fund is given to the grandson, charged only with the support of his mother. Whatever is not required for her support is his to enjoy. What is paid to her creditors is not used for her support, although it is paid by him. If the court should attempt to recoup his loss by limiting the amount which he should be liable to pay for his mother's support to the amount he is to pay to her creditors, while this would deprive her of a right of support under the will, it could not relieve him from his statutory obligation to support her. If, however, the relations of the parties and the circumstances were such that the court would fix and secure to Mrs. Wason [the beneficiary] the amount which should be paid to her for her support, it would take care that by so doing it did not change the condition of the property, so as to defeat, instead of carrying out, the intention of the testator. If such action was sought by Mrs.

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Wason to protect her rights, the decree should be so framed as not to render the right alienable. When the parties do not desire the aid of the court, it will not interfere at the suit of a creditor to change the condition of the property, and thereby give him rights which the will alone does not give him, and which the testator did not mean that he should have."

The effect of sustaining the decree of the lower court in this case would be to require defendants to pay money in satisfaction of their father's debt out of property which in no sense belongs to the father, and which was not acquired from him, and which is not held in trust for his benefit, but only subject to a charge in his behalf, and leave them still bound under the will to take good care of him for the remainder of his life, and bound under the statute to furnish him support; that is, the very support in lieu of which the court requires money to be paid. It was plainly the intention of testatrix to impose upon the defendants, as devisees, the general, moral, and statutory duty of providing for their father in his old age by furnishing him a home and the necessaries of life. The parties have so construed the will; for, as appears in the record, the defendants have been living together as one family and furnishing a home to their father to his satisfaction. The only provision of the will which affects the property left to the defendants is that making the support and care for the father a lien upon the property in case of breach of duty by the defendants. The father may, no doubt, enforce against the property a lien for a money claim so far as the breach of duty of defendants can be compensated in money under the usual rules for measuring damages in case of a breach of such contract, but we are clearly of the opinion that plaintiff has no right to convert defendants' duty into an obligation to pay money, and thereby throw an additional burden on defendants, for it is to be assumed that, even after payment of the money which, by the decree, they are required to pay, they will continue to perform the obligations not only of the will, but of the statute, to care for and support their father.

For the reasons indicated, the decree is erroneous not only in imposing a continuing duty upon defendants as executors, but, also, if it be construed as defining the duty of defendants as devisees, in requiring payment by them individually of money towards the satisfaction of plaintiff's judgment.

Reversed.

OKLAHOMA SUPREME COURT.

T. M. HARTSHORNE, Plff. in Err.,
v.
H. A. INGELS.

(—Okla. —, 101 Pac. 1045.)

Crops — ownership.

Where there has been a recovery of the possession of land held adversely, the successful plaintiff is entitled to a matured crop of corn standing unsevered on such land at the time of the final judgment of ouster and delivery of possession of the premises to plaintiff under a writ of restitution.

(May 12, 1909.)

Headnote by HAYES, J.

Case Note. — Right as between successful plaintiff and evicted defendant to crops unsevered at time of final judgment.

The rule followed in HARTSHORNE v. INGELS, which awards an unsevered crop to the successful plaintiff in ejectment, is one of general acceptance in the courts. The following authorities support it: McCaslin v. State, 99 Ind. 428; Harrod v. Burke, 76 Kan. 909, 123 Am. St. Rep. 179, 92 Pac. 1128; Huston v. Skaggs, 7 Ky. L. Rep. 593; Brothers v. Hurdle, 32 N. C. (10 Ired. L.) 490, 51 Am. Dec. 400; Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695; Kirtley v. Dykes, 10 Okla. 16, 62 Pac. 808; 8 Am. & Eng. Enc. Law, 2d ed. p. 306; Walker v. Simkins, 2 Tex. App. Civ. Cas. (Willson) 58; King v. Fowler, 14 Pick. 238; Craig v. Watson, 68 Ga. 115; Cox v. Hamilton, 69 N. C. 30; Altes v. Hinckler, 36 Ill. 275, 85 Am. Dec. 407. And see Baker v. McInturff, 49 Mo. App. 505.

The general rule of the common law upon this question holds that crops growing on land which is the subject of an ejectment action are part and parcel of the realty, and go to the successful plaintiff. Carlisle v. Killebrew, 89 Ala. 329, 6 L.R.A. 617, 6 So. 756.

The rule of the common law which entitles a successful claimant of land to the growing crops was held in Strode v. Swim, 1 A. K. Marsh. 366, to be unaffected by a law whose object was to secure to an ejected occupant a just remuneration for his labor and expense in ameliorating the land, but which nowhere conferred upon him, by express provision, a right to the growing crops, and did, in other respects, secure him ample indemnity for improvements.

In following the generally accepted rule, McLean v. Bovee, 24 Wis. 295, 1 Am. Rep. 185, holds that the successful plaintiff in ejectment takes both the standing and severed parts of a crop sown after the suit to recover the land had been begun.

And so, of course, a growing crop became the property of the plaintiff in ejectment

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ERROR to the Probate Court for Kay County to review a judgment in plaintiff's favor in an action of replevin to recover possession of certain corn. Reversed.

Statement by **Hayes, J.**:

This is an action of replevin wherein H. A. Ingels, defendant in error, plaintiff below, seeks to recover from T. M. Hartshorne, plaintiff in error, defendant below, the possession of 1,000 bushels of corn, grown and produced by plaintiff on the northeast quarter of section 8, township 26 north, range 2 east, Indian meridian, Kay county, during the year 1906. The case was tried to the court without a jury upon an agreed statement of facts. For some time prior to the 21st day of June, 1905, a contest had been pending before the Secretary of the Interior between defendant, T. M. Hartshorne, and one F. A. McKee, to determine who had the right to take as a homestead the land upon which the corn was grown. Pending the contest, McKee occupied that portion of the quarter section upon which the corn was grown. The contest having been decided by the Secretary of the Interior in favor of Hartshorne, he instituted forcible entry and detainer action in one of the justice courts of Kay county to recover possession of that portion of the quarter section theretofore occupied by McKee. Judgment was rendered in the district court of Kay county on appeal on June 21, 1905, in favor of Hartshorne. Appeal from this judgment was taken to the supreme court of the territory, where it was dismissed. Certificate of such dismissal was filed in the district court of Kay county on October 4, 1906, and on October 19, 1906, a writ of restitution was served, whereby Hartshorne was placed in possession of the premises whereon the corn in controversy was then standing, fully matured, but ungathered. Plaintiff Ingels was not a party to the forcible entry and detainer action, but he had occupied and cultivated, during the year 1906, as tenant of McKee, the land upon which the corn was grown. He had no contract with Hartshorne in reference to the land cultivated by him or the corn grown thereon. It is agreed that the corn was seasonably planted and cultivated by plaintiff as the tenant of McKee during the year 1906, and that, at the time of the dismissal of the appeal in the supreme court in the forcible entry and detainer action, said corn crop was standing in the field fully and completely matured, unharvested, and unsevered from the soil, and that it was standing in that condition when the writ of restitution was

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when he was the prevailing party, where the crop in question was not sown by the defendant until after final judgment of ouster, execution thereon having been for a time suspended. Oyster v. Oyster, 32 Mo. App. 270; Davis v. Callahan, 66 Mo. App. 168.

In Samson v. Rose, 65 N. Y. 411, a landlord was held entitled to recover crops which had been sown and harvested by a sublessee subsequent to the beginning of an action to eject defendant for nonpayment of rent. These crops were severed at the time of final judgment or actual entry by the landlord, but, by statutory enactment, the beginning of the action was deemed to be a re-entry, and so the landlord was conclusively presumed to have taken possession at the moment of the service of the complaint.

In Hodgson v. Gascoigne, 5 Barn. & Ald. 88, the act of a sheriff in refusing to sell the growing crops of a tenant in satisfaction of a writ of fieri facias was upheld where there was also in his hands a writ against the tenant, awarding possession of the land to his landlord as plaintiff in ejectment. The court said: "The property in the growing corn in fact was not vested in the tenant at the time of the seizure, for, after the judgment was obtained in ejectment, the defendant is to be considered, in point of law, as a trespasser from the day of the demise laid in the declaration; from that time, therefore, the property was devested out of him, and he had no property at the time when the fieri facias was delivered to the sheriff."

Affirming the general rule that a plaintiff's recovery in ejectment entitles him to growing crops, Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235, applies this doctrine so as to allow a recovery against a tenant of the ejected owner for crops sown with knowledge pending the ejectment action, and harvested after judgment.

And so, as between the mortgagee of growing crops, who has acquired his interest pending the action, and a successful plaintiff in ejectment, the right to the crops is in the latter, the mortgagee standing in place of the defending occupant. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33.

While the successful plaintiff in ejectment is generally entitled to growing crops, such is not the rule where he has recovered rent for the current year. Where the judgment includes a recovery of rent, the ejected defendant is entitled to remove his growing crops or a *pro rata* share of them, where rent is recovered for part of the year only. Gardner v. Kersey, 39 Ga. 664, 99 Am. Dec. 484. And see Craig v. Watson, supra.

Where a statute provides that an occupant, in case of ejectment, shall be entitled to enter the land and remove all crops sown thereon previous to the entry of judgment against him, an evicted defendant is warranted in removing such crops, although it is adjudged that the successful plaintiff was the owner and entitled to possession of the land before the crops in question were actually sown. Bloemendal v. Albrecht, 79 Minn. 304, 82 N. W. 585.

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served on the 19th day of October, 1906. The judgment of the district court was in favor of plaintiff for the possession of the corn. From this judgment a proceeding in error was taken by defendant to the supreme court of the territory, where it was pending at the time of the admission of the state, and it is now before this court under the provisions of the enabling act (act Congress June 16, 1906, 34 Stat. at L. 267, chap. 3335) for final disposition.

Mr. **L. A. Maris**, for plaintiff in error:

Where there is a recovery of land held adversely, the successful plaintiff is entitled to the standing unsevered crops, as against the one who planted them.

8 Am. & Eng. Enc. Law, 2d ed. p. 306; 12 Cyc. Law & Proc. pp. 977, 978; Freeman v. McLennan, 26 Kan. 151; Tripp v. Hasceig, 20 Mich. 254, 4 Am. Rep. 388; McGinnis v. Fernandes, 135 Ill. 69, 25 Am. St. Rep. 347, 26 N. E. 109; Phillips v. Keyshaw, 7 Okla. 674, 56 Pac. 695; Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393; Heavilon v. Heavilon, 29 Ind. 509.

Messrs. **Moss, Lowe, & Turner**, for defendant in error:

The plaintiff's title to the crop became complete at the maturity of the crop, although it was as yet unsevered.

Hecht v. Dettman, 56 Iowa, 679, 41 Am. Rep. 131, 7 N. W. 495, 10 N. W. 241; Downard v. Groff, 40 Iowa, 597; Burleigh v. Piper, 51 Iowa, 650, 2 N. W. 520; Martin v. Knapp, 57 Iowa, 336, 10 N. W. 721; First Nat. Bank v. Beegle, 52 Kan. 709, 39 Am. St. Rep. 365, 35 Pac. 814; Garanflo v. Cooley, 33 Kan. 137, 5 Pac. 766; Beckman v. Sikes, 35 Kan. 120, 10 Pac. 592; Caldwell v. Alsop, 48 Kan. 571, 17 L.R.A. 782, 29 Pac. 1150; Missouri Valley Land Co. v. Barwick, 50 Kan. 57, 31 Pac. 685; Monday v. O'Neil, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32; Foss v. Marr, 40 Neb. 559, 59 N. W. 122; 2 Jones, Mortg. § 658; Heavilon v. Farmers' Bank, 81 Ind. 249; Cassilly v. Rhodes, 12 Ohio, 88; Houts v. Showalter, 10 Ohio St. 124.

Hayes, J., delivered the opinion of the court:

It is conceded, correctly, we think, by counsel for plaintiff, that plaintiff's rights are identical with the rights of his landlord, McKee. McKee occupied the land prior to the time he was ousted therefrom by the writ of restitution, under a claim that he had a right to homestead the same. He was therefore holding the land adversely to Hartshorne, the plaintiff in the ejectment suit and defendant in this action. Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695. The question, therefore, presented by this appeal, is whether the crops cultivated and grown and fully matured are personal property as between the successful plaintiff in an action of ejectment and the evicted defendant, who held the premises in adverse possession.

Plaintiff relies principally upon Hecht v. Dettman, 56 Iowa, 679, 41 Am. Rep. 131, 7 N. W. 495, 10 N. W. 241, and First Nat. Bank v. Beegle, 52 Kan. 709, 39 Am. St. Rep. 365, 35 Pac. 814, as supporting his contention that matured crops, as between the successful plaintiff in an ejectment suit and the evicted adverse holder, do not follow the real estate, although, at the time of the ouster, such crops are standing unsevered upon the premises in controversy. We do not think that these cases are directly in point, and should control us in the decision of this case. There is some conflict among authorities as to when growing crops are to be regarded as personal property, and when they are to be regarded as a part of the realty. The weight of authorities supports the rule that annual crops—*fructus industriales*—are subject to levy and sale as chattels for the debts of the owner; but, as between the grantor and the grantee, and as between the mortgagor and the purchaser at a foreclosure sale, they are a part of the realty, and pass with the realty upon which they stand to the grantee or purchaser, unless reserved. In Hecht v. Dettman the defendant was a tenant of a mortgagor against whom foreclosure had been made. The plaintiff was the purchaser at the foreclosure sale, and, at the time of the execution by the sheriff of the deed to plaintiff, defendant, as tenant of the mortgagor, had standing upon the mortgaged premises a crop of grain, then mature and ready for harvesting, but unharvested. The court held that the matured grain, although unsevered, was personal property, and did not pass with the realty under the foreclosure deed. The court supported its conclusion with the reasoning that, the grain being mature, the course of vegetation had ceased, and the soil was no longer necessary for its existence; that the connection between it and the ground was changed, and the ground no longer performed any office than to afford a resting place for the grain. First Nat. Bank v. Beegle is based upon a state of facts very similar to the facts in Hecht v. Dettman, and the court therein holds that, as between the tenant of the mortgagor and the purchaser at the foreclosure sale, unsevered matured crops upon mortgaged premises are personal property, and do not follow the realty, and that the character of the crops as personalty is determined by its immaturity or maturity, and

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not by the fact that it is severed or unsevered.

This rule of the courts of Iowa and Kansas we do not believe to be in harmony with the weight of authorities, but, whether it is or not, we think that the rule therein announced does not apply to the facts in the case at bar, and that the decided weight of authorities is that unsevered crops, although mature, are a part of the realty as between the plaintiff in an ejectment suit and the evicted defendant. When the crops become severed, they are then regarded as personal property. Upon this question there is but little or no conflict among the authorities. Phillips v. Keysaw, supra. Tripp v. Hasceig, 20 Mich. 254, 4 Am. Rep. 388, is a case wherein the grantor brought replevin for a crop of matured corn standing in the field unharvested at the time of the conveyance. The court, in a well-reasoned opinion, supported by numerous authorities, follows the doctrine which is in direct conflict with the rule in Hecht v. Dettman and First Nat. Bank v. Beegle. The court in that case says: "It is true that the authorities, in alluding to this subject, very generally use the words 'growing crops' as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops." And, further speaking of the merits of this rule, the court said: "Indeed, the authorities are quite decisive that whether the crop of the seller of the farm goes with the land to the purchaser of the latter, when there is no reservation or exception, depends upon whether the crop is at the time attached to the soil, and not upon its condition as to maturity. And this seems to be the most natural and most practical rule. When parties are bargaining about land, the slightest observation will discover whether the crops are severed or not, and there will be no room for question or mistake as to whether they belong with the land or not, if owned by the vendor." In Wootton v. White, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026, the court said: "So long as the crop remains physically unsevered, it partakes of the nature of the realty as between the mortgagor and the mortgagee. It forms part of the latter's security for the payment of the debt, and all persons dealing with the mortgagor in respect to it whilst it remains actually attached to the freehold deal subject to all the rights of the mortgagee, unimpaired and unaffected." In this case the court follows the rule that, as between the mortgagor or anyone claiming under him, and the purchaser at the foreclosure sale, the growing crop does not become personal property until it is actually severed from the land, and, in the absence of such severance, passes to the purchaser. In Mississippi the doctrine prevails that the execution of a mortgage vests in the mortgagee no estate in the land, but gives to him a lien thereon to secure the payment of the mortgage debt. In Reily v. Carter, 75 Miss. 798, 65 Am. St. Rep. 621, 23 So. 435, the supreme court of that state, speaking through Mr. Justice Whitfield, now Chief Justice, said: "But after the deed has been delivered, and foreclosure sale has been confirmed, the mortgagee claims no longer under the mortgage, as a mortgagee, having a mere security for his debt, and no estate in the land, but he claims as absolute owner under a confirmed sale and deed, having the whole estate in the land, and all the unsevered crops as part of the land."

No case has been called to our attention by counsel, and we have been unable, after an extended investigation, to find any case, in which it has been held that growing crops, before severance from the soil, become personalty, and do not pass with the land to the successful plaintiff in an action of ejectment. In Craig v. Watson, 68 Ga. 115, Watson brought suit to recover of Craig the value of a crop of which Craig had obtained possession under a judgment in an action of ejectment, and which was standing at the time of the judgment upon the land, fully matured. The crop had been cultivated and produced by Watson. The court held that the crop passed with the realty under the judgment in the action of ejectment to Craig. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33, is a case in point. In that case Muir, who had cultivated the crop at the time he was evicted therefrom by a writ of restitution under a judgment in an ejectment action, was harvesting a standing crop of hay. The crop was partly cut and partly uncut. The writ of restitution was served by the sheriff, and Muir was removed from possession of the premises while he was in the act of cutting the crop. He brought an action for restitution of the premises for the purpose of harvesting the remainder of the crop, but the court held that the unsevered crop of hay was part of the realty, and passed to the plaintiff by virtue of the judgment in the action of ejectment. In Brothers v. Hurdle, 32 N. C. (10 Ired. L.) 490, 51 Am. Dec. 400, the evicted claimant in an action of ejectment brought his action against the plaintiff in the ejectment suit for conversion of crops of corn, peas, and beans that were upon the premises at the time he was evicted therefrom. The fodder had been pulled and shocked, and the peas and beans had been gathered and put into a crib on the premises. The

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court held that the crops which were attached to the land at the time the plaintiff in the ejectment action was put into possession passed with the premises and belonged to the plaintiff in the ejectment action, but that the fodder and that portion of the other crops which had been severed, although upon the premises at the time of ouster under the ejectment action, did not pass with the land, but remained the property of the evicted adverse holder. In Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462, the relation of the parties to the action is very similar to that between the parties in the case at bar. In that case the successful plaintiff in the ejectment action sought to recover by replevin a quantity of hay that had been cut upon the land at the time he recovered judgment in the ejectment action. The court, in a full and exhaustive opinion, lays down the rule that the severance of the crop from the premises constituted it personal property, and that the remedy of the successful plaintiff in an ejectment action is an action to recover rents and profits of the land. In this case the court refers to a distinction made by some cases between the rights of a trespasser and one who, under color of title, occupies the premises, cultivates a crop thereon to maturity, and severs the same from the soil. In some cases it is held that the successful plaintiff is entitled to all crops grown, harvested and unharvested, which are upon the premises when he is placed in possession. McCaslin v. State, 99 Ind. 428; McLean v. Bovee, 24 Wis. 295, 1 Am. Rep. 185. A similar rule is to be found in McGinnis v. Fernandes, 135 Ill. 69, 25 Am. St. Rep. 347, 26 N. E. 109. In this case, at the time of judgment on the mandate from the supreme court in an action of ejectment wherein the plaintiff had recovered, the evicted defendant had upon the premises involved in the ejectment action a crop of corn which had been cut and placed in shocks thereon. The evicted defendant refused to deliver possession of the corn. An action of replevin was brought, in which the court held that plaintiff was entitled to recover. The court in this case based its decision upon the theory that the evicted defendant was a trespasser, and had no right to plant or cultivate the crop, and that the act of cutting and severing the crop from the soil was also the act of a trespasser, and did not destroy plaintiff's title to the crop. Other courts, however, have held that, where a trespasser cultivates and severs a crop, it becomes his property, even against the owner of the land. Lindsay v. Winona & St. P. R. Co. 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. 191; Adams v. Leip, 71 Mo. 597. In Baker v. McInturff, 49 Mo. App. 505, defendant, who had been the tenant of plaintiff the preceding year, wrongfully retained possession of the premises after the expiration of his term, under a claim that he had rented the same from another person who defendant alleged was the owner of the land, having acquired it under an alleged contract of sale from plaintiff. Defendant, during the time that he held over, planted and grew a crop of corn upon the premises. Plaintiff brought replevin to recover this crop of corn. The appellate court reversed the judgment of the trial court, in favor of the defendant, and, after holding that defendant was in the same position as an intruder, said: "It is the well-settled law of this state that where an intruder upon land plants crops thereon, such crops, so long as they remain unsevered, are regarded as the property of the landowner,"—citing authorities. The rule at common law is that one who recovers land in an ejectment action is entitled to the crops then growing on the premises. Carlisle v. Killebrew, 89 Ala. 329, 6 L.R.A. 617, 6 So. 756, and authorities therein cited. And in the term "growing crops," as used in the authorities, is embraced not only crops that are immature, but crops that are mature and are still standing unsevered upon the premises. This rule is, so far as we have been able to find, supported by all the authorities directly in point, and is expressed at page 977, 12 Cyc. Law & Proc., in the following language: "Where a mere intruder upon land plants crops thereon, such crops, so long as they remain unsevered, are the property of the owner of the land. But one who sows, cultivates, and harvests a crop upon the land of another is entitled to the crop as against the owner of the land, whether he came to the possession of the land lawfully or not, provided he remains in possession till the crop is harvested."

The exact question which this case presents was never before the supreme court of the territory, but in Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695, the relation of the parties was the same as in the case at bar. The only difference between the facts of that case and the facts in this case is that the crops the recovery of which was sought by that action were growing, immature crops; but the court, speaking through Mr. Justice Tarsney in the opinion, and the entire court, speaking for themselves in the syllabus, announced the rule to be that crops, after maturity and severance from the soil, are, for all purposes, personal property; that, where there has been a recovery of the possession of the land held adversely, the successful plaintiff is entitled to the growing crops as against the evicted defendant who planted them; but, until

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such possession has been terminated by ouster, the person who cultivates and produces the crop and who holds the same adversely is entitled to the crops produced by his labor, which are harvested by him before he is ousted. Kirtley v. Dykes, 10 Okla. 16, 62 Pac. 808, is a case in which the facts are identical with those of Phillips v. Keysaw, and with the facts in the case at bar, except that the crops involved were not matured. Mr. Justice Irwin, speaking for an undivided court, says: "This court has held to the doctrine that, before crops grown upon realty could be regarded as personal property, it must not only have matured, but have been actually severed from the realty." These two cases are cited in Wakefield v. Dyer, 14 Okla. 92, 76 Pac. 151, with approval. In that case the court permitted the adverse claimant, who had been evicted, to retain the crops, which were matured and had been severed from the soil, and again stated the rule to be that, where the crops have matured and have been severed, the same become personal property. In none of these three cases decided by the supreme court of the territory was the question presented by the facts as to whether unharvested matured crops passed with the real estate under the judgment in ejectment to the plaintiff, or remained the property of the evicted defendant; but the expression of the court in all three of these cases, to the effect that, before maturity and severance, they are a part of the realty, and that, after maturity and severance, they are personal property as between the successful plaintiff in an action of ejectment and the evicted adverse claimant, we think is the correct rule, and is supported by the weight of authorities and the best reasoning.

The judgment of the trial court is reversed and the cause remanded.

Kane, Ch. J., and Williams, Dunn, and Turner, JJ., concur.

IDAHO SUPREME COURT.

POTLATCH LUMBER COMPANY, Respt.,
v.
GEORGE RUNKEL, Respt.

ELIZA J. RUNKEL, Intervener, Appt.

(— Idaho, —, 101 Pac. 396.)

Attachment — intervention of third person — rights.

1. Under the provisions of § 4111 of the Revised Codes of this state, which authorize a third party to intervene who has "an interest in the matter in litigation, in the success of either of the parties or an interest against both," the owner or claimant of property attached in an action for debt has such an interest against both parties to the main action as entitles him to intervene for the purpose of asserting his right and title to the attached property.

Same — lien — effect.

2. Under the statute of this state (§ 4302, Rev. Codes), an attachment duly and regularly issued and levied becomes a lien on the property "as security for the satisfaction of any judgment that may be recovered." The attachment, therefore, is such a provisional remedy as reaches out and lays hold upon the property by proceeding *in rem*, and subjects it to the payment of the debt for the recovery of which the action was instituted.

Same — intervention of third person — rights.

3. The fact that the intervener has some other and adequate remedy for the protection of his property and rights is no bar to his right to intervene. If he has any interest in the matter in litigation, or in the success of either of the parties, he has a right to intervene.

(April 8, 1909.)

Case Note. — Right of third person who claim property to intervene in attachment action.

In many states there are express and specific statutory provisions permitting intervention in attachment suits by persons owning the attached property, or having some interest therein or lien thereon. As a rule, decisions based upon such statutes have no bearing on the question here under consideration, and they are therefore not included herein. It may be observed, however, that, even under such statutory provisions, the right to intervene is generally limited to the purposes expressly provided for, and to the persons to whom it is apparent the statute was intended to apply. Bank of Fayetteville v. Spurling, 52 N. C. (7 Jones, L.) 398; Henry Petring Grocer Co. v. Eastwood, 79 Mo. App. 270; Cartwright v. Bamberger, 90 Ala. 405, 18 So. 264; May v. Courtnay, 47 Ala. 185; McAbee v. Parker, 78 Ala. 573.

Thus, where intervention is allowed under certain circumstances where chattels, money, or other personal property is attached, intervention by one claiming to own real estate attached, or claiming a lien thereon, is not permissible. Copeland v. Piedmont & A. L. Ins. Co. 17 S. C. 116; Gordon v. McCurdy, 26 Mo. 304; Henry Petring Grocer Co. v. Eastwood, supra; Whitman v. Willis, 51 Tex. 421.

In many jurisdictions the right of a claimant to property attached, or one having a lien thereon, to intervene in the attachment proceeding, is based upon some statute permitting intervention in actions generally by persons not parties thereto, who are interested in the controversy or the success of any of the parties therein. Such statutes are

Headnotes by AILSHIE, J.
23 L.R.A. (N.S.)

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APPEAL by intervener from an order of the District Court for Nez Percé County denying her the right to intervene in an action wherein certain property alleged to be owned by her had been attached as that of the defendant. Reversed.

The facts are stated in the opinion.

Mr. C. H. Lingenfelter for appellant.

Mr. George W. Tannahill, for respondent:

The intervention is only an attempt of one creditor to prevent another creditor obtaining judgment against a common debtor; which is not permissible.

Horn v. Volcano Water Co. 13 Cal. 70, 73 Am. Dec. 569; Hibernia Sav. & L. Soc. v. Churchill, 128 Cal. 633, 79 Am. St. Rep. 73, 61 Pac. 279; Isaacs v. Jones, 121 Cal. 257, 53 Pac. 794, 1101.

In ordinary attachments, third parties claiming only an interest in the property attached, and not in the subject-matter of the suit, cannot intervene in the main action, for the purpose of asserting their rights to the attached property.

Ryan v. Goldfrank, 58 Tex. 356; Pool v. Sanford, 52 Tex. 621; Rodrigues v. Trevino, 54 Tex. 198, Williams v. Bailey (Tex. Civ. App.) 29 S. W. 834; Loving v. Edes, 8 Iowa, 427.

Ailshie, J., delivered the opinion of the court:

This is an appeal from a final order made by the district judge, denying appellant's application and petition to intervene in an action entitled Potlatch Lumber Company, Plaintiff, v. George Runkel, Defendant. The plaintiff commenced an action against the defendant, George Runkel, for the recovery of a money judgment in the sum of $739.65 as the purchase price of a lot of fruit boxes. The defendant answered, admitting the purchase of the boxes, and pleading a separate defense and counterclaim. Subsequent to the issuance of the summons in the action, the plaintiff procured the issuance of a writ

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substantially similar to the one considered in POTLATCH LUMBER CO. v. RUNKEL. The doctrine of this case, as shown in the opinion, is supported by the majority of the cases considering the right of a third person under such a statute to intervene in an attachment proceeding, on the ground that he owns the property attached or has a lien thereon. Such persons are interested in the controversy, or the success of one of the parties to the suit, sufficiently to authorize them to intervene in the attachment suit and assert their claim to, or interest in, the attached property.

Pierre v. Masse, 7 Mart. N. S. 196; Lee v. Bradlee, 8 Mart. (La.) 55; Blackly v. Matlock, 3 La. Ann. 366; Letchford v. Jacobs, 17 La. Ann. 79; New Orleans Canal & Bkg. Co. v. Beard, 16 La. Ann. 345, 79 Am. Dec. 582; Field v. Harrison, 20 La. Ann. 411; Gilkeson-Sloss Commission Co. v. Bond, 44 La. Ann. 841, 11 So. 220; H. B. Claflin Co. v. Feibelman, 44 La. Ann. 518, 10 So. 862; Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379 (recognizing and applying the Louisiana doctrine); Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Coghill v. Marks, 29 Cal. 673; Kimball v. Richardson-Kimball Co. 111 Cal. 386, 43 Pac. 1111; McEldowney v. Madden, 124 Cal. 108, 56 Pac. 783; Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141; Langert v. Brown, 3 Wash. Terr. 102, 13 Pac. 704; Perkins v. Bailey, 38 Wash. 46, 107 Am. St. Rep. 831, 80 Pac. 177.

The doctrine of these cases is not entirely satisfactory, because based on the Louisiana cases, from which state the statute was adopted. The Louisiana cases were undoubtedly influenced more or less by other code provisions not adopted in the other states, which conferred upon opposition parties the right to intervene where such party pretends to be the owner of property seized, or where he contends that he has a privilege in the proceeds of the things seized and sold. As to just what extent these provisions influenced the Louisiana decisions is, however, questionable, as in one of the early Louisiana cases on the subject (New Orleans Canal & Bkg. Co. v. Beard, supra), in referring to the right of judgment creditors to intervene in an attachment suit, the court said that the interveners had a direct legal interest in the success of the defendant in defeating the attachment suit, for, by defeating the suit, they released the property attached from the operation of a superior privilege claimed by the plaintiff, and subjected the property, which was insufficient to pay all the claims upon it, to the satisfaction of their own judgment.

That intervention in an attachment case under these circumstances by virtue of this statute extends the right beyond the precise scope of the provision was apparently conceded in Speyer v. Ihmels, supra, wherein the court said: "Although the interveners have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the interveners if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in § 659 . . . it is substantially within the object provided for by that section, and as that is a law only regulating modes of procedure, and not affecting rights of property, we think the interpretation given to it . . . should not be changed."

The view that such a statute does not confer upon third persons claiming ownership in or a lien upon attached property, the right to intervene in the attachment proceeding, was taken by the court in Lewis v

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of attachment against the defendant's property, and thereupon had a tract of 160 acres of land attached as the property of the defendant, but standing on the records in the name of Eliza J. Runkel, the wife of the defendant. After the levying of attachment, Mrs. Runkel, the appellant in this case, filed her petition and application, praying that she be allowed to intervene in the action and establish her right to the real estate attached, and have the cloud cast upon the same by the attachment removed. Appellant alleged in her petition that she was the wife of the defendant, George Runkel, and the absolute and sole owner of the tract of land attached in her separate and individual right, and that her husband had no interest, right, or claim whatever in or to the premises. She also alleged that she purchased the property wholly with her own money, received by her by inheritance from her father's estate. It was further alleged that the attachment cast a cloud upon her title, and would necessitate her maintaining a separate and independent action to remove such cloud if she were not allowed to intervene to show her right, title, and interest to the attached premises. The district court denied her application, and this appeal is prosecuted from that order.

The only question confronting us on this appeal is to determine whether or not the appellant has shown such "an interest in the matter in litigation in the success of either of the parties, or an interest against both," as to entitle her to intervene and be-

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Harwood, 28 Minn. 428, 10 N. W. 586, which denied to subsequent judgment creditors the right to intervene in an attachment suit wherein substantially all the common debtor's property was attached. The doctrine opposing the right to intervene in such cases was ably presented, and the California and Louisiana cases were considered and commented on. On this question the court said: "The subject-matter which the plaintiff presented to the court, by his complaint, for adjudication, was the indebtedness of the defendants to him upon the promissory notes. In a legal point of view, the interveners had no interest whatever in the question of the existence or nonexistence of such indebtedness. That was a matter wholly between the plaintiff and the defendants, with which no stranger had a right to interfere. When the judgment was entered against the defendants, the whole original subject-matter of the suit was disposed of; and the case presents the anomaly of a contention still going on, to eventuate in another and independent judgment, leaving the first judgment in full force. This is not intervention to protect an interest in the matter in litigation, but the introduction of a new subject of litigation. It is true, the new subject-matter grows out of the attachment; but a writ of attachment is a part of the remedy, and has nothing to do with the cause of action. If property is seized by virtue of the writ to which another has a better right, the vindication of such right involves a new and independent judicial inquiry. . . . It may be that it would be a convenient and useful practice to determine all questions as to the ownership and right of the avails of property seized on legal process in the suit in which the seizure was made, and to determine all questions of preference between different attaching or execution creditors in one of the suits, under proper regulations, devised to protect the rights of all parties; but to justify such a practice we are satisfied there ought to be a more distinct expression of the legislative will."

A similar statute is to be found in Nebraska. This statute was apparently construed in Danker v. Jacobs, 79 Neb. 435, 112 N. W. 579, and held not to authorize a claimant of attached property to intervene in the attachment proceeding to question the grounds on which the writ was issued. It is to be noted, however, that that portion of the statute authorizing intervention by persons interested in the success of either party to the litigation was apparently not considered by the court in reaching its conclusion; at least, the language used in disposing of the question seems applicable only to that portion of the statute permitting intervention by persons interested in the matter in litigation. As to this feature of the statute, a distinction was drawn between "matter in litigation" and property affected by the levy. On this subject the court said: "We understand the matter in litigation in this case to be, not the real estate attached, nor the ownership thereof, but the debt owing by Jacobs [the defendant] to the plaintiffs, and the existence of the facts alleged in their petition for attachment. The interest that entitles a person to intervene must be of such a nature that he will gain or lose by the direct legal operation of the judgment. . . . A judgment for the plaintiffs in this case, and the sustaining of the attachment herein, in no way prevents the intervener from disputing Jacobs' ownership of the property attached in any other proceeding. Therefore his rights are not affected by the direct legal operation of the judgment, and it follows that the judgment of the district court was correct in this respect." And see to the same effect, Haines v. Stewart, 3 Neb. (Unof.) 216, 91 N. W. 539.

And see also Kimbro v. Clark, 17 Neb. 403, 22 N. W. 788, wherein this proposition finds support from the language used by the court, although the action was in the nature of a creditors' bill. These cases are not in conflict with Deere v. Eagle Mfg. Co. 49 Neb. 385, 68 N. W. 504, wherein a junior attaching creditor was permitted to intervene in a prior attachment suit and have the relative priorities of levies adjudicated, as the right to intervene in such an action is expressly conferred by the court.

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come a party to the further proceedings in the action. Upon first impression, we were strongly inclined to believe that there was no merit in appellant's contention; but, the more we have examined into the matter and considered the statute, as well as the nature of appellant's claim, the more we are convinced that appellant should have been permitted to intervene in this action for the purpose of having the cloud cast by the attachment removed from her property, provided she could establish the allegations of her complaint to the effect that she is the sole and absolute owner of the property in her own right. Our statute authorizing intervention is § 4111 of the Revised Codes, and is as follows: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant; and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an orig-

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In reaching the same conclusion under a substantially similar statute, it was said in C. J. L. Meyer & Sons Co. v. Black, 4 N. M. 352, 16 Pac. 620, that it was clear that the matter in litigation was the alleged indebtedness from defendant to plaintiff, and that one claiming ownership in property attached in such suit would not in any way be affected by any judgment which might be rendered therein. The fact of ownership or interest in the property attached does not make the property or its ownership one of the essential questions to be determined in the litigation between plaintiff and defendant. The ownership of the property would shed no light upon the fact in issue, namely, whether defendant was indebted to plaintiff.

The same conclusion was also reached in Loving v. Edes, 8 Iowa, 427, as to the right of intervention by one claiming land attached as the property of another. The court said: "It would make no kind of difference to him, as the owner of the land, whether it was or was not attached,—whether plaintiffs did or did not recover,—at least, so far as his rights could be affected in the present action. Though the plaintiffs might recover ten times over, his title would remain the same. If he claimed that by these proceedings, and it should appear, that thereby a cloud was cast upon his title, his remedy is well defined and understood. But we know of no precedent for quieting or determining the title to real estate, in the manner attempted in this instance."

This question has also arisen where the right to intervene was based on statutes permitting intervention in actions, generally by third persons interested in the matter in litigation, but where it did not appear from the decisions, at least, that the statutes contained the further provision found in the Louisiana and similar statutes, authorizing intervention in general, not only by persons interested in the matter in litigation, but also by persons interested in the success of either of the parties thereto. These cases construing statutes not containing this latter clause are in harmony in holding that a general statutory provision authorizing third persons interested in the matter in litigation or controversy, to intervene therein, does not authorize a person not a party to an attachment suit, to intervene therein merely on the ground that he is the owner of, or claims some interest in, the property attached, or a lien thereon. Vallette v. Kentucky Trust Co. Bank, 2 Handy (Ohio) 1; Gates v. Pennsylvania Land & Lumber Co. 9 Ohio C. C. 378; Stanley v. Foote, 9 Wyo. 335, 63 Pac. 940 (statute similar to Ohio statute, follows Ohio decisions).

This view was stated as follows in Gates v. Pennsylvania Land & Lumber Co. supra: "The levy of an attachment before judgment is similar to a levy of an execution after judgment. The owner of personal property levied upon by an attachment, if different from the one against whom the attachment issues, does not intervene and settle his rights in that case, but must resort to an action in replevin. So, if levy is made upon real property, the owner does not intervene and ask that his rights to the property be determined in the original action, but he resorts to an independent action to assert his claim to the property attached. So that, as the statutes of the state now are, we do not believe that one simply claiming to own property upon which an attachment has been levied may intervene for the purpose of determining his rights and ownership to the property attached. Any judgment or order the court may make cannot affect his rights in the least; if he is the owner of the property before the judgment, he is the owner after judgment. He has all the remedies open to the owner of property for the protection of his property; but it must be by an independent action."

On the same subject in Vallette v. Kentucky Trust Co. Bank, the court remarked that the idea that a claim of a title to, or an interest in, the property attached, independent of any connection with the cause of action stated in the petition, would give the right to such claimant to appear and litigate with the plaintiff that cause of action, could not be successfully maintained.

This distinction is also made in Risher v. Gilpin, 29 Ind. 53, which holds that a

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inal complaint." This provision of our statute was copied from the California statute, and is identical with § 387 of the California Code of Civil Procedure. 3 Kerr's Code, p. 431. The California statute, in turn, was copied from Louisiana, and this is true with practically all the statutes of the middle and western states, authorizing intervention. This remedy was not known at common law, but seems to be a product of the civil law, and had its origin in this country in Louisiana. Hyman v. Cameron, 46 Miss. 725; note to Brown v. Saul, 16 Am. Dec. 177. The leading California case dealing with this statute is that of Horn v. Volcano Water Co. 13 Cal. 62, 73 Am. Dec. 569. The opinion in that case was written by Justice Field, and the right which will authorize an intervention is there defined as follows: "To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation." In support of this holding Louisiana cases are cited. In the Horn Case the California court permitted judgment creditors having judgment liens against the property involved in the litigation to intervene and set up their respective rights. The rights of third parties to intervene seem to have been frequent subjects of consideration before the supreme court of California immediately succeeding the adoption of this statute in 1854. In Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157, and while Justice Field was still a member of the California supreme court, the question arose over the right of a subsequent attaching creditor to intervene in the suit of a senior attaching creditor, and there to urge the fraudulent character of the senior attachment. The court, in passing upon the interest, or, rather, the character of the interest, asserted by the intervener, said: "Although the interveners have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the interveners if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in § 659 [practice act, Code Civ. Proc. § 387], and as explained in the case of Horn v. Volcano Water Co. supra, it is substantially within the object provided for by that section, and as that is a law only regulating modes of procedure, and not affecting rights of property, we think the interpretation given to it in the case of Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184, should not be changed." Since the decision in the Speyer-Ihmels Case, the California court has repeatedly held that a junior attaching creditor may intervene in the action of a senior attaching creditor for the purpose of testing the validity of the first attachment. McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115; Coghill v. Marks, 29 Cal. 673; Kim-

provision in substance authorizing intervention by a person claiming an interest in the controversy did not apply to persons who did not claim an interest in the matter in litigation in which the attachment was issued, but merely claimed an interest in the property attached, and the court said that relief to such persons was by original suit.

In some jurisdictions, although no statutory provision permits the practice, third persons claiming an interest in attached property, or a lien thereon, are permitted to intervene in the attachment proceeding, and contest the right to the property attached, or defend the same, on the ground of fraud between the plaintiff and the defendant therein, or raise jurisdictional objections to the sufficiency of the proceedings. Campbell v. Morris, 3 Harr. & M. C. H. 552; Ranahan v. O'Neale, 6 Gill & J. 298, 26 Am. Dec. 576; Stone v. Magruder, 10 Gill & J. 383, 32 Am. Dec. 177; Carson v. White, 6 Gill, 17; Howard v. Oppenheimer, 25 Md. 350; Clark v. Meixsell, 29 Md. 221; United States v. Howgate, 2 Mackey, 408; Wallace v. Maroney, 6 Mackey, 221; Reynolds v. Smith, 7 Mackey, 27; Buckman v. Buckman, 4 N. H. 319; Blaisdell v. Ladd, 14 N. H. 129; Kimball v. Wellington, 20 N. H. 439; National Papeterie Co. v. Kinsey, 54 N. J. L. 29, 23 Atl. 275 (judgment creditor may intervene to attack validity of attachment proceedings when debtor refuses to do so); National Bank v. Tasker, 1 Pa. Co. Ct. 173; Sailor Planing Mill & Lumber Co. v. Moyer, 35 Pa. Super. Ct. 503; Megee v. Beirne, 39 Pa. 50. But see Thistle Mills v. Watson, 2 Pa. Co. Ct. 271, where claimant of a fund attached was denied the right to intervene in the attachment proceeding.

Any apparent jurisdictional defect in an attachment proceeding may be raised either by the defendant or a third person having an interest in the property attached. Campbell v. Morris; Stone v. Magruder; and Carson v. White,—supra.

In Clough v. Curtis, 62 N. H. 409, it was said that a subsequent attaching creditor is not admitted to defend a suit in the name of his debtor as a matter of right. "He is admitted when the fact is duly found that justice requires his admission. He is not allowed to come in for the purpose of pleading in abatement, or to avail himself of mere matters of form, but to prevent the property of the debtor from being diverted from his creditors. And when the objection is one of substance, especially if it be one which the subsequent attaching creditor might take advantage of after judgment,

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ball v. Richardson-Kimball Co. 111 Cal. 386, 43 Pac. 1111; McEldowney v. Madden, 124 Cal. 108, 56 Pac. 783. See also Stich v. Dickinson, 38 Cal. 608. It has also been held by the same court that a wife might intervene in a foreclosure suit against her husband, and set up her homestead right to the mortgaged premises. Mabury v. Ruiz, 58 Cal. 11; Sargent v. Wilson, 5 Cal. 504.

In Louisiana (Cobb v. Depue, 22 La. Ann. 244) the court held that a third party might intervene for the purpose of claiming money that had been collected by the sheriff upon execution that had issued on a judgment of the plaintiff in the main case. Field v. Harrison, 20 La. Ann. 411, is a case in point in every particular here, with the exception that in that case the property attached was personal property, instead of real estate, as in the case at bar. There Field sued Harrison and others and caused an attachment to issue, under which thirteen bales of cotton were seized. One Ayers sought to intervene and have the attachment dismissed, and be decreed the owner of the property attached. The court sustained his intervention, and ordered judgment in his favor, and decreed him to be the owner of the property. The decision, coming from the very birthplace of the statute on intervention, is of necessity very strong authority in this state under a statute that has been indirectly taken from the former state. In Lee v. Bradlee, 8 Mart. (La.) 55, the Louisiana court permitted a third party to intervene for the purpose of claiming the property attached, and in course of the opinion also passed upon another point that arises in this connection, and of which we will treat later in the opinion. The court said: "The plaintiffs, citizens of Boston, have attached property here, which they say belongs to the defendant, their debtor, also a resident of that place. The defendant pleaded the general issue, and the debt was proved; so that between plaintiff and defendant it only remained for the court to pronounce judgment accordingly. But a third person has stepped in, averring the goods attached to be his property, and demanding restoration of them. The claimant has not only attempted to prove the property to be his, but he has been acting the part of the defendant by undertaking to show that the attachment ought not to have issued, and that, after it had issued, it was imperfectly executed. The only thing which we conceive a claimant may be permitted to do is to show that the property attached is verily his. As soon as he succeeds in that, his part is at an end. But a claimant has surely no right to show any irregularity in the suit in which he intervenes for the sole purpose of rescuing the property. Whether the plaintiff, the court, and the sheriff have been acting legally or not is none of his business; for, whether the proceedings are regular or not, the property must be shown to be his before it can be returned to him; and, whether they are

. . . he will . . . be heard." Applying this doctrine on motion of the junior attaching creditor, a prior attachment was dismissed because of a material alteration in the writ after service.

In Daniels v. Solomon, 11 App. D. C. 163, this doctrine was applied to a judgment creditor who had caused an execution to issue, and had placed it in the hands of an officer to be levied upon property attached, and such creditor was allowed to intervene in the attachment proceeding, and attack the affidavit on which it was based, as well as to traverse the grounds for attachment stated therein.

In other jurisdictions, in the absence of any statute permitting it, the right is denied a claimant to property attached, or persons having a lien thereon, to intervene in the attachment proceeding and defend the same, or try title to the property attached. Boston v. Wright, 3 Kan. 227; Pennsylvania Steel Co. v. New Jersey Southern R. Co. 4 Houst. (Del.) 572; Hale v. Chandler, 3 Mich. 531.

In Bradshaw v. Georgia Loan & T. Co. (Tenn. Ch. App.) 59 S. W. 785, it was held that a third party claiming title to the property attached might intervene in the attachment proceeding and assert his title to the attached property, if no objection was made.

In Whitman v. Willis, 51 Tex. 421, it was held that, in the absence of any statutory provision authorizing the practice, one claiming to own land attached in a suit against another would not be permitted to intervene in such suit to try his title to the land. The court said that if it was true that the property attached belonged to the person seeking to intervene in the attachment proceeding, the attachment could not devest his title, for he, not being a party thereto, could not be bound by any judgment rendered therein. It was, however, recognized that this rule against intervention might properly be relaxed in favor of a wife seeking by intervention to protect her homestead in property of her husband, which had been attached in a suit against him; and Baxter v. Dear, 24 Tex. 21, 76 Am. Dec. 89, and Stoddart v. Garnhart, 35 Tex. 299, were distinguished on this ground.

To the same effect also, where by statute express provision is made for intervention in attachment proceedings by claimants to personalty attached, but no provision is made for intervention by claimants to realty attached, see Bank of Fayetteville, v. Spurling, 52 N. C. (7 Jones, L.) 398; Gordon v. McCurdy, 26 Mo. 304; Henry Petring Grover Co. v. Eastwood, 79 Mo. App. 270.

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regular or not, it shall not be returned unless he proves that it belongs to him." Intervention was also allowed in favor of the owner of attached goods in Letchford v. Jacobs, 17 La. Ann. 79. Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141, is in point here, and supports the principle on which intervention is allowable in a case like the one at bar. See also Pom. Code Remedies, 4th ed. §§ 323, 324.

Other courts have construed this same statute; and, while the decisions are not entirely uniform, yet they practically all hold that one who claims to be the owner of attached property, or to have a lien on it by mortgage, attachment, or otherwise, is entitled to intervene in an action where the property has been attached as being the property of another party. This was true in Taylor v. Adair, 22 Iowa, 279.

The contention is made that since there is no contest between the plaintiff and defendant over the title of the attached property, and that the only contest between them is over the indebtedness, therefore the intervener should not be let in to present another issue. That proposition is really the cause of confusion in this case. But the difficulty is dissipated when we remember that the intervener is in no respect interested in the question as to whether the defendant is indebted to the plaintiff or not. The interest of the intervener here is to show that neither plaintiff nor defendant has any interest in this property. In fact, she would not be permitted to interpose a defense personal to the defendant, and in the result of which she could have no interest, one way or the other. See Lee v. Bradlee, supra. The plaintiff, however, by reason of causing the intervener's property to be attached by provisional remedy, has reached out by process in the nature of a proceeding *in rem* and laid hold upon certain property as security for the payment of any judgment it may obtain. Under our statute, an attachment, duly and regularly issued and levied, becomes a lien on the property "as security for the satisfaction of any judgment that may be recovered." Rev. Codes, § 4302. The plaintiff has therefore brought the issue as to the ownership of this property into the case. It has cast a cloud upon Mrs. Runkel's record title. If it obtains a judgment against the defendant, then execution will issue against this property. If a sale should be made, it would become necessary for Mrs. Runkel to prosecute an action to remove the cloud and quiet her title. If the property is not sold, it would still be necessary for her to prosecute her action to remove the cloud of the attachment, unless the plaintiff should voluntarily relinquish the lien. It is for just such cases and for the purpose of preventing circuity and multiplicity of litigation that the statute authorizing intervention by strangers was enacted. Pittock v. Buck, 15 Idaho, 47, 96 Pac. 212; Pence v. Sweeney, 3 Idaho, 181, 28 Pac. 413; Gold Hunter Min. & Smelting Co. v. Holleman, 3 Idaho, 99, 27 Pac. 413. The fact that the intervener has another remedy, and may not be barred by a judgment in the action, is no reason for denying her the right to intervene. In Coffey v. Greenfield, 55 Cal. 382, the court, in speaking of the extent of the interest necessary to entitle a party to intervene, said: "The fact that the intervener may or may not protect that interest in some other way is not material. If he 'has an interest in the matter in litigation, or in the success of either of the parties,' he has a right to intervene." To the same effect, see Kimball v. Richardson-Kimball Co. 111 Cal. 380, 43 Pac. 1111; Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141; Taylor v. Bank of Volga, 9 S. D. 572, 70 N. W. 834.

The only state from which we have found decisions denying the right of the owner or claimant of property attached to intervene is Texas. There they seem to hold that, although a third party may be the owner or claimant of the property attached, he may not intervene in the main case for the purpose of asserting his right. This is based upon the theory that in such cases the subject-matter of the suit is the debt to be collected, and that the ownership of the property is in no way put in issue by the pleadings in the case, and therefore forms no part of the subject-matter of the action. Williams v. Bailey (Tex. Civ. App.) 29 S. W. 834; Rodrigues v. Trevino, 54 Tex. 198; Meyer v. Sligh, 81 Tex. 336, 16 S. W. 1022. In Texas, however, they have no statute authorizing intervention. See Pool v. Sanford, 52 Tex. 633. In that state they seem to rest their practice of allowing intervention on a combination of the principles of the ecclesiastical and civil law, and to apply it under the principles of equity practice. See Pool v. Sanford, supra.

After a somewhat extended examination of this question, we have arrived at the conclusion that a third party whose property has been levied upon in an action against another has such an interest in the subject-matter as entitles him to intervene for the purpose of establishing his right and removing the cloud cast on his property by the attachment. The order of the District Court will be reversed and the cause remanded, with direction to permit the appellant, Eliza J. Runkel, to intervene. Costs awarded in favor of the intervener, and against the Potlatch Lumber Company.

Sullivan, Ch. J., and Stewart, J., concur.

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ILLINOIS SUPREME COURT.

ALFRED MOLWAY, by Guardian,
v.
CITY OF CHICAGO, Appt.

(239 Ill. 486, 88 N. E. 485.)

Highway — bicycle — ordinary travel.

1. Ordinary travel includes the use of a street by one riding a bicycle.

Same — safety — bicycle.

2. A municipal corporation does not fulfil its duty in making its highways safe for the use of horse-drawn vehicles if it is not safe for travel including its use of bicyclists.

(April 23, 1909.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **George L. Reker** and **Edward C. Fitch**, with Messrs. **Edward J. Brundage** and **John R. Caverly**, for appellant:

The duty of the city was to use reasonable care in keeping its streets in a reasonably safe condition for public travel for persons using ordinary care, and a basin-like depression similar to the one in question was not a violation of that duty.

Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Rock Island v. Gingles, 217 Ill. 185, 75 N. E. 468; Lockport v. Licht, 221 Ill. 35, 77 N. E. 581; Dill. Mun. Corp. § 1015; Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429.

The use of streets for bicycling, especially in the month of March, was not an ordinary use.

Chicago v. Kohlhof, 64 Ill. App. 349, affirmed in 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446; Fox v. Clarke, 25 R. I. 515, 65 L.R.A. 234, 57 Atl. 305, 1 A. & E. Ann. Cas. 548; Richardson v. Danvers, 176 Mass. 413, 50 L.R.A. 127, 79 Am. St. Rep. 320, 57 N. E. 688; Clementson, Road Rights & Liabilities of Wheelmen, §§ 73–75, 77; Sutphen v. North Hempstead, 80 Hun, 409, 30 N. Y. Supp. 128; Leslie v. Grand Rapids, 120 Mich. 28, 78 N. W. 885; Morrison v. Syracuse, 45 App. Div. 421, 61 N. Y. Supp. 313; Rust v. Essex, 182 Mass. 313, 65 N. E. 397; Gagnier v. Fargo, 11 N. D. 73, 95 Am. St. Rep. 705, 88 N. W. 1030; Lee v. Port Huron, 128 Mich. 533, 55 L.R.A. 308, 87 N. W. 637; Kenny v. Ipswich, 178 Mass. 368, 59 N. E. 1007.

Messrs. **Horton & Miller**, for appellee:

A bicycle is a vehicle, and the city owes the same duty to exercise reasonable care to keep its streets in a reasonably safe condition for one using a bicycle as for one using a carriage, buggy, or wagon.

Moses v. Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 516; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Cater v. Northwestern Teleph. Exch. Co. 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W.

Case Note. — Duty to make streets and highways safe for bicycles.

As to the duty of a town or city to keep its streets and highways in a condition safe for the travel of automobiles, see the case note to Doherty v. Ayer, 14 L.R.A.(N.S.) 816.

This note is expressly confined to the question whether any exceptional duty, beyond the ordinary duty to keep streets and highways reasonably safe for the use of vehicles generally, rests upon a municipality to keep them in such a condition as to guard against the dangers peculiar to bicycles.

As is shown by the cases herein cited, no such exceptional duty is imposed, although they recognize the fact that there will be a liability if an injury caused one operating a bicycle is due to such a defect in a street or highway as renders it not reasonably safe for the use of any vehicle of the usual character. This phase of the question, however, is not considered in this note.

As to the law generally applicable to the use of bicycles, see the note to Taylor v. Union Traction Co. 47 L.R.A. 289.

It was held in Sutphen v. North Hempstead, 80 Hun, 409, 30 N. Y. Supp. 128, that highway officers are not subject to any higher obligations by reason of the fact that a bicycle rider on an ordinary country road is exposed to greater danger than a person in a horse-drawn vehicle, and therefore, they are bound only to maintain such a road in a condition which makes it reasonably safe for general traffic. The circumstances in this case, however, did not call for the declaration of any such sweeping principle, though the road was 25 feet in width, and the accident was due to the fact that a bicyclist, finding the middle of the roadway to be too soft for easy riding, undertook to ride close to the edge of a gutter with a vertical side and about 18 inches in depth, and the soft soil gave way under the wheel and allowed it to drop into the excavation. The court remarked that "the accident was unusual, and incidental to the character of the vehicle he was riding," and therefore "not one which was within the anticipation of a prudent man," or which called for "extraordinary precautions to prevent." This point of view would seem to be erroneous, as such an accident would be more likely to happen to the wheels on one side of wagons than to a bicycle, and the mere fact that, by reason of the different construction of the two types of vehicles, the results of a subsidence of the soil at the edge of the ditch would not

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111; North Chicago Street R. Co. v. Cossar, 203 Ill. 608, 68 N. E. 88; Davis v. Petrinovich, 112 Ala. 654, 36 L.R.A. 615, 21 So. 344; Mercer v. Corbin, 117 Ind. 450, 3 L.R.A. 221, 10 Am. St. Rep. 76, 20 N. E. 132; Holland v. Bartch, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83; Whiting v. Doob, 152 Ind. 157, 52 N. E. 759; Myers v. Hinds, 110 Mich. 302, 33 L.R.A. 356, 64 Am. St. Rep. 345, 68 N. W. 156; State v. Collins, 16 R. I. 371, 3 L.R.A. 394, 17 Atl. 131; State v. Bruce, 23 Wash. 777, 63 Pac. 519; Curry v. Erie City, 209 Pa. 283, 58 Atl. 476; Spring v. Williamstown, 186 Mass. 479, 71 N. E. 949; Lee v. Port Huron, 128 Mich. 533, 55 L.R.A. 308, 87 N. W. 637; Lauder v. St. Clair Twp. 125 Mich. 479, 85 N. W. 4.

Carter, J., delivered the opinion of the court:

Appellee recovered against appellant, in the superior court of Cook county, a judgment for $6,000 in an action on the case for personal injuries. The appellate court for the first district, on appeal, affirmed that judgment, and this appeal followed.

March 23, 1905, appellee, a boy about fifteen years of age, was riding north in Wells street, Chicago, on his bicycle, and near the intersection of Ontario street he rode into a hole in the asphalt pavement, and was thrown from the wheel in such a manner as to dislocate and permanently injure his left hip. Some years prior thereto he had sustained an injury which necessitated the amputation of his left leg about 3 inches below the knee, and thereafter he procured an artificial leg, and became so proficient in its use that he was able to ride a bicycle, play ball, and engage in boyhood sports. On the day in question it had been raining, and when he started for home it was drizzling. The hole in question was from 10 to 15 inches deep, a foot or more wide, and about 2 feet long. It was filled with water, and appellee did not know it was there until the bicycle ran into it. The evidence shows that it had been in the pavement some two or three months before the accident.

The court instructed the jury, at the request of appellant, that the appellee could not recover unless they believed that it had been proved, by a preponderance of the evidence, that "the street in question, at the time and place of the alleged accident, was not reasonably safe for ordinary travel thereon by persons using due care and caution for their safety;" and also instructed the jury that "a city is not bound, under the law, to keep its streets absolutely safe, nor is it bound, under the law, to keep them in reasonably safe condition. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety." These instructions state the law with substantial accuracy. Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Kohlhof v. Chicago, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446; Rock Island v. Gingles, 217 Ill. 185, 75 N. E. 468; Lockport v. Licht, 221 Ill. 35, 77 N. E. 581;

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be exactly the same, is not a sufficient reason for maintaining that a different rule of responsibility rests upon the highway authorities in the two cases.

A bicycle is not a carriage within the meaning of a statute requiring towns and cities to keep highways in repair so as to be reasonably safe and convenient for travelers with horses, teams, and carriages. Richardson v. Danvers, 176 Mass. 413, 50 L.R.A. 127, 79 Am. St. Rep. 320, 57 N. E. 688. The court said it would impose an intolerable burden upon the towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety, and it is because ordinary roads are not considered suitable for bicycles that cities and towns are given power by statute to lay out, construct, maintain, and protect paths for bicycles. And for a similar case see also Fox v. Clarke, 21 R. I. 515, 65 L.R.A. 234, 57 Atl. 305, 1 A. & E. Ann. Cas. 548.

A road which is reasonably safe for travel of ordinary kinds is not defective merely because not fit for use with bicycles, as it is not the duty of those charged with the care of public roads to keep them so smooth that a bicycle can go over them with assured safety. Rust v. Essex, 182 Mass. 313, 65 N. E. 397. In this case a stone projected 6 inches above the surface of a highway near the wheel track, where there was 16 feet of unobstructed path on one side of it.

Reasonable care in the construction and maintenance of highways for ordinary vehicles such as wagons and carriages is the measure of the duty resting upon the municipalities and townships, and it is not their duty to keep them in a reasonably safe condition for bicycles. Leslie v. Grand Rapids, 120 Mich. 28, 78 N. W. 885.

The duty of a city to keep its sidewalks in repair so as to prevent injury to one riding a bicycle thereon is that it keep them reasonably safe for pedestrians; and it is under no obligation to make them reasonably safe for bicycles. Morrison v. Syracuse, 53 App. Div. 490, 65 N. Y. Supp. 939, affirmed in 175 N. Y. 523, 67 N. E. 1085; Gagnier v. Fargo, 11 N. D. 73, 95 Am. St. Rep. 705, 88 N. W. 1030.

However, it was held in Wheeler v. Boone, 108 Iowa, 235, 44 L.R.A. 821, 78 N. W. 909, that the duty of a city to keep a sidewalk in a suitable condition to walk over extends to a person rightfully riding a tricycle on the walk, and the test of the city's liability to him is the same as though he had been walking.

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2 Dill. Mun. Corp. 4th ed. § 1019; 1 Shearm. & Redf. Neg. 5th ed. § 367. The appellant further asked the court to instruct the jury that "ordinary travel does not include the use of a street by one riding a bicycle thereon. . . . A person when riding a bicycle on a street is not using said street for the purpose of ordinary travel thereon." It also asked the following instruction: "If you believe, from the evidence, that the street in question, at the time and place of the alleged accident, was reasonably safe for ordinary travel thereon by persons riding in vehicles, such as wagons, carriages, and other similar vehicles, then you are instructed that you should find the defendant, city of Chicago, not guilty, whether you believe that said street at said time and place was or was not reasonably safe for travel by a person riding a bicycle thereon."

The only ground for reversal urged by appellant is the refusal of these last instructions by the trial court. Does ordinary travel include the use of a street by one riding a bicycle? By the great weight of authority a bicycle is a vehicle of such a nature that it may be properly used upon our highways. North Chicago Street R. Co. v. Cossar, 203 Ill. 608, 68 N. E. 88; Holland v. Bartch, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83; Whiting v. Doob, 152 Ind. 157, 52 N. E. 759; Lee v. Port Huron, 128 Mich. 533, 55 L.R.A. 308, 87 N. W. 637; Thompson v. Dodge, 58 Minn. 555, 28 L.R.A. 608, 49 Am. St. Rep. 533, 60 N. W. 545; Taylor v. Union Traction Co. 184 Pa. 465, 47 L.R.A. 289, 40 Atl. 159. "Being a vehicle, its proper place is upon the street or roadway, and not upon the sidewalk," unless otherwise provided by statute. "Bicycles are subject to the 'law of the road,' and their use upon highways may be regulated by the legislature." Elliott, Roads & Streets, p. 635.

When not based upon a special statutory provision (as certain of the following cases were), we are inclined to doubt the soundness of the rule laid down by some courts (Leslie v. Grand Rapids, 120 Mich. 28, 78 N. W. 885; Sutphen v. North Hempstead, 80 Hun. 409, 30 N. Y. Supp. 128; Richardson v. Danvers, 176 Mass. 413, 50 L.R.A. 127, 79 Am. St. Rep. 320, 57 N. E. 688; Rust v. Essex, 182 Mass. 313, 65 N. E. 397), that a cyclist must take the road as he finds it, provided it is safe for an ordinary horse-drawn vehicle, and that, in the absence of legislation, the courts will not require the public authorities to keep streets and highways safe for bicycles, automobiles, and vehicles of like character. We think the sounder rule is laid down by one of these courts in the recent decision of Doherty v. Ayer, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677, where that court held that "persons may lawfully ride in automobiles, as they may lawfully ride on bicycles; and cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken upon such vehicles. . . . But if their ways are reasonably safe and convenient for travel generally, they are not liable for a failure to make special provisions, required only for the safety and convenience of persons using automobiles or bicycles." In Curry v. Erie City, 209 Pa. 283, 58 Atl. 476, it was held, in an action by a girl of fourteen to recover damages sustained by a fall from a bicycle, that a verdict and judgment for plaintiff will be sustained, the evidence showing that the accident occurred on an asphalted street, and was caused by the subsidence of the foundation, so that the surface of the asphalt had sunk, but was not broken, leaving a depression of which the rider had no knowledge until she came near it, and that under such circumstances the question of negligence was for the jury.

Some authorities apparently assume that to make the highways or streets reasonably safe for bicyclists using reasonable care would impose more onerous duties upon municipalities than to keep them in repair for pedestrians or horse-drawn vehicles. We do not think that this conclusion, under all conditions and circumstances, necessarily follows. While it is undeniable that certain defects in the highway may be harmless to a horse-drawn vehicle and dangerous to a bicycle, on the other hand, it may well be argued that many times the care required of public officials to make a highway perfectly safe for a bicycle would be less than it would for a vehicle drawn by horses. A bicycle, by its compactness and readiness of control, renders its rider often more favorably situated than the drivers of loaded wagons, or even of light carriages, to avoid dangerous places or collisions with other vehicles. An asphalt pavement, even when level, is practically impassable for a horse ordinarily shod when the pavement is covered with a slight coating of ice or sleet, and yet a cyclist, on account of his rubber-tired vehicle, can pass over it readily. When highways are not restricted by their dedication or statute to some particular mode of use, they are open to all suitable methods of travel. "A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used. . . . To say that a new mode of passage shall be banished from the streets, no matter how

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much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age." Moses v. Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 516. To hold that the standard of safety required of public authorities as to streets and highways for all methods of travel should be the safety required for a horse-drawn carriage, or of any other particular vehicle, would not accord with wise public policy. "If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing, and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next, a way for vehicles drawn by animals,—constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired." Cater v. Northwestern Teleph. Exch. Co. 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111. In the early history of this country, the great highways by water were supposed to be of such importance as to entitle those who used them to superior rights over those using land highways which might cross them; but long ago it was decided that the rights of vessel owners in navigable streams must submit to the incidental inconvenience of allowing those streams to be bridged for public traffic. Persons using horses as a means of travel have no superior rights in a highway to those who rightfully make use of it for other methods of travel. "Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods. A highway is a public way for the use of the public in general, for passage and traffic, without distinction." Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522.

The law does not require that a road shall be absolutely safe for bicycling purposes, any more than that it shall be absolutely safe for other methods of travel. The defect which renders municipalities liable must be such as would make the street or highway unsafe for the use of vehicles in general. In constructing and keeping in repair a street, the public officials are bound to take into consideration the probability that it will be used by all vehicles that are in common use; and they must make it reasonably safe and convenient for all such uses, and in so doing are not required to take into consideration injuries to machines, vehicles, or persons which may occur from causes which cannot be reasonably foreseen or prevented. Clementson, Road Rights & Liabilities of Wheelmen, § 77; Fox v. Clarke, 1 A. & E. Ann. Cas. 548, and note (25 R. I. 515, 65 L.R.A. 234, 57 Atl. 305).

No rigid rule can be laid down as to defects in highways or streets for which municipalities will be liable, or as to the degree of care required by the person injured. Objects negligently permitted to be placed in highways which are calculated to frighten horses of ordinary gentleness may render such authorities liable for an injury, though there might be no liability if the objects were not naturally calculated to frighten horses. Elliott, Roads & Streets, p. 447. Municipal corporations or road commissioners are not insurers against accidents. The object to be secured is reasonable safety for travel, considering the amount and kind of travel which may fairly be expected upon the particular road. Kelsey v. Glover, 15 Vt. 708. A highway in the country need not be of the same character as a street in a large city. The authorities are not required to provide a street or highway equal in smoothness to a driving or racing track for either horses, bicycles, or automobiles. A sharp stone, a tack, a bit of glass or coal in a road might puncture a bicycle tire or cause an injury to the rider; but the authorities are not ordinarily liable for, or required to insure against, such accidents. A small, loose stone on a smooth pavement might cause a bicycle to fall, and it also might, under certain circumstances, if situated on the edge of a steep embankment, cause a horse-drawn vehicle to topple over. Just what degree of care the rider of a bicycle, the driver of a team, or the chauffeur of an automobile must exercise must depend very largely upon the character of the road and the surroundings in each special case. A person may ride a bicycle without a light during the daytime without being charged with negligence, when he would be guilty of negligence if he were to so ride his bicycle at night on a public thoroughfare, where he is liable to meet moving vehicles or pedestrians, or where he might be injured by riding into a depression in the street. Cook v. Fogarty, 103 Iowa, 500, 39 L.R.A. 488, 72 N. W. 677. Every defect in a street or highway that causes an injury may not be actionable. "It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a rea-

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sonably safe condition for travel in the ordinary modes, by night as well as by day; and whether they are so or not is a practical question, to be determined in each case by its particular circumstances." 2 Dill. Mun. Corp. § 1019; Kohlhof v. Chicago, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446. Bicycling being subject to the rules of law governing other vehicles, this general rule as to liability of public authorities for injuries to bicyclists can be as reasonably and safely applied to them as to other vehicles.

This court has recently held in Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, and Harder v. Chicago, 235 Ill. 294, 85 N. E. 255, that automobiles, as well as wagons, could be taxed and the money used by the public authorities in paying the costs and expenses of street and alley improvements or other repairs. It would certainly be most illogical, after this holding, to decide that persons using automobiles are not using the streets for the purposes of ordinary travel. It is a matter of common knowledge that bicycles have for years been in common use on the streets of Chicago and other cities. We think riding a bicycle on a street is an ordinary mode of travel.

The instructions in question were properly refused. The judgment of the Appellate Court will be affirmed.

Petition for rehearing denied June 2, 1909.

KANSAS SUPREME COURT.

E. BAXTER, Plff. in Err.,
v.
JACOB KRAUSE.

(79 Kan. 851, 101 Pac. 467.)

Limitation of action — nonresident — temporary return — effect.

In order that, after a debtor has moved from the state, the statute of limitations may run in his behalf during a temporary return, it is not necessary that such visit shall be made under such circumstances as to give the creditor an opportunity, in the exercise of reasonable diligence, to make service of summons upon him. He is entitled to credit for all the time spent in the state unless he conceals himself.

(April 10, 1909.)

ERROR to the District Court for Marion County to review a judgment in defendant's favor in an action brought to recover a sum alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. E. Baxter *in propria persona.*

Mr. H. S. Martin for defendant in error.

Mason, J., delivered the opinion of the court:

E. Baxter sued Jacob Krause upon a note. The trial court held that the action was barred by the statute of limitations, and the plaintiff prosecutes error, claiming that the facts found entitled him to a judgment. The findings show that Krause lived in Marion county when he gave the note, which matured August 10, 1889, and remained there continuously, except for an absence of one week, until April 2, 1894, when he moved to Oklahoma. Between that time and the date of the commencement of the action, November 11, 1905, he made eight visits to Marion county, none being found to have been less than one week in duration, the total time spent there during that period being twenty-five weeks. Therefore he was personally present in this state for five weeks and two days more than five years after the note was due and before the action was begun. But four weeks of this time must be disregarded, because he passed it in attendance upon the district court as a defendant. Underwood v. Fosha, 73 Kan. 408, 85 Pac. 564, 9 A. & E. Ann. Cas. 833. This still leaves him, however, after allowing three days of grace, a margin of six days, and action on the note was barred unless some further deduction is to be made.

Of course, whenever one against whom a cause of action has accrued is absent from

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Case Note. — Sufficiency and effect of "return" to state by defendant to start statute of limitations running.

This note does not intend covering the question of what constitutes an absence from the state under the several statutes, or the general question of what constitutes a residence within the state, but it is confined strictly to cases passing upon the sufficiency of the defendant's return to satisfy provisions excepting the time of his absence from the state and allowing the plaintiff the statutory period after the defendant's return in which to institute his action. The early statutes in this country containing exceptions of this kind were taken from the statute of Anne, which provided in substance that, if a person against whom a cause of action accrued was beyond sea at the time of accrual, the plaintiff should be at liberty to bring his action against him within the usual time after his return. A clause was later added in the United States which also excepted the time of the defendant's absence where he departed from, and resided out of, the state after the accrual of the cause. As already indicated, the note is in the main confined to

Headnote by MASON, J.

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the state, the statute of limitations is suspended, and it is conceded that ordinarily whenever he returns it begins to run again, however often he may go and come. Gibson v. Simmons, 77 Kan. 461, 94 Pac. 1013. But the plaintiff insists that, in calculating the time the statute has been in operation, mere occasional visits to Kansas, so brief as to offer no fair opportunity to begin an action, must be ignored, and that, as the court found that due diligence had been exercised in attempting to get service in this case, the bar had not fallen. This contention is not without apparent support in the authorities. Its substance finds piquant expression in Weille v. Levy, 74 Miss. 34, 60 Am. St. Rep. 500, 20 So. 3, in these words: "The plaintiff was not required to fire judicial process at him [the defendant] as he flew, but was entitled to a fair and reasonable opportunity for a resting shot." In 25 Cyc. Law & Proc. p. 1251, it is said: "In order that a return into the jurisdiction, after an absence which has interfered with the granting of the statute of limitations, may set the statute in motion, defendant . . . must be able to show that plaintiff either knew of the return so as to have had an opportunity to avail himself of the presence by bringing suit, or that the return or stay was so public or of such length as to amount to constructive notice or knowledge, or to raise the presumption that, if plaintiff had used ordinary diligence, he might have brought his action." Not one of the cases cited in support of this text, however, arose under a statute which, like that of Kansas, makes the personal presence or absence of the debtor the determining factor, irrespective of cases arising under the first clause of the statute.

It is generally held that the return contemplated by these acts is such a coming into the state as affords the plaintiff, by the exercise of ordinary diligence, an opportunity to serve process upon the defendant.

Return held sufficient.

Thus, it was laid down in the following cases that a return, to start the statute running, must be public and notorious, so that the creditor either knew of the return, or, with due diligence, could have ascertained and served process on the defendant: Palmer v. Bennett, 83 Hun, 222, 31 N. Y. Supp. 567, affirmed in 152 N. Y. 621, 46 N. E. 1150; Cole v. Jessup, 10 N. Y. 96; Ford v. Babcock, 2 Sandf. 518; Dukes v. Collins, 7 Houst. (Del.) 3, 30 Atl. 639; Boulton v. Langmuir, 24 Ont. App. Rep. 618; Dorr v. Swartwout, 1 Blatchf. 179, Fed. Cas. No. 4,010; Steen v. Swadley, 126 Ala. 616, 28 So. 620, but see State Bank v. Seawell, infra; Campbell v. White, 22 Mich. 178. The court in the last case said: "From the foregoing and many other cases, it may be taken as having been well settled that the object of the legislature in qualifying the operation of the statute by the fact of the debtor's absence or nonabsence from the state was to allow or prevent the running of the time limited for bringing suit, when the creditor should or should not, in consequence of the circumstances, have a fair opportunity to subject his debtor to the jurisdiction of the proper court of the state. And considering the tenor of the authorities and the object of the clause in question, the rule, which alone appears admissible, is that a temporary nonabsence, or, in other words, a return, in order to cause the time limited for bringing suit to commence and keep running during his stay, must be shown by the debtor either to have been actually known to the creditor, and to have been so long continued and under such circumstances, after such knowledge, as to have enabled the creditor, by reasonable diligence, to have subjected him to the jurisdiction of the proper state court; or else to have been so notorious and protracted, and so identified with some locality, as to show that the creditor might, by reasonable diligence, have learned of the debtor's return, or nonabsence, and, by the like diligence after such fact could have been learned, might have subjected him to the jurisdiction as before stated."

And in Wood v. Ward, Fed. Cas. No. 17,965, the court instructed the jury, in effect, that the coming into the state must either be of a permanent character, or, if not of such character, it must be brought to the creditor's knowledge, or be of such nature that the creditor might, by the use of reasonable diligence, ascertain it.

So, the court said in Byrne v. Crowninshield, 1 Pick. 263, that by a return "within the government" must be meant such a return as would give a party reasonable opportunity to commence an action. It was said, however, that the decision of what amounted to such a return was not necessary to sustain the decision.

The general rule before laid down was applied in the following cases, where the return was held sufficient: Rogers v. Hatch, 44 Cal. 280 (return for few weeks consecutively, and subsequently having place of business in state, all with creditor's knowledge); Crocker v. Clements, 23 Ala. 296 (return to, and remaining in, state four or five months); Whitton v. Wass, 109 Mass. 40 (enlisted resident returning openly to his domicil); Pindell v. Harris, 57 Miss. 739 (return of former resident for a five months' visit to her old home); Fowler v. Hunt, 10 Johns. 464 (presence by debtor in the state at different times with creditor's knowledge and in his company); Montgomery v. Brown, 9 Tex. Civ. App. 127, 28 S. W. 834 (openly visiting state on business, affording fair opportunity for suit); Kers v. Erwin, 4 La. 215 (debtor's passing every

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tive of his residence. The test there proposed was rejected under a statute similar to ours in Stewart v. Stewart, 152 Cal. 162, 92 Pac. 87. The plaintiff relies upon a statement in the syllabus to Stanley v. Stanley, 47 Ohio St. 225, 8 L.R.A. 333, 21 Am. St. Rep. 806, 24 N. E. 493, that an occasional presence in the state will not set the statute of limitations to running, but the opinion shows that what is meant is that the statute will not continue to run from that time on, but will cease to operate as soon as the visit is ended. To say that the statute shall not run in favor of a debtor coming into the state unless his entry is made under such circumstances as to give his creditor an opportunity, by the exercise of ordinary diligence, to obtain service upon him, would be to ingraft a new exception upon the statute. Such exceptions by implication are not favored. Atchison, T. & S. F. R. Co. v. Atchison Grain Co. 68 Kan. 585, 75 Pac. 1051, 1 A. & E. Ann. Cas. 639. A somewhat literal construction has established the doctrine that the statute does not run in favor of one who is actually outside of the state, even although, by reason of having a residence here, he is exposed to service at any time. Consistently with that method of interpretation it must be held that he may have the benefit of all the time he spends in the state, regardless of whether or not the intervals are long enough to give reasonable opportunity for service, so that he does not conceal himself.

The judgment is affirmed.

All the Justices concur.

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winter in state); Howell v. Burnett, 11 Ga. 303 (return once or twice every year for few days in such manner that suit might be commenced); Didier v. Davison, 2 Sandf. Ch. 61, affirmed in 2 Barb. Ch. 277 (coming into the state and residing openly with family for upwards of a year); Costello v. Downer, 19 App. Div. 434, 46 N. Y. Supp. 713; Holt v. Hopkins, 63 Misc. 537, 117 N. Y. Supp. 177 (open return each day for business purposes); State Bank v. Seawell, 18 Ala. 616 (openly coming into state, including time occupied in traveling to and from plantation); Gregory v. Hurrill, 5 Barn. & C. 341 (coming ashore to mail letter).

Where a statute provides that, if a debtor shall be out of the state when an action accrues, suit may be commenced within the statutory period after he comes into the state in such a manner that, by reasonable diligence, he might be served with process, the statute commences to run where the debtor comes into the state openly and notoriously, and remains long enough for the creditor to sue out process, and for service by the sheriff. Morrow v. Turner, 2 Marv. (Del.) 332, 43 Atl. 166.

Reasonable diligence, within the meaning of a statute of this kind, requires the creditor at least to take some steps, from time to time, to ascertain whether his debtor can be reached by process. Where the debtor resides within the state at the time the debt accrues, and afterwards removes therefrom, the creditor is not bound to keep a suit pending against him. But where the debtor afterwards comes into the state in such a manner that, by reasonable diligence, he might be served with process, the statute will commence to run from that time. Dukes v. Collins, supra.

It is held that where a nonresident comes into the state to reside permanently, and his residence is open, the statute will run in his favor although the plaintiff has no knowledge of his presence. Davis v. Field, 56 Vt. 426; Hall v. Nasmith, 28 Vt. 791.

So, if the return is of such character as would afford the plaintiff an opportunity to commence suit, the fact that he has no knowledge thereof is not material. Stewart v. Stewart, 152 Cal. 162, 92 Pac. 87.

The question of presence in, or absence from, the state, and not the question of residence or nonresidence, is held to affect the running of the statute, under a provision in effect that, if, when the cause of action accrues, the debtor is out of the state or has absconded or concealed himself, the period for commencement of an action shall not begin to run until he comes into the state, or while he is so absconded or concealed. Hoggett v. Emerson, 8 Kan. 262; Investment Securities Co. v. Bergthold, 60 Kan. 813, 58 Pac. 469.

And it was held in Vans v. Higginson, 10 Mass. 29, that the statute commences to run as soon as the debtor comes within the state, although the creditor was without the state. The exact statutory provision in this case does not appear and, as stated in the note to the case, it is not supported by the later decisions.

In Patriotic Bank v. Webster, 2 Hayw. & H. 47, Fed Cas. No. 10,811a, the defendant's rejoinder that he was within the jurisdiction of the court four days during the time necessary to bar the action, to the knowledge of the creditor, was held good upon demurrer.

It is held that the question of whether a return is sufficient to bring a case within the exception is for the jury. Palmer v. Bennett, 83 Hun, 220, 31 N. Y. Supp. 567, affirmed in 152 N. Y. 621, 46 N. E. 1150; Morrow v. Turner, 2 Marv. (Del.) 332, 43 Atl. 166.

And it was held in Alexander v. Burnet, 5 Rich. L. 189, that the question of whether the creditor might have sued the debtor when he passed through the state on several occasions was for the jury.

So, where there is evidence that the debtor has been in the province after the accrual of the action, for two or three days,

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and that the creditor has transacted business with him, the question of return is for the jury and a nonsuit cannot be granted. Johnson v. Buchanan, 1 U. C. Q. B. 171.

The jury are not at liberty to presume knowledge of a debtor's presence on the part of the creditor on evidence that the debtor was present in the state upon two instances and remained publicly for a period of several weeks, but the debtor must prove actual knowledge by the creditor of his temporary stay. Mazozon v. Foot, 1 Aik. (Vt.) 282, 15 Am. Dec. 679.

Return held insufficient.

The following facts have been held insufficient to show a return: Mazozon v. Foot, supra (stay of several weeks without creditor's knowledge); Little v. Blunt, 16 Pick. 359 (visit to state at place distant from plaintiff's residence, several times a year on business, without plaintiff's knowledge); Johnson v. Smith, 43 Mo. 499 (flying visit); Crosby v. Wyatt, 23 Me. 156 (often coming few miles into state, with no evidence of creditor's knowledge); Wilson v. Daggett, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618 (temporarily in state on business); Gregory v. Hurrill, 1 Bing. 324 (coming ashore to post letter); State ex rel. Shipman v. Allen, 132 Mo. App. 98, 111 S. W. 622 (presence in state, attending court); Weille v. Levy, 74 Miss. 34, 60 Am. St. Rep. 500, 20 So. 3 (salesman traveling from place to place); Mazozon v. Foot, supra; Hill v. Bellows, 15 Vt. 727 (temporary visit to state without creditor's knowledge); Palmer v. Shaw, 16 Cal. 93 (presence for temporary business purpose).

Upon a case stated in Hysinger v. Baltzell, 3 Gill & J. 158, a showing that the debtor was within the state, purchased goods of the creditor, and remained two days, was held not to justify a holding that the statute commenced running, since it did not appear at what time during the days the debtor made his purchases, or whether the creditor had an opportunity to sue out a writ.

The fact that a debtor, after his removal from a state, comes temporarily therein on several occasions, of which the creditor, without fault on his part, has no notice, does not remove the obstruction raised by his removal, where the statute provides that when a cause of action accrues against a resident and he, by departing therefrom, obstructs the prosecution of the action, the time of the continuance of his absence from the state shall not be computed as any part of the period within which the action may be commenced, and further provides that limitations shall run from his return. Ridgeley v. Price, 16 B. Mon. 409. The court said: "We are of opinion that if the plaintiff was in fact ignorant, without fault, of the occasional visits of the defendant to this state, he cannot justly be said to have had an opportunity of suing her, and the obstruction occasioned by her removal still continued, and repelled the operation of the bar. The proviso in § 8 of the statute, in favor of the person entitled to the action, and who may be out of the country, expressly subjects him to the limitation on his return to the country. The suspension in his favor is founded on a supposed disability to sue while he is out of the state; and the disability being, with his presumed knowledge, removed by the mere fact of his coming into the state, his failure to sue becomes from that time mere laches, which the statute does not intend to assist. But when the defendant, by removal from the state, prevents or obstructs the bringing of the action, the saving of the plaintiff's right from the effect of the bar would be utterly delusive if the mere presence of the defendant in any part of the state, however distant, for however short a time, and although wholly unknown to the person having the right to sue, might, without laches on his part, deprive him of the benefit of the saving. Until he knows, or ought to know, that he can sue, he is guilty of no neglect, and the privilege of saving caused by the act of the other party ought not, and in our opinion was not intended, to be taken away." And to the same effect is Bennett v. Devlin, 17 B. Mon. 353.

In Burroughs v. Bloomer, 5 Denio, 532, where the statute provided in substance that the debtor's departure and residence out of the state should operate to prevent the statute running while so absent, a debtor who removed to another state, but retained a place of business, which he visited frequently, was held not entitled to credit for the time he spent within the creditor's state. To the same effect are McCord v. Woodhull, 27 How. Pr. 54; Bassett v. Bassett, 55 Barb. 505.

The New York statute involved in these cases was subsequently changed to read in effect that, if the debtor should depart from, or reside out of, the state, "or remain continuously absent therefrom for the space of one year or more," the time of his absence should not be deemed a part of the time limited for the commencement of an action. And later the word "or" was changed to "and."

After these changes it was held that where a debtor removed from the state after the action accrued, the fact that he made a number of brief visits to his old residence in the state would not interrupt the continuity of his absence. Connecticut Trust & S. D. Co. v. Wead, 172 N. Y. 497, 92 Am. St. Rep. 756, 65 N. E. 261. The court said: "By the substitution of the word 'and' for 'or' it became thereafter necessary, to bring a nonresident within the exception of the statute, that he should be continuously absent for a year or more,—that is to say, a nonresidence for less than a year continuously would be insufficient for the purpose. But it did not alter the rule that nonresidence is absence, and that casual visits to the state do not destroy the continuity of the absence. In Bassett v. Bassett, supra, it was said: 'The object of the exception is to give the plaintiff the whole of six

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years' residence within the state to commence his action. He is not obliged to follow the debtor into another state; nor is he called upon to watch him and ascertain whether he comes into the state for a temporary purpose, so long as his residence is elsewhere.' We think this statement is still correct. Whether the statute runs in favor of a nonresident defendant with a place of business in this state and daily present there during business hours, it is unnecessary to determine, but we hold that the casual, temporary visits of a nonresident to this state do not break the continuity of his absence, under the section of the Code, so as to entitle him to the benefit of the statute." To the same effect is Lawrence v. Hogue, 105 App. Div. 247, 93 N. Y. Supp. 998.

Under a statute in effect that the creditor may commence his action within the given period after the presence of the debtor within the state, in case of the latter's absence, it was held in Gibbons v. Ewell, 1 Handy (Ohio) 561, that temporary visits to a part of the state distant from the creditor's residence were not sufficient to remove the disability, where it was not clearly shown that the creditor knew of the fact, or that, if he did, he could serve process on the debtor. The court said the return must be such as from its publicity affords the creditor a knowledge of the fact, or means of knowledge.

The running of the statute of limitations in favor of a foreign corporation depends on the fact of its residence in the state, in the sense that service may be made on it through defendant's keeping a managing agent therein, and not upon the knowledge, or lack of knowledge, of one having a cause of action against it, as to the presence of such agent; but a foreign manufacturing corporation whose business is such that it can carry it on without a resident general agent cannot set the statute running by appointing, at any time or times, an agent in the state, upon whom process might be served. Winney v. Sandwich Mfg. Co. 86 Iowa, 608, 18 L.R.A. 524, 53 N. W. 421. The court said: "Here is a manufacturing corporation. It may establish an office or agency, and, if it does, process may be served in certain cases upon the agent or clerk employed therein. It may have a general agent in the state, in which case process may be served upon him. It may, however, carry on its business without either establishing an office or agency in the state, or having a general agent therein. Surely, in such a case, it would hardly be contended that the corporation was a resident of the state so as to be served with process; hence, it could not avail itself of the defense of the statute of limitations. If the appellant's theory is good, a foreign corporation can, at its pleasure and for its own benefit, put in motion the statute. We do not think such result was ever anticipated by the legislature when it enacted the statute we have quoted. A foreign corporation whose business in this state is such that it is not incumbent upon it to put itself in position to be at all times subject to the service of process ought not to be permitted to shield itself behind the statute of limitations because it may at some time or times, perhaps unknown to one having a cause of action against it, have an agent in this state upon whom process could be served. There is a wide distinction between the case of a railroad company, whose officers or agents may always be found within the state, and can readily be reached with process, and a foreign manufacturing corporation having, perhaps, a general agent in this state, who may have no settled abiding place, whose relations to the party he serves are not generally known to the public, and the knowledge of whose coming and going must, of necessity, be limited to a few individuals."

—secret return.

A secret return is held not to be such a return as is contemplated by the statute.

Thus, in White v. Bailey, 3 Mass. 271, a return by a debtor to his former domicil and a stay of eighteen days were held not to satisfy the statute, where he came privately, and secreted himself except on Sundays, there being nothing to show that the creditor had knowledge of his presence.

And in Hysinger v. Baltzell, 3 Gill & J. 158, the court said that a secret, concealed, clandestine presence for any length of time, of which the creditor could not take advantage, was insufficient to constitute a return within the meaning of the statute.

So, in Stewart v. Stewart, 152 Cal. 162, 92 Pac. 87, it was held that the defendant was not entitled to credit where he made a secret visit to his former residence for the purpose of ascertaining the time of his absence from the state.

Necessity of residence.

A return for the purpose of residence is not, as already stated, required by the great weight of authority.

In North Carolina, however, where the statute contains a provision to the effect that if, after the accrual of an action, the defendant shall depart from, and reside out of, or remain continuously absent from, the state, the action may be brought within a stipulated period after his return, it is held that the return contemplated is a return with a view to reside, not a casual appearance in the state, passing through it, or a stay on a visit. Lee v. McKoy, 118 N. C. 518, 24 S. E. 210; Armfield v. Moore, 97 N. C. 34, 2 S. E. 347.

The Georgia statute expressly provides that, in case of defendant's absence, the time of his absence "and until he returns to reside" shall not be counted in his favor. Under this statute a return to reside is necessary. Brooks v. Fowler, 82 Ga. 329, 9 S. E. 1089; Payne v. Bowdrie, 110 Ga. 549, 36 S. E. 89.

Miscellaneous.

Where the manifest object of the statute is to prevent the absence from operating as

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a bar, a return into the state is not shown by the debtor's taking up a residence in the Indian nation, which is within the limits of the state, but whose inhabitants are not subject to the process of the state courts. Smith v. Bond, 8 Ala. 386.

It is not necessary to aver that the return was public and notorious so that, with due diligence, the creditor could have arrested the debtor, but it is sufficient to plead the return in the words of the statute. Ford v. Babcock, 2 Sandf. 518; Shapley v. Felt, 3 N. H. 121; Cole v. Jessup, 10 N. Y. 96.

The fact that a foreign creditor has an agent in the state will not start the statute of limitations running where the statute makes no exception in such case. Wilson v. Appleton, 17 Mass. 180.

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1. Where persons enter into a written contract, assuming to act as agents for another, and receive money to be paid to the principal as part of the consideration, but which is retained in their hands, and the principal refuses to be bound by the contract, an action may be maintained against them for money had and received to the use of the person from whom they received it.

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a bar, a return into the state is not shown by the debtor's taking up a residence in the Indian nation, which is within the limits of the state, but whose inhabitants are not subject to the process of the state courts. Smith v. Bond, 8 Ala. 386.

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23 L.R.A.(N.S.)

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(— Kan. —, 101 Pac. 1070.)

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ERROR to the District Court for Kingman County to review a judgment in defendants' favor in an action brought to recover a sum of money alleged to be held by defendants to the use of plaintiff. Reversed.

The facts are stated in the opinion.

Mr. **F. L. Martin** for plaintiff in error.

Mr. **Charles C. Calkin** for defendants in error.

Porter, J., delivered the opinion of the court:

Simmonds, the plaintiff, made a written contract with Long & Sills to purchase 160 acres of land, and deposited with them $150 as earnest money and part payment on the purchase price. The contract was dated December 14, 1906. By its terms possession was to be given in sixty days, and time was made the essence of the contract. It was further agreed that, if good and sufficient deed and abstract could not be furnished, the $150 earnest money should be returned to Simmonds. On February 18, 1907, which was after the sixty days had expired, the owners of the land met plaintiff in the office of Long & Sills; and because a number of mortgages which were on the land could not be released, and because Silvius, one of the owners, who was in possession of the land, refused to give possession, as agreed, the sale fell through. Plaintiff then demanded the return of his $150, under the terms of the contract. Long & Sills refused to pay it, and this

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Supp. 470; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed without opinion in 129 N. Y. 647, 29 N. E. 1028; Costigan v. Newland, 12 Barb. 456; Hearsey v. Pruyn, 7 Johns. 179; Morrison v. Currie, 4 Duer, 79.

This doctrine has been applied where an indorser pays a note without notice of the fact that demand has not been made on the maker, and the former demands its return before the agent has paid it to his principal (Garland v. Salem Bank, supra); where an agent collects the amount of a fraudulently raised draft, and receives notice thereof before parting with any of the money collected thereon (United States Nat. Bank v. National Park Bank, supra); where an insurance company becomes insolvent before it has received or assumed any liability on account of the payment of premiums to an agent, and the payer notifies the latter, before he parts with the money, that he claims the money, and does not intend to rely upon the policy issued to him, notwithstanding the policy is not surrendered until after bringing suit (Smith v. Binder, supra); where an agent receives usurious interest for his principal, and is notified before he pays it over that he will be held accountable for it (O'Connor v. Clopton, supra); where one pays the first month's rent of premises to an agent, and his principal fails to enter into a lease before the money is paid to him (Wheeler v. Cannon, 84 Ill. App. 591); where, before money reaches a principal, land sold by an auctioneer proves to have a defective title (Burrough v. Skinner, supra); where an attorney receives the amount due on an execution in his principal's favor, and the judgment is reversed and restitution ordered before payment over to the principal (Langley v. Warner, supra); where a forged draft is paid supra protest without seeing the draft, upon the representation of the agent that it is genuine, and the payer gives immediate notice of the forgery (Goddard v. Merchants' Bank, supra); where C. O. D. charges are paid an agent of an express company, and, by reason of the consignor's fraud, the contents of the package proves worthless, the consignee notifying the agent thereof before the money is paid to the principal (Herrick v. Gallagher, supra); where, by mistake in computing the amount due, an agent is overpaid and still retains the same (Griffith v. Johnson, supra).

Where an agent sells a bar of silver and has not settled with his principal therefor, the payer may, upon offering to return the bar of silver, recover the money paid, upon discovering that an assayer had erroneously computed its value. Cox v. Prentice, 3 Maule & S. 344.

Money paid an agent who discloses his principal, upon the purchase of property which is never delivered to the payer, may be recovered from the agent, where, with the consent of his principal, the money was received by the agent in his own name. Klotz v. Gordon, 117 N. Y. Supp. 240.

However, in order that this doctrine may be applied, there must have been no alteration in the situation of the agent towards his principal in relation to such payment. McDonald v. Napier; Langley v. Warner; Goddard v. Merchants' Bank; Herrick v. Gallagher; Costigan v. Newland; LaFarge v. Kneeland; Hearsey v. Pruyn; and Carter v. Stork,—supra.

But there are cases which hold that where a payer is aware that he is dealing with an agent for a known principal, and the payment is not the result of mistake or fraudulent conduct on the part of the agent, the latter is not liable to the payer therefor if he ultimately becomes entitled to its return, as his principal alone is answerable in that event; and this is true notwithstanding the agent still has possession of the money. Ellis v. Goulton [1893] 1 Q. B. 350; Sadler v. Evans, 4 Burr. 1984; Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84; McDonald v. Napier, supra; Huffman v. Newman, 55 Neb. 715, 76 N. W. 409; Cooper v. Tim, 16 Misc. 372, 38 N. Y. Supp. 67; Middleworth v. Blackwell, 85 App. Div. 613, 82 N. Y. Supp. 704; Finnegan v. Geoghegan, 111 N. Y. Supp. 656; Levine v. Field, 114 N. Y.

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action was brought before a justice of the peace. It was afterwards appealed to the district court, and there tried. The court sustained a demurrer to the evidence of the plaintiff, and rendered judgment against him for costs. These proceedings are brought to review the judgment.

The written contract described Long & Sills as agents, and they signed it as agents, but did not disclose therein the name of their principal. The demurrer to the evidence was based upon the cross-examination of the plaintiff, who testified that he knew who owned the land, and that Long & Sills were merely agents for the owners; that he paid the money to them, and supposed the money was paid on the land. The trial court held that he had no cause of action against the defendants, because he knew they were agents, and who their principal was. On the trial, R. O. Silvius, one of the owners, testified that he had never placed the land with Long & Sills for sale, although, after the contract was entered into, he ratified their action; that they never paid him any of the money; that he understood the money in their hands was to be held by them until the deal was closed, when they were to have $100 as commission, and that the expense of making the sale and the cost of the abstract were to come out of the balance of the money in their hands. The ruling of the trial court, it is said, is supported by the law declared in McCubbin v. Graham, 4 Kan. 397. In that case the

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Supp. 819; Kurzawski v. Schneider, 179 Pa. 500, 36 Atl. 319.

Thus, where the agent still has possession of the money, this doctrine has been applied where a deposit is paid an auctioneer upon a sale which fails by reason of the default of the vendor (Ellis v. Goulton, supra); where money is paid attorneys upon a judgment that is subsequently reversed (McDonald v. Napier, supra); where the principal fails to fulfill his agent's contract for the sale of real estate (Huffman v. Newman and Middleworth v. Blackwell, supra); where the principal fails to enter into a contract for the sale of his real estate, pursuant to his agent's promise (Bogart v. Crosby, supra); where it is claimed that certain rentals paid an agent for a known principal were not actually due (Sadler v. Evans, supra); where sufficient money is paid an agent to cover the first month's rent, and security for the last month's rent, of premises which the principal does not have ready for occupancy at the agreed date (Finnegan v. Geoghegan, supra).

And it was held in Huffman v. Newman, supra, that money paid an agent for a known principal cannot be recovered from the agent, even though he has possession thereof, either in an action for money had and received or for conversion.

So, it was held in Mathews v. O'Shea, 45 Neb. 299, 63 N. W. 820, that an action for conversion will not lie against an agent, in the absence of fraud, where money is voluntarily paid him for the use of his principal, and which has never been paid over to the latter, as the agent's possession is not wrongful or fraudulent, but lawful.

And it was said in McDonald v. Napier, 14 Ga. 89, that in no event would an agent be liable to the payer of money upon a judgment upon its subsequent reversal, even though it still remained in the agent's hands, unless the payment was made in consequence of the agent's fraud or duress.

So, in Kurzawski v. Schneider, supra, it was held that an agent who receives money on a contract for the purchase of real estate, made by his principal, and which apparently he has in his possession, cannot be held liable therefor in an action by the purchaser to recover back the money, on proof of facts which would entitle the purchaser to rescind the contract.

In Bogart v. Crosby, supra, it was said that the payer's claim that there had been a forfeiture of his payment by a failure to complete a contract was a question between him and the owner of the property, and one in which the agent was not concerned; and the payer was bound to look to the principal for his money, and that between the agent and the payer there was no liability either way.

A further reason advanced for this rule, where the payer claims he has become entitled to a return of his money because of the principal's default, is that the latter has a right to litigate the question whether there has been a breach of the agreement, which is a question that does not concern the agent. Bogart v. Crosby and Levine v. Field, supra.

It was held in Gulf City Constr. Co. v. Louisville & N. R. Co. 121 Ala. 621, 25 So. 579, that money voluntarily paid an agent for an overcharge in freight could not be recovered from him in the absence of fraud or want of authority on his part, although it did not appear whether the agent had parted with the same.

Where agent has paid money to his principal.

An agent to whom money has by mistake, or under circumstances entitling the payer to recall it, been voluntarily paid for the use of his principal, is not answerable therefor to the payer, where, before notice of the mistake or right to recall it, the agent has paid it to the principal. Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219; United States v. Pinover, 3 Fed. 305; Shand v. Grant, 15 C. B. N. S. 324; Thompson v. Stickney, 6 Ala. 579; Allen v. Globe Grain & Mill. Co. (Cal.) 104 Pac. 305; Bingham v. Tully, 1 Root, 237; Fowler v. Quall, 36 Kan. 507, 13 Pac. 784; Steele v. Moxley, 9 Dana, 137; Simpson v. Garland, 76 Me. 203; Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; Jefts v. York, 12 Cush. 196; Bailey v. Cor-

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ERROR to the District Court for Kingman County to review a judgment in defendants' favor in an action brought to recover a sum of money alleged to be held by defendants to the use of plaintiff. Reversed.

The facts are stated in the opinion.

Mr. **F. L. Martin** for plaintiff in error.

Mr. **Charles C. Calkin** for defendants in error.

Porter, J., delivered the opinion of the court:

Simmonds, the plaintiff, made a written contract with Long & Sills to purchase 160 acres of land, and deposited with them $150 as earnest money and part payment on the purchase price. The contract was dated December 14, 1906. By its terms possession was to be given in sixty days, and time was made the essence of the contract. It was further agreed that, if good and sufficient deed and abstract could not be furnished, the $150 earnest money should be returned to Simmonds. On February 18, 1907, which was after the sixty days had expired, the owners of the land met plaintiff in the office of Long & Sills; and because a number of mortgages which were on the land could not be released, and because Silvius, one of the owners, who was in possession of the land, refused to give possession, as agreed, the sale fell through. Plaintiff then demanded the return of his $150, under the terms of the contract. Long & Sills refused to pay it, and this

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Supp. 470; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed without opinion in 129 N. Y. 647, 29 N. E. 1028; Costigan v. Newland, 12 Barb. 456; Hearsey v. Pruyn, 7 Johns. 179; Morrison v. Currie, 4 Duer, 79.

This doctrine has been applied where an indorser pays a note without notice of the fact that demand has not been made on the maker, and the former demands its return before the agent has paid it to his principal (Garland v. Salem Bank, supra); where an agent collects the amount of a fraudulently raised draft, and receives notice thereof before parting with any of the money collected thereon (United States Nat. Bank v. National Park Bank, supra); where an insurance company becomes insolvent before it has received or assumed any liability on account of the payment of premiums to an agent, and the payer notifies the latter, before he parts with the money, that he claims the money, and does not intend to rely upon the policy issued to him, notwithstanding the policy is not surrendered until after bringing suit (Smith v. Binder, supra); where an agent receives usurious interest for his principal, and is notified before he pays it over that he will be held accountable for it (O'Connor v. Clopton, supra); where one pays the first month's rent of premises to an agent, and his principal fails to enter into a lease before the money is paid to him (Wheeler v. Cannon, 84 Ill. App. 591); where, before money reaches a principal, land sold by an auctioneer proves to have a defective title (Burrough v. Skinner, supra); where an attorney receives the amount due on an execution in his principal's favor, and the judgment is reversed and restitution ordered before payment over to the principal (Langley v. Warner, supra); where a forged draft is paid supra protest without seeing the draft, upon the representation of the agent that it is genuine, and the payer gives immediate notice of the forgery (Goddard v. Merchants' Bank, supra); where C. O. D. charges are paid an agent of an express company, and, by reason of the consignor's fraud, the contents of the package proves worthless, the consignee

notifying the agent thereof before the money is paid to the principal (Herrick v. Gallagher, supra); where, by mistake in computing the amount due, an agent is overpaid and still retains the same (Griffith v. Johnson, supra).

Where an agent sells a bar of silver and has not settled with his principal therefor, the payer may, upon offering to return the bar of silver, recover the money paid, upon discovering that an assayer had erroneously computed its value. Cox v. Prentice, 3 Maule & S. 344.

Money paid an agent who discloses his principal, upon the purchase of property which is never delivered to the payer, may be recovered from the agent, where, with the consent of his principal, the money was received by the agent in his own name. Klotz v. Gordon, 117 N. Y. Supp. 240.

However, in order that this doctrine may be applied, there must have been no alteration in the situation of the agent towards his principal in relation to such payment. McDonald v. Napier; Langley v. Warner; Goddard v. Merchants' Bank; Herrick v. Gallagher; Costigan v. Newland; LaFarge v. Kneeland; Hearsey v. Pruyn; and Carter v. Stork,—supra.

But there are cases which hold that where a payer is aware that he is dealing with an agent for a known principal, and the payment is not the result of mistake or fraudulent conduct on the part of the agent, the latter is not liable to the payer therefor if he ultimately becomes entitled to its return, as his principal alone is answerable in that event; and this is true notwithstanding the agent still has possession of the money. Ellis v. Goulton [1893] 1 Q. B. 350; Sadler v. Evans, 4 Burr. 1984; Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84; McDonald v. Napier, supra; Huffman v. Newman, 55 Neb. 715, 76 N. W. 409; Cooper v. Tim, 16 Misc. 372, 38 N. Y. Supp. 67; Middleworth v. Blackwell, 85 App. Div. 613, 82 N. Y. Supp. 704; Finnegan v. Geoghegan, 111 N. Y. Supp. 656; Levine v. Field, 114 N. Y.

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action was brought before a justice of the peace. It was afterwards appealed to the district court, and there tried. The court sustained a demurrer to the evidence of the plaintiff, and rendered judgment against him for costs. These proceedings are brought to review the judgment.

The written contract described Long & Sills as agents, and they signed it as agents, but did not disclose therein the name of their principal. The demurrer to the evidence was based upon the cross-examination of the plaintiff, who testified that he knew who owned the land, and that Long & Sills were merely agents for the owners; that he paid the money to them, and supposed the money was paid on the land. The trial court held that he had no cause of action against the defendants, because he knew they were agents, and who their principal was. On the trial, R. O. Silvius, one of the owners, testified that he had never placed the land with Long & Sills for sale, although, after the contract was entered into, he ratified their action; that they never paid him any of the money; that he understood the money in their hands was to be held by them until the deal was closed, when they were to have $100 as commission, and that the expense of making the sale and the cost of the abstract were to come out of the balance of the money in their hands. The ruling of the trial court, it is said, is supported by the law declared in McCubbin v. Graham, 4 Kan. 397. In that case the

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Supp. 819; Kurzawski v. Schneider, 179 Pa. 500, 36 Atl. 319.

Thus, where the agent still has possession of the money, this doctrine has been applied where a deposit is paid an auctioneer upon a sale which fails by reason of the default of the vendor (Ellis v. Goulton, supra); where money is paid attorneys upon a judgment that is subsequently reversed (McDonald v. Napier, supra); where the principal fails to fulfill his agent's contract for the sale of real estate (Huffman v. Newman and Middleworth v. Blackwell, supra); where the principal fails to enter into a contract for the sale of his real estate, pursuant to his agent's promise (Bogart v. Crosby, supra); where it is claimed that certain rentals paid an agent for a known principal were not actually due (Sadler v. Evans, supra); where sufficient money is paid an agent to cover the first month's rent, and security for the last month's rent, of premises which the principal does not have ready for occupancy at the agreed date (Finnegan v. Geoghegan, supra).

And it was held in Huffman v. Newman, supra, that money paid an agent for a known principal cannot be recovered from the agent, even though he has possession thereof, either in an action for money had and received or for conversion.

So, it was held in Mathews v. O'Shea, 45 Neb. 299, 63 N. W. 820, that an action for conversion will not lie against an agent, in the absence of fraud, where money is voluntarily paid him for the use of his principal, and which has never been paid over to the latter, as the agent's possession is not wrongful or fraudulent, but lawful.

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A further reason advanced for this rule, where the payer claims he has become entitled to a return of his money because of the principal's default, is that the latter has a right to litigate the question whether there has been a breach of the agreement, which is a question that does not concern the agent. Bogart v. Crosby and Levine v. Field, supra.

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An agent to whom money has by mistake, or under circumstances entitling the payer to recall it, been voluntarily paid for the use of his principal, is not answerable therefor to the payer, where, before notice of the mistake or right to recall it, the agent has paid it to the principal. Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219; United States v. Pinover, 3 Fed. 305; Shand v. Grant, 15 C. B. N. S. 324; Thompson v. Stickney, 6 Ala. 579; Allen v. Globe Grain & Mill. Co. (Cal.) 104 Pac. 305; Bingham v. Tully, 1 Root, 237; Fowler v. Quall, 36 Kan. 507, 13 Pac. 784; Steele v. Moxley, 9 Dana, 137; Simpson v. Garland, 76 Me. 203; Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; Jefts v. York, 12 Cush. 196; Bailey v. Cor-

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defendant received a $500 bond merely as the agent of, and for the use of, Fleming, his principal, disclosing his principal at the time, and delivered the bond to him. The general doctrine was declared that the authorized acts of an agent are the acts of a principal; that where an agent receives money or property for his principal, he is liable to his principal for the same, but not liable to the party from whom he received the money or property. We think that, under the evidence in this case, the defendants were not in a position to insist upon that doctrine, not because they failed to disclose the name of their principal, for the evidence shows that the plaintiff knew at the time who the owners of the land were, and that the defendants were acting as agents, but for the reason that the evidence discloses that the defendants had no authority to receive the money for the owners of the land, nor did they have authority to bind the owners to give possession in sixty days, and because they never paid the money to the owners. The testimony of Silvius is that he never knew he was to give possession of the land in sixty days until after that time had expired. The facts are that defendants undertook to enter into a contract as agents for a principal without authority, and the principal refuses to be bound. The law is well settled in such cases that, where the proceeds received by the agent have not been turned over to the principal, the agent is liable personally.

There is a class of cases holding that,

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nell, 66 Mich. 107, 33 N. W. 50; Miller v. Seeley, 90 Mich. 218, 51 N. W. 366; Granger v. Hathaway, 17 Mich. 500; White v. Taylor, 113 Mich. 543, 71 N. W. 871; Shepard v. Sherin, 43 Minn. 382, 45 N. W. 718; Martin v. Allen, 125 Mo. App. 636, 103 S. W. 138; Ashley v. Jennings, 48 Mo. App. 142; McNeny v. Campbell, 81 Neb. 754, 116 N. W. 671, 117 N. W. 885; Read v. Riddle, 48 N. J. L. 359, 7 Atl. 487; Frye v. Lockwood, 4 Cow. 454; Langley v. Warner, 1 Sandf. 209; Mowatt v. McLean, 1 Wend. 173; Butler v. Livermore, 52 Barb. 570; LaFarge v. Kneeland, 7 Cow. 456; Morrison v. Currie, 4 Duer, 79; Waddell v. Mordecai, 3 Hill, L. 22; Gable v. Crane, 24 Pa. Super. Ct. 56; Metcalf v. Denson, 4 Baxt. 565; Embry v. Galbreath, 110 Tenn. 297, 75 S. W. 1016; Gray v. Otis, 11 Vt. 628; Holland v. Russell, 1 Best & S. 424. This doctrine is recognized in Buller v. Harrison, 2 Cowp. 565.

It was said in McDonald v. Napier, supra, that money paid an agent by mistake, or to which his principal has no lawful right, cannot be recovered from the former after it has been paid to the principal.

This doctrine has been applied where an attorney fails to apply a payment upon a decree of foreclosure, and, after remitting it to his client, sells the encumbered property for the full amount of the decree (Miller v. Seeley, supra); where an agent without authority obtains a loan upon his principal's note, and pays it to the latter before demand for repayment (Jefts v. York, supra); where an agent obtains a loan for his principal upon a note with forged signatures and pays it over to him (Huston v. Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795); where an insurer pays the amount of a loss to an agent, and becomes entitled to recall it after it has been paid to the principal (Hooper v. Robinson, supra); where, after money has been paid to the principal, it appears that the payer acquired nothing by the purchase (Engels v. Heatly, 5 Cal. 135); where an agent receives money for a corporation, and by mistake does not enter it upon its books, but in fact the money was actually turned over to the corporation (Cary v. Webster, 1 Strange, 480).

A bank which, as agent for another bank, collects $1,800 upon a draft which has been raised from $8, is not liable to the payer, where, before discovery of the fraud, the agent has paid over the proceeds to the principal. National Park Bank v. Seaboard Bank, 44 Hun, 49, affirmed in 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632.

And this is true notwithstanding the agent does not pay the identical money received, but credits the amount thereof to the principal, and remits more than sufficient to exhaust the credit long before the discovery of the forgery. Ibid.

Where an agent is paid money for his principal, and the payer subsequently becomes entitled to its return, he cannot, because there is a running account between the agent and his principal, upon which the amount can be credited, wait until the agent has, in good faith, paid it to his principal, and then claim restitution. Bixby v. Drexel, 56 How. Pr. 478.

So, where money is paid an agent by the brother of a debtor, it cannot, in the absence of any personal fraud or a guaranty of the validity of the claim by the agent, be recovered from the latter, who has already paid it to his principal, on proof that the claim was invalid. Hauenstein v. Ruh, 73 N. J. L. 98, 62 Atl. 184.

And it was held in Huston v. Tyler, supra, that the principal, and not an agent, would be answerable where the latter, whose agency was known, obtained money upon a forged note, and paid it to the principal.

Where a negotiable bond was delivered to a broker as a payment upon the purchase of his principal's real estate, the latter afterward refusing to consummate the sale, and the payer recovered damages from the principal for the breach of the contract, in which he included the said bond, he cannot afterward recover the value of the bond from the agent, who had delivered it to his principal, as the measure of damages in the action against the principal would include the amount actually paid on the contract. McCubbin v. Graham, 4 Kan. 397.

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where a contract has been entered into by one who assumes to act as the agent of another, but who lacks the requisite authority, the contract may be stripped of what the agent had no right to put there; and, if it still contain apt words to charge him, he is bound thereby. Byars v. Doores, 20 Mo. 284; Woodes v. Dennett, 9 N. H. 55; Moor v. Wilson, 26 N. H. 332; Weare v. Gove, 44 N. H. 196; Hegeman v. Johnson, 35 Barb. 200; 1 Am. & Eng. Enc. Law, p. 1128. Thus, in Byars v. Doores, supra, it is said that, where the agent signs his own name to a written contract as agent for a principal, yet, if he fails to employ language which will exclusively bind the principal, or "if, rejecting the words which he had no authority to use, enough will remain to create a promise on his part, he will be personally liable on the contract." The question is discussed at length in Hegeman v. Johnson, supra, where it is said, in respect to written contracts, that the rule is limited "to cases where the agent signs his own name, although he describes himself as an agent. This description, being surplusage, may be stricken out, and a personal obligation will remain." It is true, as a general rule, that the remedy against an agent who assumes to act for another without authority is an action for damages for the wrong done, and he is not personally bound by the terms of the contract unless it contain apt words to charge him. Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293; Hall v. Crandall, 29 Cal. 567, 89 Am.

Where the amount due on an execution was paid the agent of the plaintiff, and verbal notice given him that it was the payer's intention to sue out a writ of error, and that, if the judgment was reversed, it was expected that the money would be returned, the amount so paid could not, upon the reversal of the judgment, be recovered from the agent, where, before the reversal, it had been paid to the principal, as such notice was insufficient to disclose an intention to demand the money upon a reversal of the judgment, but only that it was expected that it would be returned. Bank of United States v. Bank of Washington, 6 Pet. 8, 8 L. ed. 299, reversing 4 Cranch, C. C. 86, Fed. Cas. No. 947.

But where money is paid to an agent to apply upon a purchase of land under circumstances showing a case of *mala fides*, as, where it is the design of a vendor to impose a defective title as and for a good one, and the vendee becomes entitled to a return of his money, it may be recovered from the agent, notwithstanding it has been paid over to the latter's principal. Shipherd v. Underwood, 55 Ill. 475.

Where a purchaser of land becomes entitled to rescind because of gross mistake of fact, the agent, who effects a sale in his own name, and receives the purchase money, will be primarily liable therefor, although his principals, who have actually received any portion thereof with full knowledge of the circumstances, must repay the same. Daniel v. Mitchell, 1 Story, 172, Fed. Cas. No. 3,562.

It was held in Bamford v. Shuttleworth, 11 Ad. & El. 926, that one making a deposit with an auctioneer upon the purchase of land, the latter signing the memorandum of sale as agent, in his principal's name, cannot, upon the sale failing by reason of the principal's default, recover the money from the agent, who has disposed of it in settling the expenses of the sale, as the payment to him is a payment to his principal.

What constitutes payment to principal.

Merely passing a payment to the credit of the principal, or making a rest without any new credit being given, new bills accepted, or a further sum advanced by the agent for the former in consequence of such payment, will not be equivalent to a payment which will exonerate the agent from liability to the payer in the event of his becoming entitled to recall the payment. Buller v. Harrison, 2 Cowp. 565; Smith v. Binder, 75 Ill. 492; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed without opinion in 129 N. Y. 647, 29 N. E. 1028; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

Merely forwarding an account on which a payment has been credited to a principal to the latter, the account not having been settled between them, is not such a payment as will relieve an agent from liability to a payer upon his becoming entitled to recall a payment. Cox v. Prentice, 3 Maule & S. 344.

Where a bank, as agent for another, collects the amount of a raised draft, the payer may recover it upon discovering the forgery, where it appears that the collecting bank has merely credited the amount to the account of the principal. Bank of Commerce v. Union Bank, 3 N. Y. 236.

But where money is credited to a principal, and more than enough remitted him to exhaust the credit before notice of the payer's right to recall it, the agent will be exonerated. National Park Bank v. Seaboard Bank, 44 Hun, 49, affirmed in 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632.

Crediting the principal's account, and thereby settling a precedent debt due the agent, after the latter is aware of the issuance of a writ of error to reverse the judgment upon which the payment was made, is not such a payment to his principal as will shield him from liability to refund the money upon a reversal of the judgment. Langley v. Warner, 1 Sandf. 209.

But where an attorney applies a payment upon an execution in satisfaction of his fees due from his principal, it is equivalent to a payment over to the latter, so as to protect the attorney from an action by the payer upon subsequent reversal of the judgment. McDonald v. Napier, 14 Ga. 89.

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Dec. 61; Wallace v. Bentley, 77 Cal. 19, 11 Am. St. Rep. 231, 18 Pac. 788. Stripping the contract here of those things which defendants had no authority to bind the owners of the land to perform, it would not be difficult to find remaining an agreement to return to the plaintiff the earnest money. But, independent of anything in the contract itself that would bind the defendants, the law under such circumstances implies an agreement on their part to restore the money because the contract which they assumed to have authority to make has failed, and they have the money of the plaintiff in their hands.

In Buller v. Harrison, 2 Cowp. 565, Lord Mansfield says: "In general, the principle of law is clear that, if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand, it is just that, as the agent ought not to lose, he should not be a gainer by the mistake; and therefore, if, after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake, the agent cannot afterwards pay it over to his principle, without making himself liable to the real owner for the amount." In that case it was held that an action for money had and received, to the use of the person so paying it, will lie against the agent. In the case at bar the bill of particulars upon which the case was tried was for money had and received. In Wallace v. Bentley, supra, it was held that the agent is not liable as principal on a contract signed by him without authority, unless the contract contain apt words to charge him personally; but it is further said that he would be liable, in an action to recover money paid under the contract, by reason of his wrong in assuming to act without authority. In Jefts v. York, 10

So, where an agent has been allowed to retain the amount received by him upon a settlement between him and his principal, it is equivalent to a payment to the latter. Holland v. Russell, 1 Best & S. 424.

Where the agent of a partnership credits a receipt of the money to the latter's account, and it is afterwards transferred from the principal's account to that of the agent, to apply on the agent's private account against one of the copartners, it is equivalent to an actual payment of money, so as to exonerate the agent from liability to the payer. LaFarge v. Kneeland, 7 Cow. 456.

Where an account between principal and agent has been settled and closed, the agent is discharged; and the retainer by the latter of a portion of the money received, with the assent of his principal, in payment of the agent's demand against the principal, operates as a payment, and exonerates the agent from liability to the payer. Mowatt v. McLelan, 1 Wend. 173.

And see also Owen v. Cronk [1895] 1 Q. B. 265, infra, under the subdivision, "Where payment is induced by fraud or wrongful act of agent."

When payment to be returned in certain event.

Money paid an agent for the benefit of a known principal, to be returned the payer upon nonperformance of certain conditions, cannot, upon the payer becoming entitled to its return, be recovered from the agent, as the question whether the payer is entitled to the money is one that does not concern the agent, but is between the payer and the principal. Bleau v. Wright, 110 Mich. 183, 68 N. W. 115; Finnegan v. Geoghegan, 111 N. Y. Supp. 656; Levine v. Field, 114 N. Y. 23 L.R.A.(N.S.)

Supp. 819; Cooper v. Tim, 16 Misc. 372, 38 N. Y. Supp. 67; Tripple v. Littlefield, 46 Wash. 156, 89 Pac. 493.

This doctrine has been applied where, upon the breach of an agreement to convey land to a payer, he becomes entitled to money deposited with an agent, which was to be returned in such event (Tripple v. Littlefield, supra); where a deposit upon a contract for the purchase of a business is to be returned to the payer if the business does not show a specified profit within a designated period (Levine v. Field, supra); where money is paid an agent as the first premium upon a life insurance policy, which is to be returned if the risk is not accepted, and the policy issued is not such as the contract calls for (Bleau v. Wright, supra).

So, where an agent receives a deposit which is to be returned if his principal does not enter into a lease with the payer, in that event the agent will not be liable therefor, where his agency and the principal were known, as, in the absence of fraud, mistake, or other wrongful act, the identity of the agent is merged in the principal, and the obligation is due the payer from the latter. Cohen v. Barry, 108 N. Y. Supp. 573.

And this is true notwithstanding the agent still has possession of the money. Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84; Finnegan v. Geoghegan; Levine v. Field; and Cooper v. Tim,—supra.

The reason given for the rule laid down in the last few cases is that one who deals with an agent of a known principal acquires no right against him, the payer's remedy being against the principal. Bleau v. Wright; Cooper v. Tim; and Levine v. Field,—supra.

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Cush. 392, it was held that, where the money had not been paid over to the principal, the measure of damages was the amount retained by the agent; and that it could be recovered in an action for money had and received. To the same effect is Cox v. Prentice, 3 Maule & S. 344, holding that, where the account remains open, and no change of circumstances has taken place, the agent will not be relieved. Of course, where the account between the principal and agent has been settled and closed, the agent is discharged. Mowatt v. McLelan, 1 Wend. 174. In Fowler v. Quall, 36 Kan. 507, 13 Pac. 784, the agent was held not liable on a contract similar to the one in the case at bar. But in that case, after the contract was signed, the parties came together and executed a new contract, and the agent paid the money to the principal in the presence of, and by the consent of, the purchaser. The principal, of course, was bound, and the agent was released from all liability.

But it is well settled, also, that there is no presumption that the agent has paid the money over to the principal, and the burden is upon him to show that he has done so, as well as to show that he had authority to act for the principal. Shipherd v. Underwood, 55 Ill. 475; Frankland v. Johnson, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480; Gillaspie v. Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715. There can be no question that, when an assumed agent receives a consideration of a contract, an implied promise to pay it back arises if there is a failure of the contract, and an action may be maintained against him for money had and received so long as the money remains in his hands. In addition to the authorities cited, see LaFarge v. Kneeland, 7 Cow. 456; Russell v. Koonce, 104 N. C. 237, 10 S. E. 256; Shipherd v. Underwood, supra; Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; 1 Am. & Eng. Enc. Law, p. 1129.

The judgment will be reversed, and a new trial ordered.

All the Justices concur.

—personal agreement of agent to return payment.

But where an agent agrees personally to refund money paid him under certain conditions upon the happening thereof, he will be liable to the payer notwithstanding he has paid the money to his principal. White v. Taylor, 113 Mich. 543, 71 N. W. 871; Goodridge v. Wood, 133 Ill. App. 483; Mead v. Altgeld, 136 Ill. 298, 26 N. E. 388, affirming 33 Ill. App. 373.

So, it was held in Goodridge v. Wood, supra, that a broker who receives a payment to apply upon a purchase, and personally agrees to return it to the purchaser in case the contract is not approved by his principal, thereby binds himself to return the money; and, upon the failure of the principal to accept the offer, the payer may recover it from the agent.

And this doctrine was applied in Mead v. Altgeld, supra, where a real estate broker gives a receipt providing that a payment shall be refunded by him in case the title to land sold proves defective.

But where an agent accepts an account against a third person as a part payment upon the purchase of his principal's real estate, it being stipulated that all money shall be returned to the payer if the sale is not ratified by the principal within ten days, upon the rejection of the contract by the latter, the agent is not liable to the payer for the cash amount due upon such account, but is only bound to return the account itself. Mitchell v. Chick, 136 Mo. App. 559, 118 S. W. 517.

—when agent is mere stakeholder.

If money is received by an agent merely as a stakeholder, to be returned in certain events to the payer, upon the happening thereof it may be recovered from the agent. Ellis v. Goulton [1893] 1 Q. B. 350; Furtado v. Lumley, 6 Times L. R. 168; Gray v. Gutteridge, 3 Car. & P. 40; Burrough v. Skinner, 5 Burr. 2639; White v. Taylor, supra; Martin v. Allen, 125 Mo. App. 636, 103 S. W. 138; Read v. Riddle, 48 N. J. L. 359, 7 Atl. 487.

This doctrine has been applied where an agent or auctioneer, upon selling his principal's property, receives a deposit from the purchaser, to be returned in the event that a good title cannot be given. Furtado v. Lumley and Read v. Riddle, supra.

And this doctrine is not affected by the fact that the agent has already paid the money to his principal. Furtado v. Lumley; Gray v. Gutteridge; Martin v. Allen; and Read v. Riddle,—supra.

Where an auctioneer signs a contract for the sale of his principal's property, in his own name, and receives a deposit in the presence of his principal, and afterward pays it over to him, upon the sale failing by a defect in the title, the purchaser may recover the deposit from the auctioneer. Lord Tenterden said that it was common practice to make such a payment to an auctioneer, trusting to his solvency. Gray v. Gutteridge, supra.

A deposit paid an auctioneer upon the purchase of realty may, upon the purchaser refusing to complete the sale because of a defective title, be recovered from the auctioneer who has possession of the deposit, as he is a mere stakeholder. Burrough v. Skinner, supra.

An agent who holds money as a mere stakeholder, to be paid over upon the happening of a certain contingency, or performance of certain conditions will be

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liable to the payer if he pays it to his principal before the happening of such contingency or the performance of the conditions. Martin v. Allen and Read v. Riddle, supra.

When payment is induced by fraud or wrongful act of agent.

Where money is paid to one whose agency is known, he will be personally liable therefor, where he is guilty of fraud or *mala fides*, notwithstanding he may have paid the money to his principal. Oates v. Hudson, 20 L. J. Exch. N. S. 284; Sadler v. Evans, 4 Burr. 1984; Gulf City Constr. Co. v. Louisville & N. R. Co. 121 Ala. 621, 25 So. 579; Shipherd v. Underwood, 55 Ill. 475; Moore v. Shields, 121 Ind. 267, 23 N. E. 89; Hardy v. American Exp. Co. 182 Mass. 328, 59 L.R.A. 731, 65 N. E. 375; Fowler v. Shearer, 7 Mass. 14; Huffman v. Newman, 55 Neb. 713, 76 N. W. 409; Mathews v. O'Shea, 45 Neb. 299, 63 N. W. 820; Cohen v. Barry, 108 N. Y. Supp. 573; Cooper v. Tim, 16 Misc. 372, 38 N. Y. Supp. 67; Seidel v. Peckworth, 10 Serg. & R. 442; Metcalf v. Denson, 4 Baxt. 565; Wright v. Eaton, 7 Wis. 595.

This doctrine will be applied where an agent refuses to deliver to a person certain papers in his possession until a sum alleged to be due his principal is paid, the payer complying with the demand for the purpose of obtaining the papers, and stating that the agent should "hear of this again." Oates v. Hudson, supra.

Likewise, it was applied where a carrier transports goods to the consignor's risk, and collects C. O. D. charges before delivery, without disclosing knowledge of facts indicating that the goods have been damaged in transit, and they are subsequently rejected by the consignee. Hardy v. American Exp. Co. supra.

And where an attorney who is also an auctioneer receives a deposit upon the sale of his principal's property, he is liable to an action therefor where the transaction fails by reason of a defect in the title of which the agent had notice before he paid the money to his principal, and misled the purchaser by stating that he had not paid it over to his principal. Edwards v. Hodding, 5 Taunt. 815.

And a broker who knowingly sells and obtains money for worthless paper will be liable to the payer for the money so received, notwithstanding he may have paid it over to his principal, as money received under such circumstances that, in equity and good conscience, the agent ought not to retain or otherwise dispose of, except to return it to the one from whom it was received, may be recovered from him in an action for money had and received. Moore v. Shields, supra.

So, an attorney who receives a partial payment from a debtor upon a promissory note he has for collection, and pays it over to the creditor without indorsing it on the note, and afterwards obtains a judgment thereon for the full amount, will be liable to the debtor in an action for money had and received, for the amount of such payment. Fowler v. Shearer, supra.

And where an attorney is overpaid the amount due on a judgment in favor of his client, which is the result of the former's failure to inform the judgment debtor of a previous payment made thereon by a third person he will be liable therefor, notwithstanding the money has been transmitted to his client before discovery of the mistake, as the rule exonerating the agent from liability after payment to his principal does not apply where the money is received by reason of the agent's own wrong. Metcalf v. Denson, supra.

An agent who extorts or wrongfully obtains money from another cannot defend his liability to respond on the ground that he acted as agent, even though the money may have been paid over to his principal. Wright v. Eaton, supra; Bocchino v. Cook, 67 N. J. L. 467, 51 Atl. 487; Frye v. Lockwood, 4 Cow. 454.

Where an agent obtains money by fraud or duress, he will be liable therefor, and cannot shield himself behind his agency. McDonald v. Napier, 14 Ga. 89.

But where an agent who manages a business for a trustee receives money that, without his knowledge, has been extorted by one of his clerks, which the agent deposits in a bank to the credit of the trustee before notice of how it was obtained, it is such a payment as will exonerate the agent from personal liability to the payer. Owen v. Cronk [1895] 1 Q. B. 265.

As to the general effect of a payment to a principal by an agent before notice of the payer's right to recall, see also the case cited supra under the subdivision entitled, "Where agent has paid money to his principal."

When agency is undisclosed.

Where money is paid by mistake, or under circumstances under which the payer may recall it, to one who does not disclose his agency, he will be liable therefor notwithstanding the money has been paid to the principal. Newall v. Tomlinson, L. R. 6 C. P. 405; Daniel v. Mitchell, 1 Story, 172, Fed. Cas. No. 3,562; Smith v. Kelly, 43 Mich. 390, 5 N. W. 437; Canal Bank v. Bank of Albany, 1 Hill, 287; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615.

This doctrine was applied where, by mistake of a broker's clerk, there was an overpayment of £500 upon a purchase from a broker who was not known to be acting for an undisclosed principal, and which was not discovered until several months later, as the case did not fall within the rule relieving an agent from responsibility where he has bona fide paid over money received by him on account of his disclosed principal. Newall v. Tomlinson, supra.

So, this doctrine was applied in Smith v. Kelly, supra, where money was paid with-

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out consideration to one without notice of his agency.

Likewise it has been applied where an express company, without disclosing the fact of its agency, receives payment of a draft with a forged indorsement, and pays the proceeds to its principal, as it is liable to the payer as an actual principal in the transaction, irrespective of the fact that its general business is to act as agent for others; it being necessary, if it desired to protect itself as agent, to give notice thereof. Holt v. Ross, supra.

And it was applied also in Canal Bank v. Bank of Albany, supra, where one, without disclosing his agency, presented and collected a forged draft, notwithstanding notice of the forgery was not given until two months after the money had been transmitted to the principal.

An agent who does not disclose his agency or principal, and sells a bill of exchange without indorsing it, will be personally liable for the money received thereon if the bill subsequently proves to be a forgery, unless, before demand is made on him for reimbursement, he has passed the money to his principal, or shown other special circumstances proving that it would be inequitable, as between the parties, to hold him responsible for it. Morrison v. Currie, 4 Duer, 79.

MASSACHUSETTS SUPREME JUDICIAL COURT.

E. I. DUDLEY
v.
NORTHAMPTON STREET RAILWAY COMPANY.

(202 Mass. 443, 89 N. E. 25.)

Automobile — license — nonresidence — time.

1. In computing the time during which a nonresident is permitted to operate his automobile without a license, on the highways of the state, after entering it, the days on which he runs the machine across the boundary into other states, returning the same day, and those in which the machine is in the repair shop, cannot be excluded.

Same — outlaw — injury.

2. One operating an automobile on a public highway in violation of a statute forbidding the operation thereon of unregistered machines has no right of action against one who injures it merely by want of ordinary care.

(June 21, 1909.)

EXCEPTIONS by plaintiff to the direction by the Superior Court for Hampshire County of a verdict in defendant's favor in an action brought to recover damages for personal injuries and for damages to plaintiff's automobile alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinioin.

Messrs. **William G. Bassett** and **John B. O'Donnell**, for plaintiff:

If plaintiff was not within the statute, that fact is not a bar to his right of action, as the statute is a regulation like the law of the road, a failure to observe which does not defeat a right of action of a person who is in the exercise of due care.

Clinton v. Revere, 195 Mass. 151, 80 N. E. 813; Baker v. Fall River, 187 Mass. 53, 72 N. E. 336; Black v. New York, N. H. & H. R. Co. 193 Mass. 448, 7 L.R.A.(N.S.) 148, 79 N. E. 797, 9 A. & E. Ann. Cas. 485.

Messrs. **John C. Hammond** and **Thomas J. Hammond**, for defendant:

The unlawful act of the plaintiff in operating his car in this state after the expiration of the statutory days of grace directly contributed to the injury, and is a conclusive bar to his recovery.

Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Doherty v. Ayer, 197 Mass. 241, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677; Finnegan v. Winslow Skate Mfg. Co. 189 Mass. 580, 76 N. E. 192;

Case Note. — ***Effect of operating automobile on highway without a license.***

It was held in Doherty v. Ayer, 197 Mass. 241, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677, which was an action by one operating an automobile, to recover for injuries sustained by defects in a highway, that the plaintiff made a prima facie case without showing that he was licensed to operate an automobile upon the public highways, or that his automobile was registered according to the same statute that was before the court in DUDLEY v. NORTHAMPTON STREET R. Co. Although the court said that if it appeared affirmatively that the plaintiff was traveling without a proper registration of the vehicle or without a license to operate it, it might well be held that he was not a traveler on the highway in a legal sense, and that the town owed him no duty under a statute requiring it to keep its highways in repair, and that a violation of the license statute so affected the direct relation of the violator to the town, in regard to the way and the only use that he was making of it, as to leave him without remedy for an injury caused by a defect therein.

For cases upon the power to require registration and license of automobiles, as well as other regulations as to the use thereof, see the subject note to Christy v. Elliott, 1 L.R.A.(N.S.) 215.

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Planz v. Boston & A. R. Co. 157 Mass. 377, 17 L.R.A. 835, 32 N. E. 356; Leonard v. Boston & A. R. Co. 170 Mass. 318, 49 N. E. 621; Massell v. Boston Elev. R. Co. 191 Mass. 491, 78 N. E. 108; Bjornquist v. Boston & A. R. Co. 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; Fitzmaurice v. New York, N. H. & H. R. Co. 192 Mass. 159, 6 L.R.A.(N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 A. & E. Ann. Cas. 586; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Bosworth v. Swansey, 10 Met. 363, 43 Am. Dec. 441; Jones v. Andover, 10 Allen, 18; Stanton v. Metropolitan R. Co. 14 Allen, 485.

Sheldon, J., delivered the opinion of the court:

It was provided by the statutes in force at the time of this accident that no person should operate an automobile or motorcycle upon any public highway or private way in this commonwealth laid out under authority of statute, unless he had been licensed to do so and unless his automobile or motorcycle had been registered as prescribed. Stat. 1903, chap. 473, p. 507; Stat. 1905, chap. 311, p. 227. But it was also provided by § 2 of the act last cited that "any automobile or motorcycle owned by a nonresident of this state who has complied with the laws relative to motor vehicles and the operation thereof, of the state in which he resides, may be operated by such owner on the roads and highways of this state for a period not exceeding fifteen days, without the license," etc., required in other cases. The first question presented in this case is whether the plaintiff in operating his machine in this commonwealth on the day of the accident was acting in violation of law.

He was a resident of Connecticut. He had complied with all the laws of that state, and had a right to operate his machine on the highways of this commonwealth for a period not exceeding fifteen days. He came into this commonwealth in his automobile on Wednesday, September 13th, and remained here until the day of the accident, September 29th, except that on September 14th he drove to West Suffield, Connecticut, returning to Massachusetts the same evening, and that he went to Brattleboro, Vermont, on one day to attend a fair, staying there that day, but not overnight. Each of these absences was merely a temporary visit to the other state, made with no intention of a permanent stay, and followed by a speedy return; and on each of these days he did actually operate his machine in this commonwealth. After his return from Vermont and before the accident, his machine needed repairs, and was kept in a repair garage a day and a half for that purpose.

It is not necessary to determine whether the statute before us should be interpreted as giving to nonresident owners of motor cars, who have complied with the laws of their own state, merely one period of fifteen days after once coming into the commonwealth, before being forbidden to operate their machines on the roads of this commonwealth without a license under its authority and allowing only one total period of grace during the whole of the license year; or whether it should be construed more liberally by allowing nonresident owners to operate their cars without a license for a period of not more than fifteen days upon any and every occasion when they shall come into this commonwealth. In either event, this plaintiff had exceeded his privilege. He made one visit here; and the running of his fifteen days was not interrupted by his temporary calls into other states. Nor can the period be extended by not counting the days on which his machine was laid up for repairs, or on which, for any other reason, he did not actually operate it. He had driven it into this commonwealth; within the meaning of the statute he was operating it during the whole of his stay. By no process of computation can it be claimed that his stay had lasted for less than sixteen days. It follows that he was acting unlawfully, in violation of the statutes referred to, at the time of the collision between his machine and the defendant's trolley car; and it must be determined whether his violation of law is necessarily fatal to his right of action.

The general rule was stated in Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555, that the plaintiff's unlawful act will prevent his recovery if it directly contributed to his injury. But there is a distinction between an unlawful act which is, at least, a contributing cause of the accident and one which is merely an attendant circumstance or a condition, though perhaps a necessary condition, of that accident. McCarthy v. Morse, 197 Mass. 332, 83 N. E. 1109; Black v. New York, N. H. & H. R. Co. 193 Mass. 448, 452, 7 L.R.A.(N.S.) 148, 79 N. E. 797, 9 A. & E. Ann. Cas. 485, and cases there cited; Biggio v. Boston, 179 Mass. 356, 60 N. E. 938. And if we had before us simply the case of a plaintiff who was driving his vehicle on a public way in a manner forbidden by law, or without appliances required by law, but who, while himself using all due care, had been injured by an accident due solely to the negligence of a third person, his own violation of law not being a contributory cause of the accident, but merely one of the

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conditions existing at the time, it could not be said that such a plaintiff was barred of recovery by the mere fact of his violation of the law. But that is not the case which is now presented. We are dealing here with a peculiar kind of vehicle which has only recently come into use, which requires unusual care in its management, and the presence of which upon the highways has been found to involve more than ordinary risks to other travelers. As was said by the chief justice, speaking for the full court in Com. v. Kingsbury, 199 Mass. 542, 544, 127 Am. St. Rep. 513, 85 N. E. 848: "Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public, great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different states, with the approval of the courts. Com. v. Boyd, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 A. & E. Ann. Cas. 487; People v. Schneider, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 A. & E. Ann. Cas. 790; People v. MacWilliams, 91 App. Div. 176, 86 N. Y. Supp. 357."

Accordingly, the legislature has dealt with this subject. The rights of these parties are governed by Stat. 1903, chap. 473, p. 507, as amended by Stat. 1905, chap. 311, p. 227, which was then in force, and to which we have already referred. But we must now look more closely at the provisions of this statute. We find that, as expressed in the title, it provides comprehensively for "the registration of automobiles and motorcycles and for licensing operators thereof." Section 1 requires that "all automobiles . . . shall be registered," and provides with much detail for the registration by the highway commissioners both of the machines, with identifying numbers or marks, and of the names of the owners. Section 2 allows a general registration to be made by manufacturers of such machines and by dealers therein. Section 4 provides for the licensing of operators or drivers; and by § 5 all unlicensed persons are forbidden to operate such machines. Sections 7, 8, 10, and 11, and Stat. 1905, chap. 366, p. 289, contain limitations upon the speed allowed, and requirements of brakes and other appliances, manifestly intended as precautions to be observed for the safety of other persons upon the highways. Section 9 fixes penalties for any violation of the act. Thus far the provisions of the act in question substantially resemble those of the Lord's Day act formerly in force, which made traveling on that day illegal simply by imposing a penalty upon anyone who did so. But § 3 of the act before us (Stat. 1903, chap. 473, p. 507) goes yet further, and expressly ordains that, "except as otherwise provided herein, no automobile or motorcycle shall . . . be operated upon any public highway . . . unless registered as above provided." This provision, in addition to the penalties fixed for any operation of unregistered machines, forbids their being operated upon the highway at all. We cannot avoid the conclusion that it was intended to safeguard persons who were lawfully using the highways, from the serious risks of injury by machines of this character which were operated in defiance of the law, and the owners of which furnished no means by which they could be identified, and compelled to make proper compensation for the injuries which, by their violation of law or by their mere negligence, they might cause to other travelers. The legislature, in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them, as to persons lawfully using the highways, no other right than that of being exempt from reckless, wanton, or wilful injury. They were to be no more travelers than is a runaway horse. Richards v. Enfield, 13 Gray, 344; Higgins v. Boston, 148 Mass. 484, 20 N. E. 105. The plaintiff as a mere trespasser upon the highway was there not only against the right of the owner of the soil and so liable to an action by him, but also against the rights of all other persons who were lawfully using the highway. He was violating a law made for their protection against him; accordingly, he was a trespasser as to them. It follows that the defendant, which was lawfully using the highway with its cars, owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property; that is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or recklessness. Sullivan v. Boston Elev. R. Co. 199 Mass. 73, 76, 21 L.R.A.(N.S.) 36, 84 N. E. 844; Fitzmaurice v. New York, N. H. & H. R. Co. 192 Mass. 159, 162, 6 L.R.A.(N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 A. &

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E. Ann. Cas. 586; Massell v. Boston Elev. R. Co. 191 Mass. 491, 493, 78 N. E. 108.

It is difficult to see how § 3 of this act can be given any effect if it is not construed as we have stated. Sections 1 and 9, requiring registration and fixing a penalty for any violation of the act, make of themselves the operation of an unregistered automobile unlawful, as in the case of the Lord's Day act already referred to, and as in the failure to use bells upon a sleigh, under Rev. Laws, chap. 54, § 3. But the purpose of the statute—to afford protection and adequate means of redress to all persons upon the ways—would not then have been fully accomplished. The additional prohibition was made, we must suppose, for the purpose of regulating the rights of travelers among themselves, whether they should be walking, driving vehicles drawn by horses, or operating automobiles. It is a reasonable assumption that the legislature intended to put these forbidden and dangerous machines outside the pale of travelers, not merely for the purpose of the criminal law, but as regards all other persons rightfully upon the streets. The addition of the prohibition was well adapted for this purpose; if not so construed, it was merely a useless iteration of the legal effect of the other provisions of the same act. And our view is confirmed by the fact that the prohibition is not extended to automobiles which are merely traveling without the lights or other appliances required by §§ 10 and 11 of the act. The owner or operator may be liable to a penalty in that case; but the operation of the machine itself was not expressly forbidden.

The real question here is doubtless whether the legislature has created a duty to other travelers upon the highways, or merely a public duty to be enforced in the ordinary administration of the criminal law, while civil rights and liabilities are left to be governed by the general rules which are applicable in such cases, between parties one of whom has been guilty of a violation of law. Monroe v. Hartford Street R. Co. 76 Conn. 201, 206, 56 Atl. 498; Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 995; Cook v. Johnston, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; Hayes v. Michigan C. R. Co. 111 U. S. 228, 239, 28 L. ed. 410, 414, 4 Sup. Ct. Rep. 369; Atkinson v. Newcastle & G. Waterworks Co. L. R. 2 Exch. Div. 441. In our opinion the former is the case. Banks v. Highland Street R. Co. 136 Mass. 485; Newcomb v. Boston Protective Dept. 146 Mass. 596, 600, 4 Am. St. Rep. 354 et seq., 16 N. E. 555.

As we consider that this case is governed by the peculiar provisions of Stat. 1903, chap. 473, p. 507, as amended by Stat. 1905, chap. 311, p. 227, we do not think it necessary to examine the decisions in Marble v. Ross, 124 Mass. 44; O'Brien v. Hudner, 182 Mass. 381, 65 N. E. 788; Slattery v. Lawrence Ice Co. 190 Mass. 79, 76 N. E. 459; Jaehnig v. J. G. & B. S. Ferguson Co. 197 Mass. 364, 83 N. E. 868, and similar cases.

Of course the defendant would have had no right to run its car into the plaintiff's machine wantonly or recklessly; and that is the point of such cases as Welch v. Wesson, 6 Gray, 505, and McKeon v. New York, N. H. & H. R. Co. 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329. But there was no evidence in the case at bar to warrant a finding for the plaintiff upon this ground.

Accordingly, the verdict for the defendant was rightly ordered; and we need not consider the somewhat doubtful question whether upon the evidence it could have been found that the plaintiff's conduct at the time of the collision was in other respects consistent with the exercise of due care on his part.

Exceptions overruled.

MICHIGAN SUPREME COURT.

SOUTH HAVEN & EASTERN RAILWAY COMPANY et al., Appts.,
v.
WILLIAM CULVER et al.

(— Mich. —, 122 N. W. 95.)

Pleading — demurrer — collateral questions.

1. Collateral questions as to proceedings on appeal and on motions for new trial cannot be raised by demurrer to a bill to set aside a judgment on the ground that it was procured by perjury, which does not set out the facts on which such questions are based.

Injunction — perjured judgment — enforcement.

2. That a judgment was confessedly procured by perjury gives a court of equity no jurisdiction to enjoin its enforcement.

(July 6, 1909.)

Case Note. — Perjury as ground for relief against judgment.

This subject was treated in an exhaustive note to Graves v. Graves, 10 L.R.A.(N.S.) 216. The present note is merely supplementary thereto.

The general rule is that equity will not grant relief from a judgment upon the sole ground that the judgment in question was procured by means of false testimony given upon the trial. While equity has the power to grant relief from judgments procured by fraud, such fraud must be extrinsic to the case; and a party to the suit must be

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APPEAL by complainants from a decree of the Circuit Court for Van Buren County dismissing a bill filed to enjoin the enforcement of a judgment. Affirmed.

The facts are stated in the opinion.

Mr. **Alexis C. Angell**, with Mr. **Ernest Dale Owen**, for appellants:

A court will not take judicial notice of matter of record of another court, to sustain or overrule a demurrer to a pleading.

People ex rel. Atty. Gen. v. Michigan C. R. Co. 145 Mich. 140. 108 N. W. 772; 1 Wharton, Ev. § 326; Streeter v. Streeter, 43 Ill. 155; Com. v. Hill, 11 Cush. 137; Fitzgerald v. Evans, 1 C. C. A. 307, 4 U. S. App. 154, 49 Fed. 426; Lake Merced Water Co. v. Cowles, 31 Cal. 215; Daniel v. Bellamy, 91 N. C. 78; Gibson v. Buckner, 65 Ark. 84, 44 S. W. 1034; Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243; Enix v. Miller, 54 Iowa, 551, 6 N. W. 722; Anderson v. Cecil, 86 Md. 490, 38 Atl. 1074; Banks v. Burnam, 61 Mo. 76; Grace v. Ballou, 4 S. D. 333, 56 N. W. 1075; McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303.

Chancery has jurisdiction in certain instances to enjoin the execution of a judgment procured by perjured testimony.

Cleveland Iron Min. Co. v. Husby, 72 Mich. 61, 40 N. W. 168; Gray v. Barton, 62 Mich. 186, 28 N. W. 813; Wright v. Hake, 38 Mich. 525; Marshall v. Holmes, 141 U. S. 589, 596, 600, 601, 35 L. ed. 870, 872, 874, 875, 12 Sup. Ct. Rep. 62; Graver v. Faurot, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; Graver v. Faurot, 162 U. S. 435, 40

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prepared upon the trial to meet false testimony if it be offered.

Nelson v. Meehan, 12 L.R.A.(N.S.) 374, 83 C. C. A. 597, 155 Fed. 1; Gitler v. Russian Co. 124 App. Div. 273, 108 N. Y. Supp. 793; Mengel v. Mengel (Iowa) 120 N. W. 72; Walker v. State (Ind. App.) 86 N. E. 502; Whittley v. Whittley, 60 Misc. 201, 111 N. Y. Supp. 1078; Hedrick v. Smith, 137 Iowa, 625, 115 N. W. 226; Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. Supp. 926; Decker v. Thiedt, 137 Wis. 634, 119 N. W. 878.

Thus, in Nelson v. Meehan, supra, it was held that the acts for which a court of equity will, on account of fraud, annul a judgment or decree between the same parties after the term is ended, must have relation to frauds extrinsic or collateral to the matter tried, and not to a fraud such as perjury, in the matter on which the decree was rendered. An appeal from a decree setting aside a judgment on the ground of perjury was dismissed, however, upon the ground that it did not appear that the motion to vacate the judgment was not made during the same term of court.

So, a bill for an injunction to restrain the collection of a judgment on the ground of perjury, will not be sustained, although it contains an averment that the complainant has secured an admission of the perjury from the judgment creditor, as this averment only goes to the character of the proof by which the perjury is to be established. Steel v. Culver (Mich.) 122 N. W. 95.

And in Hedrick v. Smith, supra, it was held that it was a settled doctrine of that court that even an allegation of a fact known to be false, and the establishment of that fact by testimony also known to be false, do not afford sufficient ground for setting aside a judgment on the ground of fraud.

So, in Johnson v. Anna Bldg. & L. Asso. 133 Ill. App. 213, it was held that a bill of review may lie where the false evidence complained of is charged to relate to matters affecting the court's jurisdiction; but the same rule does not apply where the false evidence was simply evidence upon the issues tried and disposed of upon the original hearing.

That a judgment was obtained by perjured testimony, without other matters of equitable cognizance, cannot avail the complainant on a motion to restrain the execution of a judgment at law, founded upon the alleged fraudulent judgment. Wilson v. Anthony, 72 N. J. Eq. 836, 66 Atl. 907.

The following cases present specific reasons, independent of the general rule, why equity will not set aside a judgment procured by perjury:

Thus, the enforcement of a judgment will not be restrained on the ground that it was secured by perjury, unless the perjury is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory. Boring v. Ott, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 865.

So, in Kretschmar v. Ruprecht, 230 Ill. 492, 82 N. E. 836, it was held that false testimony given at the trial or false assertions as to liability are not ground for setting aside a judgment, especially where the party applying for relief is not free from negligence.

Delay of five years in bringing the action alone is sufficient to deny relief from a judgment procured by perjury. Whittley v. Whittley, supra.

And where the truthfulness or falsity of testimony was within the full knowledge of the complaining party at the time of the trial, the court will not entertain an action to set the judgment aside merely on the ground of the perjury. Walker v. State, supra.

A divorce will not be vacated on the ground that it was based on perjured testimony knowingly procured by the libellant, after a marriage has been entered into on the faith of the decree, and a child born of the marriage. Zeitlin v. Zeitlin, 202 Mass. 205, post, 569, 86 N. E. 762.

Perjury committed upon the trial has been held not to be a "fraud" within the meaning of statutes giving courts of equity power to set aside judgments obtained by means of fraud.

Thus, false swearing or perjury is not a

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L. ed. 1030, 16 Sup. Ct. Rep. 799; Peagram v. King, 9 N. C. (2 Hawks) 605, 11 Am. Dec. 793; Seward v. Cease, 50 Ill. 228; McGehee v. Gold, 68 Ill. 215; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Klaes v. Klaes, 103 Iowa, 689, 72 N. W. 777; Laithe v. McDona'd, 12 Kan. 340; Munro v. Callahan, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151; Adams v. Secor, 6 Kan. 542; Laithe v. McDonald, 7 Kan. 254; Stowell v. Eldred, 26 Wis. 504.

Messrs. **Angell, Boynton, Stevens, McMillan, & Bodman** also for appellants.

Messrs. **L. A. Tabor** and **Thomas J. Cavanaugh**, for appellees:

When a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of coordinate authority is at liberty to interfere with its action.

Maclean v. Speed, 52 Mich. 257, 18 N. W. 396; Wells v. Montcalm Circuit Judge, 141 Mich. 58, 113 Am. St. Rep. 520, 104 N. W. 318; Geddis v. Wayne Circuit Judge, 151 Mich. 122, 114 N. W. 874; Shields v. Riopelle, 63 Mich. 458, 30 N. W. 90; Barnum & Iron Wire Works v. Speed, 59 Mich. 272, 26 N. W. 802, 805; Bates v. Kelley, 82 Mich. 91, 21 Am. St. Rep. 554, 45 N. W. 1125; Re Axtell, 95 Mich. 244, 247, 54 N. W. 889; Detroit v. Hosmer, 79 Mich. 384, 44 N. W. 622; Hogan v. Wayne Circuit Judge, 106 Mich. 254, 64 N. W. 37; Robinson v. Kunkleman, 117 Mich. 193, 75 N. W. 451; Renaud v. State Court of Mediation & Arbitration, 124 Mich. 648, 51 L.R.A. 458, 83 Am. St. Rep. 346, 83 N. W. 620; People ex rel. Hudson v. Detroit Super. Judge, 42 Mich. 239, 3 N. W. 850, 913; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285; Detroit Tug & Wrecking Co. v. Gartner, 75 Mich. 360, 42 N. W. 968; Smith v. M'Iver, 9 Wheat. 532, 6 L. ed. 152; Riggs v. Johnson County, 6 Wall. 166, 18 L. ed. 768; Central Nat. Bank v. Stevens, 169 U. S. 465, 42 L. ed. 819, 18 Sup. Ct. Rep. 403; Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469; Miller v. Morse, 23 Mich. 365; Hendrickson v. Hinckley, 17 How. 443, 15 L. ed. 123; Morse v. Elms, 131 Mass. 151; Arnold v. Arnold, 17 Pick. 9; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Eastman v. Symonds, 108 Mass. 567; Homer v. Fish, 1 Pick. 435, 11 Am. Dec. 218; Smith v. Lowry, 1 Johns. Ch. 322; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93.

A final judgment cannot be annulled merely because it can be shown to have been based upon perjured testimony.

United States v. Throckmorton, 98 U. S. 61, 65–69, 25 L. ed. 93, 95, 96; Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Friese v. Hummel, 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458; Little Rock & Ft S. R. Co. v. Wells, 61 Ark. 354, 30 L.R.A. 560, 54 Am. St. Rep. 216, 33 S. W. 208; Camp v. Ward, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747; Hilton v. Guyot, 159 U.

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fraud justifying the setting aside of a judgment obtained thereby, within the meaning of a statute providing for the setting aside of judgments for fraud practised in obtaining the same. Richards v. Moran, 137 Iowa, 220, 114 N. W. 1034.

And perjury on the part of plaintiff is not within the provisions of a statute allowing the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. Nelson v. Meehan, supra.

Under § 4277, Rev. Laws 1905, providing for an action to set aside a judgment obtained by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action cannot be maintained upon the bare allegation that, on an issue of fact so squarely made that each party knew what the other would attempt to prove, and where neither had a right, or was under any necessity, to depend on the other to prove the fact to be as he himself claimed it, there was false or perjured testimony by the successful party or his witnesses. Hayward v. Larrabee, 106 Minn. 210, 118 N. W. 795. To the same general effect was the decision in Bisseberg v. Ree, 99 Minn. 481, 109 N. W. 1115.

In some cases, where it appears that the perjury was not discovered in time, so that the complaining party could avail himself of the knowledge upon the original trial, a bill to set aside the judgment has been entertained.

Thus, a complaint was held good on demurrer in Sargent Co. v. Baublis, 127 Ill. App. 631, where it was clear, from the averments of the bill, that the appellee perpetrated a fraud upon appellant by means of his own perjured testimony, and that the fraud was practised in the very matter of obtaining the judgment, so that it must be regarded as perpetrated upon the court as well as upon the appellant, and where it further appeared that the fraud shown could not have been litigated in the action in which the judgment was obtained, nor was a matter of which appellant could avail himself in the court giving judgment.

So, equity will enjoin the enforcement of a judgment secured by perjury where the judgment debtor used diligence, but failed to discover the perjury in time to be available at the trial, or to secure the relief provided by statute in such cases. Boring v. Ott, supra.

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S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; Graves v. Graves, 132 Iowa, 199, 10 L.R.A. (N.S.) 216, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104; Guthrie v. Doud, 33 Ill. App. 68; Demerit v. Lyford, 27 N. H. 541; Kountz's Appeal, 2 Walk. (Pa.) 458; Donovan v. Miller, 12 Idaho, 600, 9 L.R.A.(N.S.) 524, 88 Pac. 82, 10 A. & E. Ann. Cas. 444; Neun v. Blackstone Bldg. & L. Asso. 149 Mo. 74, 50 S. W. 436; Riley v. Murray, 8 Ind. 354; Bleakley v. Barclay, 75 Kan. 462, 10 L.R.A. (N.S.) 230, 89 Pac. 906; Ames v. Snider, 55 Ill. 498; Ross v. Wood, 8 Hun, 185; McDougall v. Walling, 21 Wash. 478, 75 Am. St. Rep. 849, 58 Pac. 669; Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077; United States v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121; United States v. White, 9 Sawy. 125, 17 Fed. 561; Cotzhausen v. Kerting, 29 Fed. 821; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Bailey v. Sundberg, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 583; United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 Sup Ct. Rep. 371; Bailey v. Willeford, 126 Fed. 803, affirmed in 69 C. C. A. 226, 136 Fed. 382; Andes v. Millard, 70 Fed. 515; Ritchie v. McMullen, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; United States v. Gleason, 78 Fed. 396, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; Miller v. Morse, 23 Mich. 365; Gray v. Barton, 62 Mich. 186, 28 N. W. 813; Cleveland Iron Min. Co. v. Husby, 72 Mich. 61, 40 N. W. 168; Codde v. Mahiat, 109 Mich. 186, 66 N. W. 1093; Valley City Desk Co. v. Traveler's Ins. Co. 143 Mich. 468, 106 N. W. 1125; Weisman v. Newton Beef Co. 154 Mich. 511, 118 N. W. 2.

Montgomery, J., delivered the opinion of the court:

This is a bill filed on the equity side of the court to set aside and restrain the collection of a judgment obtained by the defendant William Culver against the plaintiff railroad company for personal injuries, amounting to the sum of $19,200. The bill alleges that such judgment was obtained in the circuit court for the county of Van Buren; that an appeal was taken to this court from such judgment, where the same was affirmed; that the complainant the Fidelity & Deposit Company of Maryland became surety on the bonds given on such appeal; that subsequently, upon a sale of the complainant railroad company to another railroad system, the complainant Steele entered into an obligation to pay whatever sum might eventually be recovered against the company in said action by said Culver. The bill further alleges certain proceedings taken in the Federal court to restrain the collection of this judgment, which, however, resulted in a dismissal of the case on the ground of want of jurisdiction in the Federal court. The bill alleges that, on the trial of the case of Culver against the railroad company, said Culver and some of his witnesses knowingly and wilfully testified falsely upon the material and determining question in the case, and that he and his attorney, Tabor, suborned said witnesses to swear falsely; that the officers of the railroad company and those in charge of such litigation knew in practical effect that such testimony was false, but that, with all due diligence, they were unable to make proof of such fact, as the same was kept secret and was clandestinely done; that after the rendition of said judgment and after the appeal thereof, and preceding the determination of such appeal, in an effort to make a settlement of the case without the intervention of his lawyers, the said Culver made a full and complete statement and confession to the complainant Steele that he, the said Culver, had testified falsely in such cause on a material and controlling point therein, and that he and his attorney, Tabor, had suborned witnesses to swear falsely in corroboration of his testimony. The prayer of the bill is that the collection of the judgment be forever restrained and enjoined, and for such further relief as equity may require. To this bill of complaint a demurrer was filed, and, upon hearing by the court, was duly sustained. The complainant appeals the case here.

Attention is called in the brief of defendants' counsel to proceedings had upon motions for new trial and to proceedings in this court, which would have an important bearing upon the merits of the case if properly within the issue. But, in so far as the demurrer attempts to raise these collateral questions of fact, we think it is not good pleading. Both counsel, however, seem to be agreed that the question presented is whether the bill makes a case for equitable relief, and that question we proceed to consider.

It is contended by complainant's counsel that the question in the precise form here presented has never been determined by this court. It is true that no case presenting precisely the facts averred in this bill has been called to our attention, but we think that in principle the question is *stare decisis*. The question arose in Gray v. Barton, 62 Mich. 186, 28 N. W. 813, whether, after a judgment at law had been obtained, a court of equity would interfere to restrain the collection of the judgment and to award a new trial, where the bill averred that the defendant in the chancery case (plaintiff in the law case) had committed perjury upon the trial, and that the complainant was

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not, at the time of the trial of the suit at law, in possession of the evidence with which to prove the falsity of the defendant's testimony, but had since been able to procure testimony by which he could establish the real truth. In negativing the right to maintain the bill, it was said: "The weight of authority is decidedly against the granting of a new trial in a court of equity to impeach the testimony of witnesses, or because a party has committed perjury, or even subborned a witness to commit perjury." It was added: "It might be that a judgment at law might be so manifestly against conscience that a new trial would be granted in equity, as in a case where perjury was established by some instrument or document in writing, or where a witness for the prevailing party has been, subsequent to the trial, convicted of false swearing in the case." The case of Miller v. Morse, 23 Mich. 368, was approved, in which case a new trial was asked in a court of equity to relieve against a judgment at law alleged to have been obtained by conspiracy and false swearing of the plaintiff. In disposing of that case, the court said, speaking through Mr. Justice Cooley: "We do not see why, if this bill should be sustained, the defeated party might not maintain a similar one in nearly every case which the courts of law dispose of." The question again was presented to this court in Codde v. Mahiat, 109 Mich. 186, 66 N. W. 1093. In that case it was averred that the verdict was obtained by perjury on the part of the defendant. Complainant averred in his bill that he had now discovered evidence to the effect that the defendant stated to other parties that she was not engaged to complainant, had no love or affection for him, and would not marry him. Again, the claim was made that these were made controlling questions in the case. But in a very brief opinion by Mr. Justice Grant it was held that the case was ruled by Gray v. Barton. It is undoubted that cases may be found which are not in accord with the views expressed in these two cases, and in which exceptions are introduced which might justify the maintenance of the bill in the present case. But we think the rule is best stated in United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93. In an able opinion by Mr. Justice Miller the rule is stated to be that if, in the trial of a suit at law, a mistake has been made in the law, there is a remedy by writ of error. "If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated. But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. . . . In all these cases and many others which have been examined, relief has been granted on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." In our view, this rule is the only one which can be applied and the sanctity of a judgment be maintained. It was further said by Mr. Justice Miller: "The mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." As was said by Chief Justice Shaw in Greene v. Greene, 2

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Gray, 361, 61 Am. Dec. 454, referred to by Mr. Justice Miller in United States v. Throckmorton: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted."

The case of Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393, is cited by complainant's counsel. As we read that case, however, it in no way militates against the decisions of Mr. Justice Shaw in Greene v. Greene. That case is reviewed at length, and the substance of the decision stated as follows: "Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question or invalidated, on the ground of fraud in its procurement, in a separate and independent libel, subsequently brought between the same parties, when it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon evidence offered in support of the allegation in the libel. To this extent there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases." It is then shown that the case under consideration is quite different, in that it appeared that the proceeding was instituted by an innocent party without notice, who was aggrieved by a judgment or decree obtained against her without her knowledge by the fraud of the other party. The following cases are in harmony with the rule laid down in this state, and to which we adhere: Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Friese v. Hummel, 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458. In Little Rock & Ft. S. R. Co. v. Wells, 54 Am. St. Rep. 233 note, it is stated, and we think it is an accurate summary of the authorities, that, while there are a few decisions which are defensible only on the theory that an allegation of perjury or subornation of perjury may be sufficient to invoke the action of the court against a judgment claimed to be due thereto, these decisions are contrary to the great weight of authority on the subject. See also Graves v. Graves, 10 L.R.A.(N.S.) 216, and accompanying note (132 Iowa, 199, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104).

It is contended that the authority of United States v. Throckmorton, supra, has been shaken by the case of Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62. Without reviewing at length this latter decision, we think the best answer to this contention is contained in the opinion of Judge Lacombe in United States v. Gleeson, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778. The precise question of whether Marshall v. Holmes had overturned the doctrine of United States v. Throckmorton was there considered, and the court held, on the contrary, that the rule laid down in the Throckmorton Case was *stare decisis*. As before intimated, the Michigan rule is established by the two cases of Gray v. Barton and Codde v. Mahiat. The only possible distinction between those cases and the present is that in this case there is an averment that the complainant has secured an admission of the perjury from the party. This, however, only goes to the character of the proof by which the perjury is to be established. The same objection to a retrial of a question foreclosed by a trial and judgment at law would arise, and the same considerations which would preclude a party from proving by evidence of other witnesses the fact of perjury would be quite as persuasive to deny the right to rest upon alleged admissions of a party. We think to ingraft such an exception on the rule would open the door to abuse, and render a judgment obtained after a full trial on the merits precarious, and impose upon the successful party the burden of unbearable expense in maintaining a right already adjudicated.

The decree of the court below, dismissing the bill of complaint, is affirmed, with costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GODDA R. ZEITLIN, Respt.,
v.
ADOLPH ZEITLIN, Appt.

(202 Mass. 205, 88 N. E. 762.)

Divorce — judgment — conclusiveness — perjury.

A divorce will not be vacated on the ground that it was based on perjured testimony knowingly procured by libellant, after a marriage has been entered into on the faith of the decree, and a child born of the marriage.

(May 21, 1909.)

APPEAL by defendant from a decree of the Superior Court for Middlesex County in complainant's favor in a suit to vacate a decree of divorce. Reversed.

The facts are stated in the opinion.

Note. — As to perjury as ground for relief against judgment, see case note to South Haven & E. R. Co. v. Culver, ante, 564.

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Mr. **F. Rockwood Hall** for appellant.

Messrs. **Robert Homans** and **Frank J. Sulloway**, for appellee:

A decree of divorce will be set aside on a petition in the same proceeding, seasonably brought, if obtained by fraud.

Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Helmes v. Helmes, 24 Misc. 125, 52 N. Y. Supp. 734; Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223; Whitcomb v. Whitcomb, 46 Iowa, 437.

Reasons of public policy or a regard to the consequences which might ensue to innocent parties from the exercise of a power to invalidate a decree of divorce after it has become *res judicata* do not constitute sufficient reasons for a denial of the existence of the power.

Edson v. Edson, 108 Mass. 598, 11 Am. Rep. 393.

Knowlton, Ch. J., delivered the opinion of the court:

This is a petition to vacate a decree of divorce obtained by the respondent against the petitioner. The jurisdiction of the court that granted the divorce, both over the case and the parties, was perfect. The ground on which the petition rests is that the case for a divorce was made out at the hearing by perjured testimony, knowingly procured by the libellant. The only question presented is whether a decree of divorce so obtained should be vacated upon proof of the fraud practised upon the court.

It is in the interests of justice that, after a trial and final judgment in a case, the matters heard and adjudicated shall not be opened for a further hearing because of a supposed error in the determination of facts by the tribunal that heard the evidence. A contention that some part of the material testimony was false might be made with plausibility in a large proportion of the cases that are tried. A contention that the prevailing party knowingly gave or procured false testimony upon an issue involved might be made and strongly supported in a great many cases. It is against public policy to open cases on no other ground than this.

In Keyes v. Brackett, 187 Mass. 306, 72 N. E. 986, 3 A. & E. Ann. Cas. 81, it was assumed, with a citation of authorities, that the law does not permit an attack of this kind upon a judgment or decree entered upon the merits, after a hearing or trial between adverse parties, upon issues arising in an ordinary case in a court of justice. The fraud that was held sufficient to give relief in that case was practised upon a master, on the question whether a bond to dissolve a mechanics' lien should be approved as sufficient. Fraud which is extrinsic or collateral to the matter tried, whereby the court was induced to assume jurisdiction when in fact it had no jurisdiction, or whereby the unsuccessful party was prevented in any way from being properly heard upon a subject which entered into the merits of the matter before the court, may be a ground of vacating a judgment or decree. But in Holbrook v. Holbrook, 114 Mass. 568, Chief Justice Gray said: "A decree of divorce will not be vacated and set aside by the court after the term at which it was entered, without clear proof that the libellee was prevented, by fraud of the libellant or imposition upon the court, from being heard in the original suit upon some matter which, if then proved, would have constituted a good defense." In Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454, Chief Justice Shaw pointed out very clearly the objections to setting aside a decree for divorce upon an application in subsequent proceedings. One of the facts to which he referred, namely, a marriage upon the faith of the decree, and the birth of a child of the marriage, exists in the present case. In Edson v. Edson, 108 Mass. 591, 11 Am. Rep. 393, it was held that such a decree may be vacated when the jurisdiction of the court was founded wholly or in part upon the fraud of the successful party. The decision in Greene v. Greene, supra, that a libel to set aside a decree of divorce on the ground that it was obtained by false testimony, fraudulently procured, cannot be maintained, is reaffirmed in this later case. The fact that the application to set aside the original decree was contained in a libel in which a divorce was prayed for was treated as immaterial. The chief justice said: "We can perceive no difference between the case where a libellant inserts such an allegation and prayer in an original libel by which she seeks a divorce *a vinculo* on another ground, and a case where such allegation and prayer are made the only subject of an original libel to set aside a former decree. The object in both cases is to reverse and annul a subsisting decree." This decision is in accordance with the general doctrine in other courts. United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Smith v. Lowry, 1 Johns. Ch. 322; Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Maryland Steel Co. v. Marney, 91 Md. 360-374, 46 Atl. 1077; 2 Bishop, Marr. & Div. 1571, and cases cited.

Decree reversed.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

ALFRED A. WRIGHT
v.
ORANGE & PASSAIC VALLEY RAILWAY COMPANY, Plff. in Err.

(— N. J. —, 73 Atl. 517.)

Street railway — ejection of passenger.

Where a passenger on a street car is entitled by his contract to be carried to a certain point, and the railway company breaks the contract by turning the car back at a point short of the destination, the passenger's right of action is complete; and, if he elects to remain on the car for its return journey, he must pay the fare, and may include the amount in his damages. He is not entitled to remain on the car without payment of fare.

(July 2, 1909.)

ERROR to the Circuit Court for Essex County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's car. Reversed.

The facts are stated in the opinion.

Mr. **Leonard J. Tynan**, for plaintiff in error:

The plaintiff having been informed when the car stopped to turn back that it would not proceed, any action he might have for failure to carry had then matured, and it was his duty to get off the car.

Shelton v. Erie R. Co. 73 N. J. L. 558, 9 L.R.A.(N.S.) 727, 118 Am. St. Rep. 704, 66 Atl. 403, 9 A. & E. Ann. Cas. 883; Hoelljes v. Interurban Street R. Co. 43 Misc. 350, 87 N. Y. Supp. 133; Baggett v. Baltimore & O. R. Co. 3 App. D. C. 522; Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481; Yorton v. Milwaukee, L. S. & W. R. Co. 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482; Louisville & N. R. Co. v. Breckinridge, 99 Ky. 1, 34 S. W. 702; Petrie v. Pennsylvania R. Co. 42 N. J. L. 449; Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157; Martindale v. Kansas City, St. J. & C. B. R. Co. 60 Mo. 508.

Mr. **Chauncy H. Beasley** also for plaintiff in error.

Messrs. **Samuel Kalisch** and **Frederick M. Payne** for defendant in error.

Minturn, J., delivered the opinion of the court:

Three cases, involving the same question, arising out of an alleged trespass *vi et armis* by defendant, through its conductor, upon plaintiffs, respectively, were tried together; and the determination of the fundamental question involved in the case *sub judice*, it is stipulated between counsel, shall be dispositive of the other two cases. The material facts constituting the concrete case are not in dispute. The plaintiff and his two sons resided at Montclair, near Eagle Rock, from and to which place they went and returned each working day in the course of their business, using defendant's street railway car upon their return by transfer from Orange. On February 15, 1906, the plaintiff boarded at Orange a car upon which the sign "Eagle Rock" was displayed. The cars upon this route, owing to the condition of the tracks at that period, had not been running to Eagle Rock for some days, but stopped at a place called Valley Way, which is in the neighborhood of a mile below the former place. At Valley Way the conductor turned the trolley pole, and notified plaintiff

Headnote by MINTURN, J.

Case Note.* — *Right of passenger on street car which turns back before reaching destination.

It appears that the only other case directly in point upon this question is Mills v. Seattle, R. & S. R. Co. 50 Wash. 20, 19 L.R.A.(N.S.) 704, 96 Pac. 520, in which it was held that where a street car turned back before it had reached the passenger's contemplated destination, to which he was entitled to be carried, it was his duty to leave the car upon the conductor's request, and, upon his refusal to leave the car, he became a trespasser, subject to ejection, although the conductor had refused his demand for a transfer to another car, on which he might have completed his journey, but he could not lawfully be ejected while the car was in motion.

Mahoney v. Detroit Street R. Co. 93 Mich. 612, 18 L.R.A. 335, 32 Am. St. Rep. 528, 53 N. W. 793, and Appleby v. St. Paul City R. Co. 54 Minn. 169, 40 Am. St. Rep. 308, 55 N. W. 1117, are cases in which the passengers failed to reach their contemplated destination because the cars stopped at the company's barns, and did not go to the end of the line. In the former it was held that the passenger, having alighted from the car without asking for a transfer ticket, could lawfully be ejected from the next car which he took, going toward his destination, if he refused to pay fare thereon, and that the second conductor was not obliged to take his statement as evidence of his right to ride. In the latter, it was held that the passenger was justified in assuming that the car on which he paid his fare was to go to the end of the line, and the conductor having disappeared, so that he could not get a transfer ticket, he had a right to complete his journey on the next car going in the same direction without again paying fare.

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that the car would proceed no further. Plaintiff then said, "We have transfers to Eagle Rock," and the conductor replied, "Well, we don't go any further," and, he continues, "he came around and demanded our fare, and we would not pay any more fare; so they dragged us off the car," which at that time was on its way back towards West Orange. The alleged trespass was of a nominal character, and no claim is made that serious injury resulted to plaintiff therefrom. At the trial the plaintiff's counsel limited the issue by the statement: "We stand upon the assault and battery counts in each declaration. We rely upon so much of the facts in each of the counts as constitutes a cause of action, and that is the wrongful ejection from the car." This narrowed the issue to the determination of the question whether the ejection of plaintiff from the car was wrongful. The defendant met this claim by insisting that after request made upon plaintiff for his fare, and his refusal to pay, he became *ipso facto* a trespasser; and, upon his refusal to alight, the right inured to defendant to eject him.

It must be conceded that, if the legal status of plaintiff under the circumstances was that of a trespasser, the right of ejection might be properly exercised by defendant; and proof of that fact at common law, conjoined with the plea *molliter manus imposuit*, would afford a complete defense to the action. 1 Chitty, Pl. 500; Gates v. Lounsbury, 20 Johns. 427. The plaintiff insists that he was not a trespasser, but had a legal right to remain on the car because the company had failed to perform its contract to carry him to Eagle Rock. He does not claim that he was entitled to be carried back free to his starting point, but stands upon a right, as he claimed to the conductor, "to stay on that car until it went to Eagle Rock." The trial judge charged that the question for the jury was whether the plaintiff was warned, when he got on the car, that it would not go through to Eagle Rock. We think this was erroneous. The failure to warn him when he got on the car would, under the circumstances of this case, justify an inference that the company had contracted to carry him to Eagle Rock; but the plaintiff's remedy for breach of that contract was an action for damages, and that right of action was complete as soon as the company abandoned the trip and turned the car back. The plaintiff was not obliged to stay on the car any longer to test the readiness of the company to perform its contract. And his remedy for the breach of contract did not include a right to stay on the car indefinitely. He had his election, when the car came to the end of its actual trip, to leave and sue for damages, or to make a new contract for carriage on the return trip, and add its cost to his damages, subject, of course, to the rule which requires one to minimize his damages. He chose the latter alternative. Having done so, he became bound to pay his fare to the conductor, who had no authority to carry him free. This is the effect of our decision in Shelton v. Erie R. Co. 73 N. J. L. 558, 9 L.R.A.(N.S.) 727, 118 Am. St. Rep. 704, 66 Atl. 403, 9 A. & E. Ann. Cas. 883. There is nothing in McDonald v. Central R. Co. 72 N. J. L. 280, 2 L.R.A.(N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 405, that supports the plaintiff's contention. What we there decided was that, where the passenger's contract entitled him to be carried to Chester by the train on which he began his journey, he was not bound to get off at an intermediate station, merely because the conductor told him the train would not stop at Chester. He was entitled to make reasonable efforts to exercise his right. So, in this case; the plaintiff was entitled to stay on the car until he knew that the defendant had finally determined not to run it to Eagle Rock. As soon as the company so determined, and started the car on its return trip, his right of action was complete; but his right was a right to damages merely, not a right to occupy the car indefinitely. The right claimed by him would, in effect, deprive the company of the management of its own car, and make the plaintiff a tenant in common. The law of self-help has never been extended as far as that; and, in contemplation of law, damages are a sufficient redress for a private wrong.

The early common law is replete with recorded instances illustrative of the rule that, under such circumstances, the abuse of a legal right or privilege which accrued originally as the result of a contract or a legal obligation or a duty imposed by law, terminable at a certain period, places the transgressor in the status of a trespasser. Thus, Rolle, in his abridgment, instances the case of a lessor who enters to view for waste and stays all night; of the commoner who lawfully enters the common and cuts down trees; of a man who enters an inn and continues all night against the will of the taverner. 2 Rolle, Abr. 561, pl. 2. So, in a recent case, where a passenger remained upon a train for an unreasonable time after it reached its destination, he thereby ceased to be a passenger. Chicago, K. & W. R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923. In like manner, Brenner v. Jonesboro, L. C. & E. R. Co. 82 Ark. 128, 9 L.R.A.(N.S.) 1060, 118 Am. St. Rep. 56, 100 S. W. 893, 12 A. & E. Ann. Cas. 489; Ripley v. New Jersey R. & Transp. Co. 31 N. J. L. 388; Imhoff v. Chicago & M. R. Co. 20 Wis.

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344; 6 Cyc. Law & Proc. p. 541, and cases cited, afford instances illustrative of the principle that the legal status of the plaintiff was that of a trespasser. At the very basis of these decisions in denial of the plaintiff's right is the fundamental ethical, as well as legal, maxim, *Nemo ex proprio dolo consequitur actionem.* Ellen v. Topp, 6 Exch. 424. So from this status was evolved that privilege which found judicial recognition as early as the Year Books, and which conceded to every owner whose property is unlawfully invaded the right, after reasonable demand, to eject therefrom the tort feasor. Case of the Tithes (1507) 1 Y. B. Hen. VII. 27 Pl. 5; Entick v. Carrington, 19 How. St. Tr. 1029; Ilott v. Wilkes, 3 Barn. & Ald. 308; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. So, also, in the case at bar, the right of defendant, through its agents, to eject the plaintiff from its car, after his refusal to avail himself of the condition which, by right of contract, would have given him a legal status, cannot be successfully controverted, in the light of uniform adjudication wherever the common law is recognized as the law of the land. State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; Manning v. Louisville & N. R. Co. 95 Ala. 392, 16 L.R.A. 55, 36 Am. St. Rep. 225, 11 So. 8; Chicago, B. & Q. R. Co. v. Wilson, 23 Ill. App. 63; Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481; Sanford v. 8th Ave. R. Co. 23 N. Y. 343, 80 Am. Dec. 286.

For these reasons the judgment in this case is reversed, and a venire de novo awarded.

OKLAHOMA SUPREME COURT.

AYLESBURY MERCANTILE COMPANY, Plff. in Err.,
v.
H. C. FITCH.

(— Okla. —, 99 Pac. 1089.)

Conversion — definition.

1. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

Action — conversion — breach of contract.

2. In a case where a retail merchant becoming indebted to a wholesaler executed a note therefor, securing its payment by a chattel mortgage on his stock and a contemporaneous written agreement under which he and his creditor entered jointly into possession of the stock for the purpose of selling the same at retail to liquidate the debt, the sale of a portion of such stock at prices less than its value, or the negligent use of the unsold portion, by such creditor while so in possession, or the unauthorized exclusion of such debtor from the store except during business hours, when he returned and assisted in conducting the business under the contract, would not constitute a cause of action for conversion of such stock, but one for a breach of contract.

Same — evidence — sufficiency.

3. Where, in such a case, the creditor subsequently takes exclusive possession of and appropriates the stock of goods without action, or by replevin under the clause of the chattel mortgage granting such privilege in certain contingencies, the same being taken over the protest and against the will of the debtor, such taking would constitute a conversion of the stock for which the creditor would be liable, where at the time either the debt had been extinguished or the contingency provided for had not lawfully arisen.

Conversion — return of property — mitigation of damages.

4. Where, in such a case, the property is returned to and accepted by the debtor prior to the beginning of the action, this fact is to be considered in mitigation of any damages recoverable.

Same — measure of damages.

5. If the property be wrongfully taken and is, on the order of the court, placed in the hands of a receiver, the measure of the owner's damages for loss of goods or depreciation in value is the difference between the market value thereof at the time of the taking and their value at the time of the ceiver comes into possession.

Action — joinder — tort and contract.

6. Causes of action in tort may be joined in separate counts in the same petition with causes of action in contract, when they all arise out of the same transaction or transactions connected with the same subject of action, and affect all the parties to the action.

(Turner, J., dissents.)

(November 12, 1908.)

Case Note. — Sale of property at a loss or on unauthorized terms by one rightfully in possession, as a conversion.

It, without doubt, is the general rule that where one is rightfully in possession of property with authority to sell, the mere fact that such person sells the property at a lower price than the one authorized does not make him guilty of conversion, but the proper remedy of the owner of such goods is a special action on the case or an action for breach of contract. Moore v. McKibbin, 33 Barb. 246; Sarjeant v. Blunt, 16 Johns. 74; Cairnes v. Bleecker, 12 Johns. 300;

Headnotes by DUNN, J.

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ERROR to the District Court for Kingfisher County to review a judgment in favor of defendant in an action of replevin to recover possession of a stock of goods and to foreclose a chattel mortgage thereon. Reversed.

The facts are stated in the opinion.

Messrs. **C. H. Brooks, P. S. Nagel,** and **Mathew J. Kane** for plaintiff in error.

Messrs. **Bradley & Bradley** for defendant in error.

Dunn, J., delivered the opinion of the court:

The controversy in this case grows out of a transaction between plaintiff in error, plaintiff below, and the defendant in error, defendant below, in dealing with a stock of general merchandise located in the town of Hennessey, Oklahoma. Prior to the making up the issues in the pleadings, the case was submitted to a referee with authority to settle the issues, take the evidence, and report with findings of fact and conclusions of law. This reference on the part of the court was made with the consent of both parties to the action. The referee acted in accordance with the reference, and the record made before him, now before us, covers nearly 700 pages of matter, consisting of pleadings, exhibits, and evidence. He found for the defendant, and against the plaintiff, on all the issues, made his report to the district court, which, after hearing the exceptions urged thereto by the plaintiff, overruled them and confirmed the report. Plaintiff thereupon took the case by proceedings in error to the supreme court of the territory of Oklahoma, and the same is now before us by virtue of our succession to that court under the terms of the enabling act (Act June 16, 1906, chap. 3335, 34 Stat. at L. 267), and the schedule to the state Constitution (Bunn's ed. §§ 449–493).

In view of the fact that we are unable to agree with the referee in certain findings of fact, which we regard as not reasonably supported by the evidence, and which, in our judgment, are controlling in the case, as on these were based his conclusions of law, we briefly state the facts as we find them to be shown by the evidence in the case, which evidence is nearly, if not quite, uncontradicted. All of the record and evidence on which he acted was returned by him and made a part of his report, and is now before us. The contracts under which the parties acted were in writing, and are before us for our consideration, just as they were before the referee. 2 Moore, Facts, § 1278; Faulkner v. Simms, 68 Neb. 299, 89 N. W. 171, 94 N. W. 113.

Dufresne v. Hutchinson, 3 Taunt. 117; 28 Am. & Eng. Enc. Law, 2d ed. p. 701.

See the review of the above New York cases in AYLESBURY MERCANTILE CO. v. FITCH.

The reason for the above rule was stated in Clark & Skyles on Agency, vol. 1, p. 882, to be as follows: "In such cases the agent does not exercise any right of ownership over the property; he does nothing with it but what he was authorized to do. He disobeyed his instructions as to price or terms of sale only, and is liable for misconduct, but not for a conversion of the property. This distinction may, in a practical sense, seem technical, but it is founded upon the distinction between exercising a right of ownership over the property itself, and an unauthorized interference with the terms of sale, and is well supported by authorities. The proper remedy in such cases is an action for damages, not trover."

However, in Priestman v. Kendrick, 3 U. C. Q. B. O. S. 66, one who received two horses to sell at a certain price, and who, without his principal's authority or assent, sold them at a lower price, seems to have been held guilty of a conversion of the property, and is liable in trover.

So, where a sales agent illegally obtained possession of an automobile, and, in violation of his contract with the owner, sold the machine for a lower price than authorized, he was held to be liable to an action for conversion. Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950.

23 L.R.A.(N.S.)

The fact that an agent sells on credit, when authorized to sell for cash, does not make him guilty of conversion.

Thus, in Loveless v. Fowler, 79 Ga. 134, 11 Am. St. Rep. 407, 4 S. E. 103, it was held that a sale on credit by an agent in possession of the goods, and authorized to sell for cash only, is not a conversion, unless, possibly, it appears that the purchaser had notice of the limitation in the agent's instructions. The court said that the proper remedy against such agent is not trover, but an action on the case for violation of instructions or breach of contract.

Nor is an agent liable for conversion where he, with authority, sells fertilizers on credit, guaranteeing payment, and the goods so sold are not paid for, the remedy of the principal being upon the agent's contract of guaranty. Standard Fertilizer Co. v. Van Valkenburgh, 21 Misc. 559, 47 N. Y. Supp. 703.

However, where one in possession of goods, with mere authority to sell, exchanges the goods, it has been held that he is liable in trover for the conversion. Ainsworth v. Partillo, 13 Ala. 460; Haas v. Damon, 9 Iowa, 589. In each of these cases it was held that demand was not necessary to hold the agent liable for the value of the property.

Cases of sale at a different place than the one authorized, or at an unauthorized time, have been expressly excluded from this note, as well as those cases dealing with the appropriation of the proceeds.

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Prior to November, 1901, H. L. Fitch, a gentleman somewhat advanced in years, owned and was in possession of a stock of general merchandise in the town of Hennessey, Oklahoma. He was indebted to a local bank in the sum of $175, and to plaintiff in the sum of $600. While this condition existed, and in the fore part of November, 1901, he transferred by bill of sale the said stock of goods to his son, H. C. Fitch, this defendant, and, on making the said transfer, delivered to him the possession thereof. On this taking place, the bank attached the stock of goods for its debt as the property of H. L. Fitch. The store was closed and placed in the hands of the sheriff, who was invoicing it when W. A. Story, vice president and credit man of plaintiff, the Aylesbury Mercantile Company, appeared on the ground for the purpose of looking after and protecting the debt due his house. Finding the store closed and the stock of goods in the hands of the sheriff, he proposed to defendant, H. C. Fitch, then the owner thereof, that he would take up and pay off the indebtedness of the bank, release the stock, add this to the amount then due from the father, the payment of which had been assumed by the defendant, and take from him a note covering the entire amount, to be secured by a chattel mortgage on the stock. This was accordingly done, and the defendant executed a note covering the whole indebtedness, with some other charges, in the sum of $836.95, to the plaintiff, dated November 12, 1901, drawing 8 per cent interest, due six months after date, the payment of which he secured by a chattel mortgage on all of the merchandise going to make up the stock, as well as the furniture and fixtures. This mortgage contained the usual covenants of instruments of that character, and provided that, if the party to whom it was given should at any time deem itself insecure for any cause, it should be lawful for it to take the property wherever the same could be found, and dispose of it at public auction or private sale, without notice, etc. At the same time, and as a part and parcel of the same contract, the plaintiff and the defendant entered into a writing entitled "Contract and Agreement," which, owing to its importance in this controversy, we copy in full. It is as follows:

Know all men by these presents, that Aylesbury Mercantile Company of Wichita, Kansas, party of the first part, and Harry C. Fitch enter into the following stipulated agreement, and contract as follows, to wit:

Witnesseth: That the said party of the first part has a mortgage on the general stock of goods, wares, and merchandise, dated of even date herewith and signed and executed by the party of the second part. The Aylesbury Mercantile Company hereby agrees to sell Harry C. Fitch staple groceries which will be necessary in running the business, selling the goods at retail in the usual line of business for cash, at the lowest market price.

It is further agreed the Aylesbury Mercantile Company will put ———— in charge of their interest, at a salary of $50 per month, to assist the said Harry C. Fitch in carrying on the business in paying off said mortgage.

It is understood and agreed that Harry C. Fitch's salary is to be $50 per month, that said salaries are to be deducted from the proceeds of the business under the head of running expenses, the proceeds of the said indebtedness, the sum of $836.95, after deducting the said running expenses from the said net proceeds, are to be applied to the above described indebtedness.

It is hereby expressly agreed that written consent is given hereto to sell and dispose of the above-described goods, without violating any statute that may be in force from prohibiting the sale of property where there is a recorded lien by the said mortgage herein, that this agreement shall take effect and be in force during the entire period the aforesaid of the time of the aforesaid mortgage above referred to.

Witness my hand this 13th day of Nov. 1901. Aylesbury Mercantile Company,
By W. A. Story, V. P.
Harry C. Fitch.

Signed and executed in the presence of the named witnesses:
G. W. Baker,
H. L. Fitch.

November 16, 1901, under the arrangement thus made, plaintiff and defendant opened the store, after making an invoice of the goods contained therein, and began selling the same at retail, which continued until the 19th day of December, 1901, or for approximately a period of one month. It appears from the evidence that the plaintiff placed upon the door of the store a different lock, delivering the key thereof to one Charles Dumar, who, under the contract, was the party placed by the company "in charge of their interest." The defendant was given no key, and was excluded from the store except during the hours of business, when he, in conjunction with Dumar, sold goods at retail during the entire period the business was so operated. Defendant objected to being denied a key to the store, so that he might go and come at other times than during the time the same was open for business. Dumar employed to assist, at

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a small salary, a young woman of the community, to whom it appears the defendant objected. It is also claimed on the part of the defendant that Dumar and the young woman sold goods at sacrifice prices, far below their actual value, and that this was done over the protest and objection and to the great loss of the defendant. It is further contended that the store was not opened by Dumar as early in the morning, and was not continued open as late in the evening, as defendant desired, and as he claimed was customary for stores so situated, and as he insists the demands of such business properly conducted required. Furthermore, it is the claim of the defendant that the young lady who was introduced into the store by Dumar was not of good reputation, and that the relations existing between her and Dumar were improper, and that these things became so notorious that the reputation of the store was injured thereby. On December 16, 1901, after the store and business had been conducted as above set out for the period of one month, the defendant, acting under that portion of the agreement in which the plaintiff agreed to sell him "staple groceries which will be necessary in running the business, selling the goods at retail in the usual line of business for cash, at the lowest market price," wrote a letter to plaintiff containing an order for groceries, which was as follows: "Please ship by freight at once, the following goods, which we are in need of at the store." That, on receipt of this letter, W. A. Story, acting for the plaintiff, came from Wichita, Kansas, to Hennessey, Oklahoma, for the purpose of investigating the running of the business and to look after its security. He found that up to this time, the store having been in operation about thirty days, there had been received for goods sold the sum of $602.40, of which $127.72 had been paid for salaries of the employees and other expenses, leaving a balance of $474.75, which was credited on defendant's note. It appearing from the evidence that the sales had been constantly diminishing, until, as Story states, the business was eating itself up, he thereupon locked the door, and further selling ceased, the entire possession being then taken by plaintiff. Things remained in this condition until the 30th day of December, 1901, a period of about ten days, when defendant, acting under authority of § 3572, Wilson's Rev. & Anno. Stat. Okla. 1903, secured an injunction restraining plaintiff from proceeding to sell the stock under the chattel mortgage without a proceeding of foreclosure, and defendant recovered possession of the stock of goods. He retained possession until the 30th day of January, 1902, or a period of one month, during which time he sold from the stock $106 worth of goods. The stock was then taken by plaintiff in an action of replevin begun by it January 24, 1902. On June 25, 1902, it also brought foreclosure proceedings on its note and mortgage, and on August 7, 1902, on its application, a receiver was appointed to take possession of the goods, and dispose of them under the order of the court. It is defendant's contention that the stock was misused by plaintiff on securing possession, under the action of replevin, by being improperly, carelessly, and negligently packed and stored, and that by reason thereof it greatly deteriorated in value. The receiver, under the order of the court, finally sold the same on the 20th day of December, 1902, receiving therefor the sum of $325.

The action of replevin and the suit for foreclosure were consolidated, and referred to D. K. Cunningham, Esq., with authority, as above set out, to settle the issues, hear the evidence, and report to the court with his findings of fact and conclusions of law. Defendant to this consolidated suit filed answer and cross petition, in which he admitted the incorporation of the plaintiff and the execution of the written instruments above mentioned, but denied any indebtedness to plaintiff, or that it was entitled to the personal property described in its petition, and avers that he had fully paid plaintiff all that was due on the note and chattel mortgage, prior to the commencement of either action. For a cross petition, he admitted generally the facts above stated in reference to the original indebtedness due from himself to the plaintiff, and the assumption by the plaintiff of the debt due the bank, and the execution and the delivery of the note, chattel mortgage, and contract, but averred that plaintiff induced their execution through false representations and promises, except for which they would not have been executed, and that on their execution plaintiff wrongfully, unlawfully, and by force, took possession of all of said personal property, placed a padlock on the front door of the store, and locked defendant out, and kept him out, of the said store every evening, and did not open the store in the morning for business until about 9 o'clock A. M.; averred that the value of the stock was about $5,000, and that while the store was opened for business the said Dumar and the young woman employed sold merchandise at ruinously low prices, and, in addition thereto, injured by careless handling the goods which they did not sell. He entered into much detail in setting out the different items of goods sold by plaintiff for less than their value, all of which constituted a

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pleading showing on the part of plaintiff a breach of the contract. He further averred improper care of the goods in the packing and storage after they were taken from him in the latter part of January, 1902, and sets up specifically the damage done to the counters, shelvings, and store furniture, and then prays for the total value of the goods and furniture, which he alleged plaintiff converted on the 16th day of November, 1901. For further damages he pleaded that, by the wrongful acts complained of, he was damaged in the sum of $5,000 on account of the destruction of his business, and $2,000 on account of the loss of credit and reputation. The reply was a general denial. On these issues and the evidence introduced, the referee found that the plaintiff was liable to the defendant in damages for conversion of all the goods, wares, merchandise, furniture, and fixtures, at their value on the 16th day of November, 1901; that the value of the same was $5,000; that on this plaintiff was entitled to a credit of $836.95, with interest thereon from the 12th day of November, 1901, at the rate of 8 per cent per annum, which was the amount of the note and the rate of interest provided for and set out in plaintiff's petition; that, in addition thereto, plaintiff was entitled to a credit of $106.95, being the amount of goods defendant claims to have sold while in possession of the stock during the month of January, 1902; denied defendant any damage for loss of business and reputation of his store, for the reason that the same was too indefinite, uncertain, and speculative, and gave judgment against plaintiff in the sum of $4,945.50.

From the foregoing it will be observed that the referee based his entire conclusion upon finding that there was a conversion of the stock by plaintiff at the time it and the defendant entered into the possession of the same under the contract on the 16th day of November, 1901. This raises the question, in the forefront of our consideration of the case, as to whether, under the controlling and undisputed facts, there was a conversion at that time, or whether the plaintiff after entering the store, in charge of its interests, by and with the consent of the defendant, and its subsequent doings therein, as pleaded by defendant, prior to December 19, 1901, constituted a breach of the contract under which all parties were acting. The materiality of this inquiry is at once apparent. Counsel for defendant in his cross petition, while urging a conversion of the stock of goods at that time, was unquestionably impressed with the force of the reasoning that plaintiff was guilty of a breach of contract rather than conversion, as is shown by the minuteness of his cross petition, in which he detailed the different acticles of merchandise sold by the plaintiff at a price less than their true value. If there was a conversion, it was of no consequence to the defendant what plaintiff did with the goods after taking them into possession. So far as defendant was concerned, he had elected, if the goods were converted, to accept a judgment for the value of the goods rather than the goods themselves, and, when this election had taken place, it was of no concern of the defendant what plaintiff did with them, as any loss incurred would fall on plaintiff, and not on defendant. While, on the other hand, if there was a breach of contract instead of a conversion, the pleading by the defendant was entirely proper for the damages incurred by the sacrifice of the goods, but the damages would not be the value of the entire stock, but the difference only between the market value of the goods sold and the sum plaintiff received therefor. If plaintiff violated the terms of the contract by the employment of the young woman to whom reference is made, and wrongfully paid money belonging to defendant to her for her services, then defendant's damages would be the amount of money which was so paid her. The measure of damages for conversion is laid down in § 2752, Wilson's Rev. & Anno. Stat. (Okla.) 1903, as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: First, the value of the property at the time of the conversion with the interest from that time; or, second, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, third, a fair compensation for the time and money properly expended in pursuit of the property." While the measure of damages for a breach of contract as laid down under § 2730, Wilson's Rev. & Anno. Stat. supra, is as follows: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

While the Code has abolished the numerous common-law forms of actions, and all civil rights are now justifiable in a single proceeding known as a "civil action," it has not nor could it abolish the rights, duties, and liabilities enjoyed, incurred, and borne by men in their intercourse and dealings with each other. Elucidating this idea, Judge Irwin in the case of Phelps, D. & P.

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Co. v. Halsell, 11 Okla. 1, 65 Pac. 340, said: "To arrive at a correct solution of the question before the court, it will be necessary to consider the law of conversion, and especially to determine the nature of the action of conversion. It may be contended that under our Code the procedure or forms of action have been abolished. While we have but one form of action in this territory, this does not mean that every action which is brought is controlled by the same rules of law. All actions which are not criminal we call civil, but this does not mean that there is only one kind of civil action. We have the same kind of actions, practically, as existed at common law. We have actions in attachment, replevin, injunction, mandamus, ejectment, etc. Each of these actions has its own rules of law, and, except when modified by statute, is subject to common-law principles. It would be impossible to conduct the business of courts without keeping in mind the essential distinctions existing between the various kinds of actions. By its very nature the practice of law must have some consistency, and when an action is brought in court there must be some way of determining what the character of the action is, and these distinctions are by no means artificial. They are perfectly material, and are necessary to the protection of the rights of litigants, as well as for the information and guidance of the court."

The parties to this action, as members of organized society, owed each other the duty to respect the ownership and right to possession of each to his own property; should either deprive the other thereof without right, the taker then owes the duty of paying therefor, the measure of this payment being set out in the paragraph of the statute first above quoted. Should the parties, however, enlarge their relationship toward each other by entering into a lawful contract involving the property of one, both are entitled to have its provisions fulfilled; should either, acting under this agreement, fail, neglect, or refuse, without lawful right, to carry out his engagement according to the terms, his liability is measured by the second paragraph quoted; and in a case where it is insisted that either of these rights has been violated, modern procedure requires that the written allegations of the parties to the action state the facts, that the proof support and be consistent therewith, and the judgment rendered be in consonance with both. These requirements are not to vindicate a mere dogmatic form prescribed to secure symmetry only, but are absolutely essential to secure the administration of justice. A party is entitled to know, on entering an action, just wherein and how he is charged with having violated an obligation. This constitutes notice to him so he may be prepared in his own right and to assist the court with relevant testimony to ascertain the truth. He is then entitled to have the judgment rendered based on the evidence offered in support of the specific averments of the pleadings as they may be finally settled by the court. So, in the case at bar, the necessity of clearly distinguishing the nature of the responsibility on the facts becomes at once apparent, the pleadings and evidence under one being confined to asserting and establishing the detriment caused by the loss of the value of the whole property involved, with the additional elements mentioned in the statute, while under the second the measure of damages is such as are shown to grow out of the failure of the delinquent party to comply with his engagement. The cross petition of defendant herein contains averments showing a breach of contract, and much testimony is offered to support them. The prayer was for a conversion, and the judgment rendered was in conformity with the prayer rather than the allegations and the evidence.

Now let us see what constitutes conversion, and if, under the facts found in this case, there was a conversion of defendant's property on the 16th day of November, 1901; or whether the acts of plaintiff constituted a breach of the contract under which both acted.

In 21 Encyclopedia of Pleading & Practice, p. 1014, the general rule as to what is required to constitute conversion is laid down as follows: "Any distinct act of dominion wrongfully exerted over another's personal property, in denial of his right or inconsistent with it, amounts to and may be treated as a conversion, for which trover is a remedy."

The supreme court of the state of Minnesota in the case of Latusek v. Davies, 79 Minn. 279, 82 N. W. 587, states the facts necessary to maintain an action of conversion to be as follows: First, a proof of a general or special property in plaintiff; second, the right of possession at the time of the conversion; and, third, that the defendant had converted the same to his own use. The right to recover is then established.

The case of Moore v. McKibbin, from the supreme court of New York, 33 Barb. 246, was one wherein an agent was intrusted with certain horses to sell for a sum not less than $500, and who sold them for $200. He was sued in conversion, and the court held in the syllabus: "Where an agent intrusted to sell property for not less than a specified sum sells the same for less than the price fixed, an action for the conversion of the property will not lie against him.

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Where the complaint is for a wrongful conversion of property, and the proof establishes another and different cause of action, viz., a mere breach of duty on the part of the defendant, it is not a case of variance, which may be remedied by amendment, but is a failure of proof of the cause of action alleged, and the plaintiff should be nonsuited." In the discussion of the case, the court said: "The case of Sarjeant v. Blunt, 16 Johns. 74, is directly upon the point that an action for the conversion of the property will not lie against an agent for selling under the price fixed. The same rule is laid down in Cairnes v. Bleecker, 12 Johns. 300, though the point was not there decided. See also McMorris v. Simpson, 21 Wend. 610. This must be so upon principle, or else the purchaser would get no title. No one, I apprehend, would pretend that the purchaser did not get a good title because the agent, having power to sell, sold for a price something less than he was instructed to sell at. If the purchaser gets a good title, it must be upon the ground that the agent had the right to sell. If he could sell and transfer a valid title, the sale could not be tortious. The wrong in such a case consists not in the act of selling, which is authorized, but in the breach of duty in selling at the reduced and unauthorized price. It is not the want of authority, but the exercise of it contrary to the measure prescribed, which constitutes the wrong."

The case of Sarjeant v. Blunt, favorably cited in the quotation from Moore v. McKibbin, supra, was one wherein the plaintiff deposited a chronometer with the defendant, to be sold by him for a price not less than $500. The defendant sold the same for $300. The court in this case held in the syllabus as follows: "When goods are deposited with a person, to be sold at not less than a certain fixed price, and the depositary sells the property at less than that sum, the owner cannot maintain trover against him, but the proper remedy is a special action on the case."

Another case from the supreme court of Minnesota, that of Chase v. Blaisdell, 4 Minn. 90, Gil. 60, was one where Blaisdell sued the appellants, setting out in the complaint a contract by which they were to pick up and sell certain logs, and make returns to him, averring the sale of the logs by them pursuant to the agreement, but that they failed to make returns and account to him according to the contract. The verdict being rendered for plaintiff, appeal was taken to the supreme court, which held in the syllabus that "where a party comes into possession of and disposes of property pursuant to an agreement with the owner, he cannot be held for a conversion of the property. . . . His liability, if any, grows out of the disposition of the proceeds of the property, and in such case the value of the property disposed of is not the measure of damages." In the discussion of the case, the court said: "Had the defendants become possessed of the plaintiff's logs without authority from him, and converted them to their own use, or, being lawfully possessed, had they afterwards made any disposition of them contrary to authority, they would have been liable in damages for the conversion, and the measure of such damage would have been the value of the logs. But when, as in this case, a party comes into possession of property under an agreement with the owner, and afterwards sells it, in pursuance of the terms of the agreement, for the sole use and benefit of the owner, he cannot by any possibility be guilty of converting the property originally intrusted to him, and his only responsibility results from the disposition he may make of the proceeds of such sale. If the proceeds be in money, and he refuse to pay it over upon reasonable demand, or contrary to the terms of the agreement with the owner, he would be liable therefor as for so much money had and received; or, if the proceeds consist of property other than money, he, upon a like refusal, would be held to have converted it (the proceeds) to his own use, and would be liable in damages, the measure of which would be the value, not of the property originally committed to his charge, for that, having been sold in pursuance of authority, has never been converted, but the value of the property received in exchange therefor. . . . The defendants could not be held for more than they received on the sale of the logs, unless they wilfully or negligently sold them below their value, in which case there should have been an allegation to that effect, and a special claim for the damages sustained by reason thereof."

To constitute conversion for which trover will lie, nonconsent to the possession and disposition of the property by the defendant is indispensable. Van Dusen v. Arnold, 5 S. D. 588, 59 N. W. 961.

And it is essential to the right of recovery that plaintiff have a right to immediate possession of the goods at the time of the alleged conversion. Robison v. Hardy, 22 Ill. App. 512.

Other cases to the same effect are as follows: McMorris v. Simpson, 21 Wend. 610; Worth v. Buck, 34 Neb. 703, 52 N. W. 566.

Thus, we conclude that under the facts as shown in this case, plaintiff having gone into possession under and by virtue of the contract, which provided that it might place an agent in charge of its interest, he

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had the right to sell the goods, and, the defendant having consented to the same, there could be no conversion of the stock. We suppose that defendant would hardly contend that the people to whom plaintiff sold goods from the store secured no title thereto, and yet, if they did, there would be no conversion. If there was a conversion on the part of the plaintiff, it had no title, and defendant might have maintained an action of conversion or replevin against all of the customers purchasing goods, equally as well as an action against plaintiff itself. Does anyone think this could have been done? Nor are we able to find any sufficient evidence on which to predicate the finding that the contract was procured by fraud. The action of both parties under it, the acquiescence in its operation for thirty days, all, stronger than any spoken words, fixed the validity of the instrument under the terms of which they acted. The action of the defendant in entering jointly with the agent of plaintiff into the possession of the stock, and remaining there, assisting in the sale of the goods under the contract for thirty days and then ordering more goods, is absolutely inconsistent with any theory of fraud or conversion. So that we hold that there was no conversion in plaintiff taking possession of the stock jointly with the defendant under the contract above referred to, and that whatever wrongful acts may have been committed by it while thus in possession were breaches of contract, and damages would lie against it for any specific injuries sustained by the defendant from these breaches, and that the pleadings and the evidence on this phase of the case should be restricted to these things.

On the closing and taking possession of the store by the plaintiff on the 19th day of December, 1901, entirely excluding defendant therefrom, if against his will, as he contends, a new and a different situation arose, the effects of which depend upon the following conditions: If the debt secured by the mortgage had been extinguished, or, if not, if the condition under which plaintiff might lawfully take possession of the stock under its chattel mortgage had not arisen, then its taking exclusive possession of the goods against the will of the defendant, and over his protest, was wrongful, and would amount to a conversion, for which he could maintain an action, even though the goods were recovered by him, as shown by the evidence, at the expiration of ten days. See 28 American & English Encyclopedia of Law, 2d ed. p. 683, where the general rule in such cases is stated as follows: "It seems to be well settled that trover for a conversion may be maintained, in case of an unlawful taking or exercise of dominion over the chattels of the plaintiff, though the property may have been returned to the plaintiff and accepted by him prior to the institution of the action, or though he may have reacquired possession by purchase from a third person or by means of an action of replevin." Plaintiff's measure of damages in such a case is stated in the same volume, at page 684, to be as follows: "Where the property has been returned to and accepted by the plaintiff, this fact is to be considered in mitigation of the damages recoverable for the conversion, and in some instances it has been held that the court had power to permit the defendant to return the chattel in mitigation of damages."

Defendant reacquired possession of the stock of goods on the 30th day of December, 1901, and held the same until the 29th of January, 1902, when it was again taken from him under plaintiff's action in replevin. The goods were then, as stated above, taken into possession by the plaintiff and held by it until turned over to a receiver, appointed by the court in August following. On this occurring, we are again confronted by the same proposition that arose at the time of the taking of the goods in December. If plaintiff's debt had not been liquidated, and the situation was such as to legally entitle it to possess itself of the stock under its chattel mortgage, then there was no conversion, but its possession was lawful. If, on the other hand, the debt had been extinguished, or the condition mentioned had not arisen, then its possession was tortious, for which it was liable in damages to the defendant. The goods, it will be remembered, were, on the 7th day of August, 1902, placed in the hands of a receiver; and the correct measure of plaintiff's damages under such a case is laid down in the case of Tootle v. Kent, 12 Okla. 674, 73 Pac. 310, as follows: "The measure of plaintiff's damages for loss of goods or depreciation in value is the difference between the market value of the goods at the time they were taken possession of under the chattel mortgage by the defendants, and its value at the time the property was placed in the hands of the receiver." Of course, being placed in the hands of a receiver, plaintiff would not then be liable for any depreciation or loss in the value of the goods by reason of any improper care or wrongful act on the part of the officer, as he would then be the one responsible therefor.

The conclusion to which we have come in this case necessarily presents to the defendant the question of whether or not his claim for damages growing out of the alleged breach of contract and his claim of damages growing out of the alleged conversion may

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be joined in the same cross petition. Believing that this question is properly within the scope of the case as presented to us, we have considered it, and hold the general rule to be as is stated in 23 Cyc. Law & Proc. p. 415, wherein it is laid down that "under the Codes, as at common law, a cause of action in tort cannot, as a general rule, be joined with a cause of action on contract [here follows a number of exceptions]. . . . Another general exception results from the provision in many of the Codes, that causes of action arising out of the same transaction or transactions connected with the same subject of action may be joined, and the same exception has been drawn from the general intent of the Codes, in the absence of such an express provision as just stated." Under this there are cited a variety of cases from a great number of the so-called "Code states." Justice Valentine of the supreme court of the state of Kansas, from which our Code is taken, in the case of Hoye v. Raymond, 25 Kan. 665 (2d ed. 465), in dealing with the question, said: "Causes of action in tort can only be united with causes of action on contract where they all arise out of the same transaction or transactions connected with the same subject of action. Civil Code, § 83. But even then they cannot be united unless they all 'affect all the parties to the action.'" This is cited approvingly by the same court in the case of Haskell County Bank v. Bank of Santa Fé, 51 Kan. 39, 32 Pac. 624. In an earlier case in the discussion of this section of the Code, Justice Valentine, in the case of Scarborough v. Smith, 18 Kan. 399, enters into an elaborate discussion of the scope and meaning of this section of the Code. But these different causes of action, the one for breach of contract, and the one sounding in tort, should be stated in separate counts of the petition. Shinn v. Guyton & H. Mule Co. 109 Mo. App. 557, 83 S. W. 1015. The causes of action in this case all arose out of the same transaction or transactions connected with the same subject of the action,—which was defendant's claim of right in and to the goods involved,—and hence may be joined in separate counts in one petition.

It therefore follows that the judgment of the District Court is reversed, and the case remanded for a new trial, with instructions to grant defendant the right to amend his pleadings and proceed in accordance with the principles declared herein.

Williams, Ch. J., and **Hayes**, J., concur.

Turner, J., dissents.

Kane, J., being of counsel, disqualified and not sitting.

23 L.R.A. (N.S.)

OKLAHOMA CRIMINAL COURT OF APPEALS.

CHARLEY FLETCHER, Appt.,
v.
STATE OF OKLAHOMA.

(— Okla. Crim. App. —, 101 Pac. 599.)

Indictment — statutory offense — requisites.

1. In an indictment or information for committing a statutory offense, the indictment or information may describe the offense in the general language of the statute; but the description must be accompanied by a statement of the particulars essential to constitute the crime or offense with which the defendant is charged, and acquaint the accused with what he must meet upon the trial.

Intoxicating liquors — indictment — requisites.

2. An indictment or information for a single sale of intoxicating liquors must allege the name of the person or persons to whom such sale was made. If the names of such persons are unknown, then this fact must be stated. This, however, would not be necessary where the prosecution was for maintaining a nuisance, or for having possession of liquor to be illegally disposed of.

Criminal law — instruction — credibility of accused.

3. It is error for a trial judge to single out the defendant, personally, and instruct the jury upon the credibility of his evidence.

Same — credibility of witnesses.

4. Care should be taken, in instructing juries upon the credibility of witnesses, to make such instructions apply alike to all of the witnesses, whether they are for the prosecution or for the defense.

(April 24, 1909.)

Headnotes by FURMAN, P. J.

Case Note. — Must indictment or information for unlawful sale of intoxicating liquors state name of person to whom sale is made.

The sufficiency of an indictment, information, or complaint for an illegal sale, which does not name anyone as a buyer, is the sole question to be covered by this note. The questions of the effect of alleging a sale to a principal when, in fact, made to his agent, or *vice versa*, or other misnomers and variances, are omitted.

Sale to prohibited class.

It is uniformly held that the name of the buyer must be alleged, where it is made an offense to sell to a particular class of persons, *e. g.*, men of known intemperate habits (Com. v. Powers, 17 Pa. Co. Ct. 304); minors (Com. v. Liebtreu, 1 Pearson [Pa.] 07; Com. v. Pfaff, 17 Pa. Co. Ct. 302; Tro-

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APPEAL by defendant from a judgment of the Muskogee County Court convicting him of an illegal sale of intoxicating liquors. Reversed.

Statement by **Furman**, P. J.:

On the 19th of June, 1908, an information was filed against Charley Fletcher (hereinafter called the defendant), charging him with unlawfully selling intoxicating liquor. The defendant demurred to the information upon the ground that it did not state facts sufficient to constitute a public offense. This demurrer was by the court overruled, and the defendant reserved an exception. Upon the trial of the cause, the defendant was found guilty, and his punishment was assessed by the jury at a fine of $50 and thirty days' confinement in jail. Motions for a new trial and in arrest of judgment were filed and overruled, and the defendant excepted. The case is regularly before us upon appeal.

Messrs. S. M. Rutherford and Bailey & Kistler for appellant.

Mr. Fred S. Caldwell, for appellee:

In charging illegal selling in any form, it is unnecessary to state the name of the person to whom the sale was made.

McClain, Crim. Law, § 1274; People v. Adams, 17 Wend. 475; State v. Munger, 15 Vt. 290; Cannady v. People, 17 Ill. 158; Rice v. People, 38 Ill. 435; State v. Bielby, 21 Wis. 205; State v. Gummer, 22 Wis. 441; State v. Becker, 20 Iowa, 438; State

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meter v. District of Columbia, 24 App. D. C. 242; State v. Martin, 44 Mo. App. 45); slaves (Francois v. State, 20 Ala. 84; Com. v. Cook, 13 B. Mon. 149; State v. Blythe, 18 N. C. [1 Dev. & B. L.] 199; State v. Schroder, 3 Hill, L. 63).

Sale within prohibited distance.

And all the cases agree that an indictment for selling liquor, contrary to law, within a given distance from a particular building or place, need not name the buyer. State v. Bailey, 43 Ark. 150; State v. Muse, 20 N. C. 463; (4 Dev. & B. L. 319); State v. Heldt, 41 Tex. 220; State v. Staley, 3 Lea, 505; Langan v. People, 32 Colo. 414, 76 Pac. 1048.

Charge against one as common dealer, etc.

Likewise, it is agreed that the buyer's name need not be alleged where defendant is charged with being a common seller or dealer in intoxicating liquors (Com. v. Pray, 13 Pick. 359; Jordan v. State, 22 Fla. 528); or pursuing the occupation of a retail liquor dealer without having paid the occupation tax (Mansfield v. State, 17 Tex. App. 468); or keeping intoxicating liquor for sale (State v. Becker, 20 Iowa, 438; Hornberger v. State, 47 Neb. 40, 66 N. W. 23); or keeping a place for the sale of liquor (Donovan v. State, 170 Ind. 123, 83 N. E. 744; Dalrymple v. State, 26 Ohio C. C. 562).

Sale contrary to prohibitory statute or ordinance.

The decisions are in hopeless and irreconcilable conflict as to this class of sales.

Thus, where the sale was in violation of a prohibitory statute or ordinance, it has been held necessary to allege the name of a person to whom the liquor was sold. Dorman v. State, 34 Ala. 216; State v. Allen, 32 Iowa, 491; State v. Tisdale, 145 N. C. 422, 58 S. E. 998, 13 A. & E. Ann. Cas. 125; State v. Burchard, 4 S. D. 548, 57 N. W. 491.

But a greater number of such cases have held that this allegation was not necessary. Nelson v. United States, 30 Fed. 112; McCuen v. State, 19 Ark. 630; Hill v. Dalton, 23 L.R.A. (N.S.) 72 Ga. 314; Parmenter v. United States, 6 Ind. Terr. 530, 98 S. W. 340; State v. Brooks, 33 Kan. 708, 7 Pac. 591; State v. Whisner, 35 Kan. 271, 10 Pac. 852; Junction City v. Webb, 44 Kan. 71, 23 Pac. 1073; State v. Moseli, 49 Kan. 142, 30 Pac. 189; Lincoln Center v. Linker, 5 Kan. App. 242, 47 Pac. 174; State v. Dellaire, 4 N. D. 312, 60 N. W. 988.

Sales in local option districts.

Where the sale was unlawful because made in territory in which a local option law was in force, it has been held that the buyer's name must be alleged. State v. Ridgway, 73 Ohio St. 31, 76 N. E. 95, 4 A. & E. Ann. Cas. 94; Stewart v. State, 25 Ohio C. C. 438; Dixon v. State, 21 Tex. App. 517, 1 S. W. 448; Martin v. State, 31 Tex. Crim. Rep. 27, 19 S. W. 434; Ellington v. State (Tex. Crim. App.) 86 S. W. 330; Drechsel v. State, 35 Tex. Crim. Rep. 580, 34 S. W. 934.

But, on the other hand, in Williams v. State, 89 Ga. 483, 15 S. E. 552; State v. Wingfield, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; State v. Houts, 36 Mo. App. 265, it was held that this allegation was unnecessary.

Sales without license or bond.

There is the same conflict as to indictments for sales without a license. Thus, the following cases hold that the name of the buyer must be alleged: State v. Stucky, 2 Blackf. 289; State v. Burgess, 4 Ind. 606; Wilson v. Com. 14 Bush, 159; Com. v. Dean, 21 Pick. 334; State v. Schmail, 25 Minn. 368; Neales v. State, 10 Mo. 498 (overruled in later cases); State v. Pischel, 16 Neb. 608, 21 N. W. 468; State, Flanagan, Prosecutor, v. Plainfield, 44 N. J. L. 118; Roberson v. Lambertville, 38 N. J. L. 69; State v. Delancey (N. J. L.) 69 Atl. 958; Weston v. Territory (Okla. Crim. App.) 98 Pac. 360; Lightle v. State (Okla. Crim. App.) 101 Pac. 608; Banks v. State (Okla. Crim. App.) 101 Pac. 610; Mitchell v. State (Okla. Crim. App.) 101 Pac. 1100; Simmons v. State (Okla. Crim. App.) 101 Pac.

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v. King, 37 Iowa, 462; State v. Ladd, 15 Mo. 430; State v. Miller, 24 Mo. 532; State v. Spain, 29 Mo. 415; State v. Fanning, 38 Mo. 359; State v. Melton, 38 Mo. 368; State v. Rogers, 39 Mo. 431; State v. Jaques, 68 Mo. 260; State v. Whisner, 35 Kan. 271, 10 Pac. 852; State v. Moseli, 49 Kan. 142, 30 Pac. 189; People v. Sweetser, 1 Dak. 308, 46 N. W. 452; State v. Muse, 20 N. C. 463 (4 Dev. & B. L. 319); Riley v. State, 43 Miss. 397; Williams v. State, 89 Ga. 483, 15 S. E. 552; State v. Chisnell, 36 W. Va. 659, 15 S. E. 412; Dansey v. State, 23 Fla. 316, 2 So. 692; State v. Parnell, 16 Ark. 506, 63 Am. Dec. 72; McCuen v. State, 19 Ark. 630; Johnson v. State, 40 Ark. 453; State v. Bailey, 43 Ark. 150; United States v. Gordon, 1 Cranch, C. C. 58, Fed. Cas. No. 15,233; State v. Hickerson, 3 Heisk. 375; Lea v. State, 64 Miss. 201, 1 So. 51; Jordan v. State, 22 Fla. 528; State v. Brown, 41 La. Ann. 771, 6 So. 638; Mansfield v. State, 17 Tex. App. 468; State v. Heldt, 41 Tex. 220; State v. Kuhn, 24 La. Ann. 474; State v. Jordan, 39 Iowa, 387; State v. Doyle, 15 R. I. 527, 9 Atl. 900; State v. Ferrell, 30 W. Va. 683, 5 S. E. 155; United States v. Warwick, 51 Fed. 280; 1 Bishop, Crim. Proc. § 548; Bishop, Statutory Crimes, § 1037; Hughes Crim. Law & Proc. § 1433; Myers v. People, 67 Ill. 510; Lincoln Center v. Linker, 5 Kan. App. 242, 47 Pac. 174; Hornberger v. State, 47 Neb. 40, 66 N. W. 23; Moore, Crim. Law, § 277; Wrocklege v. State, 1 Iowa, 168; Zarresseller v. People, 17 Ill. 101; Myers v. People, 67 Ill. 1102; State v. Doyle, 11 R. I. 574; State v. Steedman, 8 Rich. L. 312; Burch v. Republic, 1 Tex. 608; Alexander v. State, 29 Tex. 495; Eppstein v. State, 11 Tex. App. 480.

But the following cases hold that indictments for sales without a license need not name the buyer: United States v. Gordon, 1 Cranch, C. C. 58, Fed. Cas. No. 15,233; Johnson v. State, 40 Ark. 453; People v. Sweetser, 1 Dak. 308, 46 N. W. 452; Dansey v. State, 23 Fla. 316, 2 So. 692; Brass v. State, 45 Fla. 1, 34 So. 307; Carter v. State, 68 Ga. 826; Wells v. State, 118 Ga. 556, 48 S. E. 443; Shuler v. State, 125 Ga. 778, 54 S. E. 689; Cannady v. People, 17 Ill. 158; Rice v. People, 38 Ill. 435; Myers v. People, 67 Ill. 503; Lea v. State, 64 Miss. 201, 1 So. 51; State v. Kuhn, 24 La. Ann. 474; State v. Brown, 41 La. Ann. 771, 6 So. 638; State v. Burkhalter, 118 La. 657, 43 So. 268; State v. Ladd, 15 Mo. 430; State v. Spain, 29 Mo. 415; State v. Fanning, 38 Mo. 359; State v. Jaques, 68 Mo. 260; State v. Back, 99 Mo. App. 34, 72 S. W. 466; State v. Curtright, 134 Mo. App. 588, 114 S. W. 1146; People v. Adams, 17 Wend. 475; Osgood v. People, 39 N. Y. 449; People v. Polhamus, 8 App. Div. 133, 40 N. Y. Supp. 491; Com. v. Schoenhutt, 3 Phila. 20; State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Munger, 15 Vt. 290; Com. v. Dove, 2 Va. Cas. 26; Hulstead v. Com. 5 Leigh, 724; Fletcher v. Com. 106 Va. 840, 56 S. E. 149; Runde v. Com. 108 Va. 873, 61 S. E. 792; State v. Pendergast, 20 W. Va. 672; State v. Chisnell, 36 W. Va. 659, 15 S. E. 412; State v. Bielby, 21 Wis. 205; State v. Gummer, 22 Wis. 441.

An indictment charging a sale without giving the bond required by law must name the buyer. People v. Minnock, 52 Mich. 628, 18 N. W. 390; People v. Heffron, 53 Mich. 527, 19 N. W. 170; *contra*, People v. Sweetser, supra; State v. Rogers, 39 Mo. 432; State v. Potter, 125 Mo. App. 465, 102 S. W. 668.

Sales on prohibited days.

It has been held that an indictment for selling liquor on Sunday, contrary to law, must name the person or persons to whom the liquors were sold (Capritz v. State, 1 Md. 569; Martin v. State, 30 Neb. 421, 46 N. W. 618; R. v. Cavanagh, 27 U. C. C. P. 537); but the greater number of cases have held that, since the gravamen of the charge is a desecration of the Sabbath, it is not necessary to name the person to whom the liquor was sold (State v. Parnell, 16 Ark. 506, 63 Am. Dec. 72; Trometer v. District of Columbia, 24 App. D. C. 242; State v. Merget, 129 Mo. App. 46, 107 S. W. 1015; Com. v. Liebtreu, 1 Pearson [Pa.] 107; State v. Hickerson, 3 Heisk. 375).

An indictment for selling intoxicating liquors on election day, in violation of the law, must name the buyer. State v. Stamey, 71 N. C. 202; *contra*, Newman v. State, 101 Ga. 534, 28 S. E. 1005.

Sales in prohibited quantities.

An indictment for selling liquor in a smaller quantity than authorized by law, without stating to whom the sale was made, is bad. State v. Walker, 3 Harr. (Del.) 547; State v. Faucett, 20 N. C. 239 (4 Dev. & B. L.) 107; Com. v. Benge, 13 Ky. L. Rep. 591; *contra*, State v. Ford, 47 Mo. App. 601.

Sales by druggists, on prescription.

Where druggists are authorized to sell liquors, provided the purchaser first procure a prescription therefor from a registered physician, the indictment must name the buyer, else the defendant, for his defense, would be compelled to take with him to the trial all prescriptions filed, the prosecutions for which would not be barred by the statute of limitations. State v. Martin, 44 Mo. App. 45, affirmed in 108 Mo. 117, 18 S. W. 1005; State v. Harris, 47 Mo. App. 558; State v. Cassity, 49 Mo. App. 300; State v. Quinn, 49 Mo. App. 602; State v. Major, 81 Mo. App. 289.

But under like statutes it has been held that the buyer's name need not be alleged. Riley v. State, 43 Miss. 397; State v. Elam, 21 Mo. App. 290; State v. Ferrell, 30 W. Va. 683, 5 S. E. 155.

In State v. Gibson, 61 Mo. App. 368, it was

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504; State v. Allen, 32 Iowa, 491; Black, Intoxicating Liquors, § 464.

Furman, P. J., delivered the opinion of the court:

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In the cases of People v. Adams, 17 Wend. 475, and of State v. Ladd, 15 Mo. 430, and of State v. Gummer, 22 Wis. 441, the defendants were charged with selling liquors to divers unknown persons. It is a fundamental rule of criminal law that in all cases where the name of a person should be given in an indictment, and the name is unknown, it may be stated in the indictment that such name is unknown, and this will dispense with the necessity of giving the name of such persons in the indictment; otherwise it would be impossible to indict and convict for many crimes.

All exceptions to the general rules of law which are sanctioned and approved by the wisdom and experience of centuries must be strictly followed, or the rules will cease to exist, and we will be involved in confusion and in inextricable conflicts as to matters of principle. Under the rule that, where a necessary name is unknown, that fact may be stated, the indictments in the above-cited cases were sufficient, and the decisions should not be considered as authorities that

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The cases which hold that it is not necessary in the indictment to name the person to whom the liquor was sold are generally based upon the theory that the offense is against public morals, and not against the property or person of an individual; that the mere sale does not affect the rights of another person, as in the case of larceny, assault, and the like, where the violation of private rights enters into the very essence of the offense.

The decisions holding that the name of the person to whom the illegal sale was made should be stated in the indictment are generally based upon the ground that such averment is requisite, not only to inform the accused of the specific charge alleged against him, so that he may prepare his defense, but to prevent a second punishment for the same offense, by pleading in bar a former acquittal or conviction. Nevertheless, many of these same courts hold, and all the cases agree, that when the buyer's name is unknown to the grand jury, and it is so stated in the indictment, it is sufficient. Foerster v. United States, 54 C. C. A. 210, 116 Fed. 860; State v. Jackson, 4 Blackf. 49; Blodget v. State, 3 Ind. 403; Ashley v. State, 92 Ind. 559; Com. v. Hendrie, 2 Gray, 503; Com. v. Hitchings, 5 Gray, 482; Com. v. Sherman, 13 Allen, 248; State v. Dowdy, 145 N. C. 432, 58 S. E. 1002; State v. Toler, 145 N. C. 440, 58 S. E. 1005; Com. v. Liebtreu, supra; State v. Boughner, 5 S. D. 461, 59 N. W. 736; State v. Carter, 7 Humph. 158; State v. Harris, 2 Sneed, 224; Com. v. Smith, 1 Gratt. 553; State v. Bodeckar, 11 Wash. 417, 39 Pac. 645.

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The cases of State v. Whisner, 35 Kan. 271, 10 Pac. 852, and of State v. Moseli, 49 Kan. 142, 30 Pac. 189, are also cited by counsel for the state as authorities in point. In the first-cited case, on page 276 of 35 Kan., the court said: "In prosecutions of this character, it is not necessary to state the kind of liquor sold, or the name of the person to whom sold, for the statute expressly and specifically provides that these things need not be stated."

So we see that the omission to state in the indictment the person to whom the liquors were sold was the result of a special statute in Kansas. We have no such statute in Oklahoma. Hence, those cases are not applicable. Counsel cite five decisions from the supreme court of Arkansas. An examination of the first Arkansas case cited (State v. Parnell, 16 Ark. 506, 63 Am. Dec. 72) will disclose the fact that in a great nnmber of cases the supreme court had held that in indictments for gambling it was necessary to state the names of the persons by whom the game was played, as matters of description of the offense, and that the proof must correspond with this allegation. The legislature of Arkansas passed a law which dispensed with the necessity of making the allegation in the indictment of the names of the persons who engaged in card playing. Upon analogy, the supreme court of Arkansas held that this statute was applicable to indictments for selling whisky. We have no such statute in Oklahoma. Therefore the decisions of the Arkansas courts are not authorities on this point.

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ticular person is injured. I conceive, however, that this distinction is immaterial or unimportant, and that it is really a question touching the essential right of the defendant in the prosecution,—his right to be informed by the indictment of the particular sale alleged to be unlawful. . . . This indictment is for but one offense; but one penalty can be imposed under it. Why should the omission of the name of the purchaser make it an exception to the general rule that, under an indictment of one count, but one offense can be proven, and the rule that, where several offenses have been offered in evidence, the prosecution must elect the particular one on which it will rely? It is argued that it would be illogical to require the indictment to contain several similar counts, only to prove more than one offense. The answer is based on old rules of evidence, that where there is but one count, but one offense can be proven; where there are several counts, several offenses may be proven. These rules are fundamental and established; they are unchanged. See Lebkovitz v. State, 113 Ind. 27, 14 N. E. 363, 597."

We indorse the reasoning of this case, but we do not indorse the action of the court in considering itself bound by precedents which its judgment condemned. We decline to follow any precedents which are not founded upon justice and supported by reason. It is the earnest desire and sole purpose of this court to give to Oklahoma a system of criminal jurisprudence unhampered by ill-considered precedents and free from arbitrary, senseless technicalities. We will be guided alone by the justice of those decisions which we adopt and follow. Reason alone will govern our conduct, it matters not how many decisions may be cited to the contrary. In this way only can we faithfully discharge the laborious and important duties of the position which we occupy, and protect the rights of all classes of our people. We cannot, without doing great violence to our consciences, make any distinctions as to persons and classes. We cannot have one rule for one class of cases and another rule for other classes of cases. The same rules must be applicable to all; the same justice and consideration is the right of all. The more prejudice that may exist against a person charged with crime, the greater the necessity for the strict enforcement by the courts of those rules which experience and reason show to be necessary to the protection of the liberties and rights of the people. It is the sworn duty of this court to see that the law is enforced in Oklahoma without distinction as to persons or classes, and we are going to discharge this duty to the best of our ability, let it please or shake whomsoever it may.

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Counsel for the state cite: State v. Miller, 24 Mo. 532; State v. Spain, 29 Mo. 415; State v. Fanning, 38 Mo. 359; State v. Rogers, 39 Mo. 432; State v. Jaques, 68 Mo. 260. These cases are all based upon the case of State v. Ladd, 15 Mo. 430. An examination of Ladd's Case will disclose that the question which we are now considering was not raised by the counsel in that case. The exact language of the supreme court, on page 431, is as follows: "I will first consider the indictment. It charges that the defendant sold intoxicating liquors in a quantity less than a quart, to wit, one pint of whisky, one pint of gin, etc., to divers persons to the jurors unknown, without any license, etc. The only objection made to it rests on the omission to state the price for which the liquor was sold." If this was the only objection made to the indictment, then this was the only question rightfully before the court, and anything stated by the judge who wrote the opinion with reference to matters not presented is purely *obiter dictum*, and is not, in any sense of the word, binding as an authority. The decision of the court that it is not necessary to state the price paid for such liquors is correct. The price of liquor sold or given away in no manner affects the crime committed, either as to identity, degree, or punishment, and therefore need not be alleged; but there can be no sale or gift of liquor without a purchaser or receiver. Therefore the existence of such purchaser or receiver is a constituent element of the offense, and the name of such person must be given to describe the offense with which the party is charged. Again, the indictment in this case was good because it stated that the names of the persons to whom the sale was made were unknown. This is always permissible, and would be good in any kind of indictment. The subsequent Missouri cases cited by counsel for the state are all based upon an *obiter dictum* of the judge who wrote the opinion in the Ladd Case. As they all rest upon the same foundation, when it is shown that this foundation is unsound, we cannot consider these cases as authorities in point.

Counsel cite Cannady v. People, 17 Ill. 158, and Rice v. People, 38 Ill. 435. In Cannady v. People is cited Com. v. Odlin, 23 Pick. 277. The court says: "In the Massachusetts statutes there are two offenses defined, and different penalties imposed. One against common sellers, or retailers, and the other against persons guilty of a single act, without a license. Where the indictment charged the latter offense, the court held it necessary to charge the time, place, and to a person named, or that the name was unknown. Com. v. Thurlow, 24 Pick. 379. But in an indict-

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ment against a common seller, etc., it was unnecessary to name the person."

We are at a loss to know why this citation was made. It is directly in conflict with the decision which it claims to be founded upon. We agree fully with what the Massachusetts court says on this subject. It is worthy of note that Cannady's Case was decided by a divided court. This further weakens its force as an authority. Also in Cannady's Case, the indictment alleged that the sale was made to persons whose names were unknown. This destroys the force of the decision, because the judge who rendered it went outside of the question submitted to him for decision. In the Rice Case the decision is based alone upon the Cannady Case. We cannot recognize such ill-considered cases as these. Counsel cite State v. Heldt, 41 Tex. 220. This does not support the contention of counsel because the indictment expressly charges that the liquors were sold to persons to the grand jury unknown. Equally unfortunate for the contention of counsel is the citation of Mansfield v. State, 17 Tex. App. 468. On page 470, the court said: "The other cases cited by appellant's counsel in his brief, *viz.*, Burch v. Republic, 1 Tex. 608, and Alexander v. State, 29 Tex. 495, were cases arising under statutes regulating the sale of intoxicating liquors, and cannot, we think, be held applicable to the article of the Penal Code under which this indictment was framed, which article creates and describes a very different offense; that is, pursuing any occupation, etc., taxed by law, without first obtaining a license therefor. It is not the sale of intoxicating liquors that constitutes the offense denounced by said article, but it is the act of pursuing a taxable occupation without obtaining a license therefor. We think the indictment sufficiently alleges this offense, and that the exceptions to the same were properly overruled." As neither of these cases in any wise touch upon the question now before us, we are at a loss to understand why they are cited. State v. Doyle, 15 R. I. 527, 9 Atl. 900, is also relied upon by counsel for the state. That was not a case for selling liquors, but was a case for maintaining a nuisance. We commend this case as being a correct statement of the law upon the subject of nuisances. It would be well for the county attorneys to follow this case in such prosecutions in this state. We give it our hearty commendation.

State v. Jordan, 39 Iowa, 387, is also cited by counsel. The charge in this case is also for maintaining a nuisance. We approve the decision in this case also, except that the indictment would not be good in Oklahoma, because it does not conclude as our Constitution directs. The indictment is as follows: "The grand jury of the county of Wapello, in the name and by the authority of the state of Iowa, accuse Kinsey Jordan of the crime of nuisance, committed as follows: The said defendant, in the state of Iowa, on the 1st day of May, A. D. 1873, in the county aforesaid, did then and there keep a certain house in which he then and there kept for sale and sold intoxicating liquors." In this case the offense was for keeping intoxicating liquors for sale. It was immaterial as to whether any sales were made. Therefore the words "and sold" were surplusage, and need not be proven.

United States v. Warwick (D. C.) 51 Fed. 280, is cited. This is only the individual opinion of the congressional district judge of Alaska, and is altogether unsupported by any line of reasoning. No lawyer will contend that it should be treated as an authority.

Jordan v. State, 22 Fla. 529, and Dansey v. State, 23 Fla. 317, 2 So. 692, are cited by counsel for the state. In both these cases the defendants were indicted for pursuing the occupation of selling intoxicating liquors without a license. It is one offense to pursue an occupation, and it is another offense to do a single act. As to the first offense, some courts do contend that it is not necessary to allege the names of the persons to whom sales are made. This position can be defended with some show of reason. The offense is complete when a person professes and holds himself out to the public as being engaged in such an occupation. If a person has in his possession such liquors and offers them for sale, it is not necessary for a single sale to be made or proven; but these reasons do not apply to cases charging a single sale.

State v. Becker, 20 Iowa, 439, is also cited by counsel. The indictment charges that the defendant, in a certain building, kept intoxicating liquors for sale and did sell them. The offense charged was for keeping such liquors for sale, and it was therefore not necessary to allege to whom they were sold, neither was it necessary to allege or prove any sale. The words "and did sell" were surplusage. Such evidence would be admissible to prove the main fact, *viz.*, that the liquors were kept for sale. This intention might also be proven by other evidence. This is the substance of the decision relied upon.

Counsel also cite State v. Kuhn, 24 La. Ann. 474, and State v. Brown, 41 La. Ann. 771, 6 So. 638. These indictments were for retailing spirituous liquors without having first obtained a license. They were for pursuing an unlawful occupation, and not for a single offense. They are therefore not in point.

State v. Bielby, 21 Wis. 206, is cited. This indictment is for trafficking in and giving

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away spirituous liquors without having first obtained a license therefor. Here the occupation of the defendant is the subject of the indictment, and not any particular sale.

With one exception, so far as we have been able to find, the cases cited by counsel for the state are in the condition of those above discussed. A number of the citations could not be found in the books. When counsel has one grain of wheat, why hide it in a bushel of chaff? This illustrates the danger of making citations from digests. It entails an immense amount of useless work upon appellate courts. It hinders, instead of assists, the courts. It is one thing to understand and discuss the principles of the law; it is another and very different thing to pile up digest citations. We earnestly request the members of the bar in this state to cite in their briefs only such decisions as they have personally examined and found to be applicable to their cases. By so doing they will greatly lighten the burdens of this court, and strengthen themselves in the confidence and respect of the court. It is not evidence of industry, learning, or ability to file lengthy briefs filled with citations from digests, which, upon critical examination, are found to have but little, if any, application to the questions involved in the particular case before the court. We have been forced in many cases to spend a great deal of time in such work. It is unjust to the members of the court, and also to the state. We are already overwhelmed with work, and are over a year behind with cases now on the docket. We should only be expected to consider those decisions which are applicable to the questions before us.

The case cited, which, upon its face, supports the contention of counsel, is State v. Ferrell, 30 W. Va. 683, 5 S. E. 155. The court said: "The indictment, omitting the caption, is in these words: 'The grand jurors of the state of West Virginia, in and for the body of the county of Ritchie, and now attending such court, upon their oaths present that Patrick Ferrell, on the ——— day of June, 1887, in the said county, was a druggist, and as such druggist, at his drug store in the town of Pennsboro, in the county aforesaid, did then and there unlawfully sell alcohol, spirituous liquors, and wines, said sale not having been made for medicinal, mechanical, or scientific purposes, against the peace and dignity of the state.'" This was not an indictment for pursuing an occupation without license, but for a special sale. The court did sustain the indictment, although it failed to allege the name of the person to whom the liquor was sold. In its opinion the court said: "So far from this rule operating with peculiar hardship upon the licensed druggist while engaged in legitimate business, the duties imposed upon him by the statute which confers his peculiar privilege on him, if faithfully performed, secure to him perfect immunity against every groundless prosecution. As a druggist, he has no authority whatever to sell alcohol, spirituous liquors, or wines as a medicine, except the sale be made upon the written prescription of a practising physician in good standing in his profession, etc., specifying the name of the person, and the kind and quantity of the liquors to be furnished to him, and not 'more than one sale shall be made upon the same prescription.' And the production of such prescription by him at the trial of an indictment against him for the sale of alcohol, spirituous liquor, or wines shall be sufficient to rebut the presumption arising from the proof of such sale, if the jury believe, from all the evidence in the case, that the sale was made in good faith, under the belief that such prescription and statement were true."

How could a druggist know what prescription to produce in his defense unless the name of the purchaser is stated in the indictment? The defendant may live at a point distant from the place of trial. After the state has proven the sale to a certain person, would the court stop and allow the defendant to send for his prescriptions? Suppose that the defendant brings all of the prescriptions which he has filed within the time in which the indictment would not be barred by the statute of limitations, must the court stop and be delayed while the defendant is looking for the prescription? But the evidence might disclose a sale not on a prescription, but one made for sacramental, scientific, or mechanical purposes. What good would the prescriptions do the defendant? The defendant, not knowing what particular sale he is charged with having made, has been wholly unable to prepare his defense. Will the court stop and wait until the defendant can go out and gather up his witnesses? This line of reasoning does not apply to conditions existing in Oklahoma, because all sales are unlawful here, just as all acts of larceny are unlawful. But who will contend that, in a case of larceny, the name of the person from whom the theft was committed need not be given in the information?

Counsel, in his oral argument before the court, earnestly insisted upon three propositions to sustain his contention that it is not necessary to state in an information or indictment for the single sale of intoxicating liquor the name of the person or persons to whom such sale was made, *viz.*: (1) That if an information or indictment follows and uses the language of the statute creating the offense, it is sufficient. (2) That the date up-

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on which the sale is alleged to have been made sufficiently informs a defendant of the particular offense with which he is charged. (3) That a different rule of pleading applies to those offenses which violate the personal rights of other individuals from those offenses which do not violate the personal rights of others. Counsel admitted that in the first class of cases it was necessary to give the name of the individuals whose personal rights were violated, but insisted that, as to cases where no personal wrong was done to others, this rule, upon principle, would not apply. We will now proceed to consider each of these propositions in the order named.

First. It is a general rule of law that if an indictment uses the words of a statute, or words of equal import, to this extent the indictment or information is good. But suppose that an indictment or information for murder, or for an assault, or for larceny, perjury, libel, embezzlement, or for any offense, would simply use the language of the statute,—who is bold enough to assert that this is all that the law requires, and that such an indictment or information would be sufficient to charge any offense? We dislike to differ from the eminent counsel for the state, but we at least have respectable authority behind us: "In an indictment for committing an offense against a statute, the offense may be described in the general language of the act, but the description must be accompanied by a statement of all the particulars essential to constitute the offense or crime, and to acquaint the accused with what he must meet on trial." United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571.

Second. The position that the date of the alleged offense charged in the information or indictment is sufficient to put the defendant upon notice of the particular offense which he is required to meet is equally untenable. Every lawyer knows that time is not the essence of the offense, and only becomes material in connection with the statute of limitations. The state is not bound by the alleged date of the commission of an offense, except that the offense charged must have been committed prior to the filing of the information or indictment, and that any date prior thereto may be proven within the date of the limitations prescribed by statute for the given offense alleged in the indictment or information. It is a travesty upon reason to say that the alleged date of an offense gives the defendant the least notice of "all the particulars essential to constitute the offense or crime, and acquaints the accused with what he must meet upon trial." It must be remembered that the Supreme Court of the United States is the highest court of the land. This is the language of that court, which is the most illustrious judicial tribunal on earth, in the case just quoted from, and we are content to accept its conclusions, it matters not how severely they may be criticized or bitterly denounced by the eminent counsel for the state. The rule thus established is not an arbitrary, senseless technicality; but it is absolutely necessary to the substantial rights of a defendant, and is based upon justice and supported by the soundest reasons.

Third. The contention that different rules of pleading exist as between those offenses which involve an invasion of the personal rights of other persons than the defendant, and those which simply constitute a public offense, is equally unsound. One illustration will demonstrate this to an absolute certainty. If A is indicted for having suborned a witness to commit perjury in his behalf, in a case against A for selling whisky, whose personal rights have been invaded? Who will assert that it is not necessary to allege in an indictment for such an offense the name of the witness so suborned, or the substance of such false evidence, or the allegation that it was material to the issues involved?

Again, the contention made is squarely against two provisions in the Bill of Rights of our Constitution: "Sec. 16. Due Process of Law. Sec. 7. No person shall be deprived of life, liberty, or property without due process of law." Section 16, Bunn's Constitution of Oklahoma. No one will deny that due process of law includes notice of the specific offense charged, and reasonable time in which to prepare to make a defense. Who will contend that this has been done when the indictment or information does not contain a statement of all the particulars essential to constitute the offense or crime? How can there be a sale or a gift without a purchaser or receiver? Are they not necessary constituent elements of the crime? How can it be said that a defendant has been given reasonable time in which to prepare his defense, when, after the state has introduced its evidence, he learns for the first time the particulars essential to constitute the crime?

But again: "Sec. 29. Criminal Prosecutions; Change of Venue; to be Confronted with Witnesses. Sec. 20. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed: Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him, and have a copy thereof, and be confronted with

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the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their postoffice addresses." Section 29, Bunn's Constitution of Oklahoma. If an indictment or information does not state the nature and cause of the accusation against the defendant, it is void. This means substantially the same thing as due process of law. Even if this were an open question, we would be bound by these constitutional provisions. "In criminal cases the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amendment to U. S. Const. art. 6, §§ 134–168. The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the crime is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that the indictment must furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and also to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For these facts are to be stated and set forth in the indictment with reasonable particularity of time, place, and circumstances. United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Cooley, Const. Lim. 374; Wharton, Crim. Pl. & Pr. 153." Slover v. Territory, 5 Okla. 509, 49 Pac. 1009.

Again: Section 5358, Wilson's Oklahoma Statutes, is as follows: Sec. 5358. "The indictment must be direct and certain as it regards: First. The party charged. Second. The offense charged. Third. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense." Here is a mandatory provision of our statutes which forces this court to hold all indictments fatally defective which fail to give the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. The language of the statute is that, as to these matters, the indictment must be direct and certain. As we have hereinbefore said, there can be no sale without a purchaser, and no gift without a receiver. A sale or a gift necessarily implies the existence of two or more persons; neither can be accomplished except under these conditions. The mere statement of this proposition amounts to its demonstration to a mathematical certainty. Therefore the existence of such purchaser or receiver is a constituent element of the offense, and his or her name must be alleged in the information or indictment, if known; if not known, that fact must be alleged.

This matter has been before passed upon by this court in Weston v. Territory (Okla. Crim. App.) 98 Pac. 360. We there held that an indictment for a single gift was fatally defective because it omitted to allege the name of the parties to whom the intoxicating liquors were given. At the earnest request of the counsel who represents the state in this case, we have gone over this question again and more fully. The result of this investigation has only strengthened our confidence in the views there expressed. We would quote from (not simply cite) well-reasoned cases enough to fill a volume, sustaining the conclusion at which we arrived in the Weston Case; but, as we are entirely satisfied with the reasoning in the Weston Case, and the authorities there quoted from, and as we have an overwhelming amount of work on our hands, we will content ourselves with only a few additional quotations.

Bishop on Statutory Crimes, § 1037, says: "Where the wrong consists of specific sales, the most ready and apt way of pointing out and identifying the transaction is to give the names of the persons to whom the sales were made. And, in the absence of any other adequate identification, such names should, in principle, be alleged if known, or the fact of their being unknown should be averred in excuse. Yet there is a good deal of authority, more in the older cases than in the later ones, to the proposition that the names are not essential. On the other hand, it has been even held that a statute dispensing with this allegation is unconstitutional and void; and, in one way or another, the doctrine which requires the name, or the averred excuse for its omission, is widely maintained. Where the charge is being a common seller, no names of persons to whom sales are made need be set out, for, in this offense, not even instances of sale are required to be averred."

In the case of Bush v. Republic, 1 Tex. 459, will be found the following language: "It is a general rule that 'the indictment must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it.' 'It is in every case desirable to attend with the greatest nicety to the words contained in the act, for no others can be so proper to describe the crime.' 1 Chitty, Crim. Law, 281, 288; 2 Archbold, Crim. Pr. & Pl. 47. But if the definition and description embraced in the statute be departed

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from in any material respect, and any ingredient in the definition of the offense be omitted, the indictment will be bad. Ibid."

In the case of State v. Pischel, 16 Neb. 608, 21 N. W. 468, the court says: "It is thought expedient to decide the question suggested without a further hearing, or imposing the expense of printing additional briefs. The first question presented is whether or not it is necessary, in an indictment for selling the prohibited liquors, to allege the name of the person to whom the liquors were sold. To this question we answer, 'Yes.' The statute makes each act of selling a crime. It is proper that that act be so described as to identify it from other acts of a similar kind, as near as practicable, and this can be best done by giving the name of the vendee, if known, or, if unknown, so alleged. Bishop, Statutory Crimes, § 1037, and cases cited in note 2. Also, see State v. Doyle, 11 R. I. 574."

In the case of Martin v. State, 30 Neb. 421, 46 N. W. 618, the same doctrine is laid down, and a great many cases cited to support it. In the case of State v. Stamey, 71 N. C. 202, 203, will be found the following language: "1. It does not set forth the name of any person to whom the liquor was given or sold. The offense charged is highly penal, and in order to defend himself the defendant must know not only the offense charged, but the name of the person upon whom it was committed. A conviction upon this bill could not be pleaded in bar of another indictment for the same offense. An indictment charging the defendant with selling spirits to slaves is not good unless their names are given. State v. Blythe, 18 N. C. (1 Dev. & B. L.) 199. So, to charge a white man with playing cards with a slave, without naming him. State v. Ritchie, 19 N. C. (2 Dev. & B. L.) 29. The purpose of setting forth the name of the person on whom the offense has been committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have notice of the specific charge, and have the benefit of an acquittal or conviction if accused a second time."

In the case of State v. Allen, 32 Iowa, 493, will be found the following language: "If, then, any one of the material facts going to make up the offense be left out of the information, it fails to charge an offense, and no judgment can be rendered thereon upon a verdict of guilty. That the sale was made to some 'other person' is as material as that the thing sold was intoxicating liquor. A sale of intoxicating liquors to some person is the very gist of the offense. The offense can only be defined by charging the person accused with selling intoxicating liquor to another person. The person to whom the liquor has been sold should be named, if known, and, if not known, that fact should be stated. This is necessary to enable the defendant, if convicted or acquitted, to plead such conviction or acquittal in bar of any subsequent prosecution for the same offense. The information in this case is, in these respects, clearly and fatally defective."

In the case of Alexander v. State, 29 Tex. 495, 497, it is said: "In the case of Burch v. Republic, 1 Tex. 608, which was a case like the present, this court said: 'It is not sufficient to aver generally that the defendant did vend spirituous liquors in a quantity of a quart and over,' without stating at whose house or establishment, or to whom the vending took place, or some other fact tending to identify the transaction. This is the true principle of the certainty that is required. 'The transaction' of which the party is accused must be identified with reasonable certainty. The indictment, in a case like the present, should name the person to whom the liquor was sold; or, if the name of the person to whom the liquor was sold was unknown to the grand jurors, then other circumstances tending to identify the transaction should be alleged, so that the accused may know what he will be called upon to answer, so that, in case of conviction or acquittal, he may be able to plead the judgment in bar of another prosecution for the same offense. See the case of State v. Hanson, 23 Tex. 232."

In the case of Wilson v. Com. 14 Bush, 159, the same doctrine is announced. In the case of Com. v. Cook, 13 B. Mon. 149, is announced the same doctrine.

In the case of Com. v. Blood, 4 Gray, 32, the court uses the following language: "Nothing can be more clear than the duty of the commonwealth to prove the identity of the offense charged in a complaint or indictment, with that on which it seeks to convict the party charged before the jury of trials. The fundamental principles of our government require this as an essential safeguard to the rights and liberty of the citizen. If it were not so, the constitutional privilege of a party, before he is held to answer to an offense, to have it 'fully and plainly, substantially and formally, described to him,' and to be secure from arrest until 'the cause or foundation of the warrant be previously supported by oath or affirmation,' might be violated at the pleasure of prosecutors. Such a practice would be also in direct contravention of § 2, chap. 135, Rev. Stat. 1836, which requires that, when a complaint shall be made to a magistrate that a criminal offense has been committed, he shall examine the complainant under oath, and, if it appear that such offense has been committed, he shall issue his warrant, reciting

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the substance of the accusation. These provisions of our Constitution and of the statute are but a declaration and affirmation of the ancient rule of the common law that no one shall be held to answer to an indictment or information unless the crime with which it is intended to charge him is set forth with precision and fullness. Petition of Right, 3 Car. I., § 5; R. v. St. George, 9 Car. & P. 491; Com. v. Phillips, 16 Pick. 213. So strictly is this held that, if an indictment charges a party with committing an offense upon the body or property of a person unknown, and it is made to appear at the trial that the name of the person was in fact known to the grand jury at the time when the indictment was found, the defendant will be entitled to an acquittal. The offense must not only be proved as charged, but it must be charged as proved. Archbold, Crim. Pr. & Pl. 5th Am. ed. 36; 1 Chitty, Crim. Law, 213; 2 East, P. C. 651, 781; R. v. Walker, 3 Campb. 264; R. v. Robinson, Holt, N. P. 595.

In State v. Doyle, 11 R. I. 575, it is said: "The complaint is in the usual form. It charges, with the usual negative averments, that on the 28th day of November, A. D. 1876, the defendant 'did unlawfully sell and suffer to be sold, and not for the purpose of exportation, ale, wine, rum, and other strong and malt liquors and mixed liquors,' etc. The only objection made to the complaint is that it does not state the name of the purchaser, nor state that the sale was to some person to the complainant unknown. The question, then, is whether such an averment is indispensable. The cases cited for the defendant show that, in several states where the question has arisen, it has been held that the certainty required in criminal pleading makes it necessary to name the purchaser, unless his name is unknown, in which case it is permissible to describe him as some person to the jurors or complainant unknown. Com. v. Thurlow, 24 Pick. 374; Blodget v. State, 3 Ind. 403; Capritz v. State, 1 Md. 569; Dorman v. State, 34 Ala. 216; State v. Faucett, 20 N. C. (4 Dev. & B. L. 107), 239; State v. Cox, 29 Mo. 475. The only decision which we find to the contrary of this is People v. Adams, 17 Wend. 475, decided in 1837. The decisions rest on the indisputable right of the accused to be charged specifically, so that he may know beforehand what the particular offense is of which he is accused, and be able to prepare his defense, and so, also, that he may not be accused of one offense and be tried for another; and, finally, so that the record of his acquittal or conviction may be a good bar in case he is again indicted or complained of for the same offense. It is evident that this right has not been duly respected in the complaint before us. The offense charged is not so identified as to give the defendant certain information of what in particular she was accused, nor so but that she may have been tried for one offense when she was accused of another, totally distinct from it. Her right 'to be informed of the nature and cause of the accusation' is a constitutional as well as a common-law right, and ought to be carefully guarded and maintained. It is true that even naming the purchaser is not always a perfect mode of identification, but it is the approved mode, and it is perhaps as perfect as any that can be devised. In this state the practice is to omit the name. This practice has prevailed for more than a generation. We do not know that it has ever been questioned. If it has, it has doubtless been sustained. We should be glad if we could sanction it for pending complaints, but we are declaring the law, not simply for pending complaints, but for them and all others after them; and we do not see how, upon either principle or precedent, the practice can be upheld. It is suggested that the objection comes too late. We do not find it so. Ordinarily any defect which is fatal on demurrer is also fatal upon motion in arrest of judgment. 1 Bishop, Crim. Proc. § 1109. In Capritz v. State and in State v. Faucett, supra, the objection was taken on motion in arrest of judgment."

In Wilson v. Com. 14 Bush, 160, the court said: "The general charge that a merchant has sold whisky, etc., without a license so to do, without stating to whom the sale was made, is too general, as it does not inform the defendant with reasonable certainty of the offense charged, and the record of conviction would not be a safe reliance against another indictment for the same offense."

In Dorman v. State, 34 Ala. 217, counsel contended: "The indictment also fails to specify the name of the person to whom the alleged sale was made, or to allege that it was made to any person whatever, and in this particular it is fatally defective. Francois v. State, 20 Ala. 84; Brown v. Mobile, 23 Ala. 722."

In Martin v. State, 31 Tex. Crim. Rep. 28, 19 S. W. 434, the court said: "A general allegation that the accused sold liquor in contravention of law is too general in its terms to charge this offense. The particular offense, with such circumstances as will identify it, should be alleged; otherwise an accused party would not know what particular sale he is to answer for, and could not be prepared to meet the accusation against him. The allegations charging the offense should be specific enough to enable the accused to plead a judgment of conviction or acquittal thereunder in bar of another prosecution for the same offense. The information should

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allege the name of the person to whom the liquor was sold, or, if the name of such person is unknown, that fact should be averred."

In Capritz v. State, 1 Md. 574, the court said: "The indictment does not mention the name of the person to whom the liquor was sold, but merely avers that 'he, the said James Capritz, then and there being a regular licensed ordinary keeper, unlawfully exposed for sale, and then and there did sell, spirituous liquors; to wit, brandy,' etc. In such an indictment, time is immaterial; that is to say, the particular Sunday is immaterial. If the offense be laid on a Sunday previous to the finding of the indictment, it will be sufficient, and the state will not be called upon to prove the day, in exact conformity with the designation of the indictment. It is essential, however, that the name of the person to whom the liquor was sold should be mentioned. State v. Nutwell, 1 Gill, 54. Unless this be furnished, the party has no means of preparing for his defense. Where the name of the purchaser is unknown to the jurors, he may be described as 'a certain person to the jurors aforesaid unknown.'"

These cases present our fixed conclusion upon this question. We will not have time to go over it again.

2. Upon the trial of this case the court instructed the jury as follows: "No. 3. The court instructs the jury that the defendant in this case is a competent witness in this case, and you must consider his testimony in arriving at a verdict; but, in determining what weight and credibility you must give to his testimony in making up your verdict, you may take into consideration the fact that he is the defendant in this case and on trial, his interest in the result of the trial, together with any other fact or circumstance of the trial affecting the credit to be given the testimony of any of the witnesses in the case."

A similar instruction was condemned by this court in the case of Green v. United States (Okla. Crim. App.) 101 Pac. 112, and that case was reversed in part on this account. The same question came up again before us in the case of Hendrix v. United States (Okla. Crim. App.) 101 Pac. 125. The instruction was again condemned, but was held to be harmless error in that case for reasons given in the opinion. We think that it is error for the court to single out any special witness, personally, and burden his testimony with any suggestions which might indicate to the jury that, in the opinion of the court, such witness was liable to testify falsely. Instructions as to the credibility of witnesses should be general, and apply equally to all of the witnesses for the state and the defendant alike. Because a witness may be the defendant is no reason why he should be visited with condemnation upon the one hand, or clothed with sanctity upon the other. He is before the court as a witness, and should be treated by both the court and the jury just as other witnesses are treated,—no better and no worse. We trust that the courts in Oklahoma will cease to give such instructions in the future; otherwise it will result in the reversal of many convictions which, but for such instructions, would be affirmed.

For the reasons hereinbefore given, this case is reversed and remanded, with instructions to the county judge of Muskogee county to set aside the verdict of the jury, and to sustain the demurrer to the information.

Baker and Doyle, JJ., concur.

PENNSYLVANIA SUPREME COURT.

LOUIS WIENER FOR USE OF J. R. PRINGLE

v.

AMERICAN INSURANCE COMPANY OF BOSTON et al.

PHŒNIX INSURANCE COMPANY, Garnishee, Appt.

(224 Pa. 292, 73 Atl. 443.)

Garnishment — corporate debt — nonresidence.

A debt due from one corporation to another, without any limitation with respect to payment, may be garnished in the hands of such corporation in any state where jurisdiction of the debtor can be secured, although neither debtor nor creditor is located therein.

(April 12, 1909.)

Note. — As the debt garnished in this instance was payable generally, and not expressly payable in a state other than Pennsylvania, and as the garnishee, though a foreign corporation, would apparently have been subject to suit in respect of the indebtedness by the principal defendant, the jurisdiction to garnish the same is clear, under the doctrine of Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, supplemented by Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084.

Upon the general subject as to the jurisdiction to garnish an indebtedness due to a nonresident not personally within the jurisdiction of the court, see exhaustive note to Goodwin v. Claytor, 67 L.R.A. 209; and as to place of payment of debt, as affecting jurisdiction to garnish the same, see case notes to Baltimore & O. R. Co. v. Allen, 3 L.R.A.(N.S.) 608, and Steer v. Dow, 20 L.R.A.(N.S.) 263.

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APPEAL by the garnishee from a judgment of the Court of Common Pleas, Number 2, for Philadelphia County, in plaintiff's favor in a foreign attachment proceeding. Affirmed.

The facts are stated in the opinion.

Messrs. **Francis S. Laws** and **John F. Lewis** for appellant.

Messrs. **G. Heide Norris** and **Theodore F. Jenkins**, for appellee:

A debt due to a nonresident is liable to foreign attachment when the debtor is within reach of our process.

Furness v. Smith, 30 Pa. 520; Bushel v. Commonwealth Ins. Co. 15 Serg. & R. 173; Fithian v. New York & E. R. Co. 31 Pa. 114; Jones v. New York & E. R. Co. 1 Grant Cas. 457; Morgan v. Neville, 74 Pa. 52; Barr v. King, 96 Pa. 485; Datz v. Chambers, 3 Pa. Dist. R. 353; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084; Pennsylvania R. Co. v. Pennock, 51 Pa. 244; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207.

Brown, J., delivered the opinion of the court:

This foreign attachment was issued against the American Insurance Company of Boston, a Massachusetts corporation, as defendant, and the Phœnix Insurance Company of New York, a New York corporation, as garnishee. The defendant appeared, and judgment was entered against it for want of a sufficient affidavit of defense. Subsequently judgment was entered against the garnishee on its answers to the interrogatories filed, and from that judgment it has appealed. What was attached was a debt due from the garnishee to the defendant in the attachment, and we are asked to say that this was not attachable, because it was not, in contemplation of law, within the jurisdiction of the court at the time the writ issued. Authorities are not wanting to sustain this contention of the appellant, but we cannot follow them.

If, under the attachment in his hands, the sheriff had undertaken to seize tangible property of the defendant in the possession of the garnishee, beyond the jurisdiction of the court, such property would not have been bound by the attachment. Pennsylvania R. Co. v. Pennock, 51 Pa. 244. By the act of June 13, 1836 (P. L. 568), the goods and effects of a defendant in a foreign attachment, in the hands of the garnishee, shall, after service of the writ, be bound by it, and be in the officer's power; and, if susceptible of seizure or manual occupation, the officer shall proceed to secure the same, to answer and abide the judgment of the court in the case. If tangible goods are not in the possession of the garnishee within the jurisdiction of the court out of which the writ of attachment issued, they cannot be touched by that writ, and are therefore not bound by it. An intangible thing—a debt due from the garnishee to the defendant—cannot be actually seized anywhere; but, being an effect of the defendant in the hands of his creditor, is bound by the attachment from the time it is served. "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere." 2 Parsons, Contr. 8th ed. 702.

It does not appear from the answers to the interrogatories that the debt due by the garnishee to the defendant had imposed upon it any "special limitation or provision in respect to the payment." It was payable generally, and unquestionably could have been sued on here in Pennsylvania, and therefore was attachable here. "This is the principle and effect of the best-considered cases,—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. The rule that, to give a court jurisdiction in a foreign attachment, the *res* must be within the territorial jurisdiction of the court, applies only to tangible assets, capable of actual seizure, and does not apply to choses in action. Jurisdiction to fasten choses in action by garnishee process depends upon the ability to serve that process upon the debtor of the absent defendant, within the jurisdiction of the court. National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663. This case is cited with approval in Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084. In that case a citizen of North Carolina, indebted to another citizen of that state, was, while temporarily in Maryland, garnisheed by a creditor of the man to whom he owed the money, and judgment was duly entered according to the Maryland practice, and paid. Subsequently the original creditor of the granishee sued him in North Carolina, and the defense was set up of judgment against the garnishee and its payment by him; but the North Carolina courts held that, as the situs of the debt was in North Carolina, the Maryland judgment was not a bar to a recovery by the North Carolina creditor, and judgment was awarded against the debtor. On a writ of error to the Supreme Court of the

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United States, that court, in reversing the judgment, held that, as under the laws of Maryland the garnishee could have been sued by his creditor in the courts of that state, he was subject to a garnishee process if found and served there, even though there only temporarily, no matter where the situs of the debt was originally, and it was said: "The cases holding that the state court obtains no jurisdiction over the garnishee if he be but temporarily within the state proceed upon the theory that the situs of the debt is at the domicil either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state. We regard the contention of the plaintiff in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them. Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. Blackstone v. Miller, 188 U. S. 189, 206, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state, when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicil of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay his creditor is thereby arrested, and a lien created upon the debt itself. Cahoon v. Morgan, 38 Vt. 234, 236; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment."

The foregoing is in accord with what was held in Fithian v. New York & E. R. Co. 31 Pa. 114, where the question was whether a debt due by a foreign corporation, which was evidenced by a judgment obtained against it in a foreign state, was attachable here at the instance of a creditor of the corporation's creditor, and we decided that such debt could be attached, and that the garnishee was not protected by paying over the amount of the judgment against it to the attorneys of its judgment creditor in the state of New York, in disregard of the attachment. The attachment, it is true, was one in execution under the act of June 13, 1836, but that act, directing that a debt due to a defendant may be attached, provides that it is to be attached in the manner allowed in the case of a foreign attachment. If the debt was attachable in the attachment execution, it clearly would have been so in a foreign attachment.

The assignment of error is overruled, and the judgment is affirmed.

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TEXAS COURT OF CRIMINAL APPEALS.

MILT DUPREE, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. App. —, 120 S. W. 871.)

Former conviction — appeal — effect.

1. A pending appeal from conviction of an unlawful sale of intoxicating liquor will prevent the conviction from being a bar to another prosecution for the same offense.

Judicial notice — former conviction.

2. A court will take judicial notice, in a prosecution for illegal sale of intoxicating liquors, of the fact that an appeal has been taken from its former judgment convicting accused of the same offense.

(May 26, 1909.)

APPEAL by defendant from a judgment of the Brown County Court, convicting him of the unlawful sale of intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. **Harrison & Wayman**, for appellant:

An appeal does not suspend the judgment so that a plea of former conviction cannot be based on that judgment.

People ex rel. Arns v. Rickert, 159 Ill. 496, 42 N. E. 886; Moore v. Williams, 132 Ill. 589, 22 Am. St. Rep. 563, 24 N. E. 619; United States v. Olsen, 57 Fed. 579.

The trial court is not charged with notice, and need not take judicial cognizance, that an appeal has been perfected in the case pleaded in bar.

Slaughter v. Cooper (Tex. Civ. App.) 107 S. W. 898; Murphy v. Citizens' Bank, 82 Ark. 131, 11 L.R.A.(N.S.) 616, 100 S. W. 895, 12 A. & E. Ann. Cas. 535; Schoonmaker v. Lloyd, 9 Rich. L. 173; Moore v. Chattanooga Electric R. Co. 119 Tenn. 710, 16 L.R.A.(N.S.) 978, 109 S. W. 501; Gibson v. Robinson, 90 Ga. 756, 35 Am. St. Rep. 254, 16 S. E. 969; 16 Cyc. Law & Proc. p. 918; 17 Am. & Eng. Enc. Law, p. 926; 7 Enc. Ev. p. 1003; Watkins v. Martin, 69 Ark. 311, 65 S. W. 103, 425; Gibson v. Buckner, 65 Ark. 84, 44 S. W. 1034; Hall v. Cole, 71 Ark. 601, 76 S. W. 1076; Armendiaz v.

Case Note. — Effect of a pending appeal from a conviction upon its operation as a bar to another prosecution for the same offense.

It is not expressly stated in the foregoing case whether the second indictment was for the same offense as the first or not; and a portion of the language of the court would seem to imply that the court was discussing indictments for different offenses; but the general argument of the court would be unintelligible if such were the fact, and upon the rehearing the court expressly states that, if the judgment introduced was in another case and in respect to a separate transaction, it could not avail appellant as the basis of a plea of former conviction. It is suggested that the second indictment was an attempt to convict the defendant of an entirely distinct offense; but the indictment was drawn in such a form, and the evidence introduced upon the trial was of such a character, that no sufficient distinction between the two actions could be made, and the state was obliged to rely upon the fact that an appeal was pending from the first conviction in order to defeat the defendant's plea of former conviction. This is not expressly stated in the record, but an examination of the original briefs seems to warrant the inference.

There are but few authorities upon the question of the effect of the defendant's taking an appeal from a conviction upon his right to plead the conviction as a bar to a second prosecution for the same offense, and these seem to be in direct conflict.

The language of the court in Maines v. State, 37 Tex. Crim. Rep. 617, 40 S. W. 490, which is discussed and quoted at length 23 L.R.A.(N.S.) in DUPREE v. STATE, seems fully to support the decision in the latter case. The court, however, in the Maines Case, held that the granting of the new trial eliminated from the case the question of former jeopardy, and consequently the case, in reality, is not in point upon the question.

The decision in Harvey v. State (Tex. Crim. App.) 121 S. W. 501, is squarely in point, and supports the decision in DUPREE v. STATE. In this case it was held that evidence to sustain a plea of former jeopardy would have been admissible upon the second trial, except for the fact that the lower court certified that the cause upon which the plea of former conviction rested had been appealed from, and was pending on appeal in the appellate court. The court said: "Under all the authorities, this was not a final judgment, or such a judgment as would furnish a basis for a plea of former conviction." It is to be noted, however, that no authorities are cited.

There appear to be no other cases which expressly support this view. It is stated in Wharton, Crim. Pl. & Pr. 9th ed. ¶435, that a conviction on which there is no judgment, as where the case is pending on error, is not necessarily a bar to a second prosecution for the same offense; but most of the cases cited to this proposition are clearly distinguishable. The decision in Com. v. Fraher, 126 Mass. 265, supports the text somewhat. In this case it was held that where no judgment had been rendered on a verdict of guilty on the first indictment, and the question whether that verdict should stand was still open and pending on a bill of exceptions filed by the defendant himself, the former verdict would not sup-

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de la Serna, 40 Tex. 304; Goodwin v. Harrison, 28 Tex. Civ. App. 7, 66 S. W. 308; Anderson v. Cecil, 86 Md. 490, 38 Atl. 1074; Enix v. Miller, 54 Iowa, 551, 6 N. W. 722; Garretson v. Ferrall, 92 Iowa, 728, 61 N. W. 251; Stanley v. McElrath, 86 Cal. 449, 10 L.R.A. 549, 25 Pac. 16; Thayer v. Honeywell, 7 Kan. App. 548, 51 Pac. 929; Grace v. Ballou, 4 S. D. 333, 56 N. W. 1075; Cumberland Teleph. & Teleg. Co. v. St. Louis, I. M. & S. R. Co. 117 La. 199, 41 So. 492; Auditor General v. Clifford, 143 Mich. 626, 107 N. W. 287; Allison v. Fidelity Mut. F. Ins. Co. 74 Neb. 366, 104 N. W. 753; Ollschlager's Estate, 50 Or. 55, 89 Pac. 1049; McNish v. State, 47 Fla. 69, 36 So. 176.

Mr. **F. J. McCord**, for appellee:

In order to establish the plea of former conviction, the accused must prove the judgment showing a conviction, that such judgment has never been set aside, that a new trial has not been granted, and that the case has not been reversed, nor the judgment arrested.

Simco v. State, 9 Tex. App. 338; Dubose v. State, 13 Tex. App. 418; Parchman v. State, 2 Tex. App. 239, 28 Am. Rep. 435; Maines v. State, 37 Tex. Crim. Rep. 617, 40 S. W. 490.

Ramsey, J., delivered the opinion of the court:

This is an appeal from a judgment of conviction had in the county court of Brown county on October 13, 1908, convicting appellant of unlawfully selling intoxicating liquors in said county, and assessing his punishment at a fine of $50 and thirty days' confinement in the county jail.

In this case a statement of the facts was filed, which was duly approved by the court, and in the case there is properly raised the issue and question as to the validity of appellant's plea of former conviction. This plea in substance contained averments that appellant had heretofore been convicted of the same offense, and is well drawn, and is, we think, sufficient, if sustained by the evidence, in that it in terms avers a conviction had in the county court of Brown county on the 28th day of July, 1907, convicting appellant of the sale of intoxicating liquors on a sale to the witness Couch, on a general

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port the plea of former conviction, even assuming that both prosecutions were for the same offense.

Some other cases bearing somewhat on the subject may be noted.

In Williams v. State, 20 Tex. App. 357, the defendant was indicted a second time for the same offense on the same day that the judgment of conviction on the first indictment was reversed on appeal. On a motion in arrest of judgment on the second conviction, the court held that the pending appeal from the first conviction was not a good ground for an arrest of the second judgment. This decision, however, is based solely on the terms of the statute governing the granting of arrests of judgment, and does not reach the merits of the question under discussion.

Where a motion to arrest judgment of conviction upon an indictment conceded to be invalid by the prosecuting officer had been made, it was held in State v. Huffman, Addison (Pa.) 140, that the first conviction was not a bar to a second conviction for the same offense. It does not appear, however, that the first conviction had not been set aside, or that the motion in arrest of judgment was still pending.

The arresting of judgment after conviction on an indictment for felony was held in People v. Casborus, 13 Johns. 351, not to be a bar to a second indictment for the same offense. Cases, however, in which the judgment has been arrested, are not in point upon this question, for, as is pointed out in the Casborus Case, the effect of arresting a judgment is the same as quashing the indictment; and the arrest of judgment cannot be pleaded in bar to another prosecution for the same matter, because there is no judgment of the court susceptible of review.

The decision in United States v. Olsen, 57 Fed. 579, is directly in conflict with the Texas decisions cited above. In this case the court, after quoting with approval a statement of Mr. Justice Clifford in Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118, to the effect that a plea of former conviction is bad unless it contains the averment that the prior judgment is in full force and unreversed, said that it was not prepared to say that the plea must also show that no appeal or writ of error had been taken from the judgment pleaded at bar, and it was held that even though an appeal was pending, the defendant was not, for that reason, deprived of the protection of the judgment if it was otherwise sufficient. And the court cited with approval Bishop, Crim. Law, § 1021, to the effect that there can be no second prosecution while the judgment, even if void, is unreversed; not because there has been a jeopardy, but because an erroneous final judgment is voidable only, and of the same effect while it stands as a valid one.

There is undoubtedly much authority in civil cases for the proposition that an appeal or writ of error, during its pendency, deprives the judgment of that finality of character necessary to entitle it to admission as *res judicata;* but it may be considered doubtful whether a rule of the civil courts, in which both parties stand upon an equal footing, is applicable to a criminal case, where the defendant is entitled to have statutes and rules of procedure construed strictly in his favor.

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charge, and is followed by the allegation that the "offense for which he is now being prosecuted is, under the law, one and the same transaction and offense as that for which he has heretofore been convicted, and that said judgment has not been set aside or reversed, but remains in full force and effect, and that he, affiant, is one and the same person who was thus tried and convicted, and against whom the judgment aforesaid was rendered in said court; and, further, that the evidence of the witness Couch upon which the judgment aforesaid was predicated was to the substance and effect that he bought various and sundry drinks of whisky and intoxicants from appellant on or about the day alleged in this case, all of which was before the jury in the cause in which he was convicted." On the trial appellant offered in evidence in support of his plea of former conviction the indictment in said cause No. 2,989, in which he had theretofore been convicted, which charges the sale of intoxicating liquor by appellant to J. C. Couch on or about the 10th day of April, 1907, the judgment of conviction had thereon in the county court of Brown county, Texas, on the 28th day of July, 1907, and the charge of the court, submitting this issue to the jury, wherein the court gives this charge: "Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant, in Brown county, Texas, on or about the 10th day of April, 1907, and since the 16th day of November, 1906, next before the filing of the indictment herein, did unlawfully sell one drink of whisky, the same then and there being intoxicating liquor, to J. C. Couch, as charged, and that the sale of intoxicating liquor had theretofore been and was then and there prohibited in said Brown county under and by the laws of this state, then you will find defendant guilty, and assess his punishment by a fine of not less than $25, nor more than $100, and imprisonment in the county jail for not less than twenty nor more than sixty days." There was no proof offered as to what had become of this judgment,—as to whether it was final, had been set aside, or appealed from. As a matter of fact, it had been appealed from, the appeal was then pending, and is to-day before this court.

Appellant relies, to sustain his plea, upon the decisions of this court in the case of Piper v. State, 53 Tex. Crim. Rep. 550, 110 S. W. 899, and Alexander v. State, 53 Tex. Crim. Rep. 553, 110 S. W. 918. As applied to the facts of those cases, there is and can be no doubt about the correctness of the decisions therein rendered. It is our judgment that plea of former conviction in this case should not have been submitted at all, and furnishes absolutely no protection to appellant. The court below, as all the courts of record, was authorized, and indeed required, to take notice of his own proceedings and records. The court and judge presiding knew, and was charged by law with knowing, that the conviction in the original case, the basis of the plea, had been appealed from, and on such appeal the judgment and its effect suspended. It was held in the case of Maines v. State, 37 Tex. Crim. Rep. 617, 40 S. W. 490, that on a plea of former conviction, where it appeared that defendant's motion for a new trial in the case in which the conviction was had was still pending, it was his duty to ask for a postponement of his trial; and it was his right to have a final disposition of the first case before being forced to trial in the second, in order that he might avail of such disposition on his plea of former conviction. In discussing the case, Judge Henderson says: "In our opinion, it was the duty of appellant, when he was placed on trial, in view of the fact that a motion for a new trial was pending in said former case, to have asked that the case then called for trial be postponed until the former case should be finally disposed of. It was his right to have a final disposition made of said other case before he was forced to trial in the last-mentioned case, in order that he might set up such final disposition. This was not done. The record shows that there was really no final judgment against the appellant when he set up his special plea, and it further shows that, while a new trial was then pending, before the record was made up and the bill of exceptions approved by the court in this case, a new trial was granted." To the same effect, see Brown v. State, 43 Tex. Crim. Rep. 272, 64 S. W. 1056; Washington v. State, 35 Tex. Crim. Rep. 156, 32 S. W. 694; Powell v. State, 42 Tex. Crim. Rep. 11, 57 S. W. 94.

This question came before this court in the early case of Thompson v. State, 9 Tex. App. 649, in which Judge Winkler says: "The position of counsel, that the defendant had once before been placed in jeopardy and could not be again tried, though supported by an able and ingenious argument, in which numerous authorities are cited, is wholly untenable. The circumstances are briefly these: The defendant had previously been tried and convicted. On his own appeal the conviction was set aside, the judgment reversed, and the case remanded for a new trial. 4 Tex. App. 44. The effect of this action of the court of appeals upon the defendant's case was to place his case in precisely the same condition as if the district court had granted a new trial and there had been no appeal. Code Crim. Proc. 1879,

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art. 876. In such a case the doctrine of former jeopardy has no application whatever, for the simple reason that there had been no final adjudication of the case. Vestal v. State, 3 Tex. App. 648, and authorities there cited; Simco v. State, 9 Tex. App. 338. The action of this court on the former appeal is known to us, and it is shown by the record that it was known to the court below on the present trial. The plea of former jeopardy was properly stricken out on the motion and demurrer of the county attorney." It will be noted by the language of this case that an appeal had been had and a reversal obtained in this court. In many cases cited in the books (Dubose v. State, 13 Tex. App. 418, and Parchman v. State, 2 Tex. App. 239, 28 Am. Rep. 435) it appeared that a motion for a new trial had been granted, and for these reasons the plea of former conviction was held unavailable. It would, indeed, be a singular doctrine to hold that because in one case, in prosecutions covering many months, a conviction for violating the local option law had been had, while contesting this conviction and resorting to all the means known to law to escape its result, the appellant would be able to use such conviction, while still denying its force and while suspending its effect, as a shield against prosecution for other sales. If this could be done, it might easily happen that, while contesting the first of thirteen cases, an acquittal might be obtained in the remaining twelve cases on the ground of former conviction, and finally, on appeal, a reversal obtained in the first case, and ultimately a judgment of acquittal therein secured. It would thus happen that appellant would secure the benefit of a former conviction in the twelve cases, whereas it might result that in the case used as a shield he would go free, and we would have the strange anomaly of twelve acquittals by reason of a former conviction, when finally it should be determined that the appellant was not guilty at all, and he would escape punishment in all thirteen cases, in some or all of which he might be guilty, on the ground of a conviction in the trial court, contested by him, in which it had been finally determined that in fact he was not guilty of any offense.

Our ruling is directly in keeping with the rule laid down in our supreme court. It was held in the case of Texas Trunk R. Co. v. Jackson Bros. 85 Tex. 608, 22 S. W. 1030, that an appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives judgment of finality of character necessary to entitle it to admission as *res judicata*. It was also held in the case of Maxwell v. First Nat. Bank (Tex. Civ. App.) 24 S. W. 848, that *res judicata* cannot be pleaded while judgment relied upon is pending appeal in another suit. It was later held in the case of Buckner v. Lancaster (Tex. Civ. App.) 40 S. W. 631, that a judgment from which an appeal is pending is not admissible in evidence as conclusive of the issue it involves. It is urged, however, that to adopt this practice would involve the application of a rule that would delay proceedings in courts and cause much confusion. That this might result is undoubtedly true; but, at least, it would follow the rule everywhere adopted in this state, and would, while perhaps occasioning delay, result in the due administration of justice, and would not involve the absurd and ridiculous result which the construction contended for by appellant would necessarily cause to apply.

Finding no error, the judgment is affirmed.

Brooks, J., absent.

A petition for rehearing having been filed, **Ramsey, J.**, on June 23, 1909, handed down the following additional opinion:

In this case counsel for appellant have filed a very able, thoughtful, and well-considered motion for rehearing, in which the correctness of the opinion of the court is questioned and its conclusion attacked with great vigor. It is with entire candor admitted in the motion that the conclusion of the court in holding that an appeal from a judgment, during the pendency of such appeal, deprives same of the finality of character necessary before it can be pleaded in bar of another prosecution. This, it is conceded, is the rule of our supreme court, and is also the rule adhered to in very many of the other states of the Union. It is recognized that this is the first time the doctrine has been applied in this court, though the correctness of the doctrine laid down by us is substantially conceded. The conclusion of the opinion, with which issue is taken, is that part of same which holds, in substance, that a trial court would and should take judicial notice that an appeal was pending in this tribunal, in the absence of any direct evidence to this effect.

In the original opinion we made the following statement: "The court below, as all the courts of record, was authorized, and indeed required, to take notice of his own proceedings and records. The court and judge presiding knew, and was charged by law with knowing, that the conviction in the original case, the basis of the plea, had been appealed from, and on such appeal the judgment and its effect suspended." This statement was made on the assumption that the case from which the former conviction resulted was, indeed, the same case on which appellant was in the instant case being pros

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cuted. If the judgment introduced was in another case, and in respect to a separate transaction, it could not avail appellant as basis of a plea of former conviction. By the words "in another case" we mean, of course, another separate and severable transaction. So that it seems to us that appellant's argument defeats itself. If, as a necessary result of his position, it is asserted that in the instant case the conviction could not be had for the reason that a former conviction in respect to the same matter had once been had against appellant, then where the parties were the same, the transaction the same, and before the same court, by all the rules of law the court must take cognizance of its own judgments in respect to such matter. If it be conceded it is a different case and different transaction, then it is not available as a basis of a plea of former conviction at all. We do not attach any importance to the fact that the former conviction was had in a merely different numbered case. The true test is, as we understand: Were the parties the same? Was the transaction the same? To illustrate: If one should be indicted for murder, and on trial convicted of manslaughter, a new trial granted, and, for any reason, a new indictment found, the case docketed under a new number, could it be doubted that, where pending in the same court, the judge must take cognizance of the proceedings and judgments in the different numbered case against the same defendant? The statement in the original opinion was perhaps rather broader than should have been made, and not stated with that exactitude and accuracy which is always desirable in opinions of courts of last resort; but we assumed that it would be understood and read with reference to and in the light of the facts shown by the record.

There are many authorities holding that the courts are not required to take judicial cognizance and notice of their own judgments in cases pending therein between other parties. This rule is well established and supported by the cases cited by appellant, and of this rule the case of Slaughter v. Cooper (Tex. Civ. App.) 107 S. W. 898, is an excellent illustration. In that case the judgment in the suit of Cooper v. Heffner was admitted in evidence, and it appeared on the face of judgment that notice of appeal was given; but it was not shown that the appeal was ever perfected, so as to give it that finality necessary to make it admissible in evidence. And it was further objected to because the appellant was not a party to the case, and his rights were not concluded by reason thereof in this case. It was there held, following the case of Rust v. Burke, 23 L.R.A.(N.S.) 57 Tex. 343, that the fact that an appeal was ever perfected cannot be presumed, and that the judgment must be held to be a subsisting and valid judgment until the contrary was shown. There, as will be noted, the judgment was between different parties, and one to which appellant was in no sense a party, and by which, in the nature of things, he could not be bound.

We think, further, in any event, that appellant is without complaint, for the reason that the court did, in an admirable charge, submit the issue of former conviction to the jury. This matter was submitted to them in this language: "In this case the defendant has pleaded specially that he has heretofore been tried and convicted of the same offense for which he is now being tried, and evidence has been introduced before you with regard to said plea. You are charged that in order to sustain said plea you must be satisfied from the evidence that the offense for which the defendant was formerly convicted was the identical case for which he is now on trial before you; that is, that the evidence in the former case and that introduced in this case establishes one and the same state of facts and circumstances. Or, if you find from the evidence and the former charge of the court the jury in former case could have convicted defendant of the charge for which he is now being tried, if you are so satisfied and so believe from the evidence, then the form of your verdict will be, 'We, the jury, find that the matters alleged in the defendant's plea of former conviction are true;' and you need not inquire any further into nor render or return any further verdict in the case. But should you not be so satisfied from the evidence, and upon further inquiry, under the other instructions herein given you, you should find the defendant guilty as charged in the indictment, then and in that event the form of your verdict will be, 'We, the jury, find that the matters alleged in the defendant's plea of former conviction are untrue, and we further find that the defendant is guilty as charged in the indictment,' and assess his punishment at fine and imprisonment as directed under the other instructions herein given you." It was, of course, under the well-settled rules, incumbent on appellant to show a conviction for the same offense as that wherein he is here charged.

We have carefully considered the matter, and are clearly of opinion that appellant is without just cause of complaint, and that the judgment is correct.

The motion for rehearing is in all things overruled.

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UTAH SUPREME COURT.

HYRUM BELNAP, Appt.,
v.
LIZZIE CONDON et al., Respts.

(34 Utah, 213, 97 Pac. 111.)

Lien — materialman — contract — parol.

1. A materialman may show a parol agreement between a conditional vendor and his vendee from which authority to purchase material to improve the property may directly appear or be inferred, and is not bound by the terms of the written agreement between them.

Same — agent's orders — conditional vendee.

2. The mere expectation by a conditional vendor of real estate that the purchaser will make improvements upon it and thereby enhance its value, or permission to do so, is not sufficient to establish the relation of principal and agent between them, so as to give the one furnishing the material a right to a lien on the vendor's interest, under a statute giving liens for materials furnished, whether at the instance of the owner, or of "any other person acting by his authority or under him as agent."

Same — vendor's interest — alteration of account.

3. One furnishing materials for a building to a conditional vendee of the real estate on which it is to be placed, to whom it is charged, cannot change the account so as to bind the interest of the vendor without his consent, upon ascertaining the true state of the title.

(August 4, 1908.)

Case Note. — Power of lessee or vendee to subject owner's interests to mechanics' liens.

It is the purpose of this note to show under what conditions a lessee, vendee, licensee, or other person bearing some similar contractual relationship with the owner, may subject the latter's interests to a mechanics' lien under the various statutes affording liens for labor or materials furnished in erecting buildings or making other improvements upon lands. Cases involving improvements made by persons bearing some legal relationship, such as husband, guardian, etc., have been excluded.

The character of the contractual relationship borne by the person causing the improvements to be made, to the owner, is apparently immaterial, as the result is the same in practically every case, whether such person be a lessee, vendee, or licensee. If the court makes any distinction in this respect, the fact will be noted in connection with the case.

Two distinct and directly opposed rules of construction are frequently applied to mechanics' lien statutes. Some courts hold that they are to be strictly construed, as being in derogation of the common law. On the other hand, it has been said that as they are highly remedial in character, they should receive a liberal construction. It is suggested that both rules are to be applied. Asserting rights in derogation of the common law, the lienor must bring himself strictly within the requirements of the statute; but, having brought himself within the provisions of the statute, and having shown that he is one of the class to whom it was intended to give a special remedy for enforcing his claim, the statute is to be liberally construed, so that he may receive the benefits which the legislature intended to grant him.

It should be noted at the outset that great difficulty has been experienced in grouping the cases according to any logical scheme of classification, so that the rulings of the various courts as to the effect of statutes of the same general import, under similar conditions, may be shown. The statutes not only differ greatly in their terms, but also are the subject of frequent amendment. As many of the cases do not set out the statute in terms, nor make mention of the particular provision under which the lien is claimed, it has been necessary in many cases to compare the decision with others from the same jurisdiction in order to determine the bearing of the case upon the point in question. A number of cases which, apparently, are determined without reference to any particular statute, have been grouped at the close of the note.

Furthermore, different provisions of the same statute frequently are apparently inconsistent, and a lien may be claimed under one provision, when other provisions would seem to negative the right to a lien. The attempt has been made, however, to group, so far as possible, cases according to the particular provision upon which the case turns.

Statutes giving liens for improvements made under contracts with the owner—general rule.

Under statutes confining mechanics' liens to claims for labor or materials furnished for improvements made under contracts with the owner, or with the owner or proprietor, it may be stated generally that no contract for labor and material, made by a lessee or vendee, will subject the owner's interests to a lien; and this is so, even if the owner has knowledge that the labor and material is being furnished. One exception to this rule, recognized in some states, but not in all, is where the contract between the owner and his vendee or lessee expressly requires the latter to make specified improvements, the cost of which, or a part thereof, is to be borne by the owner.

Under statutes of this general character, the following cases hold that contracts for improvements made with lessees or vendees, or with parties holding bonds for title, do not subject the legal owner's interests to

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APPEAL by plaintiff from a judgment of the District Court for Weber County in favor of the owner of the fee in a proceeding to enforce a mechanics' lien on real estate. Affirmed.

The facts are stated in the opinion.

Mr. **J. D. Skeen and W. L. Maginnis,** for appellant:

Where a contract of sale requires the vendee to make improvements on the land, the vendor thereby either constitutes the vendee his agent to make the improvements, or contracts that the fee-simple title to the land may be bound by a mechanics' lien to pay for the improvements.

20 Am. & Eng. Enc. Law, p. 322; 27 Cyc. Law & Proc. p. 61; Boisot, Mechanics' Liens, § 305; Henderson v. Connelly, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1; Paulsen v. Manske, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; Story, Agency, 476; Sheehy v. Fulton, 38 Neb. 691, 41 Am. St. Rep. 769, 57 N. W. 395; Shapleigh v. Hull, 21 Colo. 419, 41 Pac. 1108; Hendrie & B. Mfg. Co. v. Holy Cross Gold Min. & Mill. Co. 17 Colo App. 341, 68 Pac. 785; Shearer v. Wilder, 56 Kan. 252, 43 Pac. 224; Hill v. Gill, 40 Minn. 441, 42 N. W. 294; Bohn Mfg. Co v. Kountze, 30 Neb. 719, 12 L.R.A. 33, 46 N. W. 1123; Guiou v. Ryckman, 77 Neb. 833, 124 Am. St. Rep. 877, 110 N. W. 759; Hickey v. Collom, 47 Minn. 565, 50 N. W. 918; Althen v. Tarbox, 48 Minn. 18, 31 Am. St. Rep. 616, 50 N. W. 1019; Edwards & McC. Lumber Co. v. Mosher, 88 Wis. 672, 60 N. W. 264; Miller v. Mead, 127 N. Y. 544, 13 liens: Brown v. Morison, 5 Ark. 217; Pittsburgh Plate Glass Co. v. Peters Land Co. 123 Ga. 723, 51 S. E. 725; Wilkins v. Litchfield, 69 Iowa, 465, 29 N. W. 447; Johnson v. Pike, 35 Me. 291; Gray v. Carleton, 35 Me. 481; Metcalf v. Hunnewell, 1 Gray, 297; English v. Foote, 8 Smedes & M. 444; Kirk v. Taliaferro, 8 Smedes & M. 754; Laud v. Muirhead, 31 Miss. 89; Dutro v. Wilson, 4 Ohio St. 101; Mutual Aid Bldg. & L. Asso. v. Gashe, 56 Ohio St. 273, 46 N. E. 985; Filberl v. Davis, 4 Ohio Dec. Reprint, 496; Gillespie v. Bradford, 7 Yerg. 167, 27 Am. Dec. 494; Judson v. Stephens, 75 Ill. 255; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; Williams v. Vanderbilt, 145 Ill. 238, 21 L.R.A. 489, 36 Am. St. Rep. 486, 34 N. E. 476; Hickox v. Greenwood, 94 Ill. 266.

Builders who contract with lessees have no lien on the property, there being no privity between the builder and the owner. Hoffman v. Laurans, 18 La. 70; Sewall v. Duplessis, 2 Rob. (La.) 66.

And in Nicholson v. Nichols, 115 N. C. 200, 20 S. E. 294, it was held that no lien would attach unless work was done or the materials were furnished under a contract with the owner, express or implied.

So, in Conner v. Lewis, 16 Me. 268, it was held that one who merely held a contract of conveyance was not the proprietor or owner within the meaning of the statute giving liens for labor and material furnished under contract with the owner or proprietor, and the fact that the true owner's name is in the body of the contract for the building will not cause the lien to attach to his interest, where he did not sign the contract.

And in Getto v. Friend, 46 Kan. 24, 26 Pac. 473, it was held that, in actions to foreclose mechanics' liens for work done and for material furnished under a contract with one who has an executory contract for the purchase of land, and is in possession thereof, the lien of mechanic or materialman must be measured by the extent of the equity of the purchaser under the contract. And to the same effect were the decisions in Johnson v. Badger Lumber Co. 8 Kan. App. 580, 55 Pac. 517, and Seitz v. Union P. R. Co. 16 Kan. 133.

Where the plaintiffs, when they performed the work and furnished the materials, knew that the ones at whose instance the work was done had only an oral contract, or a privilege or option to purchase, it was held in Thomas v. Ellison, 57 Ark. 481, 22 S. W. 95, that they had no lien upon the interests of the owner, where the work was done without the owner's authority and he in no way misled them, or did anything to prevent the vendee from acquiring the legal title.

A plea by defendant that she was the proprietor of the land, and did not contract for the erection of the building, was held good in Sibley v. Casey, 6 Mo. 164, where the statute gave a lien to those only who contracted with the proprietor.

And in Hawley v. Henderson, 34 Miss. 261, it was held that a complaint which alleges that material was furnished to one who was in possession of and in control of the property was bad on demurrer, where the express provision of the statute confined liens to those under contracts with the proprietor or lessor of property.

And where the lease provided that no alteration should be made without the owners' written consent, and the owners supervised improvements at the lessee's request, to see to it that the alterations which were being made in the building were not injurious to their interests, it was held in Muldoon v. Pitt, 54 N. Y. 269, that the directions given by the owners did not in any sense constitute them parties to the contract for the improvement. And to the same effect was the decision in Cornell v. Barney, 94 N. Y. 394.

A contract by the owner to sell the property, and to advance money to the vendee to build upon it, does not make the vendee a contractor with the owner within the meaning of a statute giving liens for material or labor furnished to one who contracts with the owner to make improvements on the property. Loonie v. Hogan, 9 N. Y. 435, 61 Am. Dec. 683.

So, a vendor of land who agreed to make

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L.R.A. 701, 28 N. E. 387; Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219.

Messrs. **James H. DeVine** and **James N. Kimball**, for respondent Condon:

Requiring the vendee to build a house upon the premises would not give him authority from vendor, or make him her agent, to purchase material for the house, or subject her interest in the lot to a mechanics' lien.

Morrow v. Merritt, 16 Utah, 412, 52 Pac. 667; Morrison, M. & Co. v. Clark, 20 Utah, 438, 77 Am. St. Rep. 924, 59 Pac. 235.

The lien attached only to such title as the purchaser had, and the vendor could not be required to part with his title until the purchase money was paid.

Hickox v. Greenwood, 94 Ill. 266.

Mr. Theodore Maloney for respondent Becker.

Frick, J., delivered the opinion of the court:

The appellant instituted this action to foreclose a mechanics' lien. In his complaint he in substance alleges that the respondents were indebted to him in the sum of $218.61 for a balance due for certain materials furnished by him to them at their special instance and request, to be used in the construction of a certain building to be erected upon certain premises, which are described in the complaint, and that said materials were furnished between the 29th day of August and the 26th day of October, 1904, and were used for the purposes aforesaid.

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advances for the purpose of assisting the vendee in erecting buildings thereon is not the owner of the buildings, within the meaning of a statute providing for liens made under contract with the owner, so as to subject his interests to the lien. Burbridge v. Marcy, 54 How. Pr. 446; Dugan v. Brophy, 55 How. Pr. 121; Holley v. Van Dolsen, 55 How. Pr. 333; Hallahan v. Herbert, 4 Daly, 209, affirmed in 57 N. Y. 409; Walker v. Paine, 2 E. D. Smith, 662; Gay v. Brown, 1 E. D. Smith, 725. These cases all cite with approval the Loonie Case and arrive at the same result, but apparently approach the question from another point of view.

But a vendee under an executory contract of sale can subject the legal title to a lien where the holder of such title with full knowledge that the improvements are being made, does not disclose to the contractor the true condition of the title. Donaldson v. Holmes, 23 Ill. 85.

So, where certain material was furnished to one holding under a contract of sale, and, with the full knowledge of the owner, was put into the construction of a building, it was held in Weber v. Weatherby, 34 Md. 656, that the materials must be considered to have been furnished upon the authority of the owner, within the meaning of the statute, as the latter, by his conduct, accepted the agency of the vendee. And to the same effect was the decision in Blake v. Pitcher, 46 Md. 453.

The following cases present somewhat unusual features:

In Scales v. Griffin, 2 Dougl. (Mich.) 54, after stating that a mere trespasser could not subject the owner's interest to a mechanics' lien, the court said: "Little less monstrous would be the doctrine that the owner, who has contracted to convey a lot upon certain terms, and given the possession until those terms be fulfilled, without parting with his title, but who, on account of a breach of the contract, was obliged to take possession of his land again, should be subject to be deprived of his title by virtue of such a lien for buildings erected for the contractor, and without the privity or consent of the owner." And to the same effect was the decision in Wager v. Briscoe, 38 Mich. 587.

And in Fuller v. Detroit Loan & Bldg. Asso. 119 Mich. 71, 77 N. W. 642, where the statute gave a lien for labor and materials furnished under contract with the owner, part owner, or lessee, to the extent of the interest of such owner, part owner, or lessee, it was held that one holding under a land contract, who completed a building being erected upon the land with money furnished by the owner, but which was to be repaid, was not a contractor with the owner, so as to make the plaintiff, who furnished labor and material, a subcontractor, and entitle him to a lien upon the owner's premises. The court said that a provision of the statute that the lienor who contracted with a vendee should be subrogated to the interests of the latter in case the contract should be surrendered, upon his performance of the vendee's obligations within a stated period, took the case out of the class of cases like Bohn Mfg. Co. v. Kountze, 30 Neb. 719, 12 L.R.A. 33, 46 N. W. 1123, which hold that where the construction of a building by a vendee is authorized by the vendor, the lien attaches to the whole land.

And the holder of a grantor's lien cannot subject the property to a lien in favor of one whom he hired to take care of the property, where the statute requires that a lien shall attach only where there is a contract with the owner. Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. 809.

And where a lease provided that the lessee was to pay for repairs, and there was a special fund set apart by the lessee for their payment, and the premises were not to be bound for the repairs, it was held in Boone v. Chatfield, 118 N. C. 916, 24 S. E. 745, that no lien could attach to premises for such repairs, made at the instance of the lessee.

In Willverding v. Offineer, 87 Iowa, 475, 54 N. W. 592, where a daughter purchased a house for the use of her father and mother, and the latter had a right to do with the property anything which the daughter could have done, and the daughter knew that ma-

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These allegations are followed by the usual allegations in such cases with respect to the filing of a notice of intention to claim a lien upon the premises in question, and with a prayer for foreclosure of the lien. The respondent Becker made no appearance in the action, and default was entered against him. The respondent Mrs. Lizzie Condon answered the complaint, in which she denied that she was indebted to plaintiff, or that she purchased or authorized the purchase of the material for the purposes aforesaid, or for any purpose, and alleged that she is, and prior to the alleged furnishing of said materials was, the owner of the premises described in the complaint; that she, prior to said time, had sold said premises to the respondent Becker, and had agreed to convey the same to him upon payment of the purchase price therefor; and that no part of the purchase price had been paid.

Upon a hearing the court found the facts to be substantially as follows: (1) That the respondent Mrs. Lizzie Condon was not indebted to the appellant in any sum. (2) That she was, at all times mentioned in the complaint, the owner in fee of the premises set forth in the complaint; that she at no time requested the appellant, or anyone acting in his behalf, to furnish any material for the purposes of erecting a building upon the premises described in the complaint. (3) That on the 4th day of August, 1904, said Lizzie Condon entered into an agreement with the respondent Becker and wife, whereby she sold the premises described in the

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terials were furnished and labor performed in making improvements to the building, it was held that the interests of the daughter would be subjected to a lien for the improvements.

A mechanics' lien for improvements upon land, constructed with the consent of the owner, under an oral contract with one holding a written contract or bond for a deed, was held in Middletown Sav. Bank v. Fellowes, 42 Conn. 36, not to affect the interests of the legal owner, so as to take precedence of a mortgage executed by the vendee in such a manner that the giving of the mortgage and his receiving the deed to the premises from the original owner constituted one transaction.

The general requirements of the later Indiana statutes are shown in the following statement from Adams v. Buhler, 116 Ind. 100, 18 N. E. 269: "Mechanics' liens rest upon contract, express or implied, with the owner or other person whose interest in the real estate it is proposed to bind or affect by the lien; and while persons who perform labor or furnish material for a contractor may secure a lien upon the real estate or building by notifying the owner and taking the other necessary steps, it is nevertheless essential to the sufficiency of a complaint to foreclose such a lien that it should appear therein who owned the real estate, or the interest to be affected, at the time the building was erected, and that it was erected in pursuance of a contract, express or implied, with such owner."

So, in Hopkins v. Hudson, 107 Ind. 191, 8 N. E. 91, it was held that the lien of a subcontractor or materialman is upheld upon the theory of an implied authority from the owner to the original contractor, to employ men and purchase materials for the structure, which is adding to the value of the owner's property. The lien must be founded on contract with the owner, either directly or indirectly. But the court said: "No analogy can be maintained between the case of a contractor, who is supposed to possess implied authority to bind the property of the owner to the extent of subjecting it to a lien imposed by law in favor of subcontractors and materialmen, and that of a tenant or lessee, who has no such authority." And to the same effect were the decisions in McCarty v. Burnet, 84 Ind. 23, and Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218, 36 N. E. 132.

And in People's Sav. L. & Bldg. Asso. v. Spears, 115 Ind. 297, 17 N. E. 570, the court said: "That the purchaser in possession under a contract of purchase made improvements or repairs with the knowledge and consent of the vendor did not estop the latter to assert its prior title. Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property."

So, in Rusche v. Pittman, 34 Ind. App. 159, 72 N. E. 473, it was held that a party in possession of real estate under a contract of purchase, accompanied by a title bond binding the vendor to convey the property upon the payment of the full purchase price, cannot, by contract, create a mechanics' lien which the holder thereof may enforce against the premises in derogation of the legal title of the vendor. And to the same effect was the decision in Davis v. Elliott, 7 Ind. App. 246, 34 N. E. 591.

—where improvements are required by lease or contract of sale.

As was suggested above, there is a conflict of opinion as to whether a provision in a lease or contract of sale requiring the lessee or vendee to construct the improvements authorizes the lessee or vendee to subject the owner's interests to a lien.

Thus, in Hillhouse v. Pratt, 74 Conn. 113, 49 Atl. 905, it was held that a mere agreement to sell land does not, of itself, give to the vendee such an equitable estate in the property as to enable him by contract to create a lien as owner which would affect the vendor's title, even if the materials for which the lien is claimed were furnished with the owner's consent; but where the contract of sale requires certain buildings to be erected, and the deed is not to be transferred until the buildings are completed, then the vendee may subject the vendor's interest to a lien for the required improvements.

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complaint, to said Beckers, and upon the payment of the purchase price she agreed to convey the same to them by proper deed of conveyance. (4) That no part of the purchase price was paid upon said agreement. (5) That at and for a long time prior to the time that said material was furnished, said Lizzie Condon was the owner in fee of said premises, and that during all of said time the deed evidencing the title in her was of record in Weber county, Utah, where the land is situate. (6) That appellant furnished lumber and material to respondent Becker of the value of $218.61, but that no part thereof was furnished or delivered to said Lizzie Condon, and that she never promised to pay said Belnap, or anyone for him, for said lumber or material. There are further findings, but it is not deemed necessary to mention them here. Upon these findings the court made conclusions of law, and entered judgment against the respondent Becker for the amount claimed by appellant, and in favor of respondent Lizzie Condon, and awarded her costs.

The appellant now insists that the court erred in making findings 1, 2, and 6, upon the ground that the evidence does not support such findings, or any of them. The evidence upon which these findings are based, briefly stated, shows that some time in July, 1904, the respondent Becker and his wife orally agreed to purchase the premises in question from the respondent Lizzie Condon for the agreed price of $625. On the 1st day of August following, Lizzie Condon entered into

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So, in Henderson v. Connelly, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1, it was held that where a contract of sale did not authorize or in any wise empower the purchaser to erect buildings on the premises, or to incur any liability for the improvement thereof, and the vendor was in no manner connected with the building which the purchaser erected on the premises, but merely sold the lot, leaving the purchaser to improve it or not, as he pleased, then the lien of the mechanic could attach only to such title as the purchaser had; but, if the vendor authorized and empowered the purchaser to erect a building on the premises, the mechanic who furnished labor and material before the termination of the contract would be entitled to subject the vendor's legal title to the lien. And to the same effect was the decision in Paulsen v. Manske, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275.

And if the owner of land authorized a third person to have a building erected thereon, it was held in Hough v. Collins, 176 Ill. 188, 52 N. E. 847, that his land would be subject to a lien for the labor and materials furnished.

And in Shearer v. Wilder, 56 Kan. 252, 43 Pac. 224, it was held that a purchaser under an executory contract of sale which required him to erect a number of houses according to certain plans, at a limited cost, and which provided that the vendor should make certain advances, but that no advances should be made and no conveyance made until all liens had been paid, was authorized, as agent of the owner, to contract for materials and labor with which to build the houses, and the laborers and materialmen were entitled to a lien against all the property and all of the legal and equitable interests of the owner therein.

But in Williamson v. Shank, 41 Ind. App. 513, 83 N. E. 641, where a tenant at will was put in possession of property for the purpose of erecting a building, it was held that a materialman furnishing material for the building was not entitled to a lien upon the land.

And where an owner agreed to transfer a certain lot upon the consideration, among others, that the vendee would erect a building thereon, the latter to forfeit all his claims if he failed to fulfil his contract, it was held in McGinniss v. Purrington, 43 Conn. 143, that a mason who built the wall for the building would have no lien upon the land after the vendee's interests had become forfeited, as the owner had not, directly or indirectly, contracted for the work.

Where the statute provided that a lien could attach by virtue of a contract with the owner, it was held in Chicago Lumber Co. v. Schweiter, 45 Kan. 207, 25 Pac. 592, that one in possession of certain lots, holding under an executory contract of sale which required him to build upon the lots, but which reserved the legal title in the vendor until full payment had been made, and which provided that until that time the vendee should have no authority to subject the land to liens of any kind or description, could not subject the owner's interests to a lien.

That the lessor required the lessee, by his lease, to construct a building of a certain value, and made advances to the lessee, secured by a mortgage upon the latter's interests, and the improvements were to revert to the lessor at the end of the term, was held in Cornell v. Barney, 94 N. Y. 394, not to show any contract between the lessor and a materialman furnishing materials for the improvements.

Statutes giving liens on interests of the one "causing" the improvements to be made.

A few statutes give liens upon the interests of the one causing the improvements to be made, or at whose instance they are made. For the most part, such statutes are construed to mean that, in the absence of a contract with the owner, no lien will attach to the owner's interest.

Thus, in Bremen v. Foreman, 1 Ariz. 413, 25 Pac. 539, it was held that, under such a statute, no lien attaches to the interests of the owner or his grantee for improvements caused to be made by a vendee, although the contract of sale required large improvements to be made.

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a written contract with said Becker and his wife, whereby she agreed to convey said real estate to said Beckers upon the payment of said sum of $625, $25 of which was to be paid then, and the remainder on the 1st day of August, 1909, with interest at 6 per cent per annum. It further appears from the evidence that the respondent Becker is a carpenter, and, at the time of the purchase, told Mrs. Condon that he wanted to build a shanty upon the property during the fall of 1904, and that he intended to build a better house on it the year following; that he said he had made arrangements with a Mr. Scowcroft for the lumber to put up the shanty; that, instead of getting lumber from Mr. Scowcroft, Becker, in July or August, 1904, bought the lumber and some other material from the appellant; that Mrs. Condon did not know anything about Becker's purchase of lumber until some time in October following, when her attention was called to it by appellant; that the lumber and material were charged to Mr. Becker upon the books of appellant, but in October, when appellant ascertained the true condition of the ownership of the property, and the contract of sale by Mrs. Condon to the Beckers, the account was changed upon the books so as to include Mrs. Condon. This change the appellant claims was made for the reason that Mrs. Condon, whom he went to see about the matter in the fall of 1904, told him that "if you will wait until the first of the year, I will see that the whole thing is paid." This statement appellant

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Under the Montana statute providing that, if the person contracting for the labor and material owns less than the fee simple in the land, then the lien shall attach to his interest only, the interest of the owners of leased premises is not subject to liens for improvements made under contracts with lessees. Pelton v. Minah Consol. Min. Co. 11 Mont. 281, 28 Pac. 310; Block v. Murray, 12 Mont. 545, 31 Pac. 550; Stenberg v. Liennemann, 20 Mont. 457, 63 Am. St. Rep. 636, 52 Pac. 84.

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A. He told me that he had made arrangements with Mr. Scowcroft for some lumber to put a little shanty on it this fall, and said: "Next summer I am going to build a better place on it."

Q. Is it not true that it was your idea that they would take that property and put a good house on it, and then you would make some money on it, even if they didn't pay for it, and that was one of the considerations for your selling it on those terms,—that he would put a house on it?

A. Why, certainly.

Q. So it is not at all probable that you would go to work and sell a bare lot of this kind, and take no pay on it, and no security, except the title to the lot itself, and agree to wait for five years for your pay, unless he would improve the lot?

A. Well, I supposed of course, the man was able—was a carpenter, and would put up the building himself.

Q. You wanted a building put up there?

A. Yes, sir.

Q. So, if he failed to carry out his contract, you would have some little chance of getting your money back?

A. As I said, he said he had made arrangements with Scowcroft's for some lumber; and the first I knew he had gotten lumber from Mr. Belnap was when Belnap called at my house. I never went down to Belnap's in my life. I went up to see Becker after I let him have the money, to see if he had put the water in, along the 1st of August; and I saw the water was in, but that was all. The 1st of August was when this contract was signed, but he got the

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tract with one in possession under a contract of sale. And to the same effect was the decision in Poole v. Fellows, 25 R. I. 64, 54 Atl. 772, where the labor and material were furnished to a lessee.

And in Perkins Bros. v. Blair, 22 R. I. 334, 47 Atl. 883, where the contract between the owner and the vendee constituted consent by the former that the latter should build a house upon the land, which, when completed, was to become the property of the owner, and the contract also contained an agreement to sell the land and the house to the vendee for a certain sum, it was held that this did not authorize the vendee to buy material in the name or on account of the owner, and no lien would attach to his interests therefor, in the event of the failure of the lienor to give the specified notice of intention to claim a lien, and to file the specified account.

Where the whole proceeding in working a mine and making improvements therein was carried on, to all appearances, in the name of and by the authority of the company owning the mine, it was held in Salt Lake Foundry & Mach. Co. v. Montana Min. Co. 6 Utah, 351, 23 Pac. 760, affirmed in 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384, that the trial court was justified in finding that the improvements were made at the request of the company, although they were ordered by the secretary, where there was no notice given that he was to make them at his own expense.

Statutes giving liens for improvements made by agents.

One of the most common provisions of the mechanics' lien statutes gives liens for labor or material furnished under a contract with the owner or his agents; and in many cases the question has arisen, Who is an agent of the owner, within the meaning of such a statute?

Under such a statute, a vendee under an executory contract of sale, merely because of such relationship, is not the owner's agent. Galveston Exhibition Asso. v. Perkins, 80 Tex. 62, 15 S. W. 633; Smith v. Huckaby, 4 Tex. Civ. App. 80, 23 S. W. 397; Steel v. Argentine Min. Co. 4 Idaho, 505, 95 Am. St. Rep. 144, 42 Pac. 585; Cross v. Tscharnig, 27 Or. 49, 39 Pac. 540; Walker v. Burt, 57 Ga. 20; Mentzer v. Peters, 6 Wash. 540, 33 Pac. 1078; Iliff v. Forssell, 7 Wash. 225, 34 Pac. 928.

Nor is a lessee the agent of the owner, within the meaning of such a statute. Wilkins v. Abell, 26 Colo. 462, 58 Pac. 612; Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. 843; Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284, 68 Pac. 226; Little Valeria Min. & Mill. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. 970; Harman v. Allen, 11 Ga. 45; Reppard v. Morrison, 120 Ga. 28, 47 S. E. 554; Pickle Marble & Granite Co. v. Apollo Turkish Bath Co. 85 Mo. App. 313; Stetson-Post Mill. Co. v. Brown, 21 Wash. 619, 75 Am. St. Rep. 862, 59 Pac. 507; Z. C. Miles Co. v. Gordon, 8 Wash. 442, 36 Pac. 265; Masow v. Fife, 10 Wash. 528, 39 Pac. 140; Waterman v. Stout, 38 Neb. 396, 56 N. W. 987; Moore v. Vaughn, 42 Neb. 696, 60 N. W. 914; Stevens v. Burnham, 62 Neb. 672, 87 N. W. 546; Meade Plumbing, Heating, & Lighting Co. v. Irwin, 77 Neb. 385, 109 N. W. 391, 111 N. W. 636.

Nor will the fact that the owner stood by and saw the repairs being made without objecting subject his interests to a lien for improvements made by his vendee. Callaway v. Freeman, 29 Ga. 408.

And a mechanic or materialman does not, by contracting with a lessee, secure a lien upon the fee, and the fact that the owner allowed the improvements to be made, and agreed to contribute to the cost, does not change the rule. Reed v. Estes, 113 Tenn. 200, 80 S. W. 1086.

So, in Charleston Lumber & Mfg. Co. v. Brockmyer, 18 W. Va. 586, it was held that the express consent of the legal owner that a building be erected by his vendee, and his knowledge that it was being erected on credit, would not subject his legal interest in the land to a mechanics' lien, where the statute gave a lien for labor or

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money the 19th of July. I gave him $5. He agreed to pay me $25 then. In place of paying the $25, he gave his note for it. I never saw any money.

Counsel for appellant contends, as we understand him, that upon this evidence the court should have found that the lumber and material were purchased for the building, if not upon an express, then upon an implied, request of Mrs. Condon, and that therefore her property should be held, if she is not personally liable. In support of this contention counsel cites numerous cases wherein it has been held that where an owner enters into a contract to sell real estate, wherein he requires the purchaser to make improvements upon the land sold, the land is subject to mechanics' liens, including the interest of the vendor. It is further contended that such is the result, whether the contract expressly requires the improvements to be made, or whether this arises by implication merely. Counsel therefore insists that the court erred in its findings and conclusions in favor of respondent Condon, and that the findings, conclusions, and judgment should have been in favor of appellant, and against both respondents. This claim is based upon § 1372, Comp. Laws Utah, 1907, which, so far as material here, in substance provides that mechanics, materialmen, contractors, subcontractors, builders, and some others, specially mentioned, shall have liens upon the lands of the owner for which labor or material is furnished or services rendered, "whether at the instance of the owner or of any other person acting by his authority or

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material furnished under contract with the owner or his agent.

Where the owner of land completes negotiations for the sale thereof, and the vendee takes possession without the consent of the owner, and commences the erection of a building, but fails to make the payment of the purchase money, which, by the terms of the sale, was to be made upon the delivery of the conveyance, and the vendor refuses to make the conveyance or complete the contract without such payment, no agreement having been executed, it is held in Burlingim v. Warner, 39 Neb. 493, 58 N. W. 132, that the vendor is not charged with liens for labor and material used in the construction of the building.

One in lawful possession and control of land is not, without more, authorized to contract for the erection of buildings, as mere general agency is not sufficient to subject the owner's interests to liens. Miller Lumber Co. v. Wilson, 56 Ark. 380, 19 S. W. 974. And to the same effect is Rudd v. Peters, 41 Ark. 184.

It was held in Winslow Bros. Co. v. McCully Stone Mason Co. 169 Mo. 236, 69 S. W. 307, that one corporation organized by the stockholders of another to take a lease of the latter's real estate was the agent of the lessor corporation.

A son who lived with his father upon a farm and worked the farm, the father taking such portion of the proceeds as he saw fit, was held in Hoag v. Hay, 103 Iowa, 291, 72 N. W. 525, to be a mere licensee, without any authority to bind his father for the purchase price of any material used in the improvement which he put upon the premises, under a statute giving a lien for labor and material furnished by virtue of any contract with the owner, his agent, or trustee.

A stranger to the title cannot subject it to a mechanics' lien, although he is the father of the owner, where the latter in no wise misleads the person furnishing the labor and materials. Rice v. Warren, 91 Ga. 759, 17 S. E. 1032.

In Gates v. Fredericks, 5 Ariz. 343, 52 Pac. 1118, it was held that there was no statute nor any principle which made a lessee the agent of the lessor so as to enable him to subject the latter's interests to a mechanics' lien, under a statute providing in general terms that anyone furnishing labor or material for any building or improvement shall have a lien on the building or improvement and also on the land improved.

In Ogg v. Tate, 52 Ind. 159, it was held that a complaint in an action to establish a lien was insufficient which did not show that the person at whose instance the labor or material was furnished was the agent, contractor, or architect of the owner, or that the latter had contracted for the building, or had any knowledge that materials were being furnished for completing a house on his land. It does not appear what relationship the one causing the improvements to be made bore to the owner.

The provision in the statute in regard to giving notice by the owner to prevent liens upon the buildings, where he himself has not contracted for the material and labor, does not, by implication, give one holding a bond for title deed authority to subject the owner's interests to a lien. St. Paul & T. Lumber Co. v. Bolton, 5 Wash. 763, 32 Pac. 787.

Under a statute giving a lien for labor or material furnished "by virtue of any contract with the owner or proprietor, or his agent, trustee, or subcontractor," it was held in Badger Lumber Co. v. Stepp, 157 Mo. 366, 57 S. W. 1059, that a materialman could not secure a lien against the building of the owner for materials furnished to a third person, who, under a contract with the owner, erected a third story upon the owner's building, which was to become the property of the third person.

Where a person entered upon premises with the consent of the owner, and made improvements thereon which were authorized by the owner, it was held in Moore v. Jackson, 49 Cal. 109, that he was, as to materialmen and laborers, the agent of the owner, and the estate of the latter would be subject to the lien independently of the particular

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under him as agent, contractor, or otherwise." From the foregoing it would seem that the person who can bind the owner's land for the things for which a lien is given must in some way obtain his authority to do so from the owner. Without such authority, express or implied, in the first instance, or by subsequent ratification by the owner, the owner's property is not bound, although the improvements may benefit his land.

This court has in effect passed upon the question involved in this case. In the case of Morrow v. Merritt, 16 Utah, 412, 52 Pac. 667, it was held that, under the section of the statute above referred to, material furnished at the request of a tenant of the owner does not bind the owner's interest in the land, although the tenant was by his contract of lease in writing obligated to make the improvements. Mr. Chief Justice Zane, at page 417, of 16 Utah, speaking for the court, said: "Doubtless statutes of other states may be found, giving a lien upon the interest of the lessor of land without a contract with him or his agent, when material or labor is furnished to the tenant, and employed with his consent in erecting buildings or making improvements on the land. But, as we have seen, the Utah statute, upon which the plaintiff must rely, requires the materials to be furnished or the services to be rendered upon the request of the owner of the land, or his agent, before the lien can arise upon his interest." It is thus held in that case that the landlord does not constitute the tenant his agent, so

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There is a sharp conflict of authority as to whether, if the owner, in his contract with the lessee or vendee, requires the latter to make the improvements, he thereby constitutes him his agent within the meaning of the statute.

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are furnished at the instance of the owner or of some person acting by his authority.

It is, however, contended by appellant, that it appears from the testimony of Mrs. Condon that she expected that the Beckers would build upon and improve the property, and that hence the authority from her to bind her interest in the property is implied. In this connection it is also insisted that the appellant is not limited by the terms of a written agreement which may bind the parties to it only, but that he may show any parol agreement between Mrs. Condon and Mr. Becker from which the authority from her to him to purchase material to improve the property may directly appear or be inferred. This contention, in our judgment, is sound. The real question involved in such case is to establish the relation of principal and agent between the vendor and purchaser. If, therefore, the person furnishing material which is purchased for the improvement of certain property can show that the purchaser of the material was the agent of the real owner of the property, the agency may be established in such a case precisely as it may be in any other case. But the evidence in such a case must establish agency. Without this there can be no authority in the person purchasing the material to bind the owner of the property, who is the principal. This is well illustrated in the case of Sheehy v. Fulton, 38 Neb. 691, 41 Am. St. Rep. 767, 57 N. W. 395,—a case upon which appellant strongly relies. The principle stated above

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Co. v. Cunningham, 29 Colo. 284, 68 Pac. 226.

In Nebraska the statute provided for liens made by virtue of a contract or agreement, express or implied, with the owner or his agents, and under this statute it was held in Bohn Mfg. Co. v. Kountze, 30 Neb. 719, 12 L.R.A. 33, 46 N. W. 1123, that where a vendee of real estate, under a contract of sale which contained a stipulation that the purchaser should construct a building upon the premises, erected a building thereon, the laborers and materialmen were entitled to a lien against the premises paramount to the lien of the vendor. And this decision is cited with approval and followed by numerous other Nebraska cases. Millsap v. Ball 30 Neb. 728, 46 N. W. 1125; Irish v. O'Hanlon, 34 Neb. 786, 52 N. W. 695; Sheehy v. Fulton, 38 Neb. 691, 41 Am. St. Rep. 767, 57 N. W. 395; Fuller v. Pauley, 48 Neb. 138, 66 N. W. 1115; West v. Reeves, 53 Neb. 472, 73 N. W. 935; Guiou v. Ryckman, 77 Neb. 833, 124 Am. St. Rep. 877, 110 N. W. 759.

And the vendor in an executory contract for the sale of land will subject his rights in the property to be conveyed to a mechanics' lien by directly, though in conjunction with the vendee, contracting for improvements for the construction of which the mechanics' lien is sought to be enforced. Pickens v. Plattsmouth Invest. Co. 37 Neb. 272, 55 N. W. 947.

A lessor who not only consented to the making of the improvements, but bound the lessee to make them, and expressly agreed to pay for the same by deducting the cost thereof from the rent, thereby made the lessee his agent. Whitcomb v. Gans (Ark.) 119 S. W. 676.

So, where a vendor required a vendee to build upon the premises, and knew that he was so doing, it was held in Janes v. Osborne, 108 Iowa, 409, 79 N. W. 143, that the vendor's interest would be subjected to a lien, as he had made the vendee his agent, within the meaning of the statute.

In Eaman v. Bashford, 4 Ariz. 199, 37 Pac. 24, it was held that the lessee of a mine, who, by the terms of his lease, was to make certain improvements at his own expense, and was to turn over to the lessor the entire net proceeds for six months, and a percentage thereafter, which improvements and payments were to be forfeited to the lessor in case the lessee failed to purchase the mine,—had charge and control of the mine within the meaning of a statute which provided that a person who was in "charge and control" of mines should be deemed the agent of the owner, with power to subject the property to mechanics' liens.

But where persons were merely given the right to take possession of land for the purpose of building on it at their own expense, but were under no obligation to exercise the right, it was held in Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 S. W. 609, that they had no authority to subject the owner's interests to a lien.

Where statute gives lien for improvements made with consent of owner.

A provision quite frequently found in mechanics' lien statutes is that materialmen and mechanics are entitled to liens for material or labor furnished with the "consent" of the owner. If the consent is express, of course, the right to the lien is plain; but in many cases the consent, if any, can only be inferred from the attending circumstances.

—circumstances from which consent is not inferred.

A number of cases hold generally that mere knowledge of the owner that improvements are being made by a lessee or vendee, and acquiescence therein, do not show the statutory consent. Ottiwell v. Watkins, 15 Daly, 308, 6 N. Y. Supp. 518, affirmed in 125 N. Y. 706, 26 N. E. 752; Havens v. West Side Electric Light & P. Co. 49 N. Y. S. R. 771, 20 N. Y. Supp. 764, affirmed in 143 N. Y. 632, 37 N. E. 827; Moore v. McLaughlin, 11 App. Div. 477, 42 N. Y. Supp. 256; McCauley v. Hatfield, 59 N. Y. S. R. 552, 28 N. Y. Supp. 648; Hayes v. Fossenden, 106 Mass. 228; Courtemanche v. Blackstone Valley Street R. Co. 170 Mass.

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is illustrated and applied in that case. The mere expectation by the owner and vendor of the land that the purchaser will make improvements upon it, and in that way enhance its value, is not sufficient to establish the relation of principal and agent between the vendor and vendee. Nor do we think that mere permission by the vendor to the vendee to make improvements would be sufficient; and certainly mere knowledge or acquiescence on the part of the owner is not sufficient under our statute. In the case last above cited, at page 696 of 38 Neb., in referring to the subject-matter now under consideration, the supreme court of Nebraska uses the following language: "When one sells land to another, and places that other in possession, in the absence of any restrictive covenants, there is always an implied license that the vendee may make improvements on the land. The expression of direct authority to do so, independent of other circumstances, would not charge the vendor's estate." It requires no argument to establish the soundness of the principle enunciated in the foregoing statement. No doubt, when one purchases land of any kind, he has at least the implied power to improve it in his own way. If he does so upon his own responsibility, it is not easy to perceive how, in the absence of an express statute, he thereby binds the owner of the title for the value of the improvements. Nor do we think it changes the rule if the owner either expresses his assent to the making of the improvements, or per-

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50, 64 Am. St. Rep. 275, 48 N. E. 937; Saunders v. Bennett, 160 Mass. 48, 39 Am. St. Rep. 456, 35 N. E. 111.

So, it was held in Gray v. Walker, 16 S. C. 143, that the bare knowledge of the agent of the owner that the plaintiff was employed on the house did not amount to a consent by the owner in the sense of the act, which would impose a lien upon her property and subject it to the stringent provisions thereof. The court defined "consent," within the meaning of the statute, as follows: "Consent here, we think, implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid." And to the same effect was the decision in Geddes v. Bowden, 19 S. C. 1.

Consent of the owner will not be implied from the fact that his agents visited the premises while the improvements were being made, for the purpose of collecting rents. Seklir v. Krizer, 48 Misc. 25, 96 N. Y. Supp. 74.

The fact that the owner remarked to the workman employed by the lessee that she hoped he would do her a good job, and that the same kind of work would be done on all the houses, does not show consent. Eichler v. Warner, 46 Misc. 246, 91 N. Y. Supp. 793.

A landlord who merely recommended a mechanic to his tenant, who was about to make repairs at his own expense, in consideration of a reduction in his rent, and who expressed satisfaction with the manner in which the work was being done, did not thereby give statutory consent. Hedlund v. Payne, 60 Misc. 603, 113 N. Y. Supp. 841.

A general covenant on the part of the tenant to keep the premises in repair does not constitute consent on the part of the landlord. Ætna Elevator Co. v. Deeves, 57 Misc. 632, 108 N. Y. Supp. 718, affirmed in 125 App. Div. 842, 110 N. Y. Supp. 124. The court said: "We think the statute requires either that the particular repairs be specifically provided for in the lease, or that the owner shall expressly consent to or request the particular repairs made, or that, with a knowledge of the employment and its purposes, he acquiesces therein."

So, in Jones v. Manning, 25 N. Y. S. R. 771, 6 N. Y. Supp. 338, the court said: "The mere consent of the owner of the fee that his tenant for a term of years may improve the premises by erecting buildings thereon, or repairing those already constructed, does not obligate him, either legally or morally, to pay for the same. The tenant had the right to make the repairs without the consent of his lessors, and it is absurd to claim that the approval of the act of their tenant in this respect amounted to a consent on their part that their title might be charged with the cost of the repairs, if the tenant failed to keep his promise to pay the contractor therefor."

A mere general consent or requirement on the part of the owner that the lessee may or shall, at his own expense, make alterations and repairs to the premises, does not constitute "consent" within the meaning of the lien law. Ætna Elevator Co. v. Deeves, 125 App. Div. 842, 110 N. Y. Supp. 124; Garber v. Spivak, 114 N. Y. Supp. 762, second appeal 119 N. Y. Supp. 269.

A provision in a lease that the tenant shall make all the repairs at his own expense does not imply the consent required by the statute. Berger Mfg. Co. v. Zabriskie, 75 N. Y. Supp. 1038.

So, a lessee whose lease authorizes him to make repairs at his own expense cannot subject the lessor's interests to a mechanics' lien. Conant v. Brackett, 112 Mass. 18.

So, a mere general agreement to the effect that a third person may, at his own expense, make alterations in a building occupied by him, does not, without more, amount to the statutory consent. Hankinson v. Vantine, 152 N. Y. 20, 46 N. E. 292.

Where there was no agreement in the lease or contemporaneous with it, binding the tenants to build a mill on the premises or make other improvements, it was held in J. B. Alfree Mfg. Co. v. Henry, 96 Wis. 327, 71 N. W. 370, that the lessor's interest would not be subject to a lien for the improvements, although the landlord made advances for certain improvements which

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mits them to be made without objection. In either case the necessary authority required by our statute in the vendee from the vendor to bind the vendor's interest in the property is lacking. If, therefore, we construe Mrs. Condon's testimony in this regard most strongly against her, it amounts to no more than a strong expectation on her part that Becker would make some improvements upon the property in question. At any rate, it goes no further than an expressed permission upon her part that he might do so. This falls far short of the requirement of our statute as construed by this court.

Nor can the appellant recover upon the claim that Mrs. Condon ratified the acts of Mr. Becker in purchasing the materials. She denies that she made the statement attributed to her by appellant. The trial court found against appellant on this point, and it was for that court to say who told the truth in that respect. It is clear, however, that the lumber was sold upon the credit of Mr. Becker alone. He alone was charged with the account, and no change therein was made until appellant informed himself of the true state of the title. He could not at that time change the account, so as to include Mrs. Condon, without her consent. If he did not want to trust Becker, he should have looked into the matter sooner, and consulted Mrs. Condon before he furnished the lumber to Becker; and, in failing to do so, he cannot now complain. We need not pause to review the numerous cases cited by appellant's counsel. It must suffice to say that the decisions in all of them are based upon written contracts between lessors and lessees, or vendors and vendees, wherein it was expressly provided that the lessees or vendees should make certain stipulated improvements upon the premises leased or sold. Many of the cases are also based upon statutes much broader than our own.

We are of the opinion that the court committed no error in rendering judgment in favor of respondent Lizzie Condon, and the judgment, therefore, should be, and accordingly is, affirmed, with costs to her.

McCarty, Ch. J., and Straup, J., concur.

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were made at some time after the execution of the lease.

Consent will not be implied from a clause in a lease which reserved all improvements to the lessor upon the termination of the lease, although improvements must necessarily have been made to render the building suitable for the purpose for which it was leased, where the lease further provided that no improvements should be made by the tenant without the written consent of the landlord, and there was no evidence of such consent. Regan v. Borst, 11 Misc. 92, 32 N. Y. Supp. 810.

Where the vendee who contracted for the improvement had been let into possession pending the performance of the executory agreement of sale, but it did not appear that it was for the purpose of making the improvements, a judgment of foreclosure of a mechanics' lien was set aside in Rossi v. Mackellar, 37 N. Y. S. R. 503, 13 N. Y. Supp. 827.

In Cowen v. Paddock, 137 N. Y. 188, 33 N. E. 154, it was held that, by failing to have a vendee, who had not made payments in accordance with a contract of sale, ejected as an intruder, the owner did not expose her property to a mechanics' lien for labor and material which were contracted for by the vendee, but without the consent and over the objection of the vendor. The court said: "While it is doubtless true that the consent required by the lien law need not be expressly given, but may be implied from the conduct and attitude of the owner with respect to the improvements which are in process of construction upon his premises, still, the facts from which the inference of a consent is to be drawn must be such as to indicate at least a willingness on the part of the owner to have the improvements made, or an acquiescence in the means adopted for that purpose, with knowledge of the object for which they are employed." And to the same effect was the decision in Lowry v. Woolsey, 83 Hun, 257, 31 N. Y. Supp. 1101.

And in Spruck v. McRoberts, 139 N. Y. 193, 34 N. E. 896, it was held that knowledge by the true owner, who had been ousted from possession of the property, that the person in possession was causing improvements to be made, and the failure upon his part to forbid or prevent the improvements, did not amount to consent.

—circumstances from which consent is inferred.

Consent, within the meaning of the statute, may be implied from actual knowledge and the absence of objection (Husted v. Mathes, 77 N. Y. 388), and from the fact that the owner was present while the work was in progress, and rendered some assistance in the erection of the house (Nellis v. Bellinger, 6 Hun, 560).

The provision in a lease that any improvements made on the premises would revert to the lessor, together with the fact that he knew that improvements were being made, was held in Burkitt v. Harper, 79 N. Y. 273, to be sufficient to subject the lessor's interest to a lien. To the same general effect were the decisions in McLean v. Sanford, 26 App. Div. 603, 51 N. Y. Supp. 678, and Kealey v. Murray, 40 N. Y. S. R. 23, 15 N. Y. Supp. 403.

Evidence that the owner frequently visited the premises while the work was in progress, talked with the contractors engaged

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in performing work thereon and furnishing materials therefor, and that she at times disapproved of the work, and made complaints and suggestions as to how it should be done, was held sufficient to show consent, in Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. Supp. 689, modified on other points in 183 N. Y. 342, 76 N. E. 273.

Consent will be inferred where the owner agreed to sell to another certain lots, and to erect thereon a dwelling house, and gave to the vendee the privilege of selecting the contractor to erect the building, and paid a portion of the contract price. Builders' Supply Co. v. North Augusta Electric & Improv. Co. 71 S. C. 361, 51 S. E. 231.

That the vendor and the vendee contemplated, at the time of their contract, that the latter should build on the property, and the former had knowledge of the kind of houses to be erected, and approved the plans, and had knowledge that the vendee was to borrow money from a savings bank, and gave the lines for the building on the corners of the streets, and knew that work was being done and the labor and material in question were being furnished, was held in Brown v. Haddock, 199 Mass. 480, 85 N. E. 573, to be sufficient to show statutory consent.

And in Shaw v. Young, 87 Me. 271, 32 Atl. 897, it was held that if the owner leaves his real estate in the possession of agents or tenants, knowing that it is necessary from time to time to make repairs, and makes no provision for them, but leaves them to be made by agents or tenants, and gives no notice of dissent, his consent may be inferred, so far as the lien claimants are concerned.

Some cases have held generally that the owner's knowledge and consent or approbation was sufficient to charge his interests with the lien, even in the absence of a contract. Helwig v. Blumenberg, 28 N. Y. S. R. 75, 7 N. Y. Supp. 746; Garland v. Van Rensselaer, 71 Hun, 2, 24 N. Y. Supp. 781, affirmed in 140 N. Y. 638, 35 N. E. 892; Marshall v. Cohen, 11 Misc. 397, 32 N. Y. Supp. 283; Rossi v. Mackellar, supra.

—where lease or contract of sale requires the improvement.

The question whether the requirement in a lease or contract of sale that the lessee or vendee make certain improvements at his own expense is a "consent" within the terms of statutes of this character is treated in a note to Clark v. North, 11 L.R.A. (N.S.) 764. Cases of that character, unless decided since the preparation of that note, are consequently excluded from this note. Some other cases, however, which present somewhat the same question, but which do not fall strictly within the scope of the earlier note, are included here.

Such a requirement in a lease or executory contract of sale is generally held to imply necessarily the consent of the owner.

Thus, a written agreement to sell land, which contained a promise on the part of the vendee to erect buildings thereon, was held in McCormack v. Butland, 191 Mass. 424, 73 N. E. 761, necessarily to imply the vendor's consent within the meaning of the statute.

So, in Borden v. Mercer, 163 Mass. 7, 39 N. E. 413, it was held that consent would be inferred from an agreement that the owner would sell the land on which a partially constructed building stood on condition that the vendees should complete the building at their own expense and on their own behalf, the vendor to make advances for that purpose, which were to be paid back before the land was conveyed. The court said although the vendees were required to complete the building on their own behalf, they were not obliged to do the work personally.

And an agreement whereby the vendee was to build the foundation of a house, the vendor advancing the money therefor, and upon the completion thereof, the vendor was to convey and take back a mortgage for the price of the land and the advances, was held in Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219, to be sufficient to show consent within the meaning of the statute.

So, where the principal purpose of an agreement to convey appeared to be the erection of a house, although there was no express agreement to that effect, it was held in Davis v. Humphrey, 112 Mass. 309, that a lien would attach to the owner's interest.

And in Baker v. Waldron, 92 Me. 17, 69 Am. St. Rep. 483, 42 Atl. 225, it was held that the owner of the land must be considered as assenting to the purchasing of materials and the hiring of labor for the purpose of erecting the contemplated structure, inasmuch as the contract of sale of the land between him and the principal defendant, who hired the plaintiff's services, made it a condition of the sale that he should erect just such a mill as he was undertaking to construct.

Consent of the lessor to the improvements is shown by the terms of a lease which recites that, as the lessee desires and agrees to make certain improvements on the property, and as they will revert to the lessor, the latter will mortgage the property to raise money to enable the lessee to make the improvements. Steeves v. Sinclair, 56 App. Div. 448, 67 N. Y. Supp. 776, affirmed without opinion in 171 N. Y. 676, 64 N. E. 1125.

The interests of a vendor will be subject to a mechanics' lien for improvements which the agreement to sell required the vendee to make, as consent could be clearly implied from the requirements of the contract. Hammond v. Shephard, 50 Hun, 318, 3 N. Y. Supp. 349.

Where, as a part of the consideration of a deed, the grantor was to make certain improvements upon the premises at his own expense, it was held in Pope v. Heckscher, 109 App. Div. 495, 96 N. Y. Supp. 533, affirmed in 190 N. Y. 508, 83 N. E. 1130, that such improvements made by the grantor were made "with the consent or at the request of" the grantee, and his interests would be subject to a mechanics' lien. And to the same effect was Barnard v. Adorjan, 191 N.

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Y. 556, 85 N. E. 1106, affirming the decision of the appellate division (116 App. Div. 535, 101 N. Y. Supp. 502), which is included in the earlier note.

So, in Cook v. Goodyear, 79 Wis. 606, 48 N. W. 860, it was held that one who entered into a contract with the owner of premises, whereby he was to cut, log, and saw certain timber, and for that purpose was to erect a sawmill on the premises, had such an interest in the premises as to subject them to a mechanics' lien for the material for the mill, where it was built with the full knowledge and consent of the owner.

And in Edwards & M. Lumber Co. v. Mosher, 88 Wis. 672, 60 N. W. 264, it was held that where the vendor required the erection of a building, and title to it as well as to the lot was to be retained as security for the purchase money, the vendor's interest would be subject to a lien. And this decision was cited with approval and followed in Bentley v. Adams, 92 Wis. 386, 66 N. W. 505, in which case the improvements were made by a lessee whose lease required him to make the improvements.

In Schuyler v. Hayward, 67 N. Y. 253, it was held that the result of a statute which expressly provided that, for the purposes of the act, any person who might have sold or disposed of lands upon an executory contract of sale contingent upon the erection of a building thereon should be considered the owner, and the vendee the contractor, was the same as that accomplished in other statutes giving a lien wherever buildings are erected upon lands with the consent of the owner.

—miscellaneous cases.

Where there was evidence sufficient to support the finding of the court that the owner consented to the contract of the tenant for the erection of the building, it was held in Butler v. Flynn, 51 App. Div. 225, 64 N. Y. Supp. 877, that the land would be held subject to the lien. The court said that the consent clause in the statute proceeded upon the equitable principle that one who knowingly receives the benefit of labor or property of another in the form of improvements upon his land ought to have his property subjected to a lien for the value of such improvements. And this case was cited with approval and followed in Fischer v. Jordan, 54 App. Div. 621, 66 N. Y. Supp. 286, affirmed in 169 N. Y. 615, 62 N. E. 1095.

A complaint which alleged that the defendant was the owner of the fee of the premises, had full knowledge of the work, and consented to the same, was held to be good on demurrer in Ross v. Simon, 16 Daly, 159, 9 N. Y. Supp. 536, 10 N. Y. Supp. 742.

Where a vendor took back the premises upon the contract of sale being surrendered, it was held in Kerrick v. Ruggles, 78 Wis. 274, 47 N. W. 437, that he took it back subject to a lien for improvements made by the vendee with the vendor's full knowledge and consent.

In Engfer v. Roemer, 71 Wis. 11, 36 N. W. 618, it was held that a lessor was not liable for a lien for improvements put on the premises without his authority, knowledge, or consent.

Where there was nothing to justify a holding that a vendor was to advance money or give credit to enable the vendee to build a house on the land, it was held in Perkins v. Davis, 120 Mass. 408, that the vendee could not subject the vendor's interest to a lien which, upon the sale of the property to the vendee, would be superior to a mortgage given back as a part payment of the premises.

A lien will not attach to land for work furnished to one who had contracted to buy; and a lien for work furnished after the deed passed will not be superior to a mortgage given for the purchase money and for advances for the improvements, where there was nothing from which to imply consent other than the advances. Ettridge v. Bassett, 136 Mass. 314.

And in Morse v. Dole, 73 Me. 351, it was held that a mechanics' lien for materials or labor furnished to a mortgagor in possession did not affect the rights of a prior mortgagee, where the latter was not a party to the delivery of the materials nor to the work done, by consent either tacitly or expressly given.

A lien creditor cannot attach, as personal property of the vendee, a building erected by one who made a verbal purchase of land, partly paid for it, and erected the building, where there was no agreement between him and the owner that the building was to remain the property of the builder. Dustin v. Crosby, 75 Me. 75.

Where a lease provided that the structure to be erected by a lessee was to remain his property, it was held in Johnson v. Alexander, 23 App. Div. 538, 48 N. Y. Supp. 541, that no lien would attach to the land.

In Miller v. Schmitt, 67 N. Y. Supp. 1077, it was held that the assent of two owners that their common vendee might use the adjoining lots as one piece of land by constructing one building across both, and that the plaintiff might furnish material towards the erection of such structure, sufficiently charged the property with the plaintiff's lien.

Where a lease forbade the lessee to make any improvements or alterations without the consent of the owner on pain of forfeiture and liability for damages, it was held in Hankinson v. Vantine, 152 N. Y. 20, 46 N. E. 292, that the purpose of a written consent by the owner that the lessee might make certain improvements at his own expense was merely to avoid a forfeiture of the lease, and did not constitute consent within the meaning of the lien law.

In Hartley v. Murtha, 36 App. Div. 196, 56 N. Y. Supp. 686, where the lease contained similar provisions, the court recognized the rule in Hankinson v. Vantine, supra, and held that no consent was shown where the lease provided for certain specific improvements to be made by the lessee upon

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certain conditions precedent, and the conditions had not been fulfilled.

In Wheeler v. Hall, 41 Wis. 447, it was held that where one in actual possession of premises, with the full knowledge, approbation, and consent of the owner, employed the plaintiff to construct improvements, and he did so, the owner would be personally liable, and therefore the premises upon which the work was done would be subject to a mechanics' lien for such work. This decision, however, is based rather upon the equitable principle that, if one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay for them.

But the Wheeler Case was criticized in Lauer v. Bandow, 43 Wis. 556, 28 Am. Rep. 571, where it was held that a lien did not attach to a wife's property for improvements made by the husband in his own name, and not as agent for his wife.

And in Leismann v. Lovely, 45 Wis. 420, it was held, following Lauer v. Bandow, supra, that one might contract for an improvement upon the land of another which he was cultivating for some advantage of his own, without charging the owner for its payment.

Statutes giving liens for improvements made with the permission of the owner.

Some statutes give a mechanics' lien against the property of an owner who knowingly permits improvements to be made thereon; the general intent of such a statute does not, of course, materially differ from those giving liens for improvements made with the "consent" of the owner. Under such a statute, the property of a lessor who consents to improvements being made by a lessee, which are to revert to the lessor, will be subject to a lien therefor. R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co. 236 Ill. 452, post, 620, 127 Am. St. Rep. 297, 86 N. E. 248.

And in West v. Pullen, 88 Ill. App. 620, it was held that a mechanics' lien would attach to the fee where the owner permitted his agent to sell the same by verbal contract, and the vendee caused buildings to be erected thereon.

Knowledge and consent amount to "permission" within the meaning of such a statute. Rollin v. Cross, 45 N. Y. 766; Le Forgee v. Colby Bros. 69 Ill. App. 443.

But in McRae v. Murdoch Campbell Co. 94 Ill. App. 105, it was held that mere knowledge on the part of the owner that the work was being done, and failure upon his part to forbid it or expressly to disclaim any responsibility for it, were not sufficient to subject his interests.

And in McGraw v. Godfrey, 16 Abb. Pr. N. S. 358, it was held that a lien could not be acquired for work and materials furnished under a contract with the equitable owner as against one holding the legal title, unless the work or material was furnished with the latter's permission. And a verbal contract to convey land does not of itself show the permission of the owner to erect buildings thereon. Conklin v. Bauer, 62 N. Y. 620.

—improvements required by owner in lease or contract of sale.

Under such a statute it was held in Hackett v. Badeau, 63 N. Y. 476, that a condition in a contract of sale that the vendee shall build upon the premises implies the permission of the owner.

And in Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, where a lease provided for the erection of a building by the lessee, which was to become the property of the lessor upon the termination of the lease, it was held that such a contract amounted to authority or consent from the owner to make the improvements, and, in the absence of some stipulation in the agreement to the contrary, to give a lien upon the interests of the owner for material furnished or labor performed under contracts with the vendee or lessee. The court said: "In fact, it is impossible to see how it can reasonably be said that one who agrees with another that he shall place buildings or other improvements upon certain property does not thereby 'authorize or knowingly permit' the other to improve that property."

So, also, in Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, second appeal, in 233 Ill. 79, 84 N. E. 181, it was held that where a lease required or authorized the lessee to construct improvements on the demised premises, the estate of the lessor was liable to liens therefor. And to the same general effect were the decisions in Brokaw v. Tylor, 91 Ill. App. 148; Wells v. Sherwin, 92 Ill. App. 282; Hughes v. McCasland, 122 Ill. App. 365.

And in Hart v. Wheeler, 1 Thomp. & C. 403, it was held that when an owner of land agrees to sell to another, and advances him money with which to build upon the premises sold, and after the completion of the houses the builder is to secure the purchase price and the advances by a mortgage, the vendee builds by permission of the owner, and the property is chargeable with the lien. And this decision was cited with approval and followed in Gates v. Whitcomb, 6 Thomp. & C. 341.

The fact that a written contract to convey, with conditions requiring the vendee to build, was never executed, was held in Hobby v. Day, 22 N. Y. S. R. 92, 3 N. Y. Supp. 900, to be no defense to an action to foreclose a mechanics' lien upon the vendor's interests, where the materials were furnished with the vendor's knowledge and consent, and he had had the benefit thereof.

Statute giving liens for improvements made with the written consent of the owner.

A provision in a contract of sale or in a lease, which permits or requires the vendee or lessee at his own expense to make improvements, is not a "written consent" within the meaning of statutes giving liens for improvements made with the written consent of the owner.

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Thus, a lease authorizing the lessee to make improvements, which were to be left at the end of the term, was held in McKown v. Harris, 15 Pa. Dist. R. 611, to be insufficient to charge the lessor's interest for improvements under a statute which required that consent given by the owner to the tenant to improve the leased property must appear in writing, signed by the owner, to the effect that such improvement was in fact made for his immediate use and benefit.

And a covenant by a lessor with a lessee that the latter is to make improvements at his own expense, and not at the expense of the lessor, is not a "written consent" to improvements, such as will bind the interests of the lessor. McClintock v. Criswell, 67 Pa. 183. And to the same effect was the decision in Boteler v. Espen, 99 Pa. 313, where the obligation of the lessee to make the repairs at his own expense was not expressly contained in the lease, but was clear and undoubted from all the circumstances of the case.

So, in Currier v. Cummings, 40 N. J. Eq. 145, 3 Atl. 174, it was held that a lease which provided that all improvements made by the lessee should become the property of the lessor at the close of the term, and that the lessor would convey the property to the lessee upon certain conditions at any time during the year, did not amount to the written consent by the owner to the improvements required by the mechanics' lien law to give the lessee the power to subject the lessor's interests to a lien.

And an agreement to convey containing a condition that the vendee will build is not a written consent of the owner, within the meaning of the statute. Jersey Co. v. Davison, 29 N. J. L. 415.

So, in Hervey v. Guy, 42 N. J. L. 168, it was held that an executory contract of sale by which the vendor required the vendee to make certain repairs at his own expense, and permitted him to make certain improvements, also at his own expense, was not a written consent within the terms of the statute. But where the contract shows that the vendor is to pay for the improvements, the vendor's consent will be implied. Young v. Wilson, 44 N. J. L. 157.

In Luigart v. Lexington Turf Club (Ky.) 113 S. W. 814, it was held that knowledge and verbal consent of the lessor to improvements by the lessee do not satisfy the requirements of the statute which gives a mechanics' lien for improvements made "by contract with, or by the written consent of, the owner."

Statutes giving liens where owner, with knowledge of the improvement, fails to give notice of nonliability.

The California statute provides that improvements made upon premises with the knowledge of the owner shall be deemed to be made at his instance, and his interests shall be subject to a lien therefor, unless the owner shall give notice of nonliability, as prescribed by the statute.

Under this statute it has been held that a lien attached where improvements were made by a lessee, and the owner, with knowledge of the improvements, failed to give the statutory notice of nonliability. West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231; Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686; Santa Monica Lumber & Mill Co. v. Hege, 119 Cal. 376, 51 Pac. 555; Birch v. Magic Transit Co. 139 Cal. 496, 73 Pac. 238.

So, too, where the improvements were made by a vendee. Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; Hamilton v. Delhi Min. Co. 118 Cal. 148, 50 Pac. 378.

In Fuquay v. Stickney, 41 Cal. 583, the court said: "If the owner of land . . . knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent, it is eminently just that he shall be held to have acquiesced in it."

And where the lease provided that the lessee might, at his own expense, make improvements, which, in certain contingencies, would revert to the lessor, it was held in Evans v. Judson, 120 Cal. 282, 52 Pac. 585, that the lessor would be chargeable with notice of any improvements which the lessee might make. And to the same effect was the decision in Hines v. Miller, 122 Cal. 517, 55 Pac. 401.

So, in Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41, it was held that an agreement by the owner with a lessee or conditional purchaser that improvements must be made at his cost, and that the lessor would not be liable for labor or materials, would not protect the land from the lien, where the lessor knew of the proposed work, and failed to post the statutory notice.

And in Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. 990, it was held that where an improvement is constructed in such a manner as to affix it to the real property, and the laborer has no information that it will be regarded otherwise, he may assume that he is making an improvement upon real property, and the right of lien will attach.

And in Phelps v. Maxwell's Creek Gold Min. Co. 49 Cal. 336, it was held that where the president of a corporation visited the premises while the repairs were being made, it was prima facie sufficient to charge the corporation with knowledge, and to subject its interests to a lien for the improvements. But the knowledge of a director who has not the management or control of a corporation's business other than as director is not the knowledge of the corporation. Lothian v. Wood, 55 Cal. 159.

Although repairs to leased premises were made at the instance of a lessee, and not at the instance of the lessor, it was held in Gould v. Wise, 18 Nev. 253, 3 Pac. 30, under a statute similar to the one in California, that the lessor's interest would be subject to a lien therefor if, with full knowledge of the fact that the improvements were being made, the lessor failed to give the statutory notice of nonliability.

Where, among other provisions, the lien

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law provided that improvements made with the knowledge of the owner should be held to have been made by his authority unless he should, within a certain time, give a specified notice, it was held in John Martin Lumber Co. v. Howard, 49 Minn. 404, 52 N. W. 34, that a lien would attach for improvements made by a vendee, where there was no express agreement that the vendee should build, but only an implied understanding.

So, a mechanics' lien will attach to the interest of a tenant in common where she authorized the vendee to make the improvements, and failed to post the statutory notice of nonliability, as she must thereby be deemed to have had knowledge of the improvements; but the lien will not attach to the interest of a tenant in common who had no knowledge of the improvements. Seely v. Neill, 37 Colo. 198, 86 Pac. 334.

Minnesota statutes.

In Minnesota the statute, although apparently broad enough to give a lien for any improvements, no matter by whom caused, has been construed to provide for liens for such improvements as are made with the consent and authority of the owner. O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47; Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513.

That the work or material was furnished under a contract with a vendee who held nothing but an invalid agreement with his vendor, it having been furnished with the assent and knowledge and at the instance of the vendor, cannot be allowed to affect the laborer's or materialman's right to a lien. Althen v. Tarbox, infra; Little v. Willford, 31 Minn. 173, 17 N. W. 282.

And in Hill v. Gill, 40 Minn. 441, 42 N. W. 294, where, in a contract of sale with an agreement to convey real estate, the vendee was required to erect a dwelling house upon the premises within a specified period of time, and before he would become entitled to receive a deed therefor, it was held that this contract of sale authorized the vendee to enter into a contract for materials with which to build the house, and that the materialmen were entitled to a lien against the premises and against all of the right, title, and interest of the vendor therein upon the day the lien attached, together with an interest subsequently acquired by reason of the vendee's surrender to said vendor of all claim to the property. To the same effect were the decisions in Hickey v. Collom, 47 Minn. 565, 50 N. W. 918, and Althen v. Tarbox, 48 Minn. 18, 31 Am. St. Rep. 616, 50 N. W. 1018.

But in Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016, it was held that, under an amendment to the law, the rule in Hill v. Gill would not apply where there was no evidence of a surrender or forfeiture of the vendee's rights. The court said: "By specially providing for a lien where there has been a forfeiture or surrender, and in such cases declaring that the vendor shall be regarded as the owner of the building, and the vendee his contractor, within the meaning of the lien statute, the lawmakers have declared, by implication, but beyond doubt, that, until there has been a forfeiture or a surrender of the contract, the vendor shall not be held to be the owner of the building which has been placed upon the real property, nor shall the vendee be deemed his contractor under the act. The result of this legislation with respect to executory contracts of sale has been to deprive quite a numerous class of mechanics and materialmen of the benefits of the statute providing for liens for work done and materials furnished, who would have been entitled thereto under the doctrine established in Hill v. Gill."

And in Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926, it was held that the same provision in the statute applied only to contracts of sale in which there was an express requirement for improvements; and a vendee could not subject the vendor's interests to a lien for such improvements where the contract provided only that all improvements should become the property of the vendor. And to the same general effect was the decision in Brown v. Jones, 52 Minn. 484, 55 N. W. 54, which arose out of the same transaction.

And in Congdon v. Cook, 55 Minn. 1, 56 N. W. 253, it was held that the language, "the owner or person having or claiming any interest," found in § 5 of the lien law of 1889, must be held to include lessors of land improved by the lessee; and unless the notice required by the same section is given, or the omission is reasonably accounted for or explained, the estate of the lessor may be bound by liens given by that act, subject to the limitation in respect to "repairs" in the proviso of the same section.

But in Boyd v. Blake, 42 Minn. 1, 43 N. W. 485, it was held that where the affidavit and statement filed to secure the lien did not show that the building was constructed by virtue of any requirement in the contract between the vendor and the vendee, nor show in any way authority in the vendee to charge the vendor's interest in the land, no lien would attach.

Miscellaneous cases.

In Lynam v. King, 9 Ind. 3, where a section of the statute read as follows: "The provisions of this article shall only extend to work done or materials furnished on new building, or to a contract entered into with the owner of any building for repairs, and not to any contract made with the tenant," —it was held that a new building erected by a tenant would subject the interests of the landlord to a lien therefor.

And under a similar statute it was held in Wilkerson v. Rust, 57 Ind. 172, that a mechanics' lien would not attach to the interests of the landlord by a contract with the tenant for repairs to the building, and the fact that the repairs were made with

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the knowledge and consent of the landlord did not affect the question. And to the same effect was the decision in Baylies v. Sinex, 21 Ind. 45.

A tenant at will, without a lease, cannot subject the owner's interests to a lien, under a statute which provides for liens for labor or material furnished to lessees who have recorded their leases. Squires v. Fithian, 27 Mo. 134.

And a lessee cannot subject the owner's interests to a lien for buildings which are not removable by the lessee. Hammond v. Martin, 15 Tex. Civ. App. 570, 40 S. W. 347.

The fact that it was agreed that the vendee should erect a building upon the lot, and that the vendor agreed to advance him a specific sum of money for the construction of such building, was held in Faber v. Muir, 27 Tex. Civ. App. 27, 64 S. W. 938, not to be sufficient to subject the vendor's interests to a lien.

In Graham v. Williams, 9 Ont. Rep. 458, the owner in fee of certain property made a lease of the property for one year, with the privilege to the lessee to purchase at a fixed price, paying a certain sum down. Thereafter a new verbal contract was entered into between the lessor and the lessee, whereby the latter was to erect certain buildings, and the lessor was to advance, as the work proceeded, a certain proportion of the cost, and was to have a mortgage upon the property for whatever was advanced. The verbal contract was made before the expiration of the lease, and the buildings were not completed, nor was the purchase contemplated in the lease made. In an action to subject the owner's interest to a lien for the labor and materials furnished for the building, it was held that while it was difficult to understand the exact position of the parties, no lien could attach for the labor and materials furnished, as they were not furnished with the privity and consent of the owner. The court said that something more than mere knowledge of the work being done was required to bind the owner. The court proceeded upon the theory that the owner must be considered as the landlord, and that the privity and assent required by the statute must be in pursuance of an agreement.

But in Blight v. Ray, 23 Ont. Rep. 415, it was held that the decision in the Graham Case was not to be extended beyond the particular facts arising in that case; and, as a general rule, the vendor's interests will be subjected to a lien for improvements which he contracted that the vendee should erect.

In Garing v. Hunt, 27 Ont. Rep. 149, it was held that a clause in a lease providing that the lessee should make certain repairs, and deduct the cost thereof from the rent, would not subject the owner's interest to a lien for such repairs.

23 L.R.A.(N.S.)

ILLINOIS SUPREME COURT.

R. HAAS ELECTRIC & MANUFACTURING COMPANY et al.
v.
SPRINGFIELD AMUSEMENT PARK COMPANY et al., Appts.

(236 Ill. 452, 86 N. E. 248.)

Mechanics' lien — knowingly permitting.

1. A property owner who gives his consent to the lessee's placing improvements on the property which are to become his at the expiration of the lease knowingly permits them to be made, within the meaning of a statute giving a mechanics' lien against the property of one who knowingly permits improvements to be made thereon, and, if he does not limit the character or cost of the improvements, he will not be heard to complain that their cost is excessive or their character undesirable.

Same — apparatus — fixtures.

2. A provision in a mechanics' lien law that the lien shall not be defeated by lack of proof that the material, after delivery thereof, actually enters into the construction of the building, does not apply to fixtures, apparatus, or machinery, for which another section of the statute gives a lien, but it is necessary to show that such things are actually attached to the realty in such a manner as to enhance its value.

Same — meals — car fares.

3. No mechanics' lien for meals and street car tickets can be charged against a property owner under his agreement to permit his lessee to place improvements on the property.

Same — returns.

4. No mechanics' lien can be established against property for the price of carboys which, according to the contract under which they are delivered, are to be returned.

Same — payments — credits.

5. A credit on a bill for the items of which a mechanics' lien is claimed, for the price of material returned, will not be regarded as a general payment, which a court of equity will credit on nonlienable items so as to uphold a lien for the contract price of those which are lienable, which does not exceed in amount the sum unpaid on the contract.

Appeal — transactions subsequent to judgment.

6. Payment on account, made after the entry of a decree establishing a mechanics' lien, cannot be considered by the appellate court in determining the correctness of the decree.

Reference — exceptions — alteration of findings.

7. The court cannot add interest to an

Note. — As to power of lessee or vendee to subject owner's interests to mechanics' liens, see case note to Belnap v. Condon, ante, 601.

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amount allowed by a master in chancery upon account, where no exceptions are filed to his findings.

Appeal — constitutional questions — first objection.

8. An objection to the constitutionality of a provision in a mechanics' lien law allowing attorneys' fees to the lienor's solicitor cannot be raised for the first time on appeal.

Same — waiver — constitutional questions.

9. A constitutional question is waived by appealing to the appellate court rather than to the supreme court.

(October 26, 1908.)

APPEAL by defendants from a judgment of the Appellate Court, Third District, affirming a decree of the Circuit Court for Sangamon County, establishing a mechanics' lien. Reversed in part.

Statement by Vickers, J.:

This is a bill in chancery filed by the R. Haas Electric & Manufacturing Company (which will hereinafter be designated as the electric company) against the Springfield Amusement Park Company (which, for convenience, is hereinafter called the park company), the Peter Vredenburgh Lumber Company (hereinafter called the lumber company), Thomas D. Hogan, F. Reisch & Brothers, and certain other parties, defendants, to enforce a mechanics' lien.

It appears from the bill that on the 2d day of March, 1906, the electric company entered into a contract with the park company by which the electric company contracted to furnish all labor and material for electric wiring, motors, accessories, plumbing, piping, etc., to be used in the Springfield Amusement Park Company's White City Park of Springfield, Illinois, to be located at the east end of Capitol avenue, now known as Reisch's park; that said materials and labor were to be furnished at the regular retail prices; that in consideration of this contract the electric company agreed to subscribe for $1,000 of the capital stock of the park company, to be paid for in material and labor, provided that such subscription did not exceed 40 per cent of the total amount of the materials and labor furnished by the electric company. The bill avers that, in pursuance of such contract, the electric company furnished all labor and materials for electric wiring, motors, accessories, plumbing, piping, etc., used in the said park company's White City Park, and complied in all respects with the said contract, and that such material and work had been accepted and used by the park company. The bill alleges that there is due the electric company $4,297.36, together with interest from July 5, 1906, at 5 per cent. To said bill the electric company attached a schedule, marked "Exhibit A," and made the same a part of the bill, which purports to be an itemized bill, the aggregate of which is the amount above stated. The several corporations and individuals that are made defendants to the bill are alleged to have or claim some interest in the premises, the precise nature of which is alleged to be unknown to the electric company. It is charged that the interest or claim of the several defendants, if any, is subject to the lien of the electric company, and that all of said parties defendant knowingly permitted the park company to contract for and receive and obtain the materials, labor, and improvements furnished by the electric company.

The lumber company answered the bill, neither admitting nor denying any of the facts upon which the electric company predicated its right to a lien, and prayed that strict proof might be required as to all such facts. The lumber company by its answer set up a claim for lien in its behalf for lumber and building materials furnished by said lumber company to the park company under a verbal agreement of April 30, 1906. The lumber company also agreed to subscribe for $1,000 of the capital stock of the park company, to be paid for in building material. To its answer the lumber company attached an itemized bill showing a balance due it of $5,926.19, for which sum the lumber company also claims a lien upon the premises described in the bill. The park company also answered the bill, in which it denied all of the material averments in the bill. F. Reisch & Brothers answered the bill, and disclaimed all knowledge of the alleged contract or the material furnished or work done thereunder, and demanded strict proof of the same. They set up in their answer that they have an interest in said premises as sublessors to the park company. Thomas D. Hogan filed an answer to the bill, in which he claims to be the owner in fee simple of the real estate described in the bill. He denies all the averments in the bill in so far as the same affect his interest. Replications to these several answers were filed, and the cause was referred to a master in chancery to take the proofs and report his findings.

In behalf of the electric company, Rudolph Haas, the president of the company, testified that under the contract offered in evidence the electric company furnished all motors, electric lights, wiring, and accessories, which were properly installed by labor furnished and paid for by the electric company, at the White City grounds at the end of East Capitol avenue; that the mate-

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rials were furnished and work done in various buildings, such as the theater, roller coaster, and other buildings; that more or less work was done on all the buildings in the park. This witness states that the electric company complied with the contract and paid all workmen, subcontractors, and materialmen who did work for it under said contract, and that the park company owed the electric company $4,297.36, besides the interest, less the amount of stock subscribed for by the electric company.

Herman Armbruster, who superintended the electrical construction for the electric company, also testified on behalf of the complainant. This witness testifies that the work was done during June and July, 1906. In reference to the character of work done, this witness says: "We worked there on the entrance building—entrance gate—and put on the electrical sign 'White City.' That was put right in front of the entrance, on the woodwork there. We put the sign on two buildings, refreshment stands, pagodas, sign on the main stand, dancing pavilion, bridge, theater (interior and exterior), porch around the old building, additional lights in the kitchen and rear porch on the rear building, penny arcade, shooting gallery, bowling alley and pool, rough house, house of trouble, fun factory, cave of the winds, roller coaster, photograph gallery, Japanese bowling alley, three ice-cream-cone stands, throwing-the-ring stand, knock the-baby-down stand, the outhouses, wiring for fourteen arcs in and around the park, putting up buffet sign on porch around old building, theater sign on theater, signs on the penny arcades, shooting gallery, bowling alley, house of trouble, fun factory, etc. We also decorated an actual tree, called the 'Christmas tree.' We wired that complete. We furnished three-light clusters at the entrance to the theater, and one five-light cluster at the band stand. The itemized statement attached to complainant's bill is complete. They were all delivered. I delivered most of them myself." This witness testifies also that during the time that this work was being installed, Thomas D. Hogan, the owner of the land, was frequently out there and witnessed the work going on, but that the witness had no conversation with him.

In addition to the testimony of these two witnesses, the electric company introduced a lease dated October 29, 1903, between Thomas D. Hogan and F. Reisch & Brothers for the 38.44 acres described in the bill, which lease is for five years from November 1, 1903, with the privilege of renewing for five years additional. The lease provides that the premises are to be occupied for saloon and park purposes, and for no other purposes whatever. The lease provides that the lessees are to keep the premises in good condition and repair and pay a rental of $75 per month. The lease provides that the lessee should not assign or sublet without the written consent of the lessor. Under date of April 1, 1906, there is a written consent, signed by Thomas D. Hogan, to the subletting of said premises to the said park company. The written consent to the subletting recites that the park company should have the right to make improvements on said premises, provided that all improvements, alterations, and additions made by the said company should remain on the premises at the expiration of the lease, for the benefit of the lessor. This was all the evidence offered by the electric company in support of its bill, except that proof of a solicitors' fee was made, and such fee allowed in the sum of $160.

On behalf of the lumber company evidence was offered proving that the lumber company furnished the material for which it claims a lien. There is no serious dispute about the lumber company's claim. There is some question in regard to the interest allowed the lumber company. Evidence was also submitted in regard to the amount of a reasonable solicitors' fee for the lumber company, and $125 was allowed as such fee.

Upon this evidence the master in chancery found that the electric company was entitled to a lien for $4,297.36, and that the lumber company was entitled to a lien for $4,111.73, after allowing credits, about which there is no dispute. Numerous objections were filed before the master by Hogan, F. Reisch & Brothers, and other defendants, all of which were overruled and allowed to stand, by agreement, as exceptions. The decree of the court sustained the master's report in all respects, and established a lien in favor of the electric company and the lumber company for the amounts, respectively, found due them by the master. The court, in its decree, allowed interest on the amount found to be due the lumber company, which was added by the court to the amount found due by the master, making the decree in favor of the lumber company $206.10 more than the amount found due by the master. To reverse this decree the park company, Thomas D. Hogan, and others sued out a writ of error from the appellate court for the third district, where the decree of the circuit court was affirmed in all respects, except the appellate court modified the decree in regard to the interest allowed on the sum found due the lumber company by the master in chancery. The Springfield Amusement Park Company and others have appealed from the judgment of the appellate court to this court.

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Mr. **Albert Salzenstein** and Messrs. **Graham & Graham** for appellants.

Mr. **Alonzo Hoff and** Messrs. **Barber & Barber** for appellees.

Vickers, J., delivered the opinion of the court:

First. Appellants' first and most serious contention is that the court erred in decreeing a lien against the interests of F. Reisch & Brothers and Thomas D. Hogan, appellants' contention being that only the interest of the park company should be subjected to a lien for these improvements.

Section 1 of the mechanics' lien law, as amended in 1903 (Hurd's Rev. Stat. 1905, chap. 82, p. 1317, § 15), provides: "That any person who shall, by any contract or contracts, expressed or implied, or partly expressed and partly implied, with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, furnish materials, fixtures, apparatus, or machinery for the purpose of, or in the building, altering, repairing, or ornamenting any house or other building, . . . shall be known under this act as a contractor, and shall have a lien upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business."

It will be noted that under the language of this statute the owner of a lot or tract of land may subject it to a lien by either making a contract himself or authorizing another to make such contract for him, or by knowingly permitting another to contract for the improvements upon his land. By reference to the evidence set out in the statement preceding this opinion, it will be seen that Thomas D. Hogan, as owner, expressly consented that the park company should have the right to make improvements on the described premises on condition that all improvements, alterations, and additions made by the company should remain on the premises at the expiration of the lease, for the benefit of the lessor. It is true that the particular contracts relied on as the basis of the liens in this proceeding are not referred to in the consent agreement of April 1, 1906. Indeed, there is nothing said in the consent agreement about contracts that might be made by the park company in connection with any improvements, alterations, or additions that such company might undertake to make. The writing signed by the owner authorized the park company to "make improvements on said described premises," which necessarily carries with it a permission to the park company to make such contracts for labor and materials as were reasonably necessary in the making of the authorized improvements. The authority given by the owner to the sublessee to make improvements is not limited, either as to the extent or character, by any language found in the writing. The owner, no doubt, might have specified the character of improvements to be placed on his land, and have limited the cost thereof, but in the case at bar the owner did not see proper to place any limitations whatever upon the power of the park company in this regard, and he will therefore not be heard to complain that the cost is excessive or the character of the improvements undesirable. The first section of the mechanics' lien law of 1895 (Laws 1895, p. 226) made the interest of the owner of the land subject to a lien for improvements "knowingly permitted."

In the case of Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, this court held that a lessor who stipulates in the lease for the erection by the lessee of a building upon the demised premises, which is to become the property of the lessor upon the termination of the lease, by expiration or otherwise, subjects his title to mechanics' liens arising from the erection of the building, notwithstanding the lease provides, under a penalty of forfeiture, that the lessee shall permit no mechanics' liens to attach to the premises. In that case this court reviewed a number of decisions of this and other states, and the conclusion was there reached that one who agrees with another that he shall place buildings or other improvements upon certain property thereby authorizes or knowingly permits such other to improve the property, within the meaning of these terms as used in the mechanics' lien law then in force. It was also held in that case that the clause that the lessee "shall permit no mechanics' liens to attach to the premises" was merely a covenant on the part of the lessee that he would discharge such liens, and that such clause did not prevent the lien from attaching as between the owner and the party entitled thereto. This case has been reaffirmed in Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, and also in Sorg v. Crandall, 233 Ill. 79, 84 N. E. 181.

Under the rule laid down in the foregoing authorities, we are of the opinion that there was no error in holding that these improvements had been knowingly permitted by the owner of the fee.

Second. Appellants contend, under their second point, that many of the items in the respective bills were not for matters for

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which the law allows a lien. Apparently both the electric company and the lumber company proceeded in the court below upon the assumption that a prima facie case was made out by proving a contract and the delivery of the material upon the premises, to be used in improvements to be made thereon. Section 7 of the lien law of 1903 provides, among other things: "No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this act, unless it shall be shown that such error or overcharge is made with intent to defraud; nor shall any such lien for material be defeated because of lack of proof that the material, after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement: Provided, it is shown that such material was delivered either to such owner or his agent for such building or improvement, to be used in such building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction."

By reference to § 1 it will be found that it is provided that a lien shall be allowed in favor of the person who shall, under the conditions therein provided, "furnish materials, fixtures, apparatus, or machinery for the purpose of, or in the building, altering, repairing, or ornamenting any house . . . or sidewalk," etc. This section of the statute is more comprehensive than the language quoted above from § 7. The provision that it shall not be necessary to prove that material actually delivered to the owner or his agent, or at the place where such building or improvement was being constructed, was actually used in the construction or improvement, is limited to material, and does not extend to "fixtures, apparatus, or machinery," for which a lien may be established under § 1. The words "fixtures, apparatus, or machinery" are used in § 1 in addition to the word "materials," and are intended to designate things for which a lien may be established other than materials.

Even if it be conceded, which we do not decide, that under § 7 it is not necessary to prove that material delivered for the purpose of being used in the construction of a building or improvement actually entered into and was used in the building or improvement, can it be said that proof of the mere delivery or fixtures, apparatus, and machinery is sufficient to authorize a decree establishing a lien, without any proof that such fixtures, apparatus, and machinery were ever used in such a manner as to become attached to or form a part of the real estate? Commencing with the case of Hunter v. Blanchard, 18 Ill. 318, 68 Am. Dec. 547, and coming down to Compound Lumber Co. v. Murphy, 169 Ill. 343, 48 N. E. 472, this court held that, under the law which existed prior to the revision of 1895, the lien could only be established to the extent of materials actually used in the construction of the building. It was no doubt to meet the rule of law thus established that that portion of § 7 of the mechanics' lien law of 1903 which we have quoted was enacted. The principle underlying the cases which limit the lien to the extent of materials actually used in the construction of the building is that it is contrary to justice to burden real estate with liens to pay for chattels which in no sense could be supposed to enhance the value of the real estate; hence, where a lien was sought to be established for fixtures, apparatus, or machinery, it was necessary to allege and prove that the things for which a lien was claimed were so attached to the building or improvement as to become a part of the real estate. A full discussion of the law, illustrated by many citations from various states of the Union, will be found in 27 Cyc. Law & Proc. p. 38, where it is said in the text: "Whether or not machinery is within the lien law usually depends upon whether it has become a fixture. If it is stationary and firmly attached to the realty, so as to become a part thereof, it is the subject of a lien; otherwise not." In Drew v. Mason, 81 Ill. 498, 25 Am. Rep. 288, it was held that furnishing material and labor in placing a lightning rod on a house is not furnishing materials and labor in building, altering, repairing, or ornamenting a house, in the sense those terms are used in the mechanics' lien law; while in Dobschuetz v. Holliday, 82 Ill. 371, it was held that a steam engine, machinery, and fixtures attached to the soil by a lessee thereof for the purpose of hoisting coal from mines situated thereon, including all boxes and all other necessary appliances connected therewith, become a part of the lessee's estate therein, and entitle the party furnishing such engine and fixtures to a mechanics' lien against the estate of the lessee on account thereof.

By reference to the electric company's bill of particulars filed with and made a part of its bill, it will be seen that a very large number of the items which enter into the aggregate amount of its claim are matters for which no lien should have been established without proof showing in what manner, if at all, they were connected with the real estate upon which it is sought to establish a lien. Thus, in the claim of the

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electric company there is included a charge of $577.50 for two electric motors, for which a lien is claimed and allowed without any evidence whatever showing that these machines have been so installed as to become a part of the real estate. Included in the same bill are many other items for which no lien should have been allowed without proof that they were so attached to the real estate as to become permanent fixtures, or that they were used in connection with the proper installation of other lienable things. As illustrating the class of items now under consideration, the following may be mentioned: Sulphuric acid, carboys, Westinghouse knife switch, gasolene, fuse blocks, fuse plugs, fusible knife switch, plug cutouts, lamp cord, lamps, clusters and reflectors, arc lamp pole tops, poles, and candelabra base lamps. These items, together with others of like character, constitute a very large portion of the claim of the electric company. By reference to the evidence of Herman Armbruster, who superintended the installation of all of this work, which is set out very fully in the statement preceding this opinion, it will be found that the work of installing these improvements was put upon buildings, refreshment stands, pagodas, signs, dancing pavilion, bridge, theater, arcade, and various other places of amusement in the park. He says: "We decorated an actual tree, called the 'Christmas tree;' we wired that complete;" that light clusters were installed at the entrance of the theater and on the band stand. It is utterly impossible to tell from his evidence what part of this work is for lienable matters and what is not, and there is no other evidence in the record bearing on that question. There is also included in the electric company's bill a number of items for street car tickets and meals for superintendent. We are unable to see how such items could possibly become the basis of a mechanics' lien under the contract relied upon. There is also an item for carboys, which the bill shows were to be returned. This item was improperly included in the amount of the lien.

It is said by appellees that, even if nonlienable items were included in the electric company's claim, there have been payments made which the court ought to apply in discharge of such nonlienable items and affirm the decree, since the amount now due does not exceed the amount for which the electric company is clearly entitled to a lien. This view was adopted by the appellate court, and resulted in an affirmance by that court, on the authority of Monson v. Meyer, 190 Ill. 105, 60 N. E. 63, and Barbee v. Morris, 221 Ill. 382, 77 N. E. 589. The first of the above-cited cases announces the rule that equity requires the debtor to pay all of his obligations, and that the court will credit a payment so as to give the creditor the best security for the debt remaining unpaid. The case of Barbee v. Morris makes application of this equitable rule to a general payment made upon a building contract, where the parties have not made any specific application thereof, and holds that a court of equity may properly credit the payment upon the contract so as to include an item for extra work for which the creditor would not, under the contract, be entitled to a lien, and thus give him the security of a mechanics' lien for the amount remaining unpaid. Without questioning the rule announced in these cases, we are of the opinion that it is erroneously applied to the facts in this case. The evidence shows that the only credit entered upon the bill of the electric company prior to the decree in the circuit court was an item of $158.16 for material returned. The method of bookkeeping by the electric company was to charge all items that were furnished under the contract to the park company, and upon the return of any items a credit was entered, thus canceling the charge made for such item. If the return of these goods can be regarded as a payment at all, it would only be a payment of the amount charged for the specific articles returned, and could not, in any view, be regarded as a general payment, which a court of equity would apply to nonlienable items, within the equitable rule announced in the foregoing cases. If the material returned was of a class for which a lien might be given upon proof of its mere delivery, such lien would be defeated by the voluntary removal of the material by the contractor from the premises. If the material returned was lumber, the lien which the statute gives upon proof of the delivery of such material at the place of the improvement could not be transferred by the removal of the lumber to other items for which the law gives no lien. The return of material to the amount of $158.16 only had the effect of canceling the charge made for the items included in that amount.

There is a statement in appellees' brief to the effect that there have been payments made on this decree, aggregating about $2,500, since the decree was rendered in the lower court, and the electric company seeks to avail itself of this fact in answer to the alleged error committed by including in the decree nonlienable items. To this contention it may be replied (1) that the case

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must be determined in a court of review upon the record made in the trial court, and we cannot take into consideration facts *dehors* the record, that are only brought to our attention by the statement of counsel in their briefs; (2) the state of the record is such that it is impossible to separate the lienable from the nonlienable items, and until such items are separated we cannot tell what the amount of either is. There are no grounds here for the contention that the error of the trial court is cured by the application of payments to the items erroneously included in the decree.

Third. The master in chancery found the amount due the lumber company to be $4,111.73. The lumber company filed no objections to this finding. The circuit court found the amount due the lumber company to be $4,317.83, and rendered a decree for that amount. The court obtained the larger amount by the addition of $206.10 interest. The appellate court struck out the item of interest, and affirmed the decree in favor of the lumber company for $4,111.73. In this we think the appellate court is clearly right. The finding of the master in chancery is conclusive upon the parties as to all questions wherein the finding is not excepted to. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

Upon evidence heard, an attorney fee of $125 was allowed the lumber company's solicitors. Since this case was heard in the appellate court, this court, in the case of Manowsky v. Stephan, 233 Ill. 409, 84 N. E. 365, has held that portion of the mechanics' lien act allowing attorney fees for the lienor's solicitors unconstitutional. No objection or exception to the allowance of attorney fees was made before the master or in the court below, nor was the constitutional question raised until the case reached this court. We are of the opinion that appellants have waived their right to raise this question by failing to raise it in the court below; and if it had been so raised, it would have been waived by taking the case to the appellate court instead of bringing it directly to this court.

The judgment of the Appellate Court will be affirmed in all respects in so far as the same relates to the decree in favor of the lumber company, and in so far as it relates to the electric company, the decree of the Circuit Court and the judgment of the Appellate Court are reversed, and the cause remanded to the Circuit Court for further proceedings in accordance with the views herein expressed.

Petition for rehearing denied December 4, 1908.

23 L.R.A.(N.S.)

ARKANSAS SUPREME COURT.

W. A. BURKS, Appt.,
v.
J. W. HARRISS et al.

(— Ark. —, 120 S. W. 979.)

Lottery — distribution of lots.

The distribution by chance among the purchasers of lots of unequal value, which were purchased at a uniform price by citizens of a town, in consideration that the owner of the tract would erect a hotel building which would be of public benefit, is within the statute against lotteries and unenforceable against the purchasers, although such distribution was not part of the original scheme, and the vendor did not direct or make himself a party to the unlawful distribution, if the contracts of sale were with the individual purchasers, and were not to be complied with until the lots were selected, so that the method of selecting the lots was necessarily a part of the contract.

(June 28, 1909.)

Case Note. — Distribution of parcels of land by chance as a lottery.

Where parcels of land of unequal value are to be distributed by lot among ticket holders or purchasers, they not being tenants in common, the transaction constitutes a lottery, notwithstanding each pays an equal price. Paulk v. Jasper Land Co. 116 Ala. 178, 22 So. 495; Elder v. Chapman, 176 Ill. 142, 52 N. E. 10, reversing 70 Ill. App. 288; Guenther v. Dewein, 11 Iowa, 133; Den ex dem. Wooden v. Shotwell, 24 N. J. L. 789, affirming 23 N. J. L. 465; Jackson Steel Nail Co. v. Marks, 4 Ohio C. C. 343; Seidenbender v. Charles, 4 Serg. & R. 151, 8 Am. Dec. 682; Ridgeway v. Underwood, 4 Wash. C. C. 129, Fed. Cas. No. 11,815; Swain v. Bussell, 10 Ind. 438; Power v. Cannift, 18 U. C. Q. B. 403; Loyd v. Clark, 11 U. C. C. P. 248; Croyn v. Widder, 16 U. C. Q. B. 356.

The statute of 12 Geo. II., chap. 28, § 4, prohibited the sale of houses and lands by lottery. Fisher v. Bridges, 3 El. & Bl. 642.

Where a parcel of land is to be subdivided into lots which are to constitute prizes in a scheme of chance or a "gift enterprise," it constitutes a lottery. Hooker v. De Palos, 28 Ohio St. 251.

So, where such portion of land is to be conveyed to one of sixty-six persons as shall fall to him by lot, it constitutes a lottery. Allebach v. Godshalk, 116 Pa. 329, 9 Atl. 444; Allebach v. Hunsicker, 132 Pa. 349, 19 Atl. 139.

And where weekly payments are made and weekly drawings by lot held for the distribution of city lots, by which the lucky member of the lot club gets his land for less than another member, it constitutes a lottery. Branham v. Stallings, 21 Colo. 211, 52 Am. St. Rep. 213, 40 Pac. 396.

So, where parcels of land are disposed of

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APPEAL by plaintiff from a decree of the Chancery Court for Benton County dismissing the complaints in consolidated suits to recover the purchase price of several lots and to foreclose alleged liens thereon. Affirmed.

The facts are stated in the opinion.

Mr. **Dick Rice** for appellant.

Messrs. **McGill & Lindsey**, for appellees:

The scheme by which the lots were distributed was a lottery.

25 Cyc. Law & Proc. p. 1637; 19 Am. & Eng. Enc. Law, 2d. ed. p. 591; Lynch v. Rosenthal, 144 Ind. 86, 31 L.R.A. 835, 55 Am. St. Rep. 168, 42 N. E. 1103; Emshwiler v. Tyner, 21 Ind. App. 347, 69 Am. St. Rep. 360, 52 N. E. 459.

McCulloch, Ch. J., delivered the opinion of the court:

At a mass meeting of citizens of Bentonville, Arkansas, the plaintiff, W. A. Burks, proposed, on condition that the citizens of Bentonville should, within fifteen days from that date, purchase from him, at the price of $50 per lot, 200 lots 50 by 150 feet in size each, to be surveyed and platted out of a certain tract of land adjoining said city of Bentonville, to erect near Spring Park, on a tract of land known as "Spring park addition," a hotel building of certain dimensions and capacity, and to make certain other improvements on the premises so as to make the place an attractive resort. The lots were to be selected after the plat should be made, and the same were to be paid for as follows: One half when the walls and roof of the hotel should be completed, and the balance when the whole improvements were completed. A committee was appointed by the assembled citizens to solicit purchasers in order to accept the plaintiff's proposition. The committee secured a large number of subscribers or purchasers, each agreeing to purchase a certain number of lots at the price named, and out of these the plaintiff selected 200, and they each executed to him an obligation in writing, which, after reciting the plaintiff's undertaking with respect to erecting the hotel building, etc., is as follows:

"Now, therefore, in consideration of the above agreement and the benefits arising to the undersigned and the citizens of Bentonville, and the further agreement that the said W. A. Burks is to execute and deliver,

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by a drawing, each ticket holder paying a designated sum therefor, the persons holding the first two tickets drawn paying nothing more for their lots, while the others are required to pay a greater sum, it constitutes a lottery. Marshall v. Platt, 8 U. C. C. P. 189.

A sale of lots to be drawn by purchasers, the advantages of location, character, size, or condition, as between lots of the same class, as arranged by prices marked, to be determined wholly by lot, with one prize lot to be given to some one of the purchasers as the result of chance, constitutes a lottery. Lynch v. Rosenthal, 144 Ind. 86, 31 L.R.A. 835, 55 Am. St. Rep. 168, 42 N. E. 1103.

In Emshwiler v. Tyner, 21 Ind. App. 347, 69 Am. St. Rep. 360, 52 N. E. 459, where several persons entered into a written contract to purchase town lots at a certain price each, which were to be distributed among the several purchasers in such a manner as might be agreed upon between them, and, after the lots were platted, the several purchasers and the vendor met together, and, under the direction of the vendor, a distribution was made by lot, it was held that, although the contract was valid in its inception, it was rendered unenforceable by reason of the manner of distribution, to which the vendor was a party, and it thereby became tainted with the vice of lottery.

But it was held in Lauder v. Peoria Agri. & Trotting Soc. 71 Ill. App. 475, that where parcels of land of equal value are apportioned to the purchasers by a designated committee, it does not constitute a lottery.

In Chancy Park Land Co. v. Hart, 104 Iowa, 592, 73 N. W. 1059, where certain lots which were contracted for by promoters of a corporation were subscribed for under an agreement to take the number set opposite the name of each of the subscribers, to be apportioned among them in such manner as they should decide at a meeting held for the purpose of dividing the lots by a method to be decided upon by a vote of the subscribers, the plan of one of the promoters that the names were to be drawn out of one box and the numbers of the lots to correspond drawn out of another being adopted, it was held that the apportionment of the lots, which were worth more than the price paid, was by the subscribers alone, and did not constitute a lottery.

So, Washington Glass Co. v. Mosbaugh, 19 Ind. App. 105, 49 N. E. 178, where several persons had agreed to purchase town lots at a certain fixed value per lot, which were to be afterward laid out and platted by the vendor, and divided among the several purchasers in such manner as they might agree, and by mutual agreement they met and by lot apportioned the land among themselves without the vendor participating therein, it was held that the transaction did not constitute a lottery. The court said that it knew of no good reason why these purchasers did not have the right to divide their property, or that contracted for, according to their own notions and agreement.

And in McCleary v. Chipman, 32 Ind. App. 489, 68 N. E. 320, where a subscription to a manufacturing enterprise provided that the subscribers should each pay a certain amount and receive a city lot in a certain plat of land, the method of distribution to be determined upon and carried out by

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or cause to be executed and delivered, a warranty deed conveying to J. W. Harriss one lot, the particular location to be hereafter determined, each lot to be 50x150 feet, situate on the following described tract of land situate in Benton county, Arkansas, to wit: The S. E. ¼ of the S. E. ¼ of section 19, and the N. E. ¼ of the N. E. ¼ of section 30, township 20, range 30, we, the undersigned, promise to pay the said W. A. Burks the sum of $50 at the Fidelity Savings Bank & Loan Company, in the city of Bentonville, upon the following terms: One half of said sum when the walls of the said hotel building and roof thereon shall be completed, the remaining half to become due and payable when the said hotel, the dam and the six cottages, shall have been completed according to contract, and that this note shall bear interest at the rate of 10 per cent per annum from date when said payment shall fall due until paid."

The plaintiff then caused the tract of land in question to be surveyed and platted into 330 lots, out of which number the committee selected 200, to be conveyed to the purchasers as soon as it should be determined what particular lot or lots each purchaser should receive. These lots were of unequal value, some worth practically nothing, and some worth double the price named.

The committee decided to distribute or apportion the lots to the respective purchasers by a chance, each purchaser to take the lot drawn by him, and this plan was accepted and carried out. The plaintiff did not propose this plan, but he acquiesced in it and was present at the drawing. It was proposed and carried out by the committee who represented the citizens and purchasers. The plaintiff erected the proposed building and other improvements, and demanded payment from the purchasers of their respective obligations. He also executed and tendered to them deeds conveying the several lots apportioned to them in the drawing. Defendants Harriss, Armstrong, Crowell, Duckworth, Bates, Stevenson, Porter, Maxwell, Hildebranth, and Graham each declined to accept the lots so apportioned to them and refused to pay the price. The plaintiff instituted separate suits in equity against them to recover the several amounts due and to foreclose his alleged lien on the lots apportioned to them. These suits were consolidated and tried together, and a decree was rendered dismissing the complaint for want of equity, and the plaintiff appealed.

The defense asserted by each of the defendants was, among other things, that the scheme for the sale and distribution was a lottery, in violation of the law. "A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize." 25 Cyc. Law & Proc. p. 1633.

The Constitution and statutes of this state make it unlawful to conduct a lottery, or to sell or otherwise dispose of lottery tickets, gift concert tickets, or the like. Const. 1874, art. 19, § 14; Kirby's Dig. §§ 1862, 1863. Contracts for the sale of tracts of land of unequal value, to be appor-

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the subscribers, which was done by withdrawing an envelop containing a number of a lot from one box, and an envelop containing the name of a subscriber from another, it was held that the subscription was not illegal, as being in violation of the statute against lotteries.

So, it was said in Elder v. Chapman, supra, there is a broad distinction, however, between a division of property by lot and a lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made, and determination had by lot as to which part shall go to each joint owner, severally, without coming within the prohibition of the lottery statute; as, the joint owners being seised of the whole estate before partition, and the object of the lot being to assign to each his particular portion, the whole having been previously divided into parts as nearly of equal value as possible, such partition would not constitute a lottery.

In Den ex dem. Wooden v. Shotwell, supra, the court apparently recognizes the validity of a distribution of land by lot among those who hold it as tenants in common.

Where a corporation was organized for the purpose of providing homes for its subscribers, its methods of operation being to acquire land and divide it among its subscribers by lot, only a small portion of them, however, being entitled to obtain the present possession of a house or land, so that in five years only 227 out of 70,000 subscribers would obtain anything, Baron Parke, although refraining from deciding the point, said that he could not bring himself to the opinion that such a scheme was illegal, as constituting a lottery. O'Connor v. Bradshaw, 20 L. J. Exch. N. S. 26.

As to a guessing contest as a lottery, see the case note to Waite v. Press Pub. Asso. 11 L.R.A.(N.S.) 609.

As to the distribution of suits by a tailor among members of a club as a lottery, see the case note to Grant v. State, 21 L.R.A. (N.S.) 876.

As to scheme for accumulating money by payments of members, and distributing it in order of number of certificate, as a lottery, see the case note to Fitzsimmons v. United States, 13 L.R.A.(N.S.) 1095.

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tioned among the purchasers by lot, are held in many cases to be within the statute against lotteries; and it is immaterial that every purchaser is to receive some return. Paulk v. Jasper Land Co. 116 Ala. 178, 22 So. 495; Elder v. Chapman, 176 Ill. 142, 52 N. E. 10; Lynch v. Rosenthal, 144 Ind. 86, 31 L.R.A. 835, 55 Am. St. Rep. 168, 42 N. E. 1103; Den ex dem. Wooden v. Shotwell, 24 N. J. L. 789; Seidenbender v. Charles, 4 Serg. & R. 151, 8 Am. Dec. 682.

It is insisted, however, that where it is no part of the original contract of sale that the lots shall be divided by chance, and the vendor does not direct or make himself a party to the unlawful distribution, the contract is not vitiated, and that a recovery may be had thereon. The principle thus stated in the contention is undoubtedly sound, for where a number of parties join together and purchase lands, even with the intention of dividing it in an unlawful method, the vendor is not a party to the scheme, and is entitled to recover the agreed price. In that case, the unlawful scheme for the division by lot is not a part of the original contract of sale.

In Martin v. Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694, which involved to some extent the same principles which must control here, the court said: "The test to determine whether a plaintiff is entitled to recover in an action like this or not is his ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery."

Now, in applying that test to the present action, it becomes necessary to inquire particularly as to what the contract was between the parties. It will readily be observed that it was not a joint contract on the part of the subscribers or purchasers to purchase together a quantity of land, to be subsequently distributed or apportioned among themselves according to a method of their own selection. If such were the case, each purchaser would be bound by the purchase, and would be obligated to accept and pay for his undivided part of the lands so purchased, and the vendor would not be concerned in the method of its apportionment or allotment between the several purchasers. The contract in this case is in writing and speaks for itself. Each subscriber or purchaser agreed to become the purchaser of a lot, to be thereafter selected, of given dimensions and for a certain stipulated price. There were 200 of these subscribers, and they separately agreed in these contracts to purchase lots of the same dimensions and at the same price, but of unequal value. The sale of each purchaser was not complete until the lot was selected, and the method of selecting the lots was necessarily a part of the contract. It was necessary for the plaintiff to prove the distribution of each lot in order to show a completion of the contract and his right to recover thereon, for the purchaser did not agree to pay until the lot should be apportioned and set aside to him. Applying the test laid down by this court in Martin v. Hodge, supra, it was necessary for the plaintiff, in order to make out his case, to prove an illegal transaction whereby the lots were set apart and apportioned to the respective purchasers. While the evidence in this case does not establish the fact that the plaintiff selected the method of apportioning the lots, yet the contract itself necessarily made him a party to whatever method was selected, because, until the apportionment of the lots, the contract was not complete and susceptible of enforcement. The obligation which he accepted from the various purchasers contemplated that the distribution would be entirely by chance, and without reference to the actual value of the lots. It was not susceptible of the interpretation that a lawful method would or could be adopted whereby the lots were to be distributed. It could mean nothing else save that these lots, of unequal value, should be apportioned among the purchasers without regard to values, for each purchaser agreed to take a lot of the stipulated dimensions, no more, no less, and to pay the uniform price named, no more and no less. It was necessarily not in the contemplation of the parties at the time the contract was made that any regard to value should be had in the distribution of the lots, or that the values should be equalized in distributing them.

There is a decision of the supreme court of Iowa which, at first glance, appears to be in conflict with the views we have herein expressed; but on careful analysis of the facts of that case, we find that it is clearly distinguishable from this. There, certain promoters engaged in an enterprise with a packing company to erect its plant at the city or town named, and entered into a contract with the owners of a tract of land that the same should be platted and sold to subscribers or purchasers at a uniform price, and that the same were to be distributed among the subscribers according to methods to be thereafter selected by the latter. The subscribers were procured, and the lots platted and conveyed to the promoters for distribution among the subscribers, and the latter agreed upon and carried out a plan of distribution by drawing, similar

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to that adopted in the present case. The promoters had nothing to do with the adoption of the method of distribution. The court held that the contract was not vitiated by the agreement between the promoters and the purchasers for a distribution by chance. It is clear from the opinion, however, that the court treated the transaction as a purchase of the whole tract by the promoters, who held the title as trustees for the subscribers. The court said: "It thus appears that there must be some plan or scheme, on the part of the promoters of the enterprise alleged to be unlawful, for the sale or disposition of property by lot or chance, before it can be said to have the character of a lottery. If the sale is without the purpose that the property, or any part of it, shall be obtained by the purchaser through chance, and this does not result from the nature of the transaction, then it is not so tainted. The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery, or in evasion of the law." Chancy Park Land Co. v. Hart, 104 Iowa, 592, 73 N. W. 1059. The facts of the present case do not fall within the rule announced in that case. Here there was no completed purchase of any particular lot, but, as we have already shown, the contract of purchase depended upon a subsequent method thereafter to be agreed upon for the distribution of the lots. In other words, it was not a purchase of an undivided tract, and subsequent agreement of a division by chance, but it was a separate purchase by which each subscriber bought lots, the particular identity of which was to be determined by chance.

The correct distinction is, we think, drawn by the supreme court of Illinois in Elder v. Chapman, 176 Ill. 142, 52 N. E. 10, wherein it is said: "There is a broad distinction, however, between a division of property by lot and a lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made, and a determination had by lot as to which part shall go to each joint owner, severally, without coming within the prohibition of the statute. The joint owners being seised of the whole estate before partition, and the object of the lot being to assign to each his particular portion, the whole having been previously divided into parts as nearly of equal value as possible, such partition would not constitute a lottery."

We are of the opinion that the contract of sale contemplated an unlawful method of performance, and that the decree of the chancellor was correct.

Affirmed.

23 L.R.A.(N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

APPEAL OF CHARLES B. ALLYN.

(81 Conn. 534, 71 Atl. 794.)

Intoxicating liquor — validity of license.

1. The licensing of the sale of intoxicating liquor is not forbidden by a preamble to a Constitution which acknowledges God as the source of government, on the theory that the Bible is the word of God, and condemns the use and sale of intoxicating liquor as a beverage.

Same — form of government.

2. The licensing by the legislature of the sale of intoxicating liquors is not invalid under the clause of the Federal Constitution requiring the United States to guarantee to every state a republican form of government.

Same — license — revenue — validity.

3. That a revenue is secured from a license provided by the legislature for the purpose of regulating the traffic in intoxicating liquors, in the interest of the public, does not render the legislation providing therefor invalid.

(January 22, 1909.)

APPEAL by Charles B. Allyn, a taxpayer, from a judgment of the Superior Court for Fairfield County affirming a decision of the Fairfield county commissioners, granting a license to an individual for the sale of intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. **Coughlin & Wilder**, for appellant:

A liquor license is a permit, and not a restriction.

Kinne's Law Dict. p. 434; 17 Am. & Eng. Enc. Law, 2d. ed. p. 230; Black, Intoxicating Liquors, § 48; Cooley, Const. Lim. 5th ed. p. 343.

There is no inherent nor inalienable right, nor common-law right, to sell intoxicating liquors at retail for a beverage.

Malmo's Appeal, 72 Conn. 7, 43 Atl. 485; Crowley v. Christensen, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; Adams v. Cronin, 29 Colo. 488, 63 L.R.A. 61, 69 Pac. 594; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Sherlock v. Stuart, 96 Mich. 193, 21 L.R.A. 580, 55 N. W. 845; State ex rel. George v. Aiken, 42 S. C. 222, 26 L.R.A. 363, 20 S. E. 221.

The state cannot bargain or give away the public health and the public morals.

Note. — As to power of legislature to permit sales of intoxicating liquor, see note to Sopher v. State, 14 L.R.A.(N.S.) 172, and later cases, State v. Roberts, 16 L.R.A.(N.S.) 1115, and Phillips v. Godfrey, 17 L.R.A.(N.S.) 1001.

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Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Adams v. Cronin, supra; State v. Woodward, 89 Ind. 110, 46 Am. Rep. 160.

The license law is an exercise of the police power of the state.

Hopson's Appeal, 65 Conn. 140, 31 Atl. 531; La Croix v. Fairfield County, 50 Conn. 321, 47 Am. Rep. 648.

The sale of intoxicating liquors, licensed or unlicensed, at retail, for beverage purposes, is inherently wrong, unlawful, injurious, and dangerous,—dangerous to the public health, dangerous to the public and private morals, dangerous to the public peace, dangerous to the public safety, and dangerous to the good order of society.

State v. Brennan, 25 Conn. 288; Hopson's Appeal, supra; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; State v. Bixman, 162 Mo. 1, 62 S. W. 828; Mugler v. Kansas and State ex rel. George v. Aiken, supra; State v. Durein, 70 Kan. 1, 15 L.R.A.(N.S.) 908, 78 Pac. 152, 80 Pac. 987; State ex rel. Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 186; Miller v. State, 3 Ohio St. 475; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; State v. Turner, 18 S. C. 106; Goddard v. Jacksonville, 15 Ill. 589, 60 Am. Dec. 773.

The state cannot, by any means, regulate an inherently wrong business, but such business must be prohibited by either the common law or by statute.

Preamble, U. S. Const.; Preamble, Conn. State Const.; 1 Cooley's Bl. Com. § 2, p. 44; Conn. State Const. art. 1.

The state cannot recognize a wrong, and, at the same time, license or permit it.

1 Cooley's Bl. Com. § 2, p. 43; Com. v. Douglass, 100 Ky. 116, 66 Am. St. Rep. 328, 24 S. W. 233; Stone v. Mississippi and Mugler v. Kansas, supra; State v. Hipp, 38 Ohio St. 199; Chilvers v. People, 11 Mich. 43; State ex rel. George v. Aiken and Crowley v. Christensen, supra; State ex rel. Kelley v. Bonnell, 119 Ind. 494, 21 N. E. 1101.

No matter what the intent may have been, the legislature cannot, in fact, so legislate as to endanger the public health and the public morals, the public peace and the public safety, and the good order of society.

Preamble, U. S. Const.; Preamble, Conn. State Const.; Conn. State Const. art. 1, § 1; Mugler v. Kansas, supra; 1 Cooley's Bl. Com. § 2, p. 44; McKinney v. Salem, 77 Ind. 213.

Statutes which purport to license and regulate the sale of intoxicating liquors for beverage purposes are unconstitutional, since they give sanction to and permit a business that is inherently wrong and unlawful.

1 Cooley's Bl. Com. § 1, p. 44; Preamble, U. S. Const.; Preamble, Conn. State Const.; Conn. State Const. art. 1; State v. Brennan; Hopson's Appeal; Crowley v. Christensen; State v. Bixman; Mugler v. Kansas; State ex rel. George v. Aiken; State v. Durein; State ex rel. Vance v. Crawford; and Miller v. State, —supra.

The maxim, *Salus populiest suprema lex*, is the foundation principle upon which both the state and the national Constitutions rest, and therefore the supreme law of the land.

Preamble, U. S. Const.; Preamble, Conn. State Const.; Conn. State Const. art. 1, § 1; State ex rel. George v. Aiken, supra; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469.

The state cannot, under the guise of the police power, lay a tax beyond the necessary cost of collecting the same.

Desty, Taxn. chap. 35; State v. Glavin, 67 Conn. 35, 34 Atl. 708; Littlefield v. State, 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; 25 Cyc. Law & Proc. p. 611.

Mr. **Homer S. Cummings** for appellee.

Baldwin, Ch. J., delivered the opinion of court:

The sole ground of the appeal to this court is that the license law (Rev. 1902, chaps. 157, 158) is void. The claim is that the sale of intoxicating liquors to be drunk as a beverage at the place of sale is so destructive to the public health and so inherently immoral that no law upholding it can be valid either under the Constitution of this state or of the United States. The appellant first contends: That, as the people of Connecticut, in the preamble of their Constitution, gratefully acknowledge "the good providence of God, in having permitted them to enjoy a free government," this is a recognition of God as the source of that government; that the Bible contains the "word of God;" that it condemns the use and sale of intoxicating liquors as a beverage; and therefore that the state cannot permit it on any terms.

There was a time in the early history of this commonwealth when the Bible was, "in the case of the defect of a law in any particular case," a rule of political government. Col. Rec. of Conn. 1, 509. But even then it was never considered to contain any absolute prohibition of such a business as that for which the license now in question was granted. As early as 1643 it was provided by the colonial laws that no person or persons should sell wine or "strong water in any place within these libertyes, without license from the particular court

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or any two magistrates." Col. Rec. of Conn. 1, 100. Cf. Id., 154. Our Code of 1650 (Col. Rec. 1, 533), under the title of "Innkeepers," recited that "forasmuch as there is a necessary use of howses of common interteinement in euery commonwealth, and of such as retaile wine, beare, and victualls, yet because there are so many abuses of that lawfull libberty, both by persons interteining and persons interteined, there is allso need of strict lawes and rules to regulate such an imployment." Legislation of a similar character appears in subsequent revisions of the statutes, down to the date of the adoption of our Constitution. Stat. 1715, p. 123; Comp. 1808, p. 640, title 158, chap. 1; Public Acts 1810, p. 33, chap. 7. It had been one of the permanent features of that free government, for the enjoyment of which the people expressed in that instrument, in the language quoted, their gratitude to the good providence of God. In the face of this long history of dealing with the use and sale of intoxicating liquors as a beverage, to be drunk at the place where they are purchased, it is idle to claim that the framers of the Constitution understood or intended that anything contained in it should be regarded as prohibiting altogether the licensing of such a business. Minor v. Happersett, 21 Wall. 162, 175, 22 L. ed. 627, 630. Our Constitution (art. 3, § 1) vests "the legislative power of this state" in the general assembly. That power covers the whole field of legitimate legislation, except so far as limitations are to be found in other provisions of this Constitution or in that of the United States. The latter provides (art. 4, § 4) that the "United States shall guarantee to every state in this Union a republican form of government." Connecticut is therefore impliedly bound forever to maintain such a form of government. She put her legislative power in the hands of the general assembly. She put only, because she could put only, such power of that nature as was consistent with a republican form of government. Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Welch v. Wadsworth, 30 Conn. 149, 155, 79 Am. Dec. 239. In constitutional republics, as was observed by Chief Justice Chase in a case where arguments somewhat resembling those now made at our bar were advanced, "there are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature." License Tax Cases, 5 Wall. 462, 469, 18 L. ed. 497, 500; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The general assembly of Connecticut, under the 14th Amendment to the Constitution of the United States, can deprive no one of life, liberty, or property without due process of law. Any precise and exhaustive definition of the phrase "due process of law" has been sedulously avoided by the Supreme Court of the United States. Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619. It has, however, been repeatedly declared to refer not merely to forms of legal proceedings, but to "that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." Hurtado v. California, 110 U. S. 516, 527, 535, 28 L. ed. 232, 235, 238, 4 Sup. Ct. Rep. 111, 120, 292. It therefore embraces such a matter as taxation by a state of personal property having a situs in territory beyond its borders. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 211, 50 L. ed. 150, 152, 156, 4 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493. It forbids arbitrary interference with any man's liberty of contract. Adair v. United States, 208 U. S. 161, 174, 175, 52 L. ed. 436, 442, 443, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764. But, however broad the scope that has been given to the guaranty of due process of law by such decisions as those to which reference has been made, that there is nothing unrepublican, nor beyond the legitimate sphere of legislative power, in the maintenance of such a system as that long established here for governmental licenses to sell intoxicating liquors, is plain from the fact, of which judicial notice must be taken, that most free governments have, at all periods of time, made that business a subject, not of prohibition, but of regulation. Either mode of treatment is equally legitimate. State v. Brennan, 25 Conn. 278, 288; Crowley v. Christensen, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13. At common law it was a business lawful and open to any man. Our statutes do not enlarge, but restrict, this right. Sopher v. State, 169 Ind. 177, 14 L.R.A. (N.S.) 172, 81 N. E. 913.

Finally, it is argued that the statute is essentially a revenue measure, though ostensibly in the interest of public policy. The term "police power" has, at bottom, no other meaning than the general power of governing its people and dominions, belong-

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ing to every sovereignty. McKeon v. New York, N. H. & H. R. Co. 75 Conn. 343, 347, 61 L.R.A. 730, 53 Atl. 656. The state may properly restrict a business dangerous, if unregulated, to public morals or security, by the requirement of large license fees. State v. Conlon, 65 Conn. 478, 484, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 519. It is only important to distinguish between licenses issued by way of regulation and licenses issued for purposes of revenue in the case of municipal corporations, acting under legislative authority. The question then is: For what object was the authority given by the legislature? Such an inquiry is irrelevant in testing the validity of a statute of the state.

There is no error.

In this opinion the other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JOSEPH B. LEGGE, Admr., etc., of Michael Legge, Deceased,
v.
NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(197 Mass. 88, 83 N. E. 367.)

Railroad — highway crossing — traveler.

1. One attempting to cross the tracks of a railroad outside of the limits of the highway cannot recover against the railroad company for injuries caused by collision with a train, on the theory that he was a traveler on a highway crossing.

Same — passenger — trespasser.

2. One who, in going from a railroad car to a street, after passing a certain distance along the walk provided by the railroad company, turns aside and attempts to walk across the tracks of the company, cannot claim the protection from the company which is due to a passenger.

Same — exits — invitation.

3. Knowledge on the part of a railroad company of the use by passengers of a particular route in leaving its cars does not amount to an invitation to use it, where other proper arrangements have been provided.

Same — contributory negligence.

4. One who, after leaving a railroad car, for his own convenience voluntarily leaves the walk provided by the company for access to the street, and steps upon the railroad track, in full view of an approaching train, without taking the slightest precaution for his own safety, cannot hold the company liable for injuries caused by a collision with the train.

(January 1, 1908.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during trial of an action brought to recover damages for the alleged negligent killing of plaintiff's intestate, which resulted in a verdict in defendant's favor. Overruled.

Michael Legge arrived at Sharon station from the south. From the station a plank walk led north about 130 feet to a point where the public highway crossed the railroad tracks at right angles. He proceeded northward along this walk to a point a little short of the boundary of the highway, and then, in full view of a train approaching from the north, he stepped onto the railroad tracks for the purpose of shortening his journey to his destination by walking diagonally across them; he was hit by the southbound train.

The declaration was in three counts. The first alleged that deceased was killed while a traveler on the highway at a crossing of the company; second, that he was killed by the train while a passenger of the com-

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Case Note. — Right of passenger using, as approach to station, a way not provided by carrier.

That it is a carrier's duty to provide safe approaches to and from its conveyances is clear. Notes to Skottowe v. Oregon Short Line & U. N. R. Co. 16 L.R.A. 593, and Johns v. Charlotte, C. & A. R. Co. 20 L.R.A. 520.

A carrier, however, has the right to determine the routes by which passengers shall approach and leave its stations. Chicago, B. & Q. R. Co. v. Harrison, 100 Ill. App. 211; Chase v. Atchison, T. & S. F. R. Co. 134 Mo. App. 655, 114 S. W. 1141.

And where a carrier has provided a safe approach, and this is sufficiently indicated to the public, it is the legal duty of passengers to go to and from the station in the way provided. Perego v. Lake Shore & M. S. R. Co. (Mich.) 122 N. W. 535; Chase v. Atchison, T. & S. F. R. Co. supra.

A carrier is not bound to suppose that passengers who do not know the safe way provided by it will neglect the means open to their sight, and go off in the darkness somewhere else. Sturgis v. Detroit, G. H. & M. R. Co. 72 Mich. 619, 40 N. W. 914.

A passenger choosing to depart from the safe approach to the station provided by the carrier, and taking a dangerous way, against which warning notices are posted, and where the danger is apparent, assumes the risk. Perego v. Lake Shore & M. S. R. Co. supra.

Only in case of gross negligence will the carrier be held liable for injury to a passenger who has departed from the way provided into one not provided, and where he was prohibited from going. Ibid.

In Chicago, B. & Q. R. Co. v. Harrison, supra, it was held that where one alighting

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pany; and third, that he was killed while crossing the company's tracks, being in the exercise of due care. Further facts appear in the opinion.

Messrs. **M. J. Creed, A. S. Graves,** and **J. Porter Crosby,** for plaintiff:

If the plaintiff's intestate, when killed, was a passenger of the defendant company, and his death resulted from the negligence of the corporation, of the gross negligence of its servants and agents, it is not incumbent upon the plaintiff to prove that the deceased was in the exercise of due care.

Young v. New York, N. H. & H. R. Co. 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455; Com. v. Boston & L. R. Corp. 134 Mass. 211; Merrill v. Eastern R. Co. 139 Mass. 252, 29 N. E. 666; McKimble v. Boston & M. R. Co. 139 Mass. 542, 2 N. E. 97.

After rightfully leaving a train stopping at a station, a passenger continues to be a passenger while crossing the premises of the railroad company to get upon the street.

Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; Keefe v. Boston & A. R. Co. 142 Mass. 251, 7 N. E. 874; Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373; Jordan v. New York, N. H. & H. R. Co. 165 Mass. 346, 32 L. R. A. 101, 52 Am. St. Rep. 522, 43 N. E. 111; Gulf, C. & S. F. R. Co. v. Glenk, 9 Tex. Civ. App. 599, 30 S. W. 278; Cazneau v. Fitchburg R. Co. 161 Mass. 355, 37 N. E. 311; Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Burnham v. Wabash Western R. Co. 91 Mich. 523, 52 N. W. 14; Bishop, Non-Contract Law, § 1086; Chesapeake & O. R. Co. v. King, 49 L.R.A. 102, 40 C. C. A. 432, 99 Fed. 251; Girton v. Lehigh Valley R. Co. 199 Pa. 147, 48 Atl. 970; Cotant v. Boone Suburban R. Co. 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115; Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714, 99 Ill. App. 577; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713; Chicago, M. & St. P. R. Co. v. Lowell, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281; Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep.

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from a train, instead of following the safe and suitable egress provided by the carrier, clambered over a locked gate and got upon a parallel track, he severed his relation as a passenger, and became merely one whom the carrier could not recklessly or wilfully injure, but toward whom the exercise of the highest diligence had ceased to be an obligation.

In Illinois C. R. Co. v. Oberhoefer, 76 Ill. App. 672, it was held that where the carrier had provided a safe and commodious exit from its train, a passenger who left a train and proceeded along the track instead of following the safe exit provided could not recover for being run over by the train, not wilfully or wantonly, since he became a trespasser, and failed to exercise ordinary care for his own safety by walking along the track.

In Sturgis v. Detroit, G. H. & M. R. Co. supra, it was held that a company which had provided all reasonable facilities for ingress and egress from its station house was not liable to a passenger who was injured in a cattle guard while following the railroad track merely because that was a shorter cut from the depot to the village than was furnished by the regular road.

In Parsons v. New York C. & H. R. R. Co. 85 Hun, 23, 32 N. Y. Supp. 598, it was held proper to nonsuit plaintiff upon its appearing that his intestate was killed while passing from a train along a track to a public street; that there were two safe ways provided by the carrier leading to the street; that deceased was familiar with the station and the passageways; that the carrier's employees had tried to prevent people from using the unsafe exit; and there was no evidence that it in any way invited or approved of its use.

In Perego v. Lake Shore & M. S. R. Co. supra, it was held that a carrier had performed its entire duty to prevent passengers from using an unsafe way where it had provided a safe way, and had posted warning notices, and frequently advised passengers against the use of the unsafe way.

In Missouri, K. & T. R. Co. v. Criswell (Tex.) 108 S. W. 806, it was held that if the carrier permitted passengers generally to use a way not intended for passengers, it was its duty to exercise ordinary care to keep such way in a safe condition; and if injury resulted from a failure to perform that duty, the carrier was liable to the same extent as if the injury had occurred upon the way provided by it for the use of passengers.

If, with full knowledge of the facts, a carrier permits an unsafe and dangerous way to its station to be provided and used, it is as much liable for an injury to a passenger arising therefrom as if it had itself set up and maintained the dangerous way; and it is no defense that it had provided another and safe way. Collins v. Toledo, A. A. & N. M. R. Co. 80 Mich. 390, 45 N. W. 178; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178; Beard v. Connecticut & P. River R. Co. 48 Vt. 101.

And it is no defense that the dangerous way was built by and upon the property of a union depot where the defendant carrier discharged its passengers. Gulf, C. & S. F. R. Co. v. Glenk, 9 Tex. Civ. App. 599, 30 S. W. 278.

In East Tennessee, V. & G. R. Co. v. Watson, 94 Ala. 634, 10 So. 228, it appeared that two bridges over a creek connected the veranda of a hotel or eating house for passengers with the railroad company's plat-

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68; Exton v. Central R. Co. 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178.

Even though another route had been provided, if this was the one usually taken, it would be competent for the jury to find that there was an implied invitation to use it.

Chicago, M. & St. P. R. Co. v. Lowell; Cazneau v. Fitchburg R. Co.; and Chesapeake & O. R. Co. v. King,—supra.

Messrs. **Choate, Hall, & Stewart**, for defendant:

Plaintiff's intestate was not a traveler upon the highway.

Durbin v. New York, N. H. & H. R. Co. 194 Mass. 181, 80 N. E. 219.

Legge was plainly guilty of gross negligence.

Debbins v. Old Colony R. Co. 154 Mass. 402, 28 N. E. 274; Emery v. Boston & M. R. Co. 173 Mass. 136, 53 N. E. 278.

Passengers who voluntarily take exposed positions with no occasion therefor or inducement thereto caused by the managers of the road, excepting a bare license by non-interference, take the special risks of those positions upon themselves.

Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Wheelwright v. Boston & A. R. Co. 135 Mass. 225; Hickey v. Boston & L. R. Co. 14 Allen, 429; Pennsylvania R. Co. v. Zebe, 33 Pa. 318; Leary v. Fitchburg R. Co. 173 Mass. 373, 53 N. E. 817; Louisville & N. R. Co. v. Ricketts, 93 Ky. 116, 19 S. W. 182; Donnelly v. Boston & M. R. Co. 151 Mass. 210, 24 N. E. 38.

The care that the defendant owed to Legge extended to those places which were natural and incidental to the contract of carriage only.

Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373; Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; Moody v. Boston & M. R. Co. 189 Mass. 277, 75 N. E. 631; Bancroft v. Boston & W. R. Corp. 97 Mass. 275; Young v. New York, N. H. & H. R. Co. 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455.

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form; that the bridges were built by the hotel company on the railway right of way; that the railroad company had not used for three years, and had never repaired or taken control of, one of the bridges, on which a passenger was injured by falling into a hole. It was held that the passenger was entitled to act on the appearance of things, and that he might well suppose that he was invited to take either bridge, and the railroad company was liable for his injury, in the absence of contributory negligence.

In Cotant v. Boone Suburban R. Co. 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115, it was held that a railway company which expressly or by implication invited its passengers to use a stile over a wire fence in leaving its grounds was bound to exercise at least ordinary care in seeing that it was properly constructed and in good repair, although it was not erected by the company, and the defective part was not on its property, but on the property of another, where it had no right to go to make inspection or repairs.

And in Schlessinger v. Manhattan R. Co. 49 Misc. 504, 98 N. Y. Supp. 840, it was held that an elevated railway which had posted notices advising passengers to use a stairway leading from its elevated platform to the street was bound to exercise a reasonable amount of care and inspection to see that it was kept in a safe condition, although this particular stairway belonged to the city, and the company had no right to make repairs without permission.

In Cazneau v. Fitchburg R. Co. 161 Mass. 355, 37 N. E. 311, it was held that, in the absence of knowledge that only one wrought way had been provided by the railway company for the use of passengers passing between the station and the street, and in the absence of any direction or notice from the defendant to use a particular path, a passenger was at liberty to use any path which appeared to be designed for such use; and, as to such passenger, the railway company was bound to see that all paths which one in his situation would naturally and reasonably be expected to take were reasonably safe for use.

In Cross v. Lake Shore & M. S. R. Co. 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361, and Lemon v. Grand Rapids & I. R. Co. 136 Mich. 647, 100 N. W. 22, it was held that if a railroad company had, without objection, notice, or protest, permitted its passengers to cross its depot grounds on a path not laid out by the company, then it was its duty to keep its grounds along and near such walk in a reasonably safe condition for the coming and going of its passengers; and it made no difference that the company had provided another and safer way by which passengers could have gone.

In Keefe v. Boston & A. R. Co. 142 Mass. 251, 7 N. E. 874, it was held that the mere fact that an arriving passenger intended to leave the station over a way not provided by the carrier, and where she had no right to go, had no effect upon her right to recover for an injury received while walking in that direction upon the station platform where passengers were expressly or impliedly invited to go.

Passengers have a right to assume that a way to and from a train, no matter by whom provided, is in a condition to be safe for ordinary transit. Chance v. St. Louis, I. M. & S. R. Co. 10 Mo. App. 351.

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Hammond, J., delivered the opinion of the court:

There can be no recovery upon the first count because the plaintiff's intestate was killed before he reached the highway.

There can be no recovery upon the second count because, at the time the plaintiff's intestate was killed, he had ceased to be a passenger. While it is true that a corporation operating a railroad is bound to use proper care to see that a passenger who alights from one of its cars at a station provided for that purpose has a safe way of exit from its grounds, and that the relation of passenger continues until such exit is completed, yet, where proper arrangements have been made for such exit, it is the duty of the passenger to use them; and, if he knowingly fails to do so, and without any invitation, either express or fairly to be implied from the situation and arrangement of the station and grounds, leaves the way marked out by the defendant, and proceeds to make his exit in some other way, he ceases from that moment to be a passenger, and becomes a trespasser, or, at the most, a mere licensee. He has stepped from under the *ægis* by which, up to that moment, the law as to passengers covered him. Nor does it make any difference that he goes where others, with the knowledge of the railroad company, have gone before him, unless there is some invitation, express or implied, upon the part of the company. Knowledge of such use, where proper arrangements have been otherwise provided, does not, of itself, amount to such invitation. Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; Hickey v. Boston & L. R. Co. 14 Allen, 429; Keefe v. Boston & A. R. Co. 142 Mass. 251, 7 N. E. 874; Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; Cazneau v. Fitchburg R. Co. 161 Mass. 355, 37 N. E. 311; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373.

Applying these principles to the facts of this case, it is clear that, at the time of the accident, the deceased had ceased to be a passenger. The defendant had provided a safe and ample plank walk for exit to the highway. The plaintiff's intestate was upon it and had nearly reached the highway. Instead of continuing to walk upon it, he deliberately left it and undertook to reach the highway by crossing the railroad tracks. To do so he stepped down from the platform, which was 12¾ inches above the sleepers, into the space where the sleepers lay uncovered, proceeded 2½ feet over the space between the platform and the nearest rail, and had stepped over that, when he was hit by the outgoing train. There was no plank, nor even any beaten path, where he walked after he left the platform. Not only was there no indication that the place had been fitted up as a way of exit or was intended to be used as such, but, on the contrary, the surrounding platforms, the height of the one from which the deceased stepped, the protruding sleepers, and the entire lack of preparation for the convenience of one walking there,—indeed, everything,—indicated that it was not intended as such a way.

There can be no recovery upon the third count because the plaintiff has failed to show due care on the part of the deceased. For his own convenience he voluntarily left the safe way of exit provided by the defendant, and stepped upon the track upon which a train in full view was approaching, apparently without taking the slightest precaution, by way of looking or otherwise, for his own safety from injury by the train.

Exceptions overruled.

ILLINOIS SUPREME COURT.

ANNA VAN CLEEF
v.
CITY OF CHICAGO, Plff. in Err.

(240 Ill. 318, 88 N. E. 815.)

Municipal corporation — structure in street — liability.

1. A municipal corporation which, without authority, permits a fair to be held in one of its streets, with the attendant structures and shows, is liable for injury to a patron who, in attempting to leave a show, passes over an unsafe platform erected in the street to afford access to such show, and is jostled off by the crowd, to his injury.

Appeal — assignment of error — sufficiency.

2. An assignment in the supreme court of error in an intermediate appellate court in affirming a judgment is sufficient to present for review in the supreme court every error assigned in the intermediate court.

Same — instructions — sufficiency.

3. The omission from an instruction as to

Subject Note. — Liability of municipal corporation for failure to prevent improper conduct in or use of streets.

I. Scope. 636.
II. General rules. 637.
III. Riots and unlawful assemblages. 638.
IV. Coasting. 639.
V. Racing. 641.
VI. Bicycling in violation of road laws. 641.
VII. Animals running at large. 642.
VIII. Use of fireworks and other explosives. 643.
IX. Conclusion. 646.

I. Scope.

This note is one of a series of notes on the general subject of "liability of munic-

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an element of damages of a requirement that plaintiff must be found to be entitled to recover will not require reversal, where such requirement is properly set forth in other instructions.

Highway — traveler — care.

4. One attempting to use a platform in a street for entrance to a show connected with a street fair is required to use such degree of care and caution for his safety as reasonably prudent persons would use under all the circumstances of the case.

(June 16, 1909.)

ERROR to the Branch Appellate Court, First District, to review a judgment affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. **Sigmund Zeisler**, with Mr. **John R. Caverly**, for plaintiff in error:

The permit did not authorize the building or maintaining of unguarded stairs as a part of any structure to be erected, and, under such circumstances, the ownership of the ground does not create any liability for the consequences of neglect of a licensee or lessee.

Texas & P. R. Co. v. Mangum, 68 Tex. 342, 4 S. W. 617; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84; West Chicago Masonic Asso. v. Cohn, 192 Ill. 210, 55 L.R.A. 235, 85 Am. St. Rep. 327, 61 N. E. 439.

Messrs. **Darrow, Masters, & Wilson**, for defendant in error:

A city is liable for injuries arising on account of the holding of street fairs when authorized by the city, on account of the misfeasance of the city in authorizing and permitting same, the principle being that the city becomes a participant therein, and liable on the ground of misfeasance, or the doing of a positive act, as distinguished from nonfeasance, or failure to perform a governmental duty or function.

Johnson v. New York, 186 N. Y. 139, 116 Am. St. Rep. 545, 78 N. E. 715, 9 A. & E. Ann. Cas. 824; Richmond v. Smith, 101 Va. 161, 43 S. E. 345; Landau v. New York, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631; Forget v. Montreal, Montreal L. Rep. 4 S. C. 77; Brown v. Hamilton, 4 Ont. L. Rep. 249; Wheeler v. Ft. Dodge, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1057; Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696; Little v. Madison, 42 Wis. 653, 24 Am. Rep. 435; Speir v. Brooklyn, 139 N. Y. 6, 21 L.R.A. 644, 36 Am. St. Rep. 664, 34 N. E. 727; Augusta v. Reynolds, 122 Ga. 754, 69 L.R.A. 564, 106 Am. St. Rep. 147, 50 S. E. 998; Chicago v. Smith, 95 Ill. App. 339; Denver v. Spencer, 34 Colo. 270, 2 L.R.A.(N.S.) 147, 114 Am. St. Rep. 158,

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ipal corporations for defects or obstructions in streets," and the question of the liability of municipal corporations for creating or permitting dangerous conditions in their streets is treated in subd. IV. of a note entitled as above, to Elam v. Mt. Sterling, 20 L.R.A.(N.S.) 512; and the question of "liability of municipal corporations for permitting obstructions to be placed in street" is treated in a note thus entitled to McKim v. Philadelphia, 19 L.R.A.(N.S.) 506. These notes cover the general principles of municipal liability for obstructions, nuisances, and dangerous conditions in streets; but they have dealt only with physical and inanimate objects which obstruct and hinder passage, as distinguished from personal conduct in and use of streets which might interfere with their use by others; and it is this segment of the main subject that is left for consideration at this place.

II. General rules.

Municipal corporations are not responsible for every unauthorized act that may be done by anyone, resulting in injury, directly or indirectly, to persons traveling in the streets. Joliet v. Seward, 86 Ill. 402, 29 Am. Rep. 35.

They are not civilly responsible for the unlawful acts of individuals passing over a safe and convenient road because such acts may render its passage unsafe and inconvenient to others. Davis v. Bangor, 42 Me. 522; Lafayette v. Timberlake, 88 Ind. 330; Lafayette v. Rose, 88 Ind. 471; Boyland v. New York, 1 Sandf. 27.

Municipalities are not conservators of the public peace, and are not responsible for injuries on their streets occasioned by the acts of others over which they have no control except through the officers whom they may intrust with the duty of seeing that order is preserved and proper conduct maintained. Stevenson v. Phœnixville, 1 Chester Co. Rep. 113; Little v. Madison, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249.

And a power given to a municipal corporation to make all ordinances, rules, and regulations for the good government and safety of the property and persons in the city leaves it to the discretion of the municipal authorities to determine from time to time what ordinances are proper for the ends in view. Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Because a municipal corporation may prohibit a nuisance, it is not in duty bound to pass a prohibitory law and to enforce it or be subjected to all damages which may ensue from such nuisance; the corporation in such case stands upon the same footing within its own jurisdiction as the state government does in respect to the state at large. Levy v. New York, 1 Sandf. 465; Tarbutton v. Tennille, 110 Ga. 90, 35 S. E. 282.

And the liability of a town, as for an ob-

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82 Pac. 590, 7 A. & E. Ann. Cas. 1042; Cole v. Nashville, 4 Sneed, 162.

The city being a participant in the holding of the street fair, it was liable for an injury which occurred by reason of the negligent construction of any of the structures upon its property or under its control, to a person attending the fair at its solicitation or the solicitation of any of the other participants in the holding thereof.

Denver v. Spencer; Forget v. Montreal; and Brown v. Hamilton,—supra; Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304; Chicago v. Smith; Landau v. New York; and Johnson v. New York,—supra; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; New York v. Bailey, 2 Denio, 433.

A municipality, where it acts in its ministerial capacity, is liable for the result of its acts the same as any other private person would be when acting in the same or a similar manner.

Jones, Neg. Mun. Corp. 36; 28 Cyc. Law & Proc. pp. 268–289; Wood, Nuisances, 3d ed. § 74; Marseilles v. Howland, 124 Ill. 547, 16 N. E. 883; Pekin v. McMahon, 154 Ill. 144, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Linnberg v. Rock Island, 136 Ill. App. 495; Chicago v. Dermody, 61 Ill. 431; Joliet v. Verley, 35 Ill. 58, 85 Am. Dec. 342; Chicago v. Joney, 60 Ill. 383; Allen v. Decatur, 23 Ill. 332, 76 Am. Dec. 692; Palestine v. Siler, 128 Ill. App. 309; Chicago v. Cicero, 210 Ill. 298, 71 N. E. 356; Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; Chicago v. Smith, 95 Ill. App. 335; Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; Chicago v. Murdock, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386; Joliet v. Seward, 99 Ill. 267; Chicago v. Seben, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; Chicago v. Rust, 117 Ill. App. 427; Aurora v. Scott, 82 Ill. App. 617; Cole v. Nashville, supra.

If, in the exercise of the corporate powers, a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of tort.

28 Cyc. Law & Proc. pp. 1293, 1307, 1308, 1356; Chicago v. Smith, 95 Ill. App. 339; Barthold v. Philadelphia, supra; Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; Moore v. Townsend, 76 Minn. 64, 78 N. W. 880; Hart v. Union County, 57 N. J. L. 90, 29 Atl. 490; Wood, Nuisances, 3d ed. § 749; Chicago v. O'Brennan, 65 Ill. 160.

Whoever licenses the placing of a nuisance upon his property or upon property under his control is equally liable with the creator of the nuisance to a person sustaining injuries as a result thereof, and this rule applies as well to municipalities as to individuals.

Wood, Nuisances, 3d ed. §§ 31, 703, 747, 748; Murray v. Archer, 1 Silv. Sup. Ct.

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struction for misconduct upon the part of persons using a street is not enlarged by the fact that it had notice of such use. Ray v. Manchester, 46 N. H. 59, 88 Am. Dec. 192.

Nor will either the rightful use by individuals of a highway which is itself in a reasonably safe and fit condition, or their mere misconduct upon it, though such misconduct may amount to a public nuisance, of itself constitute an obstruction for an injury from which the city is liable. Ibid.

So, a charter provision of a municipality that the streets and highways shall be kept in repair by the city imports that there shall not be in the streets or highways any defect or imperfection which renders them unsafe or inconvenient for use by the public, nor any obstruction either closing them as ways or hindering the progress of those passing in them, but has no reference to violence or disorderly conduct of individuals in the streets, which may temporarily endanger the security of those who pass in them. The corporate duty of the city to keep its streets in repair is performed when the streets are free from obstructions or structural defects. Campbell v. Montgomery, 53 Ala. 527, 25 Am. Rep. 656.

And an illegal use of a highway by men, animals, vehicles, engines, or any other object while movable and actually being moved by human will and direction, neither fixed

to, nor resting on, nor remaining in one position within, the traveled part of the highway, is not a defect or want of repair for which the city or town is liable. Barber v. Roxbury, 11 Allen, 318.

III. Riots and unlawful assemblages.

With respect to the power of municipal corporations to suppress riots and assemblages of disorderly persons, in the absence of statutory provisions to the contrary, the corporation is a mere agency of the state, and not liable for negligence in the performance of such duty. Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857.

The duty of a city to enforce ordinances and by-laws which would suppress unlawful assemblages in the streets is governmental, and not ministerial, and if there be negligence in its exercise, no private action will lie to redress injuries resulting therefrom. Campbell v. Montgomery, 53 Ala. 527, 25 Am. Rep. 656; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229.

So, while city officers are in duty bound to be diligent to prevent a show in the streets where it might cause injury to persons traveling thereon, if they fail to perform that duty and an injury results from such omission, the law does not render the city liable for such neglect. Little v. Madi-

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366, 5 N. Y. Supp. 326; Hudson County v. Woodcliff Land Improv. Co. 74 N. J. L. 355, 65 Atl. 844; Texas State Fair v. Brittain, 56 C. C. A. 499, 118 Fed. 713; Thornton v. Maine State Agri. Soc. 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Hart v. Washington Park Club, 157 Ill. 9, 29 L.R.A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; Denver v. Spencer, supra; Flora v. Pruett, 81 Ill. App. 163; Arnold v. St. Louis, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 53 S. W. 900; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Hyde Park Thomson-Houston Light Co. v. Porter, 167 Ill. 276, 47 N. E. 206.

The fact that the structure in question was defective, in that no guard rail protected the stairs, was one for the jury as to whether or not, under all the circumstances, and in view of the purpose for which it was intended, the structure as it existed was a nuisance.

Fox v. Buffalo Park, supra; Jarvis v. Baxter, 20 Jones & S. 109; Melker v. New York, 190 N. Y. 481, 16 L.R.A.(N.S.) 621, 83 N. E. 565, 13 A. & E. Ann. Cas. 544; 1 Wood, Nuisances, 3d ed. 177.

The question as to whether the plaintiff was using the street and the stairway as a traveler was one of fact, for the jury, and is not a question of law, the stairs being authorized by the city as part of the thoroughfare, for the purpose of ingress and egress to the show.

Varney v. Manchester, 58 N. H. 430, 42 Am. Rep. 592; Duffy v. Dubuque, 63 Iowa, 171, 50 Am. Rep. 743, 18 N. W. 900; Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; 28 Cyc. Law & Proc. pp. 1415, 1416; Gulline v. Lowell, 144 Mass. 491, 59 Am. Rep. 102, 11 N. E. 723.

A city is liable for the condition of its streets, and this is a primary duty, and applies not only to the use of the streets for ordinary travel, but for whatever purpose the streets may be used, when authorized by or with the knowledge of the city.

Gathman v. Chicago, 236 Ill. 9, 19 L.R.A. (N.S.) 1178, 86 N. E. 152; Lehigh Valley Transp. Co. v. Chicago, 237 Ill. 582, 86 N. E. 1093; Linnberg v. Rock Island, supra; McCarthy v. Chicago, 53 Ill. 38; Sterling v. Schiffmacher, 47 Ill. App. 141; Champaign v. Forrester, 29 Ill. App. 117; Little v. Madison, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; Indianapolis & C. R. Co. v. State, 37 Ind. 493; Detwiler v. Lansing, 95 Mich. 484, 55 N. W. 361; Hogan v. Chicago, 168 Ill. 551, 48 N. E. 210; Wheeler v. Ft. Dodge, supra; Springfield v. Le Claire, 49 Ill. 476; Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; Speir v. Brooklyn, supra; Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 249.

And the receipt of a license fee by a city for permission to make an exhibition cannot be considered as affording a consideration for an implied undertaking on the part of a city to be answerable for the neglect of its police officers to perform their official duty and prevent the exhibition in the street or other improper place. Ibid.

There is a distinction, however, between a case in which the officers of a city authorize and license a show in the highway and one in which they are negligent in preventing such show or improper use of the street, since in the former case, the officers of the city become themselves active agents in the commission of the wrong. Ibid.

And where a city changes the character of a street and devotes it to the purposes of a street fair, without authority, and negligently permits structures to be erected therein for the purposes of the fair in an unsafe manner, knowing that the public will attend and go upon such structures, the city is liable for an injury to a person resulting from going upon one of such structures, upon the theory that it has permitted the creation of a dangerous condition. VAN CLEEF v. CHICAGO.

And liability for injury done by mobs is imposed on cities by statute in some cases. See CHERRYVALE v. HAWMAN, post, 645.

But a license from a city to exhibit wild animals, specifying no place for such exhibition, is a license to exhibit them in some suitable place; and the fact that the licensee makes the exhibition in a public street, and is permitted to do so by the negligence of the city officers, does not render the city liable for injuries resulting therefrom. Little v. Madison, supra.

IV. Coasting.

A municipal corporation is not liable, for failing to prevent coasting in its streets, to one who is injured by a collision with a sled used for that purpose. Dudley v. Flemingsburg, 115 Ky. 5, 60 L.R.A. 575, 103 Am. St. Rep. 257, 72 S. W. 327, 1 A. & E. Ann. Cas. 958; Lafayette v. Timberlake, 88 Ind. 330; Lafayette v. Rose, 88 Ind. 471; Altvater v. Baltimore, 31 Md. 462; Stevenson v. Phœnixville, 1 Chester Co. Rep. 113; Brumbaugh v. Bedford, 23 Pittsb. L. J. N. S. 462.

The responsibility in such case is upon the police, for whose neglect of duty the municipality is not liable. Brumbaugh v. Bedford, supra.

And this is so although the street had been used for several years by boys for coasting, and though an ordinance existed forbidding it. Stevenson v. Phœnixville, supra.

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W. 706; 5 Thomp. Neg. §§ 5800, 5863; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055.

Such duty cannot be delegated.

Sterling v. Schiffmacher, supra; Delmonico v. New York, 1 Sandf. 222; Augusta v. Cone, 91 Ga. 714, 17 S. E. 1005; District of Columbia v. Woodbury, 136 U. S. 464, 34 L. ed. 477, 10 Sup. Ct. Rep. 990; Champaign v. McInnis, 26 Ill. App. 338; Flora v. Naney, 31 Ill. App. 493, 136 Ill. 45, 26 N. E. 645; Springfield v. Scheevers, 21 Ill. App. 203; Hume v. New York, 74 N. Y. 273; Detwiler v. Lansing, supra.

Cartwright, J., delivered the opinion of the court:

On June 15, 1903, the city council of the city of Chicago, on the application of the business men of the eighth ward, passed a resolution giving permission to use certain streets for a merchants' carnival and street fair to be held from July 20 to July 26, 1903, with the necessary shows, stands, and attractions. Under that authority the streets named in the resolution were occupied with tents, booths, and other structures, and at the corner of Ninety-second street and Exchange avenue there were three shows in tents erected in the street intersection. One was an animal show, another a Lilliputian, and the third was a show named "Enoch, the Water Man." The streets were festooned and illuminated by electric lights, and the crowds at night were estimated from 40,000 to 50,000 people. The sidewalks and roadways were full of visitors to the street carnival, and teams and street cars went around through other streets. The tent in which the show of "Enoch" was conducted would hold 300 people. In front of it was a platform 6 feet wide, 15 or more feet long, and 4 or 5 feet above the street. A "barker" stood on the platform, attracting the attention of the crowd to the show, and there was a place there for selling tickets. A stairway 5 or 6 feet wide went up to the platform from the street, and a like stairway led down on the other side into the tent. The show lasted about ten or fifteen minutes, and consisted of "Enoch' in a water tank, smoking a pipe. The defendant in error, Anna Van Cleef, went into the show with her husband about 9 o'clock in the evening of July 24, 1903. The performance was attended by 150 to 200 people, and at its conclusion the crowd started to go out on the street. In descending the steps from the platform to the street, Mrs. Van Cleef was pushed by the crowd, and, there being no railing or guard along the edge of the stairway, she fell to the street and suffered serious injuries. She brought her suit in the superior court of Cook county against the plaintiff in error, the city of Chicago, to recover damages for her injuries, and obtained a verdict for $15,000. The court denied motions for a new trial and in arrest

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And a complaint in an action against a city, charging that the city did not prevent persons on a bobsleigh from sliding down a hill in a street, is insufficient as a charge of negligence against the city, in the absence of anything to connect the city with the accident, or show that the city authorized an unlawful use of the street. Toomey v. Albany, 38 N. Y. S. R. 91, 14 N. Y. Supp. 572.

Nor is a city liable for injuries suffered by one passing along or over a public street, caused by collision with persons coasting on the street, under a statute imposing liability upon the city for insufficiency or want of repair of streets. Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Hutchinson v. Concord, 41 Vt. 271, 98 Am. Dec. 584.

A boy coasting upon a hand sled is not a defect or want of repair in the highway for which the city is liable to a person struck by the moving sled. Pierce v. New Bedford, 129 Mass. 534, 37 Am. Rep. 387; Hutchinson v. Concord, supra.

And a city charter conferring upon the city authority over its streets, and making it its duty to keep them in suitable and sufficient repair, and providing for the raising of money for the performance of this duty, and an ordinance of the city in force, forbidding coasting on any of the streets and highways of the city, do not impose upon the city the duty of preventing the nuisance of coasting on its streets, so that it can be held liable for an injury resulting from a negligent omission of such duty. Weller v. Burlington, 60 Vt. 28, 12 Atl. 215.

This rule is based upon the theory that the duty of public officers to prevent coasting in a city street is one relating to the execution of a state law, and the officers charged therewith, though servants of the municipality, are, to the extent of such duty, public officers for whose neglect to perform the same no municipal liability attaches. Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 25 L.R.A. 538, 65 Am. St. Rep. 256, 29 Atl. 1047.

And that though the use of a public highway for coasting may be a public nuisance, its suppression is a police duty, and not a duty in which the corporation as such has a particular interest, or from which it derives any special benefit in its corporate capacity, and for the nonperformance of such duty by its officers and agents the corporation is not liable. Schultz v. Milwaukee and Wilmington v. Vandegrift, supra.

Nor does the action of a city in designating a particular street for coasting make it liable for an injury inflicted by coasters upon a person passing in that street. Burford v. Grand Rapids, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571.

And the liability of a city for an injury

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of judgment, and entered judgment on the verdict. The branch appellate court for the first district affirmed the judgment, and the city sued out a writ of error from this court to bring the judgment of the appellate court in review.

The brief and argument of counsel for the city is almost wholly devoted to the general proposition that, under the facts of the case, the plaintiff was not entitled to recover, and the city was not liable for her injury; and is not directed to any ruling of the trial court or any error assigned; and an argument of that kind might very properly be disregarded. On the oral argument, however, the counsel stated that the argument then made and the printed brief and argument were designed to demonstrate that the court erred in refusing to direct a verdict of not guilty, and refusing to arrest the judgment after verdict; and we are disposed to consider them as applying to the errors assigned on such rulings.

The controverted questions of fact have been settled against the city by the judgment of the appellate court, and there is and can be no dispute of the propositions: That the city had no power to authorize the use of the street for the carnival and street fair; that the occupancy of the street for that purpose was unlawful and the tent and platform a nuisance *per se;* that the city, having, by an affirmative act, authorized the creation of the public nuisance, became a participant in creating and maintaining it, and was not entitled to any notice of its existence or character; and that, although it did not itself put up the structure, it became liable for all injurious consequences to anyone who might be in a position to complain of the breach of duty by the creation of the nuisance. It is admitted that the structure in the street was a public nuisance, and the city would be liable for any resulting injuries to persons using the street for street purposes; but it is contended that to those using the structure it was a private nuisance on account of its improper construction, and that the city was not a participant in creating and maintaining the private nuisance in its aspect as a structure unsafe to those using it. Counsel, repeating the argument in different form, says that the invitation to enter the show was extended by parties in control of it; and, while the city would be liable for an injury to anyone using the street for the legitimate purposes of a street, the plaintiff was hurt solely by reason of entering upon the insufficient stairway; and the fact that the street had been made unsafe for use as a street had no connection with her injury. Counsel therefore conclude that the wrong by the city was not the proximate cause of the injury to the plaintiff.

It is, of course, true that the injury must be the legitimate consequence of the wrong; and, considering the question of proximate cause in the relation of cause and effect, it

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resulting from coasting on the streets of the city is not affected by the fact that a majority of the citizens and taxpayers approved of the practice of coasting. Weller v. Burlington, supra.

And a city is not rendered liable to a traveler on one of its streets, who was injured by persons coasting on the street, for the injury, by the fact that the coasting was carried on by a large crowd, in the presence of the mayor, marshal, and police officers, and there was an ordinance prohibiting on the streets all sports tending to produce bodily injury. Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1.

It has been held, however, that where a street was covered with snow and ice, and crowds of men, boys, and girls, with sleds, to the number of fifty or sixty, congregated and coasted thereon, and many of the sleds were composed of two ordinary sleds joined with a plank, and were from 15 to 20 feet long, and occupied by six or eight persons, and the sleds were run down the street at a rapid and dangerous rate of speed, this constituted a nuisance of a serious character, which it was the duty of the city to abate and prevent if it could be done by the exercise of ordinary and reasonable care and diligence, and this duty was not discharged by merely passing ordinances prohibiting coasting; a vigorous effort should have been made to enforce them in order to relieve the city from liability. Taylor v. Cumberland, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027.

V. Racing.

The enactment by municipal corporations of ordinances against horse racing on their streets is the exercise of a governmental power, and a corporation is not liable either for a failure to enact such ordinances, or for a failure to enforce them after they are enacted. Marth v. Kingfisher (Okla.) 18 L.R.A.(N.S.) 1238, 98 Pac. 436.

And a municipal corporation is not liable, under a statute requiring municipal corporations to keep their streets in a condition reasonably safe and fit for travel, for personal injuries caused by permitting horse racing on a street which was in proper condition and safe for travel. McCarthy v. Munising, 136 Mich. 622, 99 N. W. 865.

Nor is a horse race upon a street in a city a defect or want of repair in the highway of the city, or a dangerous condition of such highway, for which the city is liable to a traveler upon such street, who is struck by one of the horses in the race. Marth v. Kingfisher, supra.

VI. Bicycling in violation of road laws.

A municipal corporation is not liable for injury to a person who is struck by a bicycle

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is clear that the injury was a natural result of the wrongful act of the city. When the city authorized showmen to fill its streets with tents and structures of the temporary character usual in carnivals and street fairs, it was reasonably to be apprehended that unless considerable care was exercised injury might result. It was not necessary that the city should have contemplated or been able to anticipate the injurious consequences to the plaintiff or the precise form of her injury, but it is sufficient that the city might have foreseen that some injury might result from its wrongful act, and, when the injury did result, it could be seen that it was the natural consequence of the occupation of the street by structures of the nature of this platform, under the permission given by the city. The negligence of the one who constructed the platform would not exempt the city if the permission was also a proximate cause. The city was guilty of a serious wrong and violation of duty by permitting the occupation of the streets for show purposes and creating a nuisance in them; and the expectation was that large numbers of people would go into the shows by whatever means might be provided. The city negligently permitted the structure authorized by it to be erected in an unsafe manner, and the wrong and resulting damage were connected according to the ordinary course of events. This proposition is practically conceded on the part of the city in the admission expressly made, that, if the plaintiff had gone on the platform voluntarily, for the purpose of passing over it to reach some other place, and precisely the same injury had resulted from the same cause, the city would be liable. The relation of cause and effect would not exist in that case any more than in this.

The principal ground upon which counsel insist that the wrong was not the proximate cause of the injury is that the city owed no duty to the plaintiff when she went over the platform to see the show and while she was returning from it, and as to her the street was not unsafe, as a street, while she was in that situation. It is admitted that the plaintiff did not lose her character as a legitimate user of the street until the moment she stepped upon the stairway to enter the show; and up to that moment, even though she had merely loitered around the street or mingled with the throng that filled the sidewalks and roadway, the duty of the city existed, and also a liability for any injury resulting from the wrongful use of the street; but it is insisted that when she started up the stairway the duty ceased, and would not come into being again until she was again on the street. The liability of the city is, of course, not confined to travelers, but extends to a person stopping on the street to converse with another, or stopping to see a procession pass, or using the street for convenience or pleasure, and there

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ridden by an other person on a sidewalk, by reason of its failure to enact or enforce an ordinance prohibiting the riding of bicycles on sidewalks. Jones v. Williamsburg, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883; Tarbutton v. Tennille, 110 Ga. 90, 35 S. E. 282; Custer v. New Philadelphia, 20 Ohio C. C. 177; Rogers v. Binghamton, 101 App. Div. 352, 92 N. Y. Supp. 179, affirmed in 186 N. Y. 595, 79 N. E. 1115; Howard v. Brooklyn, 30 App. Div. 217, 51 N. Y. Supp. 1058; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229.

The act of a city in permitting bicycles to be operated and run at a high and dangerous rate of speed on its sidewalks does not constitute maintaining a public nuisance, within the meaning of statutory provisions requiring cities to keep their streets open and in repair and free from nuisances. Custer v. New Philadelphia, supra.

And a statutory provision that any person who shall receive bodily injury or damage in his person or property through a defect in any street, or by reason of defect or mismanagement of anything under the control of the corporation within the limits of the municipality, may recover in an action against the same the damages sustained by reason thereof, does not give a right of action against a city to a person run over by a bicycle ridden rapidly along the sidewalk. Bryant v. Orangeburg, supra.

Nor is the riding of a bicycle upon a sidewalk an unlawful act at common law; and charter power to regulate the use of sidewalks authorizes an ordinance permitting the riding of bicycles on them where such act will not amount to a nuisance. Lee v. Port Huron, 128 Mich. 533, 55 L.R.A. 308, 87 N. W. 637.

It has been held, however, that failure of a municipality to attempt to enforce its ordinance limiting the speed at which bicycles may be ridden on its streets renders it liable for injuries to a pedestrian knocked down by a bicycle ridden at an immoderate rate of speed. Hagerstown v. Klotz, 93 Md. 437, 54 L.R.A. 940, 86 Am. St. Rep. 437, 49 Atl. 836. This case is decided upon the theory apparently adopted in Maryland, that municipal corporations having powers to protect the public in the use of the streets are bound to exercise them for the public good.

VII. Animals running at large.

A power given a city by charter or statute to restrain the running at large of cattle, swine, sheep, etc., and to abate nuisances, does not impose upon it an absolute duty, which is purely ministerial, to pass such a restraining ordinance, so as to render it liable for damages done by a domestic animal running at large in the streets. It may act or not, as it shall deem expedient. Kelley v. Milwaukee, 18 Wis. 83.

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are liabilities to abutting owners and to children playing upon the street. Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267. The position of counsel for the city is illustrated by the case of Cohen v. New York, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700. In that case the city granted permission to a grocer to keep his wagon on the street in front of his store, and he negligently tied up the thills, which fell and struck Cohen, who was passing. It is said that if Cohen had climbed on the wagon the city would not have been liable, which is doubtless true. It is also true that, in the case of Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435, if the plaintiff had mounted one of the bears in the bear show licensed in the street, and had been injured, the city would not have been liable. But the argument overlooks the clear and broad distinction between those cases and this in the fact that, when the nuisance was authorized, it was expected that the public would attend the shows and go upon the structures placed in the street. Undoubtedly, under ordinary circumstances it is the duty of a city to see that its streets are reasonably safe for the uses for which streets are intended; but, when a city changes the character of a street, and devotes it to the purposes of a street fair, we do not think it can escape liability on the ground that the street was intended for different uses. If this carnival and street fair had been licensed upon common public ground or in a park under the control of the city, we do not think there could be any question as to liability; and we are unable to state any vaild ground of distinction when the city perverted its streets to like uses for a show ground. In Forget v. Montreal, Montreal L. Rep. 4 S. C. 77, the city was held liable for injuries arising from the use of a public place for an exhibition without taking the necessary measures to protect the public against dangers that might result. Manifestly, public policy would not dictate or approve refined distinctions for the purpose of relieving the city from the natural and probable consequences of its wrongful act. Justice would rather require such distinctions to be made in favor of a party injured, and, if that were done, we might say that when the plaintiff left the tent she was using the street, as such, to reach some other place. We do not regard that as necessary; but, as the city had changed the ordinary conditions governing the highway, and had actively participated in creating a carnival and street fair in public streets, we think it assumed the obligation to use reasonable care to see that the structures were reasonably safe.

It is insisted that, because a private individual owning premises and leasing them for the purpose of a show, or permitting shows on them, would not be liable for the negligent construction of a platform, the city should not be held liable; but the cases are not alike, since the individual owner has no

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And hogs running at large in the streets of a city are not *per se* nuisances which the city must abate or be liable for injury done by them, but are subject only to such regulation as the municipal authorities may determine. Ibid.

And a city having the requisite power, which enacted an ordinance prohibiting swine from running at large in the streets, with a suitable penalty, and providing for impounding the delinquent animals, is not liable to a person who was attacked and injured by a hog straying in the street. Levy v. New York, 1 Sandf. 465.

So, the adoption of an ordinance by a city in reference to allowing cattle to run at large in the city streets is a legislative function, and therefore discretionary; and a city is not liable in damages to a person who was gored by a cow which was running at large in the streets, for neglecting and omitting or refusing to notice the subject, or, having noticed it, and adopted an ordinance concerning it, for having then repealed or suspended it indefinitely. Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787.

But a city may be liable for injuries to a person on a street, inflicted by a cow running at large, which it could have prevented by ordinary care and diligence, where it had permitted the running at large of such cattle without any attempt to stop it, and it had become a common nuisance and source of danger. Cochrane v. Frostburg, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703.

Though a city is not liable for injuries committed by a cow running at large upon the street without any fault of the owner. Ibid.

VIII. Use of fireworks and other explosives.

Permitting an assemblage of people engaging in the unlawful practice of firing explosives in the streets of a city, though temporarily the assemblage may have blocked the streets from passage, does not create such a defect in, or obstruction of, the streets as will render the city liable for a death caused by an explosion. Campbell v. Montgomery, 53 Ala. 527, 25 Am. Rep. 656.

And a municipal corporation which permits the firing of a cannon in a public street, or which takes no measures to prevent such firing, is not liable to a person injured thereby. Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857.

While a crowd of citizens engaged in firing a cannon in the streets of a city, without authority, and not at any public or authorized celebration, is a nuisance, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or ma-

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duty to the public, and is not guilty of any wrong in leasing his premises or permitting the shows, while a city is guilty of violation of duty and a serious wrong in doing the same thing.

In our opinion the court did not err in refusing to direct a verdict, or in denying the motion in arrest of judgment.

Complaint is made of the action of the court in giving, refusing, and modifying instructions, and the reply is made that the assignment of errors is not sufficient to raise any question concerning the instructions. In the appellate court, the assignment of errors included all the matters complained of, and the errors assigned in this court are that the appellate court erred in not reversing the judgment, erred in affirming the judgment, and erred in rendering judgment for costs against the city. The judgment under review in this court is the judgment of the appellate court, and the only error the appellate court could commit would be in affirming the judgment. The appellate court did not give, refuse, or modify instructions, or make any other ruling which was excepted to, and it was not necessary in this court to reassign errors of the trial court. When a plaintiff in error assigns for error in this court that the appellate court erred in affirming the judgment, every question reviewable in this court under the errors assigned in the appellate court is properly raised.

Instruction No. 7, which was given at the request of the plaintiff, directed the jury that, if the plaintiff was suffering from an affection or disease of the bones, the jury had a right to consider whether her existing condition was due to the affection or to the fall, and, if they found it was due to the fall, even though the condition may have been aggravated by the condition of the bones at the time of the fall, they might proceed to assess the plaintiff's damages, if they found she had sustained any damages under the evidence in the case. The instruction, standing alone, was wrong in lacking the qualification that the jury must first find that the plaintiff was entitled to recover. The omission, however, was cured by other instructions. In fact, if the number "7" was stricken out, and the instruction should be read with No. 6, which preceded it, it would be free from any objection. Instruction No. 6 told the jury that if they found, from the evidence and under the instructions, that the plaintiff was entitled to recover as alleged in her declaration, then, in estimating the damages, they might take into consideration different elements mentioned in the instruction; and that instruction was followed by this one, which was faulty in omitting the condition mentioned. The instructions are to be read as a series, and the jury could not have misunderstood them when so read, or have supposed that damages might be assessed regardless of the merits of the case.

The sixteenth instruction, as tendered by

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terial obstructions in or near a highway, and resort, therefore, must be had to the police, for the doings or misdoings of which the municipality is not liable. Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771.

And the word "nuisance" in a statutory provision that the council of a municipality shall have the care, supervision, and control of all public highways and shall keep them free from nuisance, does not include an assemblage of persons engaged in the unlawful act of firing a cannon in a public street, but refers to something which is, in a sense, fixed or permanent, as a defect in the street. Robinson v. Greenville, supra.

So, negligence of police or peace officers in failing to stop the firing of a cannon, known to be dangerous, upon the streets of a city, does not render the city liable for an injury resulting from such negligence. Arms v. Knoxville, 32 Ill. App. 604.

And a municipal corporation is not liable for an injury inflicted by the acts of men or boys, on their own account, in firing a cannon in a public park of the city on a day when the citizens held a public meeting for the consideration of certain national affairs. Boyland v. New York, 1 Sandf. 27.

And the fact that a cannon was placed in one of the public streets of a city, and there fired, in violation of an ordinance, whereby a person was injured, does not make the city liable for such injury, although it was known to the officers of the city that the cannon was to be fired, and they took no steps to prevent it. O'Rourke v. Sioux Falls, 4 S. D. 47, 19 L.R.A. 789, 46 Am. St. Rep. 760, 54 N. W. 1044.

Nor is a city any more liable for the consequences of the violation of an ordinance prohibiting the exploding of fireworks in the streets by its mayor or council as individuals than it would be if the illegal act were done by a private citizen. Ball v. Woodbine, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846.

And where fireworks were discharged within the limits of an incorporated town in violation of its ordinances, and a person was injured thereby, though the officers of the town and a majority of the citizens actively participated in the discharge of the fireworks, and the town, by its officers, made no attempt to stop the unlawful proceeding, yet the town is not liable for the injury, there being nothing but a mere violation of a town ordinance. Ibid.

So, a city which, by ordinance, prohibits from firing guns or pistols or exploding firecrackers within the limits of the city, and afterwards passes an ordinance suspending such ordinance for a period, cannot be held liable for an injury caused by the negligent firing of squibs and firecrackers during the period of suspension. Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

And where blasting of stone is done in a

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the defendant, required the plaintiff to use due care and caution for her safety, commensurate with the knowledge which she had or which, by the exercise of reasonable care, she would have had, and the court modified it by confining her obligation in respect to care to defective conditions of which she had knowledge. She had a right to assume that the place was reasonably safe, in the absence of knowledge to the contrary; but, if the instruction was too limited in that respect, the defect was supplied by the fifteenth instruction, in which the court told the jury that the plaintiff was required to use such degree of care and caution for her safety as reasonably prudent persons would use under all the circumstances shown by the evidence.

The modification of instruction 17 did not change its substantial meaning.

Instruction 22, which was refused, represented the theory of the city that it was not liable, and that its duty was limited to the necessities of ordinary modes of travel or passing along the street. What has already been said shows that we do not regard that to be the law.

And instruction 24 was not applicable to the case and was not the law. It directed the jury to regard the authority as a license to provide, maintain, and conduct the exhibition in a proper and reasonably safe manner, and the resolution contained no qualification of that kind.

The judgment is affirmed.

KANSAS SUPREME COURT.

CITY OF CHERRYVALE, Plff. in Err.,
v.
MINERVA HAWMAN.

SAME, Plff. in Err.,
v.
FRANK HAWMAN.

(— Kan. —, 101 Pac. 994.)

Municipal corporation — liability — mob — personal injuries — instruction.

1. In an action upon the statute making cities liable for injuries done by mobs, an instruction that "a 'mob' is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is not erroneous because it makes no reference to a determination on the part of those composing the assemblage to resist opposition.

Same — charivari — "unlawful violence."

2. Where the members of a charivari party forcibly place a bride and groom in a wagon against their will, and draw them up and down the streets, they are engaged in an act of unlawful violence within the meaning of such definition. The fact that they are good natured and intend no serious harm to anyone does not absolve the corporation from liability.

(May 8, 1909.)

Headnotes by MASON, J.

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city, but not by the city, but under a contract with a private citizen, and such blasting is done in direct violation of express directions given by city officers, or done without their knowledge, the city is not responsible for an injury caused by it. Joliet v. Seward, 86 Ill. 402, 29 Am. Rep. 35.

Where an exhibition of fireworks takes place in the public streets of a city, under authority or permission of the city, however, the city is liable, if the exhibition is under such circumstances as would permit a jury to find it a public nuisance, for damage caused to those injured by a premature explosion of the fireworks. Landau v. New York, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631; Speir v. Brooklyn, 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727, affirming 46 N. Y. S. R. 561, 19 N. Y. Supp. 665.

And a discharge of fireworks including powerful explosives, in a large city, at the junction of narrow streets, completely built up, when it is managed by private persons under no official responsibility, is unreasonable and unlawful, and constitutes a public nuisance for which the city is liable. Speir v. Brooklyn, supra.

So, while a municipal corporation is not liable for failure to pass ordinances prohibiting the discharge of fireworks in the public streets, it is bound to exercise due care to keep its streets in a safe condition, and is liable for permitting dangerous obstructions or nuisances therein, and its duty cannot be avoided by passing ordinances or failing to pass them; and fireworks exhibited on an extensive scaffold, on a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as a matter of law may properly be found such as matter of fact. Landau v. New York, supra.

And, as against one injured by fireworks discharged in a public street under a permit from the mayor of the city, acting under an ordinance, the city is bound by the mayor's construction of the ordinance in respect to his power to grant the permit; especially where such construction was a plausible one, and had been acted upon for years. Speir v. Brooklyn, supra.

And a resolution of the aldermen of a city, providing for the suspension of ordinances relating to the discharge of fireworks, so far as they apply to parades of political parties during a campaign, subject to such restrictions as the police department may deem necessary, is not a repeal of the ordinances relating to the discharge of fireworks, and prohibiting such explosion, either in form or substance, but constitutes a permission to display fireworks in the public streets by a limited number of persons for a limited period of time, so as to render the city liable where the display of fireworks

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ERROR to the District Court for Montgomery County to review judgments in favor of each plaintiff in consolidated actions brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. L. P. Brooks, for plaintiff in error:

A mob consists of an assemblage of many people acting in a violent manner, defying the law, and committing or threatening to commit depredations upon property or violence to persons.

Marshall v. Buffalo, 50 App. Div. 152, 64 N. Y. Supp. 411.

The party pulling the wagon did not constitute a mob, as there was no evidence showing that the party was intent on unlawful violence.

Anderson v. Wellington, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719.

Mr. **A. B. Clark** for defendants in error.

Mason, J., delivered the opinion of the court:

Shortly after a marriage had taken place in the city of Cherryvale, a number of men gathered at the house where the bride and groom were staying, placed them in a wagon, and drew them by hand up and down the streets, making proclamation of their nuptials, and introducing them to passers-by in burlesque speeches, attracting a large crowd and occasioning some disorder and tumult. Frank Hawman, nine years of age, was run over by the wagon; his leg being thereby broken. He and his mother each sued the city under the statute making municipalities liable for all damages accruing in consequence of the action of mobs within their corporate limits. Gen. Stat. 1901, § 2501. The cases were tried together, the plaintiff recovering in each. The defendant prosecutes error.

The most serious question presented is whether the evidence justified a finding that the gathering constituted a mob within the meaning of the statute. The court instructed the jury that "a 'mob' is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property." This definition, which appears to have originated in Abbott's Law Dictionary, is substantially that usually given by the courts and text writers. 27 Cyc. Law & Proc. p. 812; 20 Am. & Eng. Enc. Law, p. 835; 5 Words & Phrases, p. 4548. Its substance was incorporated without objection in the charge in Atchison v. Twine, 9 Kan. 350. It differs but little from the one asked by the defendant, which read: "A mob consists of an assemblage of many people acting in a violent manner, defying the law, and committing, or threatening to commit, depredation upon property, or violence to persons." Perhaps, however, this requested instruction suggests an element held in New York to be essential; namely, a determination on the part of the persons composing the assemblage to carry out their purpose notwithstanding any resistance encountered. The statute of that state makes municipalities liable for injuries done by "a mob or riot," and the court of last resort, holding that the two words indicate the same kind of disturbance, excepting as to the numbers taking part, has definitely adopted this definition of the latter: "A tumultuous disturbance of the peace by three persons or more assembling of their own authority, with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." Adamson v. New York, 188 N. Y. 255, 10 L.R.A.(N.S.) 925, 117 Am. St. Rep. 863, 80 N. E. 937, 11 A. & E. Ann. Cas. 83. The word "riot" has often been defined, however, without referring either to a purpose to resist opposition or to the inspiring of terror. 24 Am. & Eng. Enc. Law, p. 971; 7 Words & Phrases, p. 6240. And the statutory definition in New York omits both these elements, reading thus: "Whenever three or more persons, having assembled for any purpose, disturb the public peace by using force or violence to any person or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied

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amounts to a nuisance. Landau v. New York, supra.

IX. Conclusion.

Generally speaking the prevention of improper use of the streets of a municipal corporation involves the exercise of legislative or discretionary functions on the part of its officers, as distinguished from mandatory or ministerial ones, and therefore failure to act or negligent action imposes no liability; and this has usually been held to be the case though the municipality itself or its officers participated in the wrongdoing.

The position has been taken, however, that a municipal corporation having powers for the protection of the traveling public is bound to use them for the public good. And the rule is well supported by authority as well as reason that the duty of a municipal corporation to use due care to keep its streets in a safe condition renders it liable for failure to prevent any use of a street which amounts to a dangerous nuisance.

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with the power of immediate execution of such threat or attempt, they are guilty of riot." In Marshall v. Buffalo, 50 App. Div. 149, 64 N. Y. Supp. 411, it is said: "This statute [making the city liable for injuries done by a mob or riot] is now substantially the same . . . as the original enactment of 1855. . . . At that time riot was not a statutory crime, and it may therefore be presumed that the legislature had the common-law definition in mind." In Kansas there is and was when the law here invoked against the city was enacted, a statute in effect defining a riot, for it provides (Gen. Stat. 1901, § 2269) that, "if three or more persons shall assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace . . . the person so offending, on conviction thereof, shall be fined in the sum not exceeding $200." The next section makes it the duty of any peace officer, when such an unlawful assembly takes place, "to make proclamation in the hearing of such offenders, commanding them, in the name of the state of Kansas, to disperse and to depart to their several homes or lawful employments," and, if such command is not obeyed, to summon aid and enforce it. The Kansas legislature, in passing an act the obvious purpose of which is to make municipal officers more vigilant in suppressing unlawful assemblies, must be deemed to have had in mind the language of its own statute in that regard, rather than any one of the several definitions recognized by the common law. We think the instruction given by the court was sufficient for the purpose of the case.

The question therefore narrows down to this: Was there any evidence of a purpose on the part of those engaged in the demonstration which occasioned the injury to employ force in an unlawful undertaking? There was testimony that several of the ringleaders entered the room where the bride was, and, taking hold of her, made her go with them; that she, seeing that they were going to use force, said that rather than submit to this she would accompany them, and did so. This was some evidence of the use of unlawful violence. If the purpose of the visitors had been to inflict punishment in revenge for some real or fancied wrong, no one would doubt the illegal character of their act. The fact that nothing worse was intended than to subject the victim to embarrassment, annoyance, and humiliation in order to provide amusement for the spectators does not change its aspect in the eye of the law. True, the testimony of the bride showed that she cherished no resentment against the perpetrators of the prank, but whether she consented to it at the time was a fair matter, under all the evidence, for the determination of the jury, and they must be deemed to have found that she did not. They also made a special finding, which was not wholly without support in the evidence, answering in the affirmative the question whether those who caused the injury disturbed the peace of anyone on the streets or along the streets over which the wagon was drawn.

There was clearly some evidence that the persons responsible for the injury to the boy constituted a mob, unless they can escape that designation by the plea that they were acting with perfect good nature and intended no real harm to anyone. It is hardly necessary to combat that plea with authorities, and yet cases in point are not wanting. In Bankus v. State, 4 Ind. 114, it proved unavailing in a prosecution for a riot, the court saying: "It is said the rioters were in good humor. Very likely, as they were permitted to carry on their operations without interruption; but with what motive were they performing these good-humored acts? Not, certainly, for the gratification of Wise and his family. They were giving them what is called a charivari, which Webster defines and explains as follows: 'A mock serenade of discordant music, kettles, tin pans, etc., designed to annoy and insult.'" In Gilmore v. Fuller, 198 Ill. 130, 60 L.R.A. 268, 65 N. E. 84, one member of a "charivari" party was accidentally shot by another. He sought to recover damages, but was denied relief on grounds thus stated: "The enterprice in which they were both engaged at the time of the injury was an unlawful one. The fact that it is called a 'charivari' does not make it any the less unlawful. The assemblage around the house of Daniel Hirsch in the nighttime, there engaged in disturbing a family in which a wedding had occurred, was an unlawful and illegal assemblage, and not only so, but a gathering of illegal trespassers. They were all, including both plaintiff in error and defendant in error, engaged in the same unlawful enterpise." In Higgins v. Minaghan, 78 Wis. 602, 11 L.R.A. 138, 23 Am. St. Rep. 428, 47 N. W. 941, damages were sought against the subject of the charivari for having shot one of its perpetrators. The plaintiff's counsel was permitted, in the examination of jurymen as to their qualifications, to ask whether they had any prejudice against that form of amusement. In expressing its view that such question should not have been allowed, the court said: "Every good, law-abiding citizen must and does condemn such unlawful and riotous assemblies. They are wholly indefensible in law and morals, and are reprobated by every well-disposed person. With the same

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propriety a juror called upon to try a man charged with a criminal act might be asked if he had or entertained any bias or prejudice for or against crime or criminals." In State v. Adams, 78 Iowa, 292, 43 N. W. 194, in reversing a conviction of manslaughter, the court used this language: "The party assembled in the night when the tragic affair took place is called a 'charivari.' Its object is about as barbarous as the pronunciation of its name. Whatever toleration it once had has long since passed away. Even when in vogue it was often attended with violence and bloodshed. If it ever was allowable to direct a jury that such an assemblage, with all its tumult and confusion, was not a great provocation to those annoyed and insulted by it, that time has passed away."

Complaint is made of the denial of a motion directed against a defective summons; but, as a sufficient summons was afterwards issued and served, the ruling became immaterial. Testimony that the mother of the injured boy was a widow was competent in her own case, and therefore the objection made to it is unfounded. The court struck out a portion of each of several interrogatories to the jury prepared by the defendant; but no material error was thereby committed, for this reason, among others, that the questions as they stood were compound. An instruction refused with regard to the extent of the injury was sufficiently covered in the general charge.

No error is discovered in the rulings complained of, and the judgment is affirmed.

All the Justices concur.

ALABAMA SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, Appt.,
v.
WILLIAM W. HILL.

(— Ala. —, 50 So. 248.)

Conflict of laws — delayed telegram.

1. In case of breach of an undertaking to transmit a telegram from one state to another, where it is to be promptly delivered to one of its citizens, by failure promptly to deliver it after it has reached the latter state, its laws will govern in an action for the breach, brought either in contract or tort, in its courts, in determining whether or not damages can be allowed for mental suffering caused by the delay, where no negligence is alleged or shown to have occurred in the former state.

Same — foreign contract — express law.

2. In determining whether or not damages can be allowed for mental anguish caused by failure promptly to deliver a telegram, the courts of the forum are not bound by the decisions of the courts where the contract was made, where the laws of that state do not contain any express declaration upon the subject.

Pleading — demurrer — damages.

3. The question of measure of damages alone cannot be raised by demurrer.

Evidence — delayed telegram — possession of telephone.

4. In an action for damages for failure promptly to deliver a telegram, the addressee may show that he had a telephone in his house and that there was also one in the office of the telegraph company.

Trial — affirmative charge — evidence.

5. The general affirmative charge cannot be given for defendant as to any count in the declaration which there is evidence to support.

Telegram — tender before office hours — effect.

6. The general affirmative charge cannot be given in favor of a telegraph company in an action for damages for failure promptly to deliver a message because the evidence shows that it was delivered for transmission before office hours of the office of destination, where the evidence also tends to show that no objection was made to receiving it at that time, and it was actually transmitted and received at such office prior to its opening time.

Jury — quotient verdict — agreement — effect.

7. A verdict is not vitiated by the fact that the jurors agreed among themselves to render a quotient verdict, if they do not in fact arrive at their verdict in that manner.

Appeal — damages — mental suffering — excess.

8. Eleven hundred dollars is not such an excessive allowance to a father for mental suffering in being deprived of the opportunity to assist in preparing the body of his child for burial, through the neglect of a telegraph company in failing promptly to deliver a message to him, that the appellate court can set the verdict aside as arbitrary or intended as punishment.

(May 13, 1909.)

Case Note. — Law governing liability of telegraph company.

This subject is covered in notes to Hughes v. Pennsylvania R. Co. 63 L.R.A. 532, and Western U. Teleg. Co. v. Lacer, 5 L.R.A. (N.S.) 751, and those notes will be supplemented by the present note.

Introductory.

The foregoing opinion evinces some uncertainty in the mind of the court as to the exact ground of its decision. There is a suggestion of four different grounds: (1) That the law of Alabama should govern be-

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APPEAL by defendant from a judgment of the City Court of Montgomery in plaintiff's favor in an action brought to recover damages alleged to have been caused by defendant's failure promptly to deliver a telegram. Affirmed.

The facts are stated in the opinion.

Messrs. **George H. Fearons** and **Rushton & Coleman**, for appellant:

The *lex loci contractus*, and not the *lex fori*, governs the measure of damages.

Blount v. Western U. Teleg. Co. 126 Ala. 105, 27 So. 779; Western U. Teleg. Co. v. Krichbaum, 132 Ala. 535, 31 So. 607; Western U. Teleg. Co. v. Rowell, 153 Ala. 295, 45 So. 73; Ligon v. Western U. Teleg. Co. 46 Tex. Civ. App. 408, 102 S. W. 430; Western U. Teleg. Co. v. Waller, 96 Tex. 589, 97 Am. St. Rep. 936, 74 S. W. 751; Western U. Teleg. Co. v. Buchanan, 35 Tex. Civ. App. 437, 80 S. W. 561; Western U. Teleg. Co. v. Anderson, 34 Tex. Civ. App. 14, 78 S. W. 34; Thomas v. Western U. Teleg. Co. 25 Tex. Civ. App. 398, 61 S. W. 501; Hancock v. Western U. Teleg. Co. 137 N. C. 497, 69 L.R.A. 403, 49 S. E. 952; Hall v. Western U. Teleg. Co. 139 N. C. 369, 52 S. E. 50; Western U. Teleg. Co. v. Pratt, 18 Okla. 274, 89 Pac. 237; Western U. Teleg. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427; Western U. Teleg. Co. v. Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354; Western U. Teleg. Co. v. Garrett, 46 Tex. Civ. App. 430, 102 S. W. 456; Reed v. Western U. Teleg. Co. 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W.

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cause the breach of duty, whether regarded as growing out of a contract or imposed by law, occurred within that state; (2) that the law of Alabama should govern because that was the place of performance of the contract; (3) that, on grounds of public policy, a court of Alabama, especially as the telegram was to be delivered in that state and the fault occurred there, should refuse to abide by the rule of damages prescribed by the law of the state in which the contract was made, even assuming that in general that law should govern; (4) that, in any event, the court of Alabama should, by analogy to the practice of the Federal courts, follow its own judicial precedents as to the right to recover for mental anguish, irrespective of the precedents established by the courts of the state in which the contract was made, even conceding that, as a matter of substantive law, the rule of damages prescribed by the law of the latter state, correctly interpreted, should govern.

No one of these grounds seems to be sustained by the weight of authority, at least, of cases in which, as in WESTERN U. TELEG. CO. v. HILL, the action was *ex contractu*, and not *ex delicto*.

As is apparent from the earlier notes as well as the present note, the first ground has some support from cases where the action was *ex delicto* and under a statute permitting recovery for mental anguish in telegraph cases.

The second suggested ground is supported by Western U. Teleg. Co. v. Lacer, 5 L.R.A. (N.S.) 751, and, as intimated in the note to that case, and shown more fully in the note to Southern Exp. Co. v. Gibbs, 18 L.R.A.(N.S.) 874, by a small minority of cases, including an Alabama case, involving carriers' contracts. It is, however, clearly opposed by the weight of authority of cases in which the action was *ex contractu*.

It is doubtful if there is any support to be found in the cases for the third ground as an independent ground. The courts, of course, very frequently refuse, on the ground of public policy of the forum, to enforce a contract or part of a contract that is valid by its proper law, and this exception is applied in a number of cases coming within the scope of this note, in respect of stipulations as to unrepeated messages. In general, however, though it is possible that some authority to the contrary may be found, the exception based on the public policy of the forum is only applied negatively, by refusing to enforce a particular rule of law of another state, or declining to uphold the validity of a particular stipulation of the contract which is, in general, governed by the law of that state; and the courts very rarely, if ever, upon the grounds of public policy, subject a contract properly governed by the law of another state to a positive and affirmative substantive rule of the forum as such.

The fourth ground is also against the clear weight of authority if Federal cases are disregarded; and, as pointed out in the note to Root v. Kansas City Southern R. Co. 6 L.R.A.(N.S.) 212, the practice of the Federal courts in this respect furnishes no valid precedent for a similar practice by the state courts.

There would seem to be some authority, though not found in telegraph cases, for still another ground for the application of the law of Alabama permitting recovery for mental anguish; *viz.*, that the measure of damages relates to the remedy rather than to the substantive rights of the parties, and is, therefore, governed by the *lex fori* as such. This, however, as a distinct ground, would clearly be against the weight of authority, since, as shown in the note to Gray v. Western U. Teleg. Co. 56 L.R.A. 301, the measure of damages, whether for breach of a contract or for a tort, is, by the great weight of authority, regarded as a matter pertaining to the substantive rights of the parties, rather than the remedy, and therefore not governed by the *lex fori* as such. This rule, however, does not prevent a court of the forum from refusing to enforce a rule of damages prescribed by the proper law, if it be deemed contrary to the public policy of the forum to do so.

Any principle of private international law which, in its application to a particular case, would subject the contract or cause of

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904; Bryan v. Western U. Teleg. Co. 133 N. C. 607, 45 S. E. 938; Johnson v. Western U. Teleg. Co. 144 N. C. 410, 10 L.R.A.(N.S.) 256, 119 Am St. Rep. 961, 57 S. E. 122; Shaw v. Postal Teleg. & Cable Co. 79 Miss. 670, 56 L.R.A. 486, 89 Am. St. Rep. 666, 31 So. 222; 22 Am. & Eng. Enc. Law, 2d ed. p. 1352.

Where a telegraph company has fixed certain hours within which all business transactions shall be consummated, it is under no obligation to receive for transmission any message outside of such office hours; but if it should receive a message at a time when the office at the other end of the line is closed, it may transmit the message within a reasonable time after the opening of the latter office.

Western U. Teleg. Co. v. Neel, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15; Western U. Teleg. Co. v. Gibson (Tex. Civ. App.) 53 S. W. 712; Given v. Western U. Teleg. Co. 24 Fed. 119; Western U. Teleg. Co. v. Georgia Cotton Co. 94 Ga. 444, 21 S. E. 835; Western U. Teleg. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827; Western U. Teleg. Co. v. McCoy (Tex. Civ. App.) 31 S. W. 210; Birney v. New York & W. Printing Teleg. Co. 18 Md. 341, 81 Am. Dec. 607; Western U. Teleg. Co. v. Crider, 107 Ky. 600, 54 S. W. 963; Western U. Teleg. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829; Davis v. Western U. Teleg. Co. 23 Ky. L. Rep. 1758, 66 S. W. 17; Davis v. Western U. Teleg. Co. 46 W. Va. 48, 32 S. E. 1026; 25 Am. & Eng.

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acton to the law of a state other than that of the forum, of course, presupposes that the law of the other state has been properly proven or conceded. As to the proper course to be pursued when the proper law is not proven or conceded, see note to Cherry v. Sprague, 67 L.R.A. 33.

The questions relating to the governing law of contracts for the transmission of telegrams are quite analogous to those in relation to the governing law of carriers' contracts generally. On the latter subject, see notes to Hughes v. Pennsylvania R. Co. 63 L.R.A. 513, and Southern Exp. Co. v. Gibbs, 18 L.R.A.(N.S.) 874.

Law governing right to recover for mental anguish.

As shown in the earlier notes as well as in the present note, the majority of the courts, certainly in cases where the action is *ex contractu*, and not *ex delicto*, hold that the substantive rights of the party, including the right to recover damages for mental anguish from breach of the contract, are governed by the law of the state in which the contract is made and from which the telegram is sent, irrespective of the place where the fault or negligence occurs.

To the same effect are Western U. Teleg. Co. v. Griffin (Ark.) 122 S. W. 489, infra (telegram sent from point in Arkansas to point in Mississippi; action by addressee; fault occurred in Mississippi; law of Arkansas permitting recovery for mental anguish applied); Hall v. Western U. Teleg. Co. 139 N. C. 369, 52 S. E. 50 (telegram sent from point in Virginia to a point in North Carolina; action by sender; negligence and delay occurring in North Carolina; clearly implies that law of Virginia would govern as to right to recover for mental anguish); Johnson v. Western U. Teleg. Co. 144 N. C. 410, 10 L.R.A.(N.S.) 256, 119 Am. St. Rep. 961, 57 S. E. 122 (telegram sent from a point in Virginia to a point in North Carolina; action apparently by sender; place of delay or negligence not appearing; law of Virginia, which was found by jury to deny recovery for mental anguish under circumstances of the case, held to govern); West-

ern U. Teleg. Co. v. Anderson, 34 Tex. Civ. App. 14, 78 S. W. 34 (telegram sent from point in Texas to a point in Indian Territory; action by addressee; place of delay or negligence not appearing; law of Texas permitting recovery for mental anguish held to govern); Western U. Teleg. Co. v. Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354 (telegram sent from point in Arizona to point in Texas; action by addressee; place of negligence or fault not appearing; assumes that law of Arizona, if proved, would have governed as to recovery for mental anguish, but recovery allowed because it was not proved in proper form that the law of Arizona was different from the law of Texas, *lex fori*); Western U. Teleg. Co. v. Garrett, 46 Tex. Civ. App. 430, 102 S. W. 456 (telegram sent from point in Missouri to point in Texas; action by sendee; delay occurred in Texas; law of Missouri denying recovery for mental anguish applied); Ligon v. Western U. Teleg. Co. 46 Tex. Civ. App. 408, 102 S. W. 429 (telegram sent from point in Missouri to point in Texas; action by husband of addressee; held that the law of Missouri denying right to recover for mental anguish would have governed had there been any cause of action at all); Western U. Teleg. Co. v. Parsley (Tex. Civ. App.) 121 S. W. 226 (telegram sent from point in Arkansas to a point in Oklahoma; action by addressee; fault occurred in Oklahoma; law of Arkansas permitting recovery for mental anguish held applicable).

So, in Western U. Teleg. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579, 13 A. & E. Ann. Cas. 354, the common-law rule in Tennessee which permits a recovery for mental anguish was held to apply in an action by the addressee for mental anguish, whether the action be regarded as *ex contractu* or *ex delicto*, the telegram having been sent from a point in Tennessee to a point in Arkansas, and it not being shown where the negligence or delay actually occurred. The latter case was cited in Western U. Teleg. Co. v. Hanley, 85 Ark. 263, 107 S. W. 1168, holding that there might be recovery for mental anguish although there was no negligence or delay in Arkansas so as to bring

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Enc. Law, p. 785; Western U. Teleg. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Sweet v. Postal Teleg. & Cable Co. 22 R. I. 344, 53 L.R.A. 732, 47 Atl. 881; Stevenson v. Montreal Teleg. Co. 16 U. C. Q. B. 530; Starkey v. Western U. Teleg. Co. (Tex. Civ. App.) 115 S. W. 853; 27 Am. & Eng. Enc. Law, 2d ed. p. 1037; Jones, Teleg. & Teleph. Cos. § 349; Croswell, Electricity, §§ 421, 422.

And a mere attempt to make immediate delivery, or the fact that the agent took it upon himself to transmit the message before office hours, did not make it the duty of the telegraph company to deliver the message before the office hours began.

Western U. Teleg. Co. v. Rawls (Tex. Civ. App.) 62 S. W. 136.

Messrs. **Campbell & Walker** also for appellant.

Mr. **S. H. Dent, Jr.,** for appellee:

The contract which was made in Georgia for transmission to and delivery in Alabama should be governed, as to the measure of recovery, by the law of Alabama.

Gentle v. Western U. Teleg. Co. 82 Ark. 96, 100 S. W. 742; Western U. Teleg. Co. v. Ford, 77 Ark. 531, 92 S. W. 528; Western U. Teleg. Co. v. Eubank, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068; Gray v. Western U. Teleg. Co. 108 Tenn. 39, 56 L.R.A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063; Western U. Teleg. Co. v. Blake, 29 Tex. Civ. App. 224, 68 S. W. 526; Howard v. Western U. Teleg. Co. 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 7 A.

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the case within the operation of the Arkansas statute, the telegram having been sent from a point in Tennessee to a point in Kentucky. It appeared, however, that a recovery of such damages was permitted both by the law of Tennessee and of Kentucky, so that the court was not obliged to choose between the two.

As shown in the earlier notes, however, there are some cases that apply the law of the state in which the telegram was to be delivered and in which the fault or negligence occurred, where the action was *ex delicto*, or was brought under a statute providing for the recovery of damages for mental anguish in such cases. To the same effect is Gentle v. Western U. Teleg. Co. 82 Ark. 96, 100 S. W. 742, where, in an action under the Arkansas statute, recovery for mental anguish was allowed, although the telegram was sent from a point in Missouri, the law of which does not permit recovery for mental anguish, to a point in Arkansas, the delay having occurred in the latter state.

So, in Balderston v. Western U. Teleg. Co. 79 S. C. 160, 60 S. E. 435,—an action by the addressee to recover for mental anguish suffered in consequence of wilful and wanton failure to deliver a telegram sent from a point in Pennsylvania to a point in South Carolina,—the action was regarded as *ex delicto*, and the statute of South Carolina permitting a recovery for mental anguish was held applicable, upon the theory that, as the place of delivery was in that state, the breach of duty necessarily occurred there, irrespective of the place where the failure or delay of transmission actually occurred. The court remarked that the decisions based on contracts were inapplicable. It may be remarked that the reasoning upon which the situs of the tort is here located in the state in which the telegram was to be delivered is quite similar to that upon which the court in Western U. Teleg. Co. v. Lacer, 5 L.R.A.(N.S.) 751, reached the conclusion that the place of delivery is the sole place of performance of a contract.

A similar conclusion, on the same ground, was reached in Hughes v. Western U. Teleg. Co. 72 S. C. 516, 52 S. E. 107, in an action by an addressee for mental anguish in consequence of the failure to deliver promptly a message sent from a point in Florida to a point in South Carolina.

The theory of the Balderston Case as to the situs of the breach of duty upon which the action *ex delicto* is based, if logically adhered to, would seem to deny the right to recover damages for mental anguish in an action *ex delicto* based on the South Carolina statute if the telegram was sent from a point in South Carolina to a point in another state, even though the actual negligence or delay occurred in South Carolina. This result, however, would be opposed to the actual decisions in Arkansas, which may, therefore, perhaps, be regarded as opposed to this theory of the Balderston Case, although agreeing with it on the general proposition that, in an action *ex delicto*, recovery may be had for mental anguish if the breach of duty occurred within the state having a statute permitting such a recovery, although the contract may have been made and the telegram sent from another state in which recovery for mental anguish is not allowed.

In Walker v. Western U. Teleg. Co. 75 S. C. 512, 56 S. E. 38, the court seems to have proceeded upon the assumption that, if the mistake in a telegram sent from a point in South Carolina to a point in Louisiana occurred in the former state, the tort of the defendant was committed within that state, and would come within the South Carolina statute permitting a recovery for mental anguish; though some parts of the opinion might seem to indicate that the decision was referred to the law of South Carolina under the general rule stated therein and sustained by citation of authorities, to the effect that a contract made in one state for the transmission of a telegram from a point in that state to a point in another is governed by the law of the former. If the first is the true ground, the case, while in harmony with the Arkansas cases, would seem to be in conflict with the logical implication of the Balderston Case as to the situs of the tort.

But whether, as in the Balderston Case, the tort is deemed to have its situs in the

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& E. Ann. Cas. 1065; Western U. Teleg. Co. v. Lacer, 122 Ky. 839, 5 L.R.A.(N.S.) 751, 121 Am. St. Rep. 502, 93 S. W. 34.

That the plaintiff had a phone in his house and that there was a phone in the office of the defendant, in connection with the further fact that there had been a uniform custom between plaintiff and defendant to deliver messages to the plaintiff over the phone at his house, was competent to go to the jury for the purpose of determining whether or not the defendant had a reasonable time in which to deliver the telegram to the plaintiff.

Montgomery & E. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489.

Even though the telegraph company had the right to establish reasonable office hours, yet the receipt of a telegram outside of those hours, for the purpose of delivery, especially one of the nature that this was, is binding on the company, and the undertaking promptly to deliver the same, in disregard of the regulations as to the office hours, is binding upon the company.

Western U. Teleg. Co. v. Crumpton, 138 Ala. 643, 36 So. 517.

Mayfield, J., delivered the opinion of the court:

This was an action by appellee against appellant to recover damages for failure to deliver within a reasonable time a telegram, and that, by reason of such failure on the part of the telegraph company, the plaintiff did not receive the message in time to reach Gainesville, in the state of Georgia, so as to be present with his wife and in time to prepare the body of their child for removal and interment, and claims as actual damages 40 cents paid to the defendant company for sending the message, and for mental pain and anguish suffered by the plaintiff in consequence thereof. To this complaint the defendant filed pleas, one setting up the general issue, and special plea No. 2, which was in words and figures as follows: "(2) For further answer to said complaint, this defendant says: That the contract for transmission and delivery of the telegram, for the breach of which this action was brought, was not made in the state of Alabama, but was entered into between the plaintiff's agent and the defendant in the state of Georgia, and was to be partly performed in the state of Georgia; that said contract is to be construed and governed according to the laws

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state in which the telegram is to be delivered, irrespective of the place where the actual fault or negligence occurs, or whether, as apparently assumed in the Arkansas cases and in the Walker Case, the tort is deemed to have its situs in the state where the actual delay or negligence occurs, even though not the state in which the telegram is to be delivered, it is apparent that the statute of the state from which a telegram is sent, permitting a recovery for mental anguish, would not support an action *ex delicto* based on a violation of the statute, at least, unless the negligence or delay actually occurred in that state. Still, it does not necessarily follow that there could be no recovery in an action *ex contractu* in such a case (*i. e.*, a case where a telegram is sent from a point in a state which, by statute, permits a recovery for mental anguish, to a state in which such recovery is allowed neither by statute nor the common law), since such an action might be regarded as falling within the general rule referred to at the beginning of the note, that, in an action *ex contractu*, the law of the state in which the contract is made and from which the telegram is sent governs.

And this position is taken in the recent case of Western U. Teleg. Co. v. Griffin (Ark.) 122 S. W. 489, holding that recovery for mental anguish might be had by the addressee of a telegram sent from a point in Arkansas to a point in Mississippi, notwithstanding that the negligence in failing to deliver the telegram occurred in the latter state, by the law of which mental anguish is not recoverable. In the opinion on the rehearing, this result was reconciled with the decision in Western U. Teleg. Co. v. Ford, 77 Ark. 531, 92 S. W. 528 (cited in the earlier note), by withdrawing the statement in the opinion in that case, to the effect that no contract relation exists between the addressee of the message and the company, and referring the case to the general rule as laid down in Parmele's Wharton on Conflict of Laws, § 471f, to the effect that a contract made in one state or country for the transmission of a telegram from a point in that state or country to a point in another is governed by the law of the former, the decision in the Ford Case being referred to the exception stated in the same section, to the effect that the rule just stated does not operate to relieve a contract from the effect of a statute which is remedial rather than substantive, of the state in which the telegram is to be delivered, if the action is brought in that state.

It so happened that the Texas court of civil appeals in Western U. Teleg. Co. v. Parsley (Tex. Civ. App.) 121 S. W. 226, prior to the decision in the Griffin Case had occasion to determine what rule the Arkansas courts would apply to just such a situation; the action in that case having been brought in Texas by the addressee, and the telegram having been sent from a point in Arkansas to a point in Oklahoma, and the negligence or delay having occurred in the latter state. The Texas court, after a somewhat extended discussion of the question, came to the same conclusion as that

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of the state of Georgia; that under the laws of the state of Georgia, as construed by its highest court, plaintiff cannot recover the special damages for mental pain and anguish claimed in each count of the complaint." To which special plea the plaintiff demurred, and the court sustained the demurrer. The trial was had upon the general issue, and resulted in a verdict for the plaintiff for $1,100.40. The defendant subsequently made a motion to set aside the verdict, because it was contrary to the evidence, because the verdict was excessive, and because it was a quotient verdict. On hearing this motion, upon the affidavit made in connection therewith, the court overruled the motion, and the defendant then and there duly excepted.

The facts as shown by the record are substantially as follows: The wife of plaintiff and his oldest child, three and one half years old, and the one who died, who was about twenty-one or twenty-two months old, were at Gainesville, Ga., during the summer of 1906. That the plaintiff was there a while and left about a week before the death of the child, and instructed his wife that, if any change took place in the condition of the child, to wire or phone him at once, in order that he might come back. At about 6:30 o'clock Sunday morning, on July 15, 1906, the landlady, Mrs. Bell, with whom Mrs. Hill was stopping, telephoned to the defendant company's office at Gainesville, asking the agent to take over the telephone, for transmission, a telegram reading as follows:

Gainesville, Ga., 7-15-1906.
W. W. Hill,
643 South Lawrence street,
Montgomery.
Come on first train. Baby dying.
[Signed] Mrs. W. W. Hill.

That the operator got up, dressed, and went to the office of the telegraph company and sent the message at 6:43 A. M., Eastern time, to Atlanta, Georgia. That the amount paid for the message was 40 cents. That between 6 and 7 A. M., Central time, the same morning, another agent of the defendant company was on duty at the defendant's office at Montgomery for the purpose of testing wires and to send out linemen, etc. That at 6:15 A. M. Central he got a call from the chief clerk at Atlanta. That the chief clerk at Atlanta said to him, "Take this rush message." That he then took the message over the wire, wrote it out, and

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subsequently reached by the Arkansas court in the Griffin Case, upon reasoning substantially like that employed by the latter court. As a matter of fact, however, the Texas court was of the opinion, both on the original hearing and on the rehearing, that the plaintiff would have been entitled to recover for mental anguish, as permitted by the law of Texas (*lex fori*), even if it had been conceded that the law of Oklahoma should govern, it not being proved that the law of the latter state differed from the law of Texas on the point.

Law governing stipulation as to unrepeated messages.

In Western U. Teleg. Co. v. Pratt, 18 Okla. 274, 89 Pac. 237, an action for damages for a mistake in a telegram sent to plaintiff by his agent from a point in Indian territory to a point in Oklahoma, involving the validity of a stipulation requiring the repetition of a message as a condition of liability for damages, it was held that the law of Indian territory governed; though the law as laid down by the Federal courts as to the validity of such stipulations was held inapplicable, for the reason that the pleadings, tested by the law of Oklahoma, *lex fori*, did not show that the message was written on the blank of the company, as required by the Federal rule as a condition of the validity of such a stipulation.

The general rule that the contract is governed by the law of the state in which the contract is made and from which the telegram is sent was recognized in Williamson v. Postal Teleg. Cable Co. (N. C.) 65 S. E. 974, an action by the addressee of a telegram sent from a point in New York to a point in North Carolina, but the court refused, on the ground of public policy, to give effect to a stipulation in the contract as to unrepeated messages, even assuming that that stipulation was valid according to the law of New York. This, of course, is a mere application of the exception, inherent in all general rules for ascertaining the governing law, that a court of one state will not enforce a contract otherwise governed by the law of another state, if to do so would be contrary to the distinctive policy of the forum.

The implication in Fox v. Postal Teleg. Cable Co. 24 L.R.A.(N.S.)—, would seem to be that, in an action *ex contractu*, the rights of the parties to a telegram would depend upon the law of the state in which the contract was made and from which the telegram was sent, and not upon the law of the state in which the telegram was to be delivered; but that, in an action *ex delicto*, the rights of the parties would be governed by the law of the latter state if the negligence or delay occurred in that state. The decision, however, is upon the ground that it would be contrary to the public policy of the forum to enforce the stipulation of a contract as to unrepeated messages, even if valid by the law that would otherwise govern.

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hung it on the file where the telegrams always hung and where the delivery clerk got them. That there was no one in the office at the time but him, and no messenger boys. That the office hours of defendant in Montgomery on week days were 7 o'clock in the morning, and on Sundays 8 o'clock. That the business was conducted at Montgomery as follows: The operators took the message over the wires, and that check boys came around and checked up the messages and carried them to the messenger clerk, and that he fixed them up and sent them out by the messenger boys. That the office was not open for business on Sunday mornings until 8 o'clock. That the agent in the office who received this message had only been in Montgomery about ten days, and did not know plaintiff's residence. That it also appeared that there was a telephone in the office of the Western Union Telegraph office, and that Mr. Hill also had a telephone at his residence. Plaintiff, Mr. Hill, got a message over the long distance telephone from Selma about 8 o'clock, informing him of the dangerous condition of his child, and that he left his house at about 8:20 and drove to the depot. That a messenger boy was started with this message at about 8:20. The boy, not finding him at home, followed him to the depot and delivered the message at 8:50. That a through train left Montgomery at 6:55 A. M., which went through Atlanta and by Gainesville, reaching Gainesville at 2 o'clock. That a local train left Motngomery for Atlanta at 9:15. Mr. Hill went on this train to Atlanta, wiring his wife to come to Atlanta. He met his wife in Atlanta with the corpse of the child. The train he went on made no connection at Atlanta. He reached Atlanta about 2 or 3 o'clock in the afternoon. That plaintiff telephoned from Atlanta to Gainesville about making arrangements for bringing the child home. That there was no relative of his wife at Gainesville at the time. That his wife reached Atlanta about 6 o'clock in the afternoon. That he was in Atlanta by himself from 2 o'clock until 6 o'clock. The child died about 8 o'clock in the morning of the 15th of July.

Various errors are assigned: First, to the sustaining of the demurrers to defendant's special plea No. 2 and the exclusion of the decision of the supreme court of Georgia in the case of Chapman v. Western U. Teleg. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901, and to the exclusion of certain sections of the Georgia Code, and to other rulings as to the evidence, and to the giving and refusing of certain charges, and to the refusal of the court to set aside the verdict for the reason assigned in the motion.

Probably the most serious question involved by this appeal, and the assignment insisted upon most strenuously by counsel for appellant, is that, under the laws of Georgia, damages are not recoverable for mental anguish in cases for failure to deliver or delay in delivering telegrams, like the one in question, and that the contract, the basis of this action, being made in Georgia, the laws of Georgia govern as to the damages recoverable for the delay or failure to deliver the telegram in question. It is insisted by counsel for appellant that the *lex loci contractus*, and not the *lex fori*, governs the measure of damages in this case. The complaint contained two counts, and both are treated as counts *ex contractu*. It must be conceded that there is much conflict of authorities on the question as to what law governs the recovery in telegraph cases where a telegram is sent from one state to another; some holding that the law of the state in which the telegram originated governs, and others holding that the law of the state where it is delivered, or where the negligent act complained of or where the breach of the contract occurred, governs as to the measure of damages. It is conceded that the law of the forum will govern in matters pertaining to remedy; but it is insisted by appellant that by "remedy" here is meant such matters as pertain to the character and form of action, evidence, procedure, mode of redress, limitations, executions, etc., and that the damages to be allowed, if fixed or limited by law, pertain to the right, and not to the remedy. So far as we know, this question has not been before passed upon by this court with regard to telegraph cases, though there are a number of cases which may be analogous. As this court has said: "A contract is [usually] governed as to its nature, obligation, validity, and interpretation by the law of the place where it is made, unless . . . it is to be wholly performed in some other place, in which case the law of the place of performance, or the law which both parties had in view, must govern." [Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552.] 2 Mayfield's Digest, p. 668, subject, "Conflict of Laws."

It should be remembered that in this case, as in most cases for failure to deliver or delay in delivering telegraph messages, while a contract is spoken of and the actions are often brought as for a breach of a contract, in fact, there is no express contract or any express agreement. Whatever contract or agreement that exists is an implied one, and is usually, though not always, a breach of

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duty imposed by law, rather than a breach of an express contract; but it may be said that it is often, as in this case, a breach of an implied contract.

A "telegraph" is defined as an apparatus or machine used to transmit intelligence to a distant point by means of electricity. A "telegram" is a message or despatch transmitted by the telegraph. A telegraph is such a public use as to justify the exercise of the right of eminent domain, and to authorize the sovereign to regulate the business by a proper law. Telegraph companies are in many respects analogous to common carriers. Like common carriers, they are bound to serve the public without discrimination, and cannot evade liability for the consequences of their negligence by any contract. Unlike common carriers, they are not insurers. A telegraph company is therefore an important public agency and an instrument of commerce. Consequently the duties and obligations of a telegraph company do not arise entirely out of contract, being a quasi public institution. This duty and liability is not measured by the standard of private individuals. The contracts for sending and delivering messages such as the one in question give force and effect to these public duties which the law imposes. Some of these duties are to accept for transmission all proper messages tendered by persons who comply, or offer to comply, with the reasonable rules and regulations of the company; but the mere fact that the message offered did not comply with the rules of the company by being on its regular blanks, but is simply telephoned to the operator, does not affect its liability, where the negligence complained of is failure to deliver after transmission.

Upon the receipt of the message, it is the duty of the telegraph company to transmit it without delay; and if from any cause it is impossible to transmit the message, or if delay will be necessary, the company should inform the sender; certainly so if the message shows on its face the importance of hasty transmission and delivery. The message, when transmitted, must be delivered to the addressee or his authorized agent. Delivery should be made as soon after transmission as is reasonably practicable. The duty of early delivery is as necessary as the prompt transmission. What constitutes due diligence as to prompt delivery is usually a question for the jury, and usually depends upon the facts of each particular case. Telegraph companies have a right to provide reasonable regulations as to hours during which it will do business, and the reasonableness of the regulation will depend largely upon the character of business done, the locality of the office, and is often a mixed question of law and fact; but a telegraph company may waive its rules as to office hours, and it cannot receive or transmit a message out of its office hours, especially when that fact is not brought home to the patron, and then set up that regulation as a defense to an action for a breach of its contract, or for its negligence in failing to deliver. These rules, like any other rules of other companies, are designed for the benefit and protection of the company itself, and may be waived expressly or by implication. Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414.

The rule as to the measure of damages against telegraph companies for failure to deliver or to deliver promptly, or for negligence in the transmission and delivery, unfortunately is not well settled, and the decisions of the various courts of the United States are far from being uniform, and many decisions of the same court of many states are conflicting. Actions against telegraph companies, like the one in question, are not necessarily *ex contractu*. They may be *ex delicto* for the breach of a duty; the right of action somewhat depending upon the implied contract of sending as to make the general rule relating to damages for breach of a contract applicable. Injury, in such cases, is more often the result of a breach of duty imposed by law, or a breach of duty growing out of the contract, than a mere breach of the contract. The contract usually serves merely to show the relation of the parties and the existence of a duty breached, which duty is more often imposed by law than by contract. There is rarely any express contract between the parties. Whatever exists is usually implied. Of course, parties can make contracts with regard to sending and delivery; but we are speaking now of the usual contracts.

Likewise, the authorities are far from uniform as to whether or not damages for mental anguish are recoverable in actions for failure or delay in delivering or transmitting telegrams; some courts holding that they are recoverable in certain actions, and not in others; some courts holding that they are recoverable under certain conditions, and not under others; and some holding that they are not recoverable in any action or under any condition. These various rulings and conflicting decisions involve various perplexing questions, as to all of which very few agree. One is: Whether the sendee as well as the sender can recover; whether the action is in contract or in tort; whether the mere violation of a contract as to injured feelings and mental anguish, disconnected and disassociated from physical injury or injury to estate, is an element of damages;

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to what extent the message must show on its face the relationship of the parties; and whether damages for mental anguish are in their nature punitive or compensatory. However, the rule has been settled in this state, and probably cannot be better or more succinctly expressed, than was done by Chief Justice McClellan in the case of Blount v. Western U. Teleg. Co. 126 Ala. 107, 27 So. 779, as follows: "The complaint in this case claims damages only for mental suffering. Such damages are not recoverable in actions for the nondelivery or negligent delivery of telegrams, except in case where there is a right of recovery aside from such injuries. There can be no recovery of actual substantive damages for physical injuries or injuries in estate here, for no such damages are claimed. There can be no recovery here of nominal damages as for a breach of contract,—to which we have held that damages for mental suffering may be superadded,—because the complaint is not upon contract, but purely in tort. No recovery apart from damages for mental suffering, in other words, can be had on this complaint, and therefore no recovery for mental suffering can be had." Or by Chief Justice Tyson in Western U. Teleg. Co. v. Westmoreland, 151 Ala. 319, 44 So. 383, to this effect: "Such damages, notwithstanding their elusive character, are actual; but they are ordinarily not the natural result of a breach, and thus not within the contemplation of the parties. In cases where they are not clearly contemplated, it would be dangerous and unfair in the extreme to allow them. When the message is betwen persons of a close degree of relationship, and relates to exceptional events, such as sickness or death of such relations, in which a failure to deliver obviously comprehends mental distress and anguish, we have allowed such anguish as an item of damages; but to extend as a natural result the allowance on other occasions would, in our judgment, tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its results." Western U. Teleg. Co. v. Crocker, 135 Ala. 492, 59 L.R.A. 398, 33 So. 45; Western U. Teleg. Co. v. Ayers, 131 Ala. 391, 90 Am. St. Rep. 92, 31 So. 78; Western U. Teleg. Co. v. Waters, 139 Ala. 653, 36 So. 773; Western U. Teleg. Co. v. Crumpton, 138 Ala. 632, 36 So. 517; Western U. Teleg. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; Western U. Teleg. Co. v. Krichbaum, 132 Ala. 535, 31 So. 607; Western U. Teleg. Co. v. Cunningham, 99 Ala. 314, 14 So. 579; Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414; Western U. Teleg. Co. v. McNair, 120 Ala. 99, 23 So. 801. As was said by Chief Justice Tyson in Westmoreland's Case, above: "It is often a question of difficulty to determine, whether an action, from its mere nature or in its form, is in case or assumpsit. . . . Manifestly, the measure of damages in such cases cannot be altered in any substantial respect by the mere adoption of one form of action rather than another for the redress of the same grievance."

As to the main questions involved in this appeal, as to whether the laws of Georgia or of Alabama should control in determining whether or not damages for mental anguish were recoverable in this action, we are met again with the condition that there is more conflict in the decisions, if possible, than of the law of the two states, as to which of the two laws, if different, should control. The question has been treated fully in a note to the case of Gray v. Western U. Teleg. Co. as reported in 91 Am. St. Rep. 706, in which the annotator concedes the conflict, but probably is constrained to the view that the *lex loci contractus* controls in such cases. The question has also been reviewed by annotators in the Lawyers Reports Annotated. See note to case of Hughes v. Pennsylvania R. Co. 63 L.R.A. 532. This annotator also concedes the conflict and reviews many of the conflicting decisions. There are various other conflicting decisions than those reviewed by the annotators. The writer of the text in the American and English Encyclopædia of Law (2d ed. vol. 27, p. 1079) states the law applicable to this case as follows: "The fact that damages for mental anguish alone are not recoverable under the laws of the state from which the message was sent will not preclude a recovery of such damages in the state to which the message was directed, where the laws of the latter state permit such recovery. Likewise, a recovery for such damages may be had in the state whence the message was sent, although they may not be recoverable under the laws of the state where the message was to be delivered. But when the law of the place whence the message was sent and that of the place of delivery both refuse to recognize such damages, they cannot be recovered, although the action may have been brought in a jurisdiction which recognizes the right to recover them."

After a careful examination of all these authorities, we deem the sounder rule to be, in cases like the one at bar, though we do not decide that the same rule would apply in all cases, that the laws of Alabama should govern in this case, for the reason that the complaint, as well as the undisputed evidence, shows that whether the injury was the result of a breach of a contract, or whether it was the result of a breach of a

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duty growing out of a contract, or imposed by law, it occurred solely within the state of Alabama, and that the parties to the contract and the contract itself, if any existed, provided for or allowed the contract to be performed partly, at least, in Alabama. No breach of the contract occurred in the state of Georgia, either as alleged in the complaint or as shown by the evidence. No negligent act was alleged to have occurred in that state, or was shown by the evidence to have occurred there. The wrong complained of, and if shown to exist by the evidence, occurred in Alabama. The plaintiff resided in Alabama. He had a right to bring his action in the courts of Alabama, either for a breach of the contract or for a breach of duty imposed by law and the contract together. If the action had been in tort, rather than in contract, then we think it certain that the laws of Alabama, would control, and we can see no reason, though there is authority to the contrary, that the laws of Georgia should control. The general rule seems to be that, where the right of action is independent of a contract, the locus of the contract is immaterial and cannot affect the question of measure of damages recoverable. We also think that the great weight of authority supports the proposition that, where a tort is committed in one state and sued on in another, the *lex loci delicti* controls. So, if the action at bar could be construed as one of tort, disconnected from the contract, then, if the action were brought in Georgia, the laws of Alabama would control.

Chief Justice Stone, in Falls v. United States Sav. Loan, & Bldg. Co. 97 Ala. 433, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 31, quoting from Chancellor Kent, says that "if a contract be made under one government, and is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed." [2 Com. 459.] And in quoting from Mr. Story, he says: "Where the contract is either expressly or tacitly to be performed in any other place, then the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." [Confl. L. § 280.] He also quotes from the Am. & Eng. Enc. of Law, as follows: "As a general rule, the validity of a contract is to be determined by the law of the place where it is made, unless it appears on its face that it was to be performed or was made in reference to the laws of some other place, in which case it will be governed by the laws of the place of the performance." [Vol. 3, pp. 543, 544.] This language was quoted by the learned chief justice, which evidently met his sanction, though it was made in a dissenting opinion, in which he held that the contract in question was governed by the laws of Minnesota, rather than of Alabama; the majority of the court holding that it was governed by the laws of Alabama.

It is true, as said by the same learned chief justice in the same case, that, in entering into contracts, if nothing appear to the contrary, the law of the place silently becomes a part of the contract, and determines the measure of the rights it secures, but adds: "This right of comity, however, has limitations. No state will enforce contracts or redress grievances entered into or suffered in another state . . . if the enforcement involve a breach of legal or moral right as maintained in the law of the forum." It is likewise a fundamental principle that the laws of the state can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the state enacting them. Consequently, any provision found in the law of another state, authorizing the making of a contract, which is obnoxious to the laws of Alabama, as to such obnoxious provisions the contract will not be enforced in Alabama; but it will be enforced in Alabama only to the extent that it is lawful in Alabama; while there are respectable authorities holding that, where a contract is entered into in one state, to be performed partly in that state and partly in another, the laws of the state in which the contract was made will control as to the measure of damages; but, in a case like this, where the contract, of necessity, so far as the breach complained of was concerned, must be performed wholly within the state of Alabama, then this rule would not apply; that is to say, the breach complained of was delay in delivering a telegram. The parties intended that the telegram should be delivered in Alabama, and it was not contemplated that it could or would be delivered in Georgia. While a part of the transmitting would probably be performed in Georgia, that part for the breach of which this action is brought was to be performed wholly within the state of Alabama; and, as the breach occurred here, and a part of the injury, at least, was suffered here, we think the laws of Alabama, and not the laws of Georgia, should control as to the measure of damages. If the breach had occurred in Georgia, rather than in Alabama, then, for the same reason, the law of Georgia should control, rather than that of Alabama.

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There is another strong reason, if not a conclusive one, why the laws of Alabama should govern in this case. It will be observed that the laws of Georgia did not deny that the plaintiff in a case like this suffers damage for mental anguish; but the court merely declares that they are of such nature that they are not recoverable in courts and under the laws of Georgia. We do not think that the courts of Alabama are bound in this respect by the courts of Georgia; but, as to whether or not such damages, if suffered, are recoverable in an action like this when brought in the courts of Alabama, is properly decided by the court of Alabama untrammeled by the decisions of any other court. This is the rule that seems to be adopted by the Federal court with regard to the recovery of damages for mental anguish, no matter what may be the laws of the state in which the contract was made, or in which the breach occurred, or in which the action is brought. The Federal court holds to the rule that such damages are not recoverable in the Federal court, and that the question is one with respect to which such court will exercise an independent judgment, and will not be bound by the holding of the courts of the states in which the cases arise. Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126 Fed. 295; Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 3 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471.

It therefore follows that there was no error in the court sustaining demurrer to plea No. 2, nor in excluding the evidence offered by the defendant as to the laws of Georgia. The demurrer to the plea could have been properly sustained for the reason that it was intended as a plea in bar, and only went to the measure of damages, not denying the right of recovery as to nominal damages. Such questions should be raised by objections to the evidence, motions to strike, or instructions by the court.

We likewise see no error in the court allowing plaintiff to prove that he had a telephone in his house, and that there was one in the defendant company's office at Montgomery, and that he had frequently received messages from the defendant company over the telephone.

We find no error in the refusal to give any of the charges requested by the defendant. There was certainly evidence tending to support all the material averments of the complaint, and consequently the general affirmative charge for the defendant could not have been given as to any one of the counts. What we have said as to the right to recover damages for mental suffering disposes of the charge which sought to limit the recovery to other damages than for mental suffering.

Nor do we think there was any error in that part of the oral charge excepted to by the defendant, to the effect that, notwithstanding the defendant company may have adopted office hours, if it undertook to transmit and deliver a telegram, the jury had a right to look to that circumstance, the nature of the telegram, and everything else in the case, in saying whether or not the defendant was negligent in failing to deliver the telegram sooner than it did deliver it. As stated in the opinion above, a telegraph company has a right to adopt rules as to office hours and have reasonable rules for its own protection; but it also has a right to waive them, and does waive them as to office hours when it accepts a message for transmission and delivery without the office hours without informing the sender of such rules, or without explaining to him that it would not be transmitted or delivered until the time. Of course, if the telegraph agent so receiving had no knowledge of the office hours at other offices, and was not chargeable with notice or knowledge thereof, so receiving the message would not be a waiver. However, we hold that in this case there was sufficient evidence to authorize the submission to the jury of the question of waiver of the rules, and to prevent the giving of the general affirmative charge to the jury on this question.

There was likewise no error in the court's overruling defendant's motion for a new trial. The evidence affirmatively showed that it was not void because it was a quotient verdict. The fact that the jurors agreed among themselves to render a quotient verdict, and afterwards declined to do so, and in fact did not arrive at their verdict in that manner, does not make the verdict a quotient one, and is no reason for setting the verdict aside. Whether or not the verdict was excessive no one can tell. There is no standard or rule of computation by which the amount can be determined in this or similar cases. There may be cases where it would be so great that the court might say that it was arbitrary or intended as punishment when no such punitive damages could be allowed, and in such case it might be set aside; but this is not such a case.

Finding no error in the record, the case must be affirmed.

Dowdell, Ch. J., and **Simpson** and **Denson**, JJ., concur in the conclusion reached in this case without committing themselves to all that is said in the opinion.

Petition for rehearing denied June 30, 1909.

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ARKANSAS SUPREME COURT.

D. G. BEAUCHAMP, Appt.,
v.
ADOLPH BERTIG et al.

(90 Ark. 351, 119 S. W. 75.)

Judgment — faith and credit — removing disability.

1. The requirement of the Federal Constitution that the judgments of one state shall be given full faith and credit in another does not render a judgment of one state removing an infant's disability to convey land effective for that purpose in another state.

Same — conflicting policy.

2. The execution by infants in a state which has removed their disability, of a deed conveying title to land in another state, will not, under the rule of comity, render the deed an irrevocable conveyance in the latter state, where its policy is to regard such deeds as revocable upon the infant's attaining full age.

Conflict of laws — infant's deeds — revocability.

3. The binding effect under the *lex loci contractus* of covenants for title in an infant's deed to land situated in another state will not be given effect by the courts of the latter state in contravention to the public policy of that state, which permits infants to disaffirm such covenants upon attaining majority.

Same — covenant for title.

4. The obligation of covenants for title in a deed is governed by the law of the place where the land is situated, and not by the *lex loci contractus*.

Infants — deed — disaffirmance.

5. A deed by which persons, on reaching their majority, "grant, bargain, sell, and convey" to a stranger property which they had during infancy deeded to another, for the purpose of disaffirming their former deed, and with knowledge that the later grantee is to institute suit for possession of the property, is a sufficient disaffirmance of the former deed, where the statute permits a conveyance of land held adversely.

Same — fraud — right to raise question.

6. Purchasers of land from an infant cannot defeat a recovery of the property by one to whom the infant deeded it on reaching his majority, on the ground that the later deed was obtained by fraud.

Same — joint deed — disaffirmance — dower.

7. The disaffirmance by infants, upon reaching their majority, of a deed which they executed jointly with their mother, of property in which she had a dower interest, destroys the merger of such interest, and leaves in the grantee the equitable title to her dower right.

Same — duty of second grantee.

8. One who purchases from infants, upon their reaching their majority, land which another had purchased from them during their minority, must restore to the former purchaser the consideration paid by him, including claims against the property which had been satisfied by him as part of the consideration for the conveyance.

Same — agent's commissions.

9. One who purchases from infants, upon their reaching majority, land which they had deeded to another during infancy, is not bound to reimburse to the latter money he had paid his own agent for conducting the negotiations leading to his purchase.

Same — contract — performance — possession.

10. One who purchases from infants, upon their reaching their majority, land which they had conveyed to another during minority, under a contract to repay the latter what he had paid the infants, must comply with his contract before he can secure possession of the property.

Same — tenancy — removal of buildings.

11. A tenant having the right to remove buildings at the end of his lease, who purchases the realty from the infant owners during their minority, is restored to his rights under the lease upon their disaffirmance of their sale by conveying the property to another after reaching majority.

Same — lease — authority of court.

12. A lease, under authority of court, of minor's property, which is to extend beyond their minority, is valid, where the state has given the court plenary power over such estates.

Same — purchaser's rights — rents.

13. One who, after the majority of infants who during minority joined with their mother in a deed of real estate belonging to their father's estate, to one having a lease of the property which has not expired, purchased the property from them during the mother's lifetime, is entitled to rents from the date of his deed upon the property, less those represented by the widow's dower interest.

(April 26, 1909.)

APPEAL by plaintiff from a decree of the Chancery Court for Greene County dismissing a complaint filed to recover possession of certain land and quieting title in defendants in accordance with the relief demanded in their cross complaint. Reversed.

Statement by **Wood, J.:**

In 1885 H. H. Sitterding, Sr., died, owning and occupying a certain lot in the town of Paragould, Greene county, Arkansas. He left a widow and two minor sons, George and Herman. The widow intermarried with one

Note. — As to law governing covenant in deed or mortgage of real property, see case note to Clement v. Willett, 17 L.R.A. (N.S.) 1094.

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Thomas, and soon afterward moved to Oklahoma, taking her son George with her. Herman was sent to live with relatives in Indiana. On the 23d of January, 1892, the present guardian and curator of George and Herman, under orders of the probate court, leased the lot in controversy to appellees for a period of eleven years, for the sum of $300 per year. Under the terms of the lease, all the improvements made on the lot by appellees would remain personal property, and when the lease expired appellees were given the privilege of removing same. The appellees took possession under the lease and erected on the leased lot and on another lot adjoining, which they owned, a two-story brick business house, at an expense of between $9,000 and $10,000.

On the 28th day of August, 1899, under the orders of the probate court, the guardian and curator executed another lease on the lot mentioned to appellees for a period of ten years, upon substantially the same terms as the former lease. Under the last lease, appellees were given six months from the expiration of the lease to sell or remove the improvements made thereon, and during such time they were to pay rent at the rate of $25 per month.

On the 3d day of May, 1904, the district court of the territory of Oklahoma rendered a judgment removing the disabilities of nonage of George and Herman Sitterding, specifically authorizing them to sell the lot mentioned above, which is described in the judgment. On the 5th day of May, 1904, a deed was executed by Emma Thomas (formerly Sitterding), George Sitterding, and Herman Sitterding, in which, for the consideration of $3,000, they did "grant, bargain, sell, and convey" unto Bertig Bros. (appellees) the lot, describing it, and covenanted with them to forever warrant and defend the title against all lawful claims. The deed was duly recorded in Greene county on June 6, 1904.

George Sitterding came of age July 30, 1905. Herman reached his majority March 15, 1907. On the 6th day of April, 1907, George and Herman Sitterding, for the consideration of $3,000, duly executed to appellant, D. G. Beauchamp, a deed in which they did "grant, bargain, sell, and convey" unto Beauchamp, and unto his heirs and assigns forever, "all their right, title, and interest in and to" the lot mentioned above. The deed contained no specific covenants to warrant and defend the title.

On the 8th of June, 1907, appellant brought suit in the circuit court of Greene county against appellees for the lot in controversy, claiming the title and right to possession of same under his deed from George and Herman Sitterding, which he made an exhibit. The complaint, after describing the lot and deraigning the title thereto, alleged that the appellees were in possession of said property under and by virtue of the deed of conveyance executed by George Sitterding and H. H. Sitterding, Jr., on May 5, 1904, while the parties were minors; and it charged that they avoided and repudiated the same afterwards by executing a deed to appellant. It was alleged that appellant had tendered to appellees the sum of $1,720, the amount paid by them to the Sitterdings, which the appellees refused to accept; that appellees were liable to him for rentals on the lot in controversy for a period of three years and one month at the rate of $100 per month. Appellant prayed judgment for possession, and for damages in the sum of $2,500, and for all proper relief.

The answer and cross complaint of appellees set up title to the lot sued for, under the deed from Emma Thomas and George and Herman Sitterding of May 5, 1904, denied that either of said heirs was under any disability when they executed the deed, and denied that appellees only paid $1,720 for the lot, but alleged that they paid $4,100,—that is, $3,000 to the grantors themselves, and discharged their obligations for $1,100 more. The proceedings of the district court of Oklahoma were set forth *in extenso*, and the duly authenticated copy of that judgment was properly pleaded; and it was alleged that under that judgment George and Herman Sitterding had the power to make the deed under which appellees claimed the same as if they had been of full age, and that under the Constitution and the Revised Statutes of the United States full faith and credit must be given to that judgment here. The terms of the lease were set forth, and the possession of appellees thereunder and the improvements made by them, and it was alleged that the appellant had notice of appellees' rights under the lease. The lease was pleaded in bar of appellant's right to recover possession of the premises. The cross complaint contained the further allegation "that on April 6, 1907, the plaintiff, well knowing the contract aforesaid and of the payment by defendants of the purchase money for said premises, for a consideration of $250, acquired from said George W. Sitterding and H. H. Sitterding a deed of conveyance to said premises, which has been recorded in the office of said recorder of Greene county;" and they charged that whatever title he may have so acquired he held in trust for the defendants.

It was further averred that no dower had ever been assigned to said widow, Emma Thomas, and that by said conveyance she had assigned to them all of her dower rights in the said premises, and that they were the

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owners thereof. And they further averred that the premises consisted of a lot 50x100 feet, entirely covered by the two-story brick business house erected by defendants under said lease, and that it was indivisible, so as to carve out said dower interest without prejudice.

There was a further allegation that the plaintiff procured George W. Sitterding to join in the deed to plaintiff for the premises in controversy by representing to him that the plaintiff represented defendants and wanted said deed from him (the said Sitterding) in order to affirm and make valid the deed which he, Sitterding, had previously made to defendants, and that said Sitterding agreed, for the sum of $100 paid by plaintiff to him, to make a new deed affirming and ratifying his previous conveyance, and that he executed said deed to the plaintiff, with the intention and for the purpose of thereby confirming and ratifying the title previously conveyed to defendants.

They prayed that the deed from George Sitterding to plaintiff be taken as a confirmation and ratification of the previous conveyance made to defendants; also, that whatever title was acquired by plaintiff be decreed to belong to them and be devested out of him and vested in them, or, failing in this, that the said dower interest be adjudged to them, and that a lien be imposed upon said premises for the value of such improvements, or that the right to remove the improvements be otherwise protected; and for other relief.

The answer of appellant to the cross complaint of appellees contained allegations of fact to show that the district court of Oklahoma had no jurisdiction to render the judgment removing the disabilities of George and Herman Sitterding, and such jurisdiction was denied. Appellant denied that more than $1,720 was paid to the Sitterdings by appellees, denied that he held the title in trust for appellees, denied that the lease to appellees was of any value, or that appellees had the right to remove the building from the lot in controversy. He denied that appellant had procured the deed from George Sitterding by representing himself to be representing appellees for the purpose of procuring a deed affirming or making valid the deed previously made to appellees, denied that the deed was made by George Sitterding to appellant for the purpose of ratifying the deed made by George Sitterding to appellees, but alleged that George made the deed to appellant for the consideration of $125 paid him by appellant, and that he knew when he executed the deed that it was not to confirm any previous deed. The appellant further denied "that he procured an execution of said deed for a consideration of $250, but says that the actual consideration for said execution was the money that the said George W. Sitterding and Herman H. Sitterding had received from the defendants herein, together with the further sum of all the indebtedness that was probated against the estate of Herman H. Sitterding, Sr., and the further sum of $500."

The cause, on motion of appellees, was transferred to the chancery court and heard there upon the pleadings, exhibits, and depositions. The court dismissed the appellant's complaint and quieted the title in appellees. Appellant prosecutes this appeal. Further facts will be stated in the opinion.

Messrs. **Hawthorne & Hawthorne** for appellant.

Messrs. **J. D. Block, Huddleston & Taylor, Morris M. Cohn, and F. H. Sullivan** for appellees.

Wood, J., delivered the opinion of the court:

1. The Constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." And § 905 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 677, provides a mode for the authentication of such records, and declares that the "records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506, was a suit in Rhode Island on a judgment recovered in Kansas. Judge Brewer, in passing upon the duly authenticated record of the Kansas court, after setting out the provisions of the Constitution and the acts of Congress, said (quoting earlier decisions): "It is held that the same effect is to be given to the record in the courts of the state where produced as in the courts of the state from which it is taken." Our own court, in many decisions in suits in this state based on foreign judgments, has announced the same rule; and, indeed, no other rule in such cases could be announced. Hensley v. Force, 12 Ark. 756; Buford v. Kirkpatrick, 13 Ark. 33; Peel v. January, 35 Ark. 331, 37 Am. Rep. 27; Lockhart v. Locke, 42 Ark. 17; Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257; Williams v. Renwick, 52 Ark. 160, 20 Am. St. Rep. 158, 12 S. W. 331; Hallum v. Dickinson, 54 Ark. 311, 15 S. W. 775.

Appellees rely upon these cases as authority for their contention that the duly authenticated record of the judgment of the

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district court of Oklahoma should have the same effect as if it had been a judgment rendered here removing the disabilities of nonage of the Sitterdings. But this is not a suit based on a judgment rendered in Oklahoma. Moreover, these decisions are not in conflict with, but, on the contrary, only declare and uphold, the view that the provisions of the Constitution and Revised Statutes above were only intended to and did establish a rule of evidence. The Supreme Court of the United States in Cole v. Cunningham, 133 U. S. 107, at page 112, 33 L. ed. 538, 541, 10 Sup. Ct. Rep. 269, 270, says: "The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other states, and they enjoy not the right of priority or privilege or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments."

In Wisconsin v. Pelican Ins. Co. 127 U. S. 265, at pages 291 and 292, 32 L. ed. 239, 243, 244, 8 Sup. Ct. Rep. 1370, 1375, it is said: "Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment rendered after due notice in one state conclusive evidence in the courts of another state or of the United States of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

The supreme court of Georgia says: "This clause ['full faith and credit'] is not to be received in the fullest import of the terms. It is referable to such records, etc., as pleadings and evidence. Any other construction, which would give the same effect to a foreign judgment as to our own, would indeed be to give the laws of one state complete operation in another—would be to make a judgment in one state bind property in another." Joice v. Scales, 18 Ga. 725; 23 Cyc. Law & Proc. pp. 1545, 1546, 1556, 1557, 23 L.R.A. (N.S.) and cases cited in notes; M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; Brengle v. McClellan, 7 Gill & J. 434–438; Shelton v. Johnson, 4 Sneed, 672–682; 70 Am. Dec. 265.

Conceding, then, the validity of this foreign judgment, we have given it the full faith and credit that it must receive when we consider it conclusive evidence that the district court of Oklahoma has adjudged a majority status for the Sitterdings before they were twenty-one years of age. Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49; Olney v. Angell, 5 R. I. 198, 73 Am. Dec. 62. But that is not the equivalent of a judgment here fixing such status for the minors. Far from it. Under our statute an infant does not attain his majority until he is twenty-one years old. Kirby's Dig. § 3756.

2. The proof is that the deed of the Sitterdings to appellees, conveying the lot in controversy, was executed in Oklahoma, and appellees contend that the effect of the judgment was to make the deed an irrevocable conveyance. The judgment of a court under a statute authorizing the removal of disabilities of nonage could not be of any higher authority or possess greater sanctity than a direct enactment declaring majority at an age of twenty-one years. Proctor v. Hebert, 36 La. Ann. 250. That enlightened sentiment of international comity, based upon the principles of right and justice as well as good policy, generally causes the courts of one state to enforce, as far as practicable, the laws of another as to contracts and other transactions therein between private individuals. Minor, Confl. L. §§ 3 and 4. But this rule of private international law or comity cannot be invoked "where the enforcement of the foreign law would contravene some established and important policy of the state of the forum," nor where the question relates to the transfer of the title to real property. Minor, Confl. L. § 5; Smead v. Chandler, 71 Ark. 505, 65 L.R.A. 353, 76 S. W. 1066. Says Mr. Minor: "Since immovable property is fixed forever in the state where it lies, and since no other state can have any jurisdiction over it, it follows necessarily that no right, title, or interest can be finally acquired therein, unless assented to by the courts of that state, in accordance with its laws." Minor, Confl. L. § 11; Oakey v. Bennett, 11 How. 33, 13 L. ed. 593; 1 Wharton, Confl. L. § 276b, p. 617. This general principle has been often recognized by this court. McDaniel v. Grace, 15 Ark. 465; Clopton v. Booker, 27 Ark. 482; Williams v. Nichol, 47 Ark. 254, 1 S. W. 243.

It has long been the rule in this state that an infant's deed conveys title to his real estate subject to his right to disaffirm when he becomes of age. Bagley v. Fletcher,

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44 Ark. 153; Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409. See also Stull v. Harris, 51 Ark. 294, 2 L.R.A. 741, 11 S. W. 104; Watson v. Billings, 38 Ark. 278, 42 Am. Rep. 1; Fox v. Drewry, 62 Ark. 316, 35 S. W. 533; Tobin v. Spann, 85 Ark. 556, 16 L.R.A. (N.S.) 672, 109 S. W. 534.

It is deemed a wise policy of our law for the protection of the landed estate of infants to give them the untrammeled right to avoid their deeds on attaining their majority. The right is often their only shield against fraud, and their only remedy against improvident contracts. It has been held of such transcendent importance that an infant will not be estopped to assert it even by his own fraudulent representations as to his age after he appears to be full grown. Tobin v. Spann, supra. If the consideration for the deed has passed out of his hands, he may rescind without returning it. 22 Cyc. Law & Proc. p. 537; St. Louis, I. M. & S. R. Co. v. Higgins, 44 Ark. 293. See also Stull v. Harris, supra.

No rule of comity would justify ignoring this settled policy upon which property rights have been grounded, to meet the demands of any case, be it ever so meritorious and exceptional in its facts. 2 Wharton, Confl. L. § 428a. So, if we consider the deed and its covenants as one instrument and as an executed contract transferring the title to land, then, as we have seen, the *lex rei sitæ* prevails. Minor, Confl. L. § 11, note 5, §§ 12 and 174; 1 Wharton, Confl. L. §§ 276a, 276b; Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41; Thomson v. Kyle, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12.

But appellees argue that the covenants for title are separate contracts, creating personal obligations, and therefore governed by the *lex loci contractus*. In Bagley v. Fletcher, supra, it is said that "the covenants in a deed constitute no part of the conveyance, but are separate contracts." In the same case it was said that the infant "was not bound by the covenants contained in her deed," and that these covenants were void. Hence, by the authority of this case, even if the covenants are considered as independent contracts, they are void, or, rather, voidable, just as is the deed, and fall with it when it is disaffirmed. If an infant has the right to disaffirm his deed on reaching majority, as we have so often held, it would be incompatible with such holding to say that he could enter into covenants in the same deed or otherwise that would defeat such right. See Connor v. McMurray, 2 Allen, 202, at page 204. Therefore, even if these covenants create obligations that would, generally speaking, be governed by the *lex loci contractus*, still that law would have to give way to the local policy as declared by this court.

The covenants under consideration, however, are not personal in the sense that the obligations incurred under them are governed by the law concerning movables. There are many contracts relating to real estate that are so governed; for example, covenants of seisin, of right to convey, and against encumbrances, and executory contracts for deeds or other instruments containing covenants that do not run with the land. All these contracts, in the absence of statutory law or an expressed intention to the contrary, are usually governed by the law of the place where such contracts are made. Such is not the case, however, with contracts containing covenants that run with the land, as, for instance, covenants of warranty and for quiet enjoyment; or covenants that can only be performed where the land lies, as, for instance, to defend title, to pay taxes, to repair, etc. These are governed by the law of the place where the land is situated. Minor, Confl. L. § 185.

This court early recognized the distinction between personal covenants (using the word "personal" with reference to situs) and covenants that run with the land and therefore savor of the realty. In Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338, we held that covenants of warranty belong to the latter class. See also Ross v. Turner, 7 Ark. 132, 44 Am. Dec. 531. We believe the authorities with practical unanimity hold to this rule, observing the distinction announced by this court between personal covenants and those that run with the land. Rawle, Covenants, §§ 202 and 213; 1 Wharton, Confl. L. § 276d, pp. 630, 631.

A careful analysis and differentiation of the cases cited by the learned counsel for appellees will discover, we think, that when this distinction is kept in mind they are not in conflict with the doctrine we have expressed. As Mr. Wharton says: "The distinction, as affecting the governing law, between questions that relate to the title to the property and those that relate merely to the personal rights and obligations of the parties, has been expressly recognized in a number of cases." 1 Wharton, Confl. L. § 276d, p. 626. He cites, as supporting this view, the leading case of Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737.

We cannot review all the cases, but the above case of Polson v. Stewart is especially relied on, and may be taken as an example of them all. It was a suit for specific performance, to enforce a covenant made by a husband with his wife in North Carolina, by which he contracted to surrender all of his marital rights in certain lands of hers in

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Massachusetts. The contract was lawful in North Carolina, where the parties were domiciled, but would have been void according to the laws of Massachusetts. The court said: "It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the *res*. Ross v. Ross, 129 Mass. 243, 246, 37 Am. Rep. 321; Hallgarten v. Oldham, 135 Mass. 1, 7, 8, 46 Am. Rep. 433. But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract." It will be noticed that the basis of the opinion was that the contract to release the marital rights was a personal covenant, and should be so treated in a suit for specific performance. The court cited with approval Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, wherein it is said: "A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding, from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the state in which it is made. . . . and the validity of any transfer of real estate by act of the owner, whether *inter vivos*, or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the state in which the land is situated. . . . But the status or condition of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicil which creates the status."

All of which shows that the supreme court of Massachusetts in Polson v. Stewart, above, speaks of the capacity of the parties to enter into a personal covenant for the release of the husband's marital rights. Mr. Minor, speaking of this case, says: "The question in this case was not of the formal validity of the covenant, but of the capacity of the parties." [§ 174.]

The case of Polson v. Stewart is invoked by appellees as authority for the doctrine that the Sitterdings might enter into valid personal covenants in Oklahoma that would prevent their annulling conveyances that were voidable in Arkansas, where the land is situated; but as we view it, the holding is expressly to the contrary, for it says: "The laws of other states cannot render valid conveyances of property within our borders which our laws say are void." We can see no analogy whatever between contracts containing covenants for the relinquishment of marital and dower rights, or Scotch terce, and covenants of warranty for title in fee. The one creates purely personal obligations, which are governed by the proper law for personal covenants; the other creates obligations that follow the *res*, partake of its nature, and are therefore governed by the proper law for covenants real. 1 Wharton, Confl. L. 631; Robinson v. Queen, 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38; Woodward v. Woodward, 87 Tenn. 644, 11 S. W. 892; Walling v. Christian & C. Grocery Co. 41 Fla. 479, 47 L.R.A. 608, 27 So. 46.

A covenant of warranty, says Mr. Rawle, runs with the land "for the protection of the owner in whose time the breach occurs, and, until then, passing with the estate by descent or by purchase, by voluntary or by involuntary alienation, and may therefore of course be enforced not only by the covenantee and his representatives, but by heirs, devisees, and alienees who claim under the seisin vested in him." Rawle, Covenants, § 213. Not so with personal covenants. As eviction is necessary to a breach of warranty, it cannot be ascertained that there has been an eviction under a paramount title except by the law of the situs of the land. Therefore, conceding that the Sitterdings had the capacity to enter into covenant of warranty in Oklahoma, the effect of the obligations imposed by that covenant must be determined by the laws of Arkansas. Here is the place of performance, and hence the *lex solutionis* is the proper law to govern. Tillotson v. Prichard, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302; Riley v. Burroughs, 41 Neb. 304, 59 N. W. 929; Kling v. Sejour, 4 La. Ann. 128; 1 Wharton, Confl. L. § 276d, pp. 632, 633; Minor, Confl. L. § 12, p. 37, and § 185, and cases cited in note 1. It is unnecessary to determine whether the district court of Oklahoma has jurisdiction to render judgment removing the disabilities of the Sitterdings, for it follows from what we have said that they had the right to disaffirm, even if such judgment be valid.

3. The next question is, Have they done so? They were *sui juris* when they executed their deed to appellant. It is unnecessary to detail the evidence showing the negotiation resulting in the execution of the deed. The terms of conveyance, "grant, bargain, sell, and convey," used therein, made it at least a quitclaim deed under our statute.

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Kirby's Dig. § 731. The grantors received a consideration in cash of $250. The evidence is conclusive that Herman Sitterding executed the deed intending it as a distinct disaffirmance of his prior deed to appellees. The evidence is in conflict as to whether George Sitterding executed the deed for that purpose or for the purpose of ratifying the former deed; but our conclusion is that a decided preponderance of the evidence shows that George Sitterding also executed the deed to appellant for the purpose of disaffirming his former deed. The evidence warrants the conclusion that appellant advised the Sitterdings that he expected to enter suit against appellees if they executed their deed to him, and, knowing this to be his purpose, they made the deed for a cash consideration to them and an agreement on the part of appellant to repay to appellees the money they had paid for the lot.

The appellees alleged and contend that appellant made certain misrepresentations to the Sitterdings, and concealed from them the fact that he intended to repay the appellees by charging them rent for the land in controversy, and that such conduct rendered the deed of the Sitterdings to him invalid, and constituted appellant a trustee *ex maleficio* for them in the purchase of the lot. The Sitterdings are not here complaining of any fraud on them in obtaining their deed; and, if they were, the evidence is not sufficient to justify this court in setting it aside at their instance for fraud. Appellant knew that the Sitterdings had the legal right to disaffirm their deed to appellees, and he had a perfect right to deal with them and make the best terms with them he could as to the purchase. It is not a question as to whether his conduct in making the purchase, or theirs in making the sale, is reprehensible under any code of morals or professional ethics; the law giving them the right to deal with each other, the appellees cannot call them to account. Appellant owed the appellees no duty in the premises. Devlin, Deeds, § 99; Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224. Appellees must also be held to a knowledge of the law giving infants the right, on attaining their majority, to disaffirm their deeds.

Since the deed to appellant was not, under the evidence, made to ratify the deed to appellees, it could not have been made for any other purpose than a disaffirmance thereof. The deed to appellant, although only a quitclaim, operated as a disaffirmance of the deed to appellees, although their deed was a warranty deed. 22 Cyc. Law & Proc. and authorities cited. "There cannot be a more decisive act of disaffirmance than the conveyance of the same land to another person who is not in privity with the first grantee. Bagley v. Fletcher, 44 Ark. 153.

But appellees contend that this doctrine is not applicable here for the reason that the land in controversy in Bagley v. Fletcher, supra, was wild and unimproved, while in the instant case it is in the possession of the appellees. The doctrine that "an infant, to avoid his deed, must enter on the land and oust the occupant, or, if already in possession, must perform such act explicitly evidencing his intention to defeat the conveyance," can have no place under our statute. Kirby's Dig. § 736, reads: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof." Under this statute, "where one who has conveyed his property while an infant executes, after his arrival at his majority, another deed conveying the same property to another person, the first deed is thereby disaffirmed." 22 Cyc. Law & Proc. p. 556, note 71, and p. 557, note 78; 5 Am. & Eng. Enc. Law, 2d ed. p. 837, note 1; Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539.

Since the last deed is a disaffirmance of the first and conveys the title to the lot in controversy to the appellant, what are his rights under it?

4. The effect of the deed to appellant was to make void the former deed of his grantors to appellees, and appellant succeeded to all the rights of the grantors in the lot in controversy. It is conceded that the widow, now Mrs. Thomas, owned an unassigned dower in the lot. This passed to appellees under the deed which she executed May 5, 1904, jointly with the Sitterdings; and their disaffirmance could have no effect on her deed. The deed was hers as well as theirs, and conveyed all her interest in the lot mentioned. It is true that where a greater and less estate meet in the same person without any intermediate estate,—and, we may add, without any contravening equities,—the less estate, in the language of the old law, is drowned or merged in the greater, and ceases to exist. 2 Rapalje & L. Law Dict. 815; Youmans v. Wagener, 30 S. C. 302, 3 L.R.A. 447, 9 S. E. 106; Mangum v. Piester, 16 S. C. 316. But the doctrine of merger can have no place here. The extinguishment of the greater estate by the deed of disaffirmance necessarily destroyed any merger, if there was one, and left the equitable title to the unassigned dower in appellees. Weaver v. Rush, 62 Ark. 51, 34 S. W. 256; Flowers v. Flowers, 84 Ark. 557, 120 Am. St. Rep. 84, 106 S. W. 949. Moreover, "the doctrine of merger never applies where there are any equities which would be thereby defeated."

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Simpson v. Robinson, 37 Ark. 132; Bemis v. First Nat. Bank, 63 Ark. 625; 40 S. W. 127. See also Neff v. Elder, 84 Ark. 277, 120 Am. St. Rep. 67, 105 S. W. 260.

If there was a merger of the dower, it was when the dower and fee united in appellees by their purchase from Mrs. Thomas and the Sitterdings; but the two estates never united in the Sitterdings. They never had a dower interest, and their deed to appellant could only transfer to him such estate as they had. They never acquired any estate through appellees. The appellant, therefore, never purchased the dower, but appellees did purchase and pay for it. It would be inequitable to take it from them and give it to appellant. The appellant, then, is the owner in fee of the lot in controversy, subject to appellees' unassigned dower right.

5. The only remaining question is, How are the rights of the respective parties to be enforced? The appellees in their cross complaint alleged that they had paid $4,100 for the lot,—"that is, $3,000 to the parties, and by paying off obligations for the grantors in the sum of $1,100." Appellant in his answer denied that over $1,720 was paid the Sitterdings, but he does not deny that appellees paid obligations for the Sitterdings, or the amount thereof. On the contrary, he alleges that the consideration he was to pay for his deed was "the money George W. and Herman H. Sitterding had received from the defendants, the amount of the claims which had been probated," etc. The appellees show that the amount of the claims against the estate of the Sitterdings paid by them was $700. While appellant in his testimony says that he was to pay "back the money that Bertig had paid them," the Sitterdings, he does not say that he was not to pay also the obligations that Bertig had paid for them. He was silent as to this. He does not show that the allegation in his answer, to the effect that he was to pay these obligations, was untrue. As he made the allegation, he should be bound by it.

Furthermore, aside from the contract, equity will compel the appellant, before he can recover possession, to repay the appellees for the debts which they discharged against the Sitterding estate. For this the estate would be liable after the minors reached majority, their homestead rights having expired. Appellees, who held this debt against the estate made it a part of the consideration of their purchase from the Sitterdings, and they, the Sitterdings, thus received the benefit of it. Under the doctrine of Stull v. Harris, 51 Ark. 294, 2 L.R.A. 741, 11 S. W. 104, they or appellant who succeeds to their rights, must do equity and repay this amount before a recovery of the property can be had. 22 Cyc. Law & Proc. p. 557; Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314.

The evidence shows that $400 was paid by the appellees, not to the Sitterdings, but to their own agent for making the negotiations. This amount, therefore, cannot be considered as a part of the consideration that appellant was to pay. According to appellant's own pleadings and evidence, the money he was to pay appellees, in addition to what he was to pay the Sitterdings in person, was the consideration for the deed by which they disaffirmed. This contract between appellant and the Sitterdings was for the benefit of appellees, and they are entitled to have the money that appellant agreed to pay them refunded before he can recover under his deed. The improvements made by appellees were under their lease contract, and are referable to that, and not to their dower estate, which was acquired after these improvements were made. Under the terms of the lease, which the deed of disaffirmance *ipso facto* reinstated, the improvements were chattels and belonged to the appellees.

Our statute empowers the probate court, upon being satisfied that it would be for the best interest of the estate of a minor, to make an order authorizing the guardian to rent the lands of such minor publicly or privately, as in his judgment shall be best for the interest of his ward, subject to the approval of the probate court or the judge thereof in vacation. Kirby's Dig. §§ 3789, 3790. It also gives the probate court power to sell or lease for purposes of reinvestment or putting proceeds on interest. Kirby's Dig. § 3801.

At the common law the guardian in socage could make a lease in his own name of the lands belonging to his infant ward, to continue only till the infant was fourteen years of age, unless the latter chose to continue it longer. But "the common law," says Drake, Justice, "in its ever-watchful care of the interest of minors, has suffered their guardians to make advantageous leases for them continuing at the option of the minor even beyond the age of twenty-one." Snook ex dem. Coursen v. Sutton, 10 N. J. L. 133, and authorities cited.

Under the common law or statutes simply declaratory thereof, leases made by the guardian to extend beyond the term of the guardianship are voidable. Rodgers, Dom. Rel. 861, note 5; 15 Am. & Eng. Enc. Law, 2d ed. pp. 68 and 69, note 1; Emerson v. Spicer, 46 N. Y. 594; Ross v. Gill, 1 Wash. (Va.) 87; Ross v. Gill, 4 Call (Va.) 250; Talbot v. Provine, 7 Baxt. 502, at page 510; 1 Bacon, Abr. Leases; 2 Kent, Com. 228; 1 Washb. Real Prop. 307; Schouler, Dom. Rel. § 350, note 1; Putnam v. Ritchie, 6 Paige, 390; Field v. Schieffelin, 7 Johns. Ch.

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150, 11 Am. Dec. 441; People ex rel. Hannigan v. Ingersoll, 20 Hun, 316.

In England from the time of Lord Hardwicke, the high court of chancery had no power to lease or sell an infant's real estate without the aid of act of Parliament. The course was to give reference to a master to inquire whether it would be for the benefit of the minors that application be made for an act of Parliament. Russel v. Russel, 1 Molloy, 525. But the supreme lawmaking power in our state has, by the above statutes, invested the probate court, with power to sell and lease the lands of infants. The matter is left in the judgment of the probate court, and there are no limitations prescribed for the term of lease, and we are of the opinion, from the above and cognate provisions of chapter 76, Kirby's Dig., that none were intended. The best interest of the estate of the minor is the prime and only consideration, and that seems to be the only limit to his discretion within the statutory provisions. Complying with these, the intention of the lawmakers was to give the probate courts plenary power in the premises. Hence the lease made by order of the court was valid, although it was to continue beyond the minority of the infants.

The improvements are not a part of the freehold, and therefore appellees and appellant, as to these, are not tenants in common. The lease had not expired at the time of the trial, and appellees were then entitled to possession under it, and will be until six months after its expiration, to have the improvements removed from the premises.

Under the case of Tobin v. Spann, 85 Ark. 556, 16 L.R.A.(N.S.) 672, 109 S. W. 534, appellant was entitled to rents only from the date of the deed of disaffirmance, which was April 6, 1907. From that date he is entitled to two thirds the amount of the rent specified in the lease, with interest at the rate of 6 per cent per annum after maturity. The appellees are entitled, also, from that date, to have the money ($2,700) which the appellant had agreed to pay them under the terms of his contract with the Sitterdings refunded, with interest on the amount at the rate of 6 per cent per annum from that date until it is paid.

It would be premature to make any decree touching the assignment of the dower interest of appellees, until the expiration of the time during which they may hold the property under their lease. The condition of the property at that time will furnish a proper criterion for ascertaining the proper value of the unassigned dower interest and the method to be pursued in its allotment. The suit of appellant for possession was in fact premature. But inasmuch as the court retained the case, and the court and the parties have treated it as a suit to settle and quiet the rights and title in and to the lot in controversy between the respective parties, we have defined and adjudged their rights as indicated above.

The decree quieting the title in appellees will therefore be reversed, and the cause remanded, with directions to the Chancery Court to enter a decree adjudging the rights and title of the parties in accordance with this opinion, and for such other and further proceedings as may be necessary, and not inconsistent herewith.

MARYLAND COURT OF APPEALS.

REBECCA GREEN, Appt.,
v.
T. A. SHOEMAKER et al.

(— Md. —, 73 Atl. 688.)

Landlord — care taker — tenant.

1. One who is entitled to occupy certain unfurnished rooms in a house in consideration of services to be rendered the owner in caring for children and keeping the remainder of the house in repair, which services are in lieu of rent, is a tenant, and not a mere roomer.

Nuisance — blasting.

2. Blasting of rocks in the vicinity of another's dwelling is a nuisance rendering the one responsible therefor liable for all injuries which result therefrom.

Action — parties — married woman.

3. A married woman whose property is destroyed and whose health is injured by blasting on adjoining property is the proper one to bring the action to recover compensation therefor.

Damages — fright — blasting.

4. Damages may be recovered for actual physical injuries resulting from fright and nervous shock caused by wrongful blasting, although there is no direct physical impact against the body of the person injured.

(June 28, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Baltimore County in defendants' favor in an action brought to recover damages for personal injuries and for injuries to plaintiff's property alleged to have been caused by wrongful blasting. Reversed.

The facts are stated in the opinion.

Note. — As to right to recover for physical injury resulting from fright caused by wrongful act, see notes to Huston v. Freemansburg, 3 L.R.A.(N.S.) 49, and Chittick v. Philadelphia Rapid Transit Co. 22 L.R.A. (N.S.) 1073.

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Messrs. **Edward M. Hammond** and **Z. Howard Isaac**, for appellant:

Anyone who is in actual and exclusive possession of real estate or chattels real at the time of the trespass, though his occupation be limited and temporary, and though he have no title whatever, may maintain an action of trespass *quare clausum fregit* against any wrongdoer who has no title himself or authority from the owner.

New Windsor v. Stocksdale, 95 Md. 196, 52 Atl. 596; Cornes v. Harris, 1 N. Y. 223; Quinn v. Winter, 15 Daly, 383, 28 N. Y. S. R. 178, 7 N. Y. Supp. 755; Ellis v. Kansas City, St. J. & C. B. R. Co. 63 Mo. 131, 21 Am. Rep. 436; Wood, Nuisances, § 828, p. 1231.

A tenant in possession can sue for an injury to his possession in trespass *quare clausum fregit*.

Chesapeake & P. Teleph. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; Monks v. Dykes, 4 Mees. & W. 567.

A tenant in possession can sue for damages in case for a nuisance.

Taylor, Land. & T. §§ 200, 770; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; 29 Cyc. Law & Proc. p. 1256; Wood, Nuisances, §§ 623-628.

Throwing rocks on the land of another by blasting is a nuisance for which case may be maintained, and for the direct forcible injury trespass *quare clausum fregit* may be maintained.

Scott v. Bay, 3 Md. 431.

Plaintiff was a tenant as distinguished from a lodger.

1 McAdam, Land. & T. 621; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Evans v. Finch, Cro. Car. 473; Fenn v. Grafton, 2 Bing. N. C. 617; Lewis v. Ponsford, 8 Car. & P. 687; Taylor, Land. & T. § 66; 24 Cyc. Law & Proc. p. 879; Waller v. Morgan, 18 B. Mon. 136; McGee v. Gibson, 1 B. Mon. 105.

One can recover for sickness, not only of himself, but of his family, when occasioned by a nuisance.

Ellis v. Kansas City, St. J. & C. B. R. Co. supra; Kearney v. Farrell, 28 Conn. 317, 73 Am. Dec. 677; Story v. Hammond, 4 Ohio, 376.

Messrs. **William H. Harlan** and **John L. G. Lee** for appellees.

Pearce, J., delivered the opinion of the court:

This is an action by the appellant, a married woman, to recover damages for alleged injuries to her property and person, caused by the blasting of rocks by the defendants in the vicinity of her dwelling. She lived at Alberton, in Howard county, about 200 yards from the line of the Baltimore & Ohio Railroad, and the defendants were contractors who were engaged in extensive work upon the line of said railroad during the year 1906, which required the blasting of large quantities of rock by explosives. The declaration contained four counts, and the first and second are substantially the same. They allege that, at the time of the grievance complained of, the plaintiff, as tenant, was in possession of three certain rooms in a house belonging to Mrs. Annie McIlvaney, in which said three rooms the plaintiff resided, and to the exclusive possession of which she was entitled; that the defendants from about April 14, 1906, to December, 1906, were engaged in blasting large quantities of rock near her said residence, and by means thereof caused large rocks and stones to be cast on the house in which she resided, and the lot of land appurtenant thereto, destroying doors, windows, sashes, and glass therein, breaking the roof and porches, and cracking the walls and ceilings of said house, and particularly of the three rooms occupied by the plaintiff, breaking the glass and china of the plaintiff and otherwise injuring her property, and wrongfully depriving her thus of the quiet and peaceable possession of said rooms as her dwelling. These two counts further alleged that, in consequence of said blasting, the plaintiff was struck and wounded by falling plaster and *débris*, "and was caused immediately by said blasting to be violently shaken and jarred, whereby she was greatly injured physically, . . . and her health has been greatly damaged and shattered, and her nervous system disordered, and she has suffered great physical pain in consequence, and has sustained severe and permanent physical injuries." The third and fourth counts are substantially the same. These counts, after alleging the plaintiff's title to, and occupation of, said three rooms, and the blasting operations of the defendants, with the resulting damage to said dwelling and rooms, as set forth in the first and second counts, further alleged that "immediately and in consequence thereof, all persons on or about said premises, and those living in said rooms, including the plaintiff, were kept in continual fear and jeopardy of their lives, rendering a proper attention by the plaintiff to her duties full of fear and danger, and, as a further consequence, the plaintiff was wrongfully deprived of the quiet and peaceable possession of said rooms as her abode, and was frequently compelled, by day and by night, to seek shelter in the cellar, and that, as a further consequence, the said dwelling and the said plaintiff's rooms therein were subjected to incessant and violent vibrations, . . . and the plaintiff and all other persons in said rooms were subjected to frequent and vio-

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lent physical jars, and that plaintiff's health has been thereby greatly damaged and shattered, and her nervous system disordered, and she has by "reason suffered great physical pain, and has sustained severe and permanent physical injuries."

The defendants filed the general issue pleas. The plaintiff testified that previous to 1901 she rented and occupied the same rooms as tenant of Mrs. McIlvaney, paying as rent $3 a month; that in 1901 Mrs. McIlvaney's husband died, and she then went to work in a mill near by; that plaintiff then agreed with Mrs. McIlvaney to take care of her children and do her housework while she was at the mill, and that her rent for the same rooms at the same rate should be paid for by said services instead of in money as theretofore; that there was no community of interest or occupation of said house between Mrs. McIlvaney and the plaintiff; that she had exclusive possession and control of her three rooms, and Mrs. McIlvaney of the residue of said dwelling; that Mrs. McIlvaney furnished the meals, prepared the same, and they were eaten in her part of the house, and the plaintiff's arrangement for her family was the same; and that all their household arrangements were separate and distinct. She testified that the first blast was on April 14, 1906; that it knocked nearly half the plastering from the wall of the room she was in, and part of the ceiling. None of it then fell on her, though some fell on Mrs. McIlvaney's child. It seemed to lift the house up, and then let it fall. It broke every glass in the window except one. It threw the table upside down. It broke two dozen jars belonging to the plaintiff in the cellar of the house. On April 24th a stone burst through the roof and ceiling and came down through plaintiff's bed, mattress, and spring, and broke the slats and rollers. It weighed 22 pounds. That blast tore the window sash out, broke some in two, and threw them across the room. They did not sleep in that bed for six weeks after that. This blasting kept up till the fall of 1906. They often had to leave their meals and run to the cellar, and were in terror all night of being killed. She had to sit up in a chair at night the best part of six weeks while they were blasting across the river. She said: "My nerves were completely broken down through fright, and I was not able to do my work. Before that time I was in ordinary health, and never was nervous. Since then I have had no health at all. Dr. Miller attended me for this nervousness, and he came every day during the latter part of April, and after that every week or so until fall." Dr. Miller testified that he was her family physician before and after this blasting; that after April 14th plaintiff developed nervous prostration, which he attributed to the shock of the blasting. George Green, plaintiff's husband, testified that he worked for defendants at that time; that there was constant blasting going on, and that in consequence his wife had become a nervous wreck; that she was thirty years of age, and before this blasting had always attended to all her household duties, but since then has been unable to do so. On cross-examination he said: "As far as the renting of the house was concerned, I did not think the house belonged to me. I did not have any jurisdiction over it. I bought the set of furniture to which the bed belonged sixteen years ago. My two sisters lived with me and I collected $8 a month rent from them." It is quite plain, as the whole rent paid Mrs. McIlvaney was $3 a month, that the $8 per month paid George Green by his sisters, and which he called rent, must have been for their board, which was supplied by him. Mrs. Harris, the former Mrs. McIlvaney, who had since married, testified that she was a sister-in-law of Mrs. Green, and that the agreement in regard to the rent of her rooms was that "she was to take care of my children and do the work while I worked in the mill." She was then asked what Mrs. Green was to get for that, and she replied: "The use of the rooms she rented." Mrs. Davis, Walter Oldfield, and Hamilton Oldfield testified to the terrific blasting and the damage of the property. Upon the close of the plaintiff's testimony, the defendants moved to strike out all the evidence of the plaintiff's witnesses "bearing on the nervous condition and nervous shock to the plaintiff, and any physical injury resulting from such nervous shock, such testimony having been admitted subject to exception, because there is no evidence of any physical impact or corporal injury to the plaintiff. This motion was granted, and the first exception was taken to that ruling.

The defendants then prayed an instruction "that, under the pleadings and evidence in the case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants;" and the second exception was taken to the granting of that instruction. The defendants having filed only the general issue plea to all the counts of the amended declaration, there is no question arising as to the form of the pleadings, and there are only two questions which it is necessary to consider: (1) Can the plaintiff, upon the evidence which was admitted, recover damages for the interference with her quiet possession and enjoyment of the rooms occupied and rented by her? (2) Does a cause of action lie for physical injury resulting from

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Messrs. **Edward M. Hammond** and **Z. Howard Isaac**, for appellant:

Anyone who is in actual and exclusive possession of real estate or chattels real at the time of the trespass, though his occupation be limited and temporary, and though he have no title whatever, may maintain an action of trespass *quare clausum fregit* against any wrongdoer who has no title himself or authority from the owner.

New Windsor v. Stockdale, 95 Md. 196, 52 Atl. 596; Cornes v. Harris, 1 N. Y. 223; Quinn v. Winter, 15 Daly, 383, 28 N. Y. S. R. 178, 7 N. Y. Supp. 755; Ellis v. Kansas City, St. J. & C. B. R. Co. 63 Mo. 131, 21 Am. Rep. 436; Wood, Nuisances, § 828, p. 1231.

A tenant in possession can sue for an injury to his possession in trespass *quare clausum fregit*.

Chesapeake & P. Teleph. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; Monks v. Dykes, 4 Mees. & W. 567.

A tenant in possession can sue for damages in case for a nuisance.

Taylor, Land. & T. §§ 200, 770; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; 29 Cyc. Law & Proc. p. 1256; Wood, Nuisances, §§ 623-628.

Throwing rocks on the land of another by blasting is a nuisance for which case may be maintained, and for the direct forcible injury trespass *quare clausum fregit* may be maintained.

Scott v. Bay, 3 Md. 431.

Plaintiff was a tenant as distinguished from a lodger.

1 McAdam, Land. & T. 621; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Evans v. Finch, Cro. Car. 473; Fenn v. Grafton, 2 Bing. N. C. 617; Lewis v. Ponsford, 8 Car. & P. 687; Taylor, Land. & T. § 66; 24 Cyc. Law & Proc. p. 879; Waller v. Morgan, 18 B. Mon. 136; McGee v. Gibson, 1 B. Mon. 105.

One can recover for sickness, not only of himself, but of his family, when occasioned by a nuisance.

Ellis v. Kansas City, St. J. & C. B. R. Co. supra; Kearney v. Farrell, 28 Conn. 317, 73 Am. Dec. 677; Story v. Hammond, 4 Ohio, 376.

Messrs. **William H. Harlan** and **John L. G. Lee** for appellees.

Pearce, J., delivered the opinion of the court:

This is an action by the appellant, a married woman, to recover damages for alleged injuries to her property and person, caused by the blasting of rocks by the defendants in the vicinity of her dwelling. She lived at Alberton, in Howard county, about 200 yards from the line of the Baltimore & Ohio Railroad, and the defendants were contractors who were engaged in extensive work upon the line of said railroad during the year 1906, which required the blasting of large quantities of rock by explosives. The declaration contained four counts, and the first and second are substantially the same. They allege that, at the time of the grievance complained of, the plaintiff, as tenant, was in possession of three certain rooms in a house belonging to Mrs. Annie McIlvaney, in which said three rooms the plaintiff resided, and to the exclusive possession of which she was entitled; that the defendants from about April 14, 1906, to December, 1906, were engaged in blasting large quantities of rock near her said residence, and by means thereof caused large rocks and stones to be cast on the house in which she resided, and the lot of land appurtenant thereto, destroying doors, windows, sashes, and glass therein, breaking the roof and porches, and cracking the walls and ceilings of said house, and particularly of the three rooms occupied by the plaintiff, breaking the glass and china of the plaintiff and otherwise injuring her property, and wrongfully depriving her thus of the quiet and peaceable possession of said rooms as her dwelling. These two counts further alleged that, in consequence of said blasting, the plaintiff was struck and wounded by falling plaster and *débris*, "and was caused immediately by said blasting to be violently shaken and jarred, whereby she was greatly injured physically, . . . and her health has been greatly damaged and shattered, and her nervous system disordered, and she has suffered great physical pain in consequence, and has sustained severe and permanent physical injuries." The third and fourth counts are substantially the same. These counts, after alleging the plaintiff's title to, and occupation of, said three rooms, and the blasting operations of the defendants, with the resulting damage to said dwelling and rooms, as set forth in the first and second counts, further alleged that "immediately and in consequence thereof, all persons on or about said premises, and those living in said rooms, including the plaintiff, were kept in continual fear and jeopardy of their lives, rendering a proper attention by the plaintiff to her duties full of fear and danger, and, as a further consequence, the plaintiff was wrongfully deprived of the quiet and peaceable possession of said rooms as her abode, and was frequently compelled, by day and by night, to seek shelter in the cellar, and that, as a further consequence, the said dwelling and the said plaintiff's rooms therein were subjected to incessant and violent vibrations, . . . and the plaintiff and all other persons in said rooms were subjected to frequent and vio-

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lent physical jars, and that plaintiff's health has been thereby greatly damaged and shattered, and her nervous system disordered, and she has by "reason suffered great physical pain, and has sustained severe and permanent physical injuries."

The defendants filed the general issue pleas. The plaintiff testified that previous to 1901 she rented and occupied the same rooms as tenant of Mrs. McIlvaney, paying as rent $3 a month; that in 1901 Mrs. McIlvaney's husband died, and she then went to work in a mill near by; that plaintiff then agreed with Mrs. McIlvaney to take care of her children and do her housework while she was at the mill, and that her rent for the same rooms at the same rate should be paid for by said services instead of in money as theretofore; that there was no community of interest or occupation of said house between Mrs. McIlvaney and the plaintiff; that she had exclusive possession and control of her three rooms, and Mrs. McIlvaney of the residue of said dwelling; that Mrs. McIlvaney furnished the meals, prepared the same, and they were eaten in her part of the house, and the plaintiff's arrangement for her family was the same; and that all their household arrangements were separate and distinct. She testified that the first blast was on April 14, 1906; that it knocked nearly half the plastering from the wall of the room she was in, and part of the ceiling. None of it then fell on her, though some fell on Mrs. McIlvaney's child. It seemed to lift the house up, and then let it fall. It broke every glass in the window except one. It threw the table upside down. It broke two dozen jars belonging to the plaintiff in the cellar of the house. On April 24th a stone burst through the roof and ceiling and came down through plaintiff's bed, mattress, and spring, and broke the slats and rollers. It weighed 22 pounds. That blast tore the window sash out, broke some in two, and threw them across the room. They did not sleep in that bed for six weeks after that. This blasting kept up till the fall of 1906. They often had to leave their meals and run to the cellar, and were in terror all night of being killed. She had to sit up in a chair at night the best part of six weeks while they were blasting across the river. She said: "My nerves were completely broken down through fright, and I was not able to do my work. Before that time I was in ordinary health, and never was nervous. Since then I have had no health at all. Dr. Miller attended me for this nervousness, and he came every day during the latter part of April, and after that every week or so until fall." Dr. Miller testified that he was her family physician before and after this blasting; that after April 14th plaintiff developed nervous prostration, which he attributed to the shock of the blasting. George Green, plaintiff's husband, testified that he worked for defendants at that time; that there was constant blasting going on, and that in consequence his wife had become a nervous wreck; that she was thirty years of age, and before this blasting had always attended to all her household duties, but since then has been unable to do so. On cross-examination he said: "As far as the renting of the house was concerned, I did not think the house belonged to me. I did not have any jurisdiction over it. I bought the set of furniture to which the bed belonged sixteen years ago. My two sisters lived with me and I collected $8 a month rent from them." It is quite plain, as the whole rent paid Mrs. McIlvaney was $3 a month, that the $8 per month paid George Green by his sisters, and which he called rent, must have been for their board, which was supplied by him. Mrs. Harris, the former Mrs. McIlvaney, who had since married, testified that she was a sister-in-law of Mrs. Green, and that the agreement in regard to the rent of her rooms was that "she was to take care of my children and do the work while I worked in the mill." She was then asked what Mrs. Green was to get for that, and she replied: "The use of the rooms she rented." Mrs. Davis, Walter Oldfield, and Hamilton Oldfield testified to the terrific blasting and the damage of the property. Upon the close of the plaintiff's testimony, the defendants moved to strike out all the evidence of the plaintiff's witnesses "bearing on the nervous condition and nervous shock to the plaintiff, and any physical injury resulting from such nervous shock, such testimony having been admitted subject to exception, because there is no evidence of any physical impact or corporal injury to the plaintiff. This motion was granted, and the first exception was taken to that ruling.

The defendants then prayed an instruction "that, under the pleadings and evidence in the case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants;" and the second exception was taken to the granting of that instruction. The defendants having filed only the general issue plea to all the counts of the amended declaration, there is no question arising as to the form of the pleadings, and there are only two questions which it is necessary to consider: (1) Can the plaintiff, upon the evidence which was admitted, recover damages for the interference with her quiet possession and enjoyment of the rooms occupied and rented by her? (2) Does a cause of action lie for physical injury resulting from

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fright and nervousness caused by the wrongful acts of the defendants?

The evidence is undisputed that the rent for these rooms was always paid by the plaintiff, and not by her husband, and that the agreement of renting was made by Mrs. McIlvaney with the plaintiff alone. We are of opinion that under the evidence the plaintiff was not a mere lodger, the landlady retaining the legal possession of the whole house; but that she was a tenant, entitled to the exclusive possession and control of the rooms she occupied. Blasting of rocks by the use of gunpowder or other explosives, in the vicinity of another's dwelling house, is a nuisance, and the person doing the act or causing it to be done is liable for all injuries that result therefrom. Wood, Nuisances, 153; 29 Cyc. Law & Proc. p. 1167; Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; 2 Greenl. Ev. § 254. Each count in this declaration charges acts which constitute a public or common nuisance, and also discloses special injuries sustained by the plaintiff, recoverable in a private action. Among the special injuries were that "all persons living in said rooms, including the plaintiff, were kept in continual fear and jeopardy of their lives, rendering a proper attention by the plaintiff to her duties full of fear and danger." This is the same allegation made in the narr. in Scott v. Bay, 3 Md. 431, which was a case of blasting, and in which the court said damages for such injuries were recoverable in case. In Webb's Pollock on Torts, the author says: "The conception of private nuisance was formerly limited to injuries done to a man's freehold by a neighbor's acts, of which stopping or narrowing rights of way and flooding land by the diversion of water courses appear to have been the chief species. In the modern authorities it includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure." [p. 491.] The same author, on page 494, says the kind of nuisance "which is most commonly spoken of by the technical name is the continuous doing of something which interferes with another's health or comfort in the occupation of his property, such as carrying on a noisy or offensive trade." The general rule of the common law is that every action must be brought in the name of the party whose legal right has been invaded or infringed. 15 Enc. Pl. & Pr. p. 484. For the immediate wrong and damage the person injured is the only one who can maintain the action. Id. p. 578. "The person who sustains an injury is the person to bring an action for the injury against the wrongdoer." Dicey, Parties to Actions, 347. We think this action was properly brought by the plaintiff. Even if no other damage were shown than the breaking of the two dozen jars, which were her personal property, she would be entitled to at least nominal damages which would carry costs. In Hazard Powder Co. v. Volger, 7 C. C. A. 130, 12 U. S. App. 665, 58 Fed. 152, a husband, Schultze Volger, sued the Hazard Powder Company, alleging that it maintained a powder magazine in violation of a city ordinance, and that its explosion wrecked his house and injured his wife. His house was erected on the land of another, under a license. He gave up his position to nurse his wife, and it was held that peaceable possession was evidence of his right to maintain the action, without regard to title. It was also held that he could recover for the loss of his wife's services, and the value of his own services as a nurse; that is, what would have been the reasonable cost for a hired nurse. The wife also brought a separate suit to recover for her own personal injuries, and did recover. It does not appear from the report of the case what was the character of her injuries, and these cases are only cited to show that separate recoveries were there allowed. It follows from what we have said that it was error to grant the defendants' prayer, which absolutely withdrew the case from the jury.

This brings us to the important question involved in the granting of the motion to strike out all the testimony bearing on the nervous shock to the plaintiff and physical injury resulting therefrom. There is a wide divergence of judicial opinion as to whether a cause of action will lie for actual physical injuries resulting from fright and nervous shock caused by the wrongful acts of another, and it may be considered as settled that mere fright, without any physical injury resulting therefrom, cannot form the basis of a cause of action. This is so because mere fright is easily simulated, and because there is no practical standard for measuring the suffering occasioned thereby, or of testing the truth of the claims of the person as to the results of the fright. But when it is shown that a material physical injury has resulted from fright caused by a wrongful act, and especially, as in this case, from a constant repetition of wrongful acts, in their nature calculated to cause constant alarm and terror, it is difficult, if not impossible, to perceive any sound reason for denying a right of action in law for such physical injury. The grounds upon which those courts have proceeded which deny such right are twofold: "(1) That physical injury resulting from fright caused by . . . [a wrongful act] is not the proximate result of the . . . [act]; [and] (2) that, on the ground of mere expediency, recovery

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must be denied because of the danger of opening the door to fictitious litigation, and the impossibility of estimating the damages." Huston v. Freemansburg, 3 L.R.A.(N.S.) 50, editor's note. As to the first of these grounds, this court has laid down in clear language the true doctrine upon this question in Baltimore City Pass. R. Co. v. Kemp, 61 Md. 80. In that case the court, speaking through Judge Alvey, said: "It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given result can be directly traced to a particular cause as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all condition of things, produce like results? It is the common observation of all that the effects of personal physical injuries depend much upon the peculiar conditions and tendencies of the persons injured, and what may produce but slight and comparatively uninjurious consequences in one case may produce consequences of the most serious and distressing character in another. . . . Hence the general rule is that in actions of tort like the present the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done." In the case now before us the evidence does not suggest any other cause of the effect complained of. It is a matter of common knowledge or observation that loud explosions, even if unattended by any immediate special dangers, are very trying to the nerves of those subjected to them. This is especially so when such explosions are constantly repeated, as in blasting, and are accompanied by the hurling about of rocks and stones displaced by the blast, to the danger of property and life. It is equally a matter of common knowledge that as a general rule the nerves of women are more sensitive to injury than those of men, are more easily disturbed, and that, when so disturbed, the injurious consequences are more serious and lasting. Here is a young woman, thirty years of age, in sound health and free from any nervous disorder or tendency. She is subjected to a long-continued series of terrific blastings near her dwelling, shattering the roof, walls, and windows by day and by night, and, in the language of the declaration, "putting her in continual fear and jeopardy of her life." In the absence of any evidence of any other cause, why, then, may not her nervous prostration be traced by the jury, under the principles stated by Judge Alvey, to the one cause shown to exist, *viz.*, the alarm and terror under which she was forced to live? In the case just cited there was a motion for a reargument based, as the court stated, upon authorities that were not brought to the attention of the court upon the former hearing, but the motion was overruled; the court saying: "Whether the direct causal connection exists is a question in all cases for the jury upon the facts in proof." In Sloane v. Southern California R. Co. 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320, a case similar to the present in that there was no physical impact, the court said: "The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. . . . The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind." If, in the case before us, the plaintiff had received an actual blow, however slight, either from a rock hurled by the blast, from the falling of a wall or ceiling, or even by a fall of herself caused by the alarm of the concussions no one would question her right to maintain this action, nor the right of the jury to consider the nervous prostration from which she is suffering in ascertaining the damages to be awarded. If, therefore, the jury had believed from the evidence which was stricken out that the nervous prostration of the plaintiff was the natural and proximate consequence of the alarm and terror to which she was subjected by the constant blasting, it would properly have formed an element for their consideration in reaching their verdict. For these reasons we do not think the question of proximate cause in this case justified the striking out of the testimony bearing upon the nervous shock and the resulting physical injury, nor in the withdrawal of the case from the jury.

We now come to the question of expediency. It appears from an examination of the cases in which the right of recovery has been denied where there has been no physical impact, that this doctrine has been the con-

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trolling one with the court. This is especially apparent in the Pennsylvania and Massachusetts decisions. In Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A.(N.S.) 49, 61 Atl. 1022, the court dealt only with that question, and said: "If we opened the door to this new invention, the result would be great danger, if not disaster, to the cause of practical justice." In Homans v. Boston Elev. R. Co. 180 Mass. 456, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737, Chief Justice Holmes said, referring to the rule established in that court, as has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. We must recognize the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong is a shock to the nerves. At the trial below the defendant by various requests tried to press the principle so far as to require the plaintiff to prove that the nervous shock was the immediate consequence of a slight blow received by being thrown forward against a seat, whereas the judge allowed her to recover for the nervous shock ending in paralysis, if it resulted from a jar to her nervous system which accompanied the slight blow to her person. In other words, the court held that it was not necessary to show that the shock was the consequence of the blow; and Judge Holmes said: "We are of opinion the judge was correct, and that further refining would be wrong." This case well illustrates the difficulty felt by the court in denying a recovery upon the ground of expediency, without withholding from the plaintiff a legal right. The argument from mere expediency cannot commend itself to a court of justice, resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one. The apparent strength of the theory of expediency lies in the fact that nervous disturbances and injuries are sometimes more imaginary than real, and are sometimes feigned, but this reasoning loses sight of the equally obvious fact that a nervous injury arising from actual physical impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter. It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view in our opinion is that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury, within the principles announced in Kemp's Case, supra, and where the injury ought, in the light of all the circumstances, to have been contemplated as a natural and probable consequence thereof, the case falls within the exception, and should be left to the jury. In England in Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222, the court held that damages arising from mere terror, unaccompanied at the time by any physical injury, could not be considered as a consequence of the wrongful act there complained of, although the court refused to decide that in no case could recovery be had without proof of actual impact. In Bell v. Great Northern R. Co. Ir. L. R. 26 C. L. 428, the court refused to follow the case just mentioned, saying that where no intervening independent cause of the injury was suggested, and where the jury could find that the bodily injury complained of was a natural consequence of the fright, the chain of reasoning for recovery was complete. These cases are reviewed in 1 Beven on Negligence, 2d ed. pp. 76–83, and the doctrine of the former is criticized with much force and discrimination. In Watkins v. Kaolin Mfg. Co. 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, the action was brought to recover damages for injury to the nerves resulting from blasting near the plaintiff's dwelling, though there was no external physical impact. It was held that an allegation that plaintiff became so nervous and frightened from the negligent and reckless blasting by the defendant that she could not sleep at night, and was greatly disturbed in body and mind, stated a good cause of action for physical injury; and it was held that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts. In Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, the jury was instructed as follows: "If great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion, and conflagration, placed [said] plaintiff, . . . and that she was actually put in fright by those circumstances, and that injury to her health was a reasonable and natural consequence of such great fright, and was actually and proximately occasioned thereby, said injury is one for which damages are recoverable." The reasoning upon which that conclusion was reached is, in our opinion, sound, and it is in accord with the views expressed in Sedgw. Damages, 8th ed. § 861; Addison, Torts, 5; 3 Sutherland, Damages, 714, 715. The same view was held in Tuttle v. Atlantic City R. Co. 66

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N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450; in Watson v. Dilts, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068; in Mack v. South Bound R. Co. 52 S. C. 323, 40 L.R.A. 679, 68 Am. St. Rep. 913, 29 S. E. 905; in Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; in Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944; and in Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100. It may be observed here that there is a class of cases in which courts which generally sustain the contrary rule seem not to require contemporaneous physical injury in order to sustain a recovery for fright and its consequences. In Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, where a recovery was denied, the court said: "Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind." In Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335, it is intimated that the rule does not reach those cases where there is an intention to cause mental distress, and in Wilkinson v. Downton [1897] 2 Q. B. 57, it was expressly so held where a practical joke resulted in fright producing a miscarriage. In the case before us the evidence is that the defendants were notified of the injury to the house, and they made some repairs, but that the blasting continued thereafter and during all the summer, with the same results. This would seem to come fairly within the description of gross recklessness as to consequences, and thus to bring the case within that exception.

In view of all the circumstances of this case, we cannot apply to it the rigid rule applied in some courts, requiring actual contemporaneous physical impact producing physical injury, and we are of opinion that the case should have gone to the jury upon the principles announced in Denver & R. G. R. Co. v. Roller, supra. It will be for the court in future cases of this character, as in all other cases where the questions of proximate cause and legally sufficient evidence arise, to permit no recovery except upon the application of the principles just mentioned, while denying none upon the ground of mere expediency, where these principles logically require the submission of the case to the jury.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

JOHN A. LAGERMAN, Receiver of Germania Bank, Respt.,
v.
LAWRENCE I. CASSERLY, Appt.

(107 Minn. 491, 120 N. W. 1086.)

Limitation of action — suspension of remedy — effect on statute.

1. The rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time for which he is thus prevented must not be counted against him in determining whether the statute of limitations has barred his right, applies only when such paramount authority is invoked and the restraint induced by the debtor.

Same — suspension of statute — injunction — parties.

2. The statutory provisions suspending the running of the period of limitation during the time the beginning of an action is stayed by an injunction or other statutory prohibition apply only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party.

(April 30, 1909.)

Headnotes by ELLIOTT, J.

Case Note. — Effect of injunction against suing on running of statute of limitations.

The earlier cases dealing with the question of effect of injunction against suing on running of statute of limitations are gathered in a case note to Hunter v. Niagara F. Ins. Co. 3 L.R.A.(N.S.) 1187.

As was pointed out in that note and illustrated by several cases in some jurisdictions, the running of the statute of limitations is suspended by an injunction, although no statutory element appears.

So, in Georgia R. & Bkg. Co. v. Wright, 124 Ga. 596, 53 S. E. 251, it was held that the statute of limitations did not run against the state during the time that the comptroller general was enjoined by the Federal court, in a suit in which the debtor, although he was not complainant, was a party, from issuing any executions for taxes on certain stock.

It will also be noticed from that note that in many of the jurisdictions the statute of limitations has been held to be suspended during the continuance of an injunction against legal proceedings by virtue of a statutory provision to that effect. The decision in LAGERMAN v. CASSERLY that such statutory prohibition applies only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party, is supported by Terrell v. Ingersoll, 10 Lea, 77, sufficiently set out in the earlier note.

Referring again to the earlier note, it was

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APPEAL by defendant from a judgment of the District Court for Ramsey County in plaintiff's favor in an action brought to enforce defendant's constitutional liability as a stockholder for debts of the Germania Bank of St. Paul. Reversed.

The facts are stated in the opinion.

Mr. **O. E. Holman**, for appellant:

The cause is barred by the statute.

Willius v. Albrecht, 100 Minn. 436, 111 N. W. 387, 112 N. W. 862; State ex rel. Pope v. Germania Bank, 106 Minn. 446, 119 N. W. 61.

Statutes providing that, when the commencement of an action is stayed by injunction, the time of the continuance of the stay is not a part of the time limited for the commencement of the action, apply only between parties to the suit, and not where the injunction is granted in a suit to which a debtor is not a party.

25 Cyc. Law & Proc. p. 1284; Terrell v Ingersoll, 10 Lea, 77; The Treasurer v. Martin, 50 Ohio St. 197, 33 N E. 1112; Van Wagonen v. Terpenning, 122 N. Y. 222, 25 N. E. 254; Wilkinson v. First Nat. F. Ins. Co. 72 N. Y. 499, 28 Am. Rep. 166; Litchfield v. McDonald, 35 Minn. 169, 28 N. W. 191; Ganser v. Ganser, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18; Bennett v. Thorne, 36 Wash. 253, 68 L.R.A. 113, 78 Pac. 936; 19 Am. & Eng. Enc. Law, 2d ed. pp. 224, 225; Bauserman v. Blunt, 147 U. S 657, 37 L. ed. 320, 13 Sup. Ct. Rep. 466.

Mr. **James E. Trask**, for respondent:

Under the law of his appointment the receiver had no authority or right to enforce the stockholders' liability unless and until it became necessary to pay the debts of the bank; and, until such necessity was shown to have arisen by some ascertainment, no cause of action accrued to the receiver.

Re People's Live Stock Ins. Co. 56 Minn. 185, 57 N. W. 468; Minneapolis Baseball Co. v. City Bank, 66 Minn. 446, 38 L.R.A. 415, 69 N. W. 331; Richardson v. Merritt, 74 Minn. 362, 74 N. W. 234, 407, 968; Anderson v. Seymour, 70 Minn. 377, 73 N. W. 171.

The right to enforce statutory liability of stockholders for debts of the corporation is generally dependent upon a prior exhausting of the legal remedies against the corporation itself, and until then the statutes do not run in favor of the stockholder.

25 Cyc. Law & Proc. pp. 121, 1199; Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Minneapolis Paper Co. v. Swinburne Printing Co. 66 Minn. 378, 69 N. W. 144; Scovill v. Thayer, 105 U. S. 143, 26 L. ed.

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there said: "But even where neither statutory exception nor recognized principle of law exists to protect a right of action from the running of the statute of limitations during the continuance of an injunction, in courts of equity and courts which allow themselves to be governed by equitable considerations, the injustice of permitting a defendant to take advantage of the statute where the plaintiff has been precluded from asserting his rights by an injunction obtained by the defendant is recognized, and the defendant in effect held equitably estopped from profiting thereby." This statement is amply supported by authority, as well as the further statement that in such case the plaintiff may obtain an injunction restraining the defendant from setting up the statute as a defense.

A case of this nature is Davis v. Hoopes, 33 Miss. 173, where an executor enjoined the enforcement of a judgment by unfounded litigation until it was barred by limitations, and it was held that the creditor could enforce its collection in a suit in chancery, and enjoin the setting up of the statute as a defense by the executor personally and his sureties.

However, in Teigen v. Drake, 13 N. D. 502, 101 N. W. 893, it was held that the procuring of an injunction by a mortgagor under a statute providing in effect that when, in case of foreclosure by advertisement, it appears that the mortgagor has a legal counterclaim or defense, a judge of the district court may enjoin the foreclosure by advertisement, and direct that all further proceedings be had in the district court, such mortgagor is not estopped to plead the statute of limitations in bar of a foreclosure by action. It was argued that to permit the statute of limitations to be pleaded under such circumstances as this would in effect make the statute a bar to foreclosure under the power of sale, because the mortgagor might present groundless defenses in his affidavit for the *ex parte* injunction under the statute, and, by pleading limitations against the action, prevent any hearing or determination of the illegal defenses. The court, however, said that, if that situation had been brought about by the statute, it was the result of legislation, which they had no power to disturb so long as it violated no provision of the Constitution.

The rule recognized in some jurisdictions that the defendant may nevertheless be estopped to plead the statute of limitations, although an injunction will not of itself suspend the running of the statute, has been held applicable, in some of these courts, only to those who are actors in procuring the allowance of such injunction, and not to affect the rights of a debtor not a party. A case of this nature is Hunter v. Niagara F. Ins. Co. 73 Ohio St. 110, 3 L.R.A. (N.S.) 1187, 112 Am. St. Rep. 699, 76 N. E. 563, 4 A. & E. Ann. Cas. 146. And this was also the effect of the decision in Wilkinson v. First Nat. F. Ins. Co. 72 N. Y. 499, 28 Am. Rep. 166.

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968; Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; King v. Pomeroy, 58 C. C. A. 209, 121 Fed. 287; Longley v. Little, 26 Me. 162; 2 Thomp. Corp. § 2013; 3 Clark & M. Priv. Corp. pp. 2530. 2535; Hanson v. Davison, 73 Minn. 461, 76 N. W. 254; State ex rel. Slingerland v. Norton, 59 Minn. 424, 61 N. W. 458; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Richmond v. Irons, 121 U. S. 52, 30 L. ed. 872, 7 Sup. Ct. Rep. 788; Deweese v. Smith, 66 L.R.A. 971, 45 C. C. A. 408, 106 Fed. 438.

The injunction prohibited the receiver from instituting any action or proceedings against stockholders who did not take stock in the bank as reorganized.

State ex rel. Pope v. Germania Bank, 106 Minn. 446, 119 N. W. 63.

The defendant was before the court in the assessment proceedings and upon the appeal in the Mann Case, both through representation by the corporation and personally through his joining in the appeal by contributing to pay the expenses thereof; and he is therefore bound by the decision and order adjudging that the receiver had no right or cause of action against those secondarily liable, and that the receiver be restrained from commencing any such actions until further order of the court.

Pope v. Nance, 1 Stew. (Ala.) 354, 18 Am. Dec. 60; Cole v. Favorite, 69 Ill. 458; Roby v. Eggers, 130 Ind. 415, 29 N. E. 365.

When a person is prevented by order of the court from enforcing a legal remedy, the period of such restraint is not to be counted against him in ascertaining whether the statute has run.

St. Paul, M. & M. R. Co. v. Olson, 87 Minn. 120, 94 Am. St. Rep. 693, 91 N. W. 294; North British & M. Ins. Co. v. Lathrop, 17 C. C. A. 175, 25 U. S. App. 443, 70 Fed. 433; 25 Am. & Eng. Enc. Law, p 999; The Treasurer v. Martin, 50 Ohio St. 197, 33 N. E. 1112.

Where the liability of the stockholder is primary, his obligation to discharge the corporate debts becomes as absolute as that of the corporation, according to the terms of the contract creating the corporate debt; and his liability continues so long as the debt is a subsisting claim against the corporation.

Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Aspinwall v. Sacchi, 57 N. Y. 331; Harger v. McCullough, 2 Denio, 123; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Fleischer v. Rentchler, 17 Ill. App. 405; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Fuller v. Ledden, 87 Ill. 310; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 136, 83 N. W. 36.

A cause of action accrues when the assessment by its terms becomes due and payable, and the statute runs from such time.

Bernheimer v. Converse, 206 U. S. 535, 51 L. ed. 1176, 27 Sup. Ct. Rep. 755; Scovill v. Thayer, supra; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Aldrich v. Yates, 95 Fed. 78; Howarth v. Lombard, supra; Aldrich v. Skinner, 98 Fed. 375; Glenn v. Marbury, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914; King v. Pomeroy, supra; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Glenn v. Liggett, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; McClaine v. Rankin, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. Rep. 410, 3 A. & E. Ann. Cas. 500; Rankin v. Barton, 199 U. S. 228, 50 L. ed. 163, 26 Sup. Ct. Rep. 29; McDonald v. Thompson, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; Great Western Teleg. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Hale v. Cushman, 96 Me. 148, 51 Atl. 874; Eichman v. Hersker, 170 Pa. 402, 33 Atl. 229; Glenn v. Williams, 60 Md. 93; Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Howarth v. Ellwanger, 86 Fed. 54; Ueland v. Haugan, 70 Minn. 349, 73 N W. 169; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Richmond v. Irons, 121 U. S. 52, 30 L. ed. 872, 7 Sup. Ct. Rep. 788; Deweese v. Smith, 66 L.R.A. 971, 45 C. C. A. 408, 106 Fed. 438; Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463.

A receiver appointed in an action by the bank examiner cannot enforce the stockholders' liability until an assessment has been ordered.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; Nicollet Nat. Bank v. City Bank, 38 Minn. 88, 8 Am. St. Rep. 643, 35 N. W. 577; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 133, 83 N. W. 36; Ueland v. Haugan, 70 Minn. 354, 73 N. W. 169; Anderson v. Seymour, 70 Minn. 364, 73 N. W. 171; Willius v. Mann, 91 Minn. 503, 98 N. W. 341, 867; King v. Pomeroy, 58 C. C. A. 209, 121 Fed. 297; Richmond v. Irons and Re People's Live Stock Ins. Co. supra; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L.R.A. 415, 69 N. W. 331; Scovill v. Thayer, supra; Burwell v. Tullis, 12 Minn. 572, Gil. 486; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365.

Elliott, J., delivered the opinion of the court:

This was an action to enforce the collection of an assessment levied upon the stock of the Germania Bank. The defendant, Cas-

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serly, was a stockholder, and the sole question is whether the statute of limitations had run against the cause of action. The trial court found in favor of the plaintiff, and the defendant appealed from this judgment.

The facts with reference to the failure of this bank have been fully stated in previous decisions and need not be repeated. Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Willius v. Albrecht, 100 Minn. 436, 111 N. W. 387, 112 N. W. 862; State ex rel. Pope v. Germania Bank, 106 Minn. 446, 119 N. W. 61. For present purposes it is sufficient to say that the Germania Bank became insolvent on January 4, 1897, and the appellant was then the owner of five shares of its capital stock. The bank was subsequently reorganized, but the appellant did not become a stockholder in the new bank. The reorganized bank also became insolvent in July, 1899, and Gustav Willius was appointed receiver, with power to enforce the constitutional liability of the debts of the stockholders. The appellant was not liable for any of the debts of the new bank, but was liable secondarily for the debts of the old bank, although this secondary liability could not be enforced until the liability of the stockholders of the new bank had been exhausted. Willius v. Mann, supra. The cause of action against all the stockholders of the Germania Bank accrued on July 26, 1899, when the receiver was appointed, and a proceeding to enforce the same could have been commenced at any time within six years thereafter. For this purpose two remedies were available—that provided by chapter 76, Gen. Stat. 1878, and that provided by chapter 272, Gen. Laws 1899. The receiver proceeded under chapter 272, but, through a misunderstanding of the law, neglected to commence proceedings to enforce stockholders' liability within six years after the cause of action arose; and it was held in Willius v. Albrecht, supra, that the statute of limitations had run against the cause of action.

The appellant in this action was liable only secondarily for the debts of the old bank, and after the decision in Willius v. Albrecht an action was commenced against him on the theory that the statute had not run, because the receiver was, during a portion of the time, restrained by the decision in Willius v. Mann and an order supplementary thereto made by the district court. If the time during which the order of the district court was in force is to be deducted, the trial court properly held that the statute had not run against the cause of action against this appellant. The entire proceedings were under chapter 272, Gen. Laws 1899. In an action against certain stockholders, it was held in Willius v. Mann, on the principle which had been established in Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069, that the stockholders of the reorganized bank were liable primarily for the debts of the old and the new bank, and that the stockholders of the old bank were liable secondarily only for its debts, and that the remedies against the stockholders of the new bank should be exhausted before proceeding against the old stockholders. The lower court was directed to proceed in accordance with that decision, rendered February 11, 1904. On May 27, 1904, the district court, on the application of the receiver and without notice to the appellant, made an order restraining the receiver "from collecting from any person secondarily liable for said assessment, made on the 17th day of September, 1903, except where such person has become liable by reason of transfer of stock made subsequent to the 4th day of January, 1897, until he shall have exhausted all remedies against the persons primarily liable for or on account of said assessment, and until said court shall make and enter its further order herein to the effect that all remedies against said persons so primarily liable have been exhausted." The order discharging this restraining order was not made until March 30, 1908.

The decision in Willius v. Mann, and the restraining order of the district court were made in proceedings under chapter 272, and were manifestly intended to be confined to the remedies and proceedings provided for by that statute. It was held in Willius v. Albrecht that during all this time the statute of limitations was running against the cause of action against the stockholders, because the right of action to enforce the same accrued on July 26, 1899. That right of action was not affected by the proceedings under the other statute. Willius v. Mann, like Harper v. Carroll, determined the order in which the liability of several classes of stockholders should be enforced, and the order of the district court merely restrained the receiver from collecting from any person secondarily liable for the assessments made on September 17, 1903, in the proceedings under chapter 272. Some proceeding should have been instituted against all the stockholders within six years after the cause of action arose, and thereafter proceedings to enforce the secondary liability should have been stayed until the liability of those primarily liable had been exhausted. But, regardless of all this, the restraining order of the district court did not affect the appellant, because he was not a party to the proceedings in which the order was made. Willius v. Mann was an action

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against certain stockholders, of which this appellant was not one. It appears that he did contribute $10 towards a fund which was used to pay the expenses of that appeal; but that fact alone is not sufficient to make him a party, and bind him as such by the decision. For certain purposes the stockholders of the corporation were in court through representation by the corporation, and in so far as the interests and affairs of the corporation are concerned they are bound by the judgment. But they are not bound as respects their individual interests, and, when sued as shareholders, they have the right to assert any defenses personal to themselves. Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 136, 83 N. W. 36.

The rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time for which he is thus prevented must not be counted against him in determining whether the statute of limitations has barred his right, applies only when such paramount authority is invoked and the restraint induced by the debtor. A court of equity cannot read an exception into the statute of limitations, although it may under certain circumstances, acting *in personam*, restrain a debtor from pleading the statute. The statutory provision suspending the running of the period of limitation during the time the beginning of an action is stayed by injunction or other statutory prohibition applies only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party. Sage v. Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106; 25 Cyc. Law & Proc. p. 1284; Van Wagonen v. Terpenning, 122 N. Y. 222, 25 N. E. 254; Terrell v. Ingersoll, 10 Lea, 77. The restraining order issued by the district court was obtained by the receiver upon his own application, without notice to the stockholders who would be affected thereby; that is, the receiver, for his own benefit, had himself restrained from proceeding against persons who were not parties to the action, who had no notice of the application, upon whom the order was never served, and whose interests were to be adversely affected; and he now claims that the period during which he was under this voluntarily imposed restraint should be deducted from the time during which the statute of limitations would otherwise be running against the stockholders. We think the rule thus invoked applies only when the restraint is imposed at the instance of the other party, or by the court in some proceeding to which the debtor is a party.

The order of the trial court is therefore reversed.

23 L.R.A.(N.S.)

MISSISSIPPI SUPREME COURT.

ALFRED WILBY, Appt.,
v.
STATE OF MISSISSIPPI.

(— Miss. —, 47 So. 465.)

Privilege tax — plumbers.

A journeyman plumber who has no place of business or bureau for obtaining contracts, and employs no helpers, but merely does such work himself as he obtains to do, is not within the terms of a statute imposing a privilege tax on each individual, firm or corporation doing a plumbing business.

(November 9, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Forrest County convicting him of conducting a plumbing business without a license. Reversed.

The facts are stated in the opinion.

Mr. R. S. Hall for appellant.

Mr. George Butler for appellee.

Case Note. — What constitutes a plumbing business within license statutes.

In People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686, it was held that the terms "trade, business, or calling," as used in a statute which required a certificate of competency of any person intending to conduct the "trade, business, or calling of a plumber, or of plumbing . . . as employing or master plumber," were synonymous, and had relation to the mechanical employment; and that any person who held himself out to the public as a plumber, undertaking to do the work as such, must, if he employed assistants to perform the work, comply with the law and procure his certificate.

In Felton v. Atlanta, 4 Ga. App. 183, 61 S. E. 27, it was held that an ordinance which prohibited any person, firm, or corporation from working at the business of plumbing, either as master or journeyman plumber, without first procuring a license, was not applicable to mere apprentices or helpers, working under licensed master or journeyman plumbers.

In Davidson v. State, 77 Md. 388, 26 Atl. 415, under a section of an ordinance which prohibited any person from engaging in, or working at, the plumbing business, without complying with six other specified sections, which provided for the examination and registration of persons who desired to work at the business as practical plumbers, and for the payment and disposition of fees for certificates,—it was held that a person who had not been registered could engage in the plumbing business and make contracts for furnishing the material and doing the plumbing work, provided he did not personally do the manual work, but employed therefor only registered plumbers.

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Mayes, J., delivered the opinion of the court:

Section 3854 of the Code of 1906, in the chapter on "Privilege Taxes," provides that "on each individual, firm, or corporation doing a plumbing business in cities or towns of 10,000 or more inhabitants, where they have waterworks and sewerage, $50. Same, in cities and towns of less than 10,000 and more than 5,000, $25. In all cities and towns where they have waterworks, $10." Alfred Wilby, the appellant, is a practical plumber, living in the city of Hattiesburg, and working at his trade for a livelihood. One H. M. Hanna was engaged in the barber business at Hattiesburg, and, desiring to have certain plumbing work done in his shop, employed Mr. Wilby to do the work, agreeing to pay therefor the sum of $240. Wilby did the work for Hanna, procuring the material by getting one Batson and Hanna to secure the purchase price of the materials used in the work. It also appears that Wilby did some work for Mr. Batson. It does not appear from this record that Mr. Wilby was engaged in the business of making plumbing contracts and employing others to do or assist him in doing the work. He had no established place of business in which he kept plumbing supplies for the purpose of furnishing the material to carry out contracts. He was merely a practical plumber, doing such work as he obtained to do himself, performing his own labor, maintaining no bureau for the purpose of obtaining contracts, and employing others to do the work or to assist him in doing it, but was simply engaged in making a living by working at his trade from day to day, taking such contracts and doing such work in this line as he found to do. This constitutes the substantial facts of this case.

While so engaged, the sheriff of Perry county demanded of him a privilege tax under the section of the Code above referred to. The city of Hattiesburg has a population of 20,000; the tax, under these circumstances, being $50. Wilby declined to pay same, and on the 1st day of November, 1907, an indictment was returned by the grand jury, charging Wilby with unlawfully conducting a plumbing business in the city of Hattiesburg, without first paying the privilege tax, etc. At the conclusion of the testimony, the defendant asked a peremptory charge acquitting him; but the court declined to give this instruction, whereupon he was convicted and appeals. Since the case is to be decided upon the refusal of this instruction, it is not necessary to enter into any discussion of the other instructions in the case.

We had no difficulty in reaching the conclusion, from the facts presented here, that § 3854 of the Code of 1906 has no application to this case. It applies only to an individual, firm, or corporation making contracts and completing them by the employment of other plumbers to do the work. It has no application to any individual plumber working by the day, or taking contracts for himself alone. A plumber cannot be said to be "doing a plumbing business," within the meaning of the act, when he merely works at his trade himself, and is not engaged in making plumbing contracts to be farmed out to others, or completed by the employment of other plumbers. We cannot assent to the proposition that it was the intention of the legislature to impose so large an occupation tax upon labor,—on the right which a man has by his brawn and muscle, without any other capital being invested, to earn his daily bread by the sweat of his own brow; but the tax was intended by the legislature to be imposed upon those engaged in the business of taking contracts and making profit by the employment of the labor of others to complete their contracts. Any other construction of this statute would tend to build up a monopoly in this line of business, which is hateful to the law and the public, and force journeymen to become mere employees of such as are able to pay the tax. Such was never the intention of the legislature. Such a law would be unjust and oppressive in its operation on the journeymen, and pernicious in its effect on the general public, as it would force out of competition all but the employers of such labor.

Let it be noted to the credit of this state that legislation of the character under discussion, which cannot be too strongly condemned, made its first appearance in the Acts of 1904. See Acts 1904, chap. 76, p. 72. We find the predicate for § 3854 in that act for the first time, and in the same act we find a companion act, being § 20, and providing that a privilege tax of $60 shall be paid by "each individual, firm, or corporation doing a contracting business in cities of over 10,000 inhabitants, where the cost of any one house or building erected by such individual, firm, or corporation exceeds $3,000." This section in relation to contractors was brought forward in the Code of 1906, becoming § 3793. But, in re-enacting it, another section was also added, providing that where the building contracted for was less than $3,000, but more than $750, a privilege of $20 should be paid. Not content with forcing a builder only contracting to build a house costing $750 to pay a privilege of $20, the inspirers of this law procured another amendment by the legislature of 1908, which is Acts 1908, chap. 73, p. 57, § 4, whereby the amount of the privilege tax to be paid is not determined by the cost of construction of the building contract-

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ed for, but by the number of men employed at any one time. Thus, by § 4, the firm or corporation must pay a privilege of $60 when the number of men employed at any one time shall be ten or more, if it be in a city of 10,000 inhabitants or more; and by a succeeding section, if the number of men employed be one or more, and not more than ten, a privilege of $20 should be paid. Thus the evil has grown, and this species of legislation has progressed from 1904 to 1908, until it is now the law, if one makes a contract to build a coal house or a chicken coop, and employ another to help him, he must first pay a privilege of $20. We cite this act in relation to contractors merely to emphasize the tendency of this legislation. The end and aim of the promoters is not for the genuine purpose of creating a revenue for the state, but to drive out of the business the competition of small contractors who are unable to pay the tax. If this were not the purpose of the legislation, the legislature would long ago have received strong protest.

The business of plumbing is an honorable and necessary one. So is that of a contractor. The law looks on both of these occupations with favor, not with disfavor. This being the case, why should a tax of $50 be levied on the plumber for the right to labor, and a tax of $10 on the lawyer, the dentist, or other professional man? The answer is easy. It was done to make it possible to monopolize the business. In our research of the law we have found no state with a law similar to this. Some states have laws regulating the plumbing business, but no such law as the section under discussion. These things have crept into the law under the guise of privilege taxes, but in reality their purpose is very different. While this evil is yet in its infancy, the attention of the legislature should be sharply directed to it and such legislation checked. Laws of this nature approximate an abridgment of the liberty of the citizen, guaranteed to him by the 14th Amendment of the Constitution of the United States, and should receive the strictest construction. Liberty, in its broad sense, must consist in the right to follow any of the ordinary callings of life without being trammeled. In the case of State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 A. & E. Ann. Cas. 577, in discussing the validity of an act passed by the legislature of the state of Washington, entitled, "An Act to Regulate Plumbing in Cities Having a Population of Ten Thousand Inhabitants or Over, Providing for the Licensing of Persons to Carry on the Business and Work of Plumbing, Creating a Board of Plumbing Examiners, . . . Providing a Penalty for the Violation Hereof," etc., the court said, after declaring the act unconstitutional: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again the court says: "We are not permitted to inquire into the motive of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business . . . is the sole end in view."

We merely quote from the above opinion to show that acts of a similar nature are being frowned upon by all courts as tending towards a deprivation of rights, and aimed at creating monopolies. Legislation of this kind is on the increase. It is stealthily stealing its way into the statutes for the ostensible purpose of raising revenue for the state, when in truth and in fact the only purpose of the promoters of such legislation is to control the business to which it is directed, to shut out competition, create a monopoly, and force those unable to pay the tax, and possessing a knowledge of the business, to look to the ones in control of the monopoly for employment. This is not only unjust to the laborer, but it is equally wrong to the public. There is just as much reason to require a $50 privilege tax of a bricklayer, or a carpenter, or a wood chopper, or a painter, or a farm laborer, as there is to require it from a plumber.

Reversed and remanded.

NEW JERSEY COURT OF ERRORS AND APPEALS.

VALINA R. CROCHERON et al., Appts.,
v.
EDWARD S. SAVAGE et al., Respts.

(— N. J. —, 73 Atl. 33.)

Attorney — purchase from client.

1. An attorney *in hac re* cannot maintain a purchase from a client of the subject-

Headnotes by DILL, J.

Case Note. — Right of attorney to purchase subject-matter of litigation or of retainer from client, and his duty in relation thereto.

The right of an attorney to purchase from his client the subject-matter of his retainer

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matter of the retainer, unless he demonstrates that he made a full communication to his client, not only of all that he knew, but as well of all that he believed, respecting the property.

Same — validity.

2. If, in the course of his employment, the attorney forms an opinion that the property is more valuable than had theretofore been assumed, and if he fails to disclose that opinion, and thus give his client all that reasonable advice against himself that he would give against a third person, the transaction, if questioned, cannot be sustained.

(June 14, 1909.)

APPEAL by complainants from a decree of the Probate Court in defendants' favor in a suit to set aside a deed of certain real property. Reversed.

The facts are stated in the opinion.

Messrs. **McDermott & Enright**, for appellants:

The purchase by an attorney from his client of the subject-matter of litigation is presumptively invalid, and, to uphold the transaction as against the client, the attorney must prove affirmatively by evidence its perfect fairness, adequacy, and equity.

Burnham v. Heselton, 82 Me. 495, 9 L.R.A. 90, 20 Atl. 80; Brown v. Bulkley, 14 N. J. Eq. 451; Hill, Trustees, 160; Porter v. Bergen, 54 N. J. Eq. 406, 34 Atl. 1067; Lynde v. Lynde, 64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694; Dunn v. Dunn, 42 N. J. Eq. 443,

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or of litigation in which he is engaged presents several distinct aspects,—that treated in this note being the right of an attorney to purchase outright from his client the subject-matter of his retainer or of prospective or pending litigation concerning which he is consulted or retained, as well as his duty to his client in relation thereto. This includes absolute purchases, as well as conveyances of such property in payment of attorneys' fees already earned, and the purchase of the client's interest in the subject-matter of litigation by the attorney at a judicial sale.

The following phases of the question, however, are excluded: The assignment to or purchase of a judgment in favor of his client by an attorney; the conveyance of the subject of litigation or retainer to an attorney to secure his prospective or contingent fees; the purchase of property by the latter from his client, where there is a general retainer which does not relate to the subject of purchase; the conveyance or assignment of subject of retainer or litigation to an attorney, in order to defraud the client's creditors; and transactions the validity of which depends upon the doctrine of champerty and maintenance, or statutes forbidding the purchase of things in action by an attorney for the purpose of bringing suit thereon.

Right of attorney to purchase; in general.

It has been held in a few cases that an attorney is under an absolute disability to purchase the subject-matter of his retainer or of prospective or pending litigation from his client. West v. Raymond, 21 Ind. 305; Atkins v. Delmege, 12 Ir. Eq. Rep. 1; York Bldgs. Co. v. Mackenzie, 8 Bro. P. C. 42.

In Rogers v. Marshall, 3 McCrary, 76, the court, in holding that the purchase by an attorney *pendente lite* of property which was the subject of litigation, worth half a million dollars for $45,000 to be invalid, said it could not be sustained in equity, even upon a showing of good faith, where the attorney was advising his client as to the probable outcome of the pending litigation, as it was difficult to see how it was possible for an attorney, under such circumstances, to deal with his client at arm's length, as the client's acceptance or rejection of any proposition for a purchase by the attorney must depend upon the nature of the advice received touching the pending litigation, and that a court of equity should hold such a sale absolutely void as being contrary to the policy of the law and principles of equity.

But a contrary rule is sustained by the weight of authority. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Yeamans v. James, 27 Kan. 195; Handlin v. Davis, 81 Ky. 34; Dunn v. Record, 63 Me. 17; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215; Miles v. Ervin, 1 M'Cord, Eq. 524, 16 Am. Dec. 623; Cane v. Allen, 2 Dow. P. C. 289; Gibson v. Jeyes, 6 Ves. Jr. 266; Holman v. Loynes, 4 De G. M. & G. 270; as well as the many other cases hereinafter cited.

The purchase by an attorney of the property in litigation is not necessarily void on the ground of that relationship, unless it appears to have been used to the prejudice of the client. Miles v. Ervin and Dunn v. Record, supra; Tippett v. Brooks, 28 Tex. Civ. App. 107, 67 S. W. 512; Keenan v. Scott (W. Va.) 61 S. E. 806.

In Handlin v. Davis, supra, the court, in holding void a purchase by an attorney for an administrator of the interest of an heir in an estate, said an attorney may not make such purchase, as, by reason of his employment, it is his duty to advise, counsel, and fully protect and advance the interests of the estate, when not inconsistent with his professional obligation, and he cannot contract with his client in relation to the subject-matter of litigation; "such contracts may not be void, and the chancellor, when it is for the benefit of the estate, might decline to cancel the trade, or, when full value has been paid, the parties acting in the best of faith, might decline to interfere, because they could not be placed *in statu quo*."

In answer to the contention that such a purchase by an attorney, be it ever so fair, is absolutely void, the court in Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192, said it knew of no such rule, but that "the general rule is that an attorney is not incapable of

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7 Atl. 842; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Condit v. Blackwell, 22 N. J. Eq. 481; Gibson v. Jeyes, 6 Ves. Jr. 278; 1 Story, Eq. 315, 316; Lowther v. Lowther, 13 Ves. Jr. 103; Porter v. Woodruff, 36 N. J. Eq. 174; Farmer v. Farmer, 39 N. J. Eq. 211; Rothschild v. Brookman, 2 Dow & C. 188.

Messrs. **Robert H. McCarter** and **William H. Osborne** for respondents.

Dill, J., delivered the opinion of the court:

The complainant Mrs. Crocheron seeks to set aside a deed of certain real property made by her to her attorney, Mr. Savage, the defendant herein, in the course of his professional employment *in hac re*. The conveyance is attacked on the grounds: That it was obtained by the defendant from his client in violation of the rule which requires that an attorney who bargains with his client in a matter of advantage to himself must conduct the transaction in all respects fairly and equitably; that he must fully and faithfully discharge all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client is fully informed of the nature and effect of the transaction proposed, and of his own rights and interests in the subject-matter involved, and by seeing to it that his client either has independent advice in the matter, or else receives from the attorney such advice as the latter

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contracting in respect to the very subject of the litigation in which he is engaged, and for his own benefit, . . . so long as the transaction is open, honest, and in every way fair to the client."

But the policy of the law is clearly opposed to such purchases, as the relationship of attorney and client begets the utmost confidence, which may not be used to the client's prejudice. Miles v. Ervin, supra.

An attorney will not be permitted, because of his confidential relation to his client, to take any advantage of his client in making such a purchase from the latter. Dunn v. Record and Keenan v. Scott, supra.

And where an attorney purchases the subject of litigation from his client, in regard to which he has superior means of knowledge, as well as undue influence over his client, derived from his position, they are regarded as standing to each other in the relation of trustee and *cestui que trust*. Brown v. Bulkley, 14 N. J. Eq. 451.

A purchase of the subject-matter of his retainer by an attorney from his client is presumptively void. Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; Burnham v. Heselton, 82 Me. 495, 9 L.R.A. 90, 20 Atl. 80; Anonymous, 16 Abb. Pr. 423; Keenan v. Scott, supra.

It was held in Keenan v. Scott, supra, that the conveyance of the subject of his retainer to an attorney is presumptively invalid as being against public policy and an imposition upon his client, and that it will be set aside irrespective of the fairness or unfairness of the transaction, if the client moves within a reasonable time.

To the same effect see Lewis v. Brown, 36 W. Va. 1, 14 S. E. 444, infra.

It was said in an anonymous case in 16 Abb. Pr. 423, that it has long been the rule that the relation of attorney and client admits of so much influence and of such an abuse of confidence, and of so great an opportunity for extortion, as to place the client in a state of pupilage and the attorney in the position of guardian, and that a gift or transfer of property, especially that in litigation, from client to the attorney, is presumptively nugatory and void.

And such a purchase will be treated as constructively fraudulent, unless the attorney establishes its perfect fairness and equity, as well as the adequacy of the consideration. Condit v. Blackwell, 22 N. J. Eq. 481; Howell v. Ransom, 11 Paige, 538.

Such a purchase, by reason of the fiduciary relation of attorney and client, is voidable at the option of the client. Lane v. Black, 21 Va. 617.

Owing to the confidential relation existing between attorney and client and the influence of the former over the latter, the courts closely scrutinize all transactions by which an attorney acquires the subject-matter of his retainer or of pending litigation. Atwood v. Hadley, Fed. Cas. No. 639; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865; Keenan v. Scott, supra; Mitchell v. Colby, 95 Iowa, 202, 63 N. W. 769. This doctrine runs through all of the cases cited in the note.

In order to establish the invalidity of such a purchase it is unnecessary for the client to show improper influence on the part of the attorney, as that will be presumed from the relation of attorney and client. Mason v. Ring, 2 Abb. Pr. N. S. 322; Klein v. Borchert and Howell v. Ransom, supra.

Where the attorney does not offer any proof to establish the good faith of the transaction, it is unnecessary for the court, in order to set it aside, to find that there was bad faith or fraud upon his part. Klein v. Borchert, supra; Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

Whether there has been actual fraud is not the question upon which such a case usually turns; and where the consideration is grossly inadequate, so that it is wholly improbable that the client would have sold the property had he been fully informed of the facts the attorney should have ascertained and communicated to him, the court is bound to declare the sale constructively fraudulent. Howell v. Ransom, supra.

And no presumption of innocence or improbability of wrongdoing will be indulged

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would have expected to give had the transaction been one between his client and a stranger. The learned vice chancellor who heard the case below sustained the transaction and held the deed valid.

We are obliged to differ with the conclusion of the court below, applying the amplification of Lord Eldon's rule (Gibson v. Jeyes, 6 Ves. Jr. 266) as laid down by Justice Kay in Luddy v. Peard (1886) 55 L. J. Ch. N. S. 884, to the effect that an attorney cannot maintain a purchase from a client unless he can demonstrate that he made a full communication to his client, not only of all that he knew, but also, what is pertinent to this case, of all that he believed, respecting the property, its character and value; that where the attorney, in the course of his employment, forms an opinion that the property is more valuable than had theretofore been assumed, if he fails to disclose that opinion, and thus give his client all that reasonable advice against himself that he would give against a third person, the transaction cannot be sustained. Inasmuch as the relation of attorney and client is involved, we discuss the facts somewhat in detail.

The complainant was the owner of an undivided half interest in a certain tract of 3 acres of salt meadow land on Staten Island sound and Thorp's creek in Middlesex county, New Jersey. The property in question had, prior to this controversy, been treated, so far as the record of title shows, as a mere adjunct to property on Staten

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in attorney's favor. Burnham v. Heselton, supra.

Duty of attorney to client upon purchasing.

In order to sustain such a purchase, an attorney must affirmatively establish the utmost good faith and fairness of the transaction, as well as the adequacy of consideration, and also that he fully informed the client of the material facts and gave him the same disinterested advice he would have given had the sale been made to a stranger, and that in fact they dealt at arm's length. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Stubinger v. Frey, supra; Day v. Wright, 233 Ill. 218, 84 N. E. 226; Zeigler v. Hughes, 55 Ill. 288; Roby v. Colehour and Mitchell v. Colby, supra; Yeamans v. James, 27 Kan. 195; Wills v. Wood, 28 Kan. 400; Dunn v. Record, 63 Me. 17; Burnham v. Heselton and Klein v. Borchert, supra; Barrett v. Bell, 101 Mo. App. 288, 73 S. W. 865; Condit v. Blackwell; Dunn v. Dunn; and Howell v. Ransom, supra; Re Demarest, 11 App. Div. 156, 42 N. Y. Supp. 444; Marden v. Dorthy, 12 App. Div. 176, 42 N. Y. Supp. 834; Miles v. Ervin, 1 M'Cord, Eq. 524, 16 Am. Dec. 623; Tippett v. Brooks, 28 Tex. Civ. App. 107, 67 S. W. 512; Keenan v. Scott, supra; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192; Young v. Murphy, 120 Wis. 49, 97 N. W. 496; Rogers v. Marshall, 3 McCrary, 76; Atwater v. Hadley, supra; Byrne v. Jones, 90 C. C. A. 101, 159 Fed. 321; Gibson v. Jeyes, 6 Ves. Jr. 266; Wood v. Downes, 18 Ves. Jr. 120; Holman v. Loynes, 4 De G. M. & G. 270; Thomas v. Phillips, 11 Jur. 80; Hall v. Hallet, 1 Cox, Ch. Cas. 134; Simpson v. Lamb, 7 El. & Bl. 84; Kenney v. Brown, 3 Ridgeway, 462.

The purchase by an attorney of his client's property concerning which his advice is sought will always be viewed with suspicion, and the attorney assumes the heavy burden of not only establishing the fact that he did not overreach his client, but also that the latter acted upon the fullest information and advice as to his rights; in other words, the attorney must prove *uberrima fides*, or the transaction will be set aside by a court of equity. Young v. Murphy, supra.

Where the subject of a purchase by an attorney from his client is the subject of litigation, there will be a strict enforcement of the rule that the burden rests upon the attorney to affirmatively establish that the transaction was fair and just, and that the client acted upon full information as to all the material circumstances, and that no advantage was taken of the latter's complacency, confidence, ignorance, or misconception. Re Demarest, supra.

As it is the duty of an attorney to protect his client's interests the latter is entitled to the full benefit of his best exertions and the attorney cannot bring his own personal interests in any way into conflict with that which his duty requires of him; neither may he make a gain for himself in any manner whatsoever at the expense of the client, with respect of the subject-matter of such relationship. Yeamans v. James, supra.

The court said in Cox v. Delmas, supra, that the relation of attorney and client is a fiduciary one of the very highest character, which binds the attorney to the most conscientious fidelity, *uberrima fides*, and, if he has on his own account any transaction with his client as to the subject of litigation, he must give the latter "all that reasonable advice against himself that he would have given him against a third person," and show that he acted with entire fairness throughout the transaction, without taking any advantage of his client.

It has been said that the rule is that an attorney in such a case is under the heavy responsibility of proving that his "diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger," and that he "must show to demonstration (for that must not be left in doubt) that no industry he is bound to exert would have got a better bargain." Gibson v. Jeyes and Holman v. Loynes, supra.

An attorney who assumes the double position of confidential legal adviser and of purchaser of a portion of the property which is the subject of the relation is bound to observe the utmost good faith toward his client, and to draft all necessary papers with

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island, and the history of the title was therefore found in deeds to Staten island property, recorded in Richmond county, in New York state. About 1890 the Port Reading Railroad Company acquired title to the other undivided half of the property by a deed from one Louis N. Meyer. In the deed to the railroad company, the scrivener attempted to convey this undivided one-half interest in 3 acres by a description conveying 1½ acres, although the property had never been partitioned or divided. The railroad, however, took possession of the whole 3 acres. The plot in question was so substantially inclosed by other lands belonging to the railroad that the only access to it was by boat, either from Staten Island sound or inland by Thorp's creek. The railroad erected on the immediately adjacent property coal docks, bulkheads, and particularly a wharf, which practically closed Thorp's creek to navigation, and thus tended to cut off the only available access to the *locus in quo* from the land side. The use made of the land by the complainant and her predecessors in title was to cut salt grass upon the meadow. Because of the situation and character of the property, it had little market value and as little available value, except from its contiguity to the railroad property and from its considerable water front, nearly 300 feet on Staten Island sound and approximately 750 feet on Thorp's creek. It therefore occupied a strategic situation and was of primary importance to the railroad.

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sufficient care and professional skill, so as to make them express the real understanding and agreement of the parties. Payne v. Avery, 21 Mich. 524.

In order to sustain a sale from a client to an attorney of the subject of litigation, the burden is upon the latter to show that he has done as much to protect the client's interest as he would have done in case the sale was to a stranger. Rogers v. Marshall, supra.

The courts will watch such a transaction with jealousy, and throw upon the attorney the burden of proving that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser. Ibid.; Keenan v. Scott (W. Va.) 61 S. E. 806.

It must also appear that the attorney gave the same price therefor that he would have advised his client to accept from a third person. Champion v. Rigby, Tamlyn, 421.

The attorney, in order to sustain the purchase, must show that he communicated to his client everything necessary to enable the latter to form a correct judgment as to the actual value of the subject-matter of the purchase, and as to the propriety of selling at the price offered. Howell v. Ransom and Rogers v. Marshall, supra.

The neglect of an attorney to inform himself of the true value of the property he purchases from his client at an inadequate consideration will not exonerate the former or be sufficient to sustain the transaction. Rogers v. Marshall, supra.

In order that such a transaction may be sustained, the attorney must show that all the considerations which should have operated to prevent the sale by the client were presented by him with the earnestness of a man who was anxious only for his client's good, and it must appear that the client is no worse off than he would have been had he consulted an adviser who had no interest and no selfish end in view, and also that the attorney took such measures to inform himself as to the value of the property as are ordinarily taken by persons dealing in such property under like circumstances, and, being himself thus informed, that he communicated all his information upon the subject to his client. Ibid.

The burden rests upon an attorney to show that his client fully understood the nature and effect of the transaction, and that the sale of the property was the voluntary and intelligent act of his client. Marden v. Dorthy, 12 App. Div. 176, 42 N. Y. Supp. 834; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865.

In Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192, the court said that, if the attorney satisfactorily lift such burden, the transaction cannot be impeached; but that equity will protect the client from all probable injury, holding the attorney to strict account and placing upon him the burden of proving his innocence, but it will go no further.

In order to sustain the purchase of the subject of litigation by an attorney from his client, it must affirmatively appear that the transaction is fair; but this rule, however, does not exclude the weight which is to be given to presumptions arising from lapse of time, acquiescence, and the death of the parties and witnesses, and these considerations are entitled to great weight in a case where such a purchase is not challenged until eighteen years afterward, and no excuse for the delay is shown, neither absence, ignorance, or inability, and both client and attorney are dead. Wills v. Wood, 28 Kan. 400.

So, such a purchase will be upheld where the attorney pays full value and acts in best of faith, and the court may decline to act when the parties cannot be placed *in statu quo*. Handlin v. Davis, 81 Ky. 34.

Where an attorney purchased land which was the subject of the relationship of attorney and client from the latter through an agent who did not disclose his principal it will be sustained fifteen years later, if such agent acted bona fide, and the attorney fully informed the client of his legal rights to such property and took no advantage of him by virtue of his relation as attorney, and the client received a just and fair price therefor. Yeamans v. James, 27 Kan. 195.

The purchase by the attorney of the plaintiff from the defendant of the land which

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In 1903 the complainant, who was a widow some seventy-five years of age, without apparent influence or means, employed the defendant, a lawyer of special experience in dealing with properties in this neighborhood, a real estate expert in local values, and the owner of similar adjacent property, to represent her as attorney and counsel, and either to sell the property to, or force some settlement with, the railroad. The defendant, under his professional retainer, entered into negotiations, but the railroad, sustained as it was by a record title which its attorney had advised was sufficient, seemed to rely upon possession as nine points of the law. From 1903 to November 1, 1905, the defendant had various communications with the railroad, asserting his client's ownership of the property, threatening suit, and demanding $7,500 for her interest; but he evidently desired to avoid a lawsuit, hoping to convince the railroad that the claimant had title and thus settle the matter. In October, 1905, he again threatened suit, stating (October 18, 1905): That he had promised his client that he would file the papers within a week unless the matter was arranged, but would hold the papers until the 23d of October, 1905; that, if not settled by that time, he would go to Philadelphia and make a demand on the railroad, preliminary to commencing the action. But the railroad constantly refused to recognize the complainants' title, although it offered the nominal sum of $100 as peace money for

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was the subject of litigation will be upheld where purchased with the client's knowledge and approbation, after being informed of all the circumstances and material facts except the purchase price, which it was understood he was not to know, which was insisted upon by the defendant and was necessary in order to obtain a settlement, and the consideration received by the client was the fair value of the property, and he received disinterested advice upon the facts. Vanasse v. Reid, supra.

Where, upon the urgent solicitation of a client, his attorney purchases his interest in the subject of litigation, which is not worth much more than the amount due the attorney for his services, and the latter fully informed his client, who resided in a distant state, of every fact that had come to his knowledge regarding the litigation, the transaction will not be set aside after six months, where the client has retained the money paid him by the attorney, and has deliberately ratified the sale in writing. Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444.

However, such transaction would have been set aside had the client moved within a reasonable time, as the rule recognized by the court is that an attorney cannot, during the existence of the relation of attorney and client, make a valid purchase of the subject-matter of the retainer, which will not be voidable at the option of his client. Ibid.

Where an attorney, after the repeated importunities of his client, purchases his interest in the subject-matter of a pending litigation at his client's own figure, the transaction will be sustained where it does not appear that the attorney took any advantage of his client or profited by the confidence between them. Myers v. Luzerne County, 124 Fed. 436.

It was held in Coaks v. Boswell, L. R. 11 App. Cas. 232, reversing 33 Week. Rep. 376, that a solicitor for the defendant in an action, who also had an interest with the solicitor for the complainant in the costs of the proceeding, might, upon obtaining leave of the court that has control of the sale of his client's property, purchase the same, as the consent of the court relieves the solicitor from his fiduciary character and places him in the same position as any other person in relation to the sale.

In order to uphold an exchange by an attorney and client of the subject-matter of retainer, it is essential that the former should make a full and open disclosure of all the material facts in connection with the transaction, and he must disclose all the material facts in connection with his title to the property exchanged. Condit v. Blackwell, 22 N. J. Eq. 481.

Where an attorney purchased the subject of litigation from his client without informing his associate counsel or consulting with him as to the fairness or equity of the transaction, it will be set aside, as his failure to communicate the fact of his purchase to his associate counsel was unfair to his client. Atwood v. Hadley, Fed. Cas. No. 639.

Where an attorney acquires the subject-matter of litigation in exchange for worthless property owned by him, an inference of bad faith upon his part arises, which it is necessary he should overcome and rebut. Klein v. Borchert, 89 Minn. 377, 95 N. W. 215.

The purchase by an attorney of his client's property at a judicial sale for an inadequate price will be regarded as invalid where it results in a sacrifice of the property, prejudicial to the interests of the client. Smith v. Thompson, 7 B. Mon. 305.

Where an attorney who is aware of the successful outcome of litigation purchases the client's interest therein for an inadequate consideration, without disclosing such knowledge to the client, the transaction will be set aside. Dunn v. Record, 63 Me. 17; Miles v. Ervin, 1 M'Cord, Eq. 524, 16 Am. Dec. 623; Lane v. Black, 21 W. Va. 617.

This doctrine was applied in Dunn v. Record, supra, where an attorney who had a favorable "inkling" as to the result of litigation purchased the cause of action from the client for $300, on which the former subsequently received about $2,000.

So, where a client who is ignorant of the successful result of litigation sells the land

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her interest, which she declined. Finally, in November, 1905, Mr. Savage had an interview with Mr. Cutter, the local counsel for the railroad, in which the latter told Mr. Savage that he had spent two or three days in the Richmond county clerk's office, Staten island, examining the title; that he had personally inspected the property, and, although the descriptions were somewhat indefinite and differed in the Oakley deed and in the Meyer deed, he thought the property mentioned in both deeds was the same. He then said that the Oakley deed, under which the complainant claimed, called only for an undivided half of the land, and that, if partition proceedings were brought, the company would have set apart to it the land upon which the docks were constructed.

In reference to this interview the railroad counsel testified that he had never admitted before that he thought the property described in the two deeds was the same property. Mr. Savage testified that Mr. Cutter told him that he had made his report, and that the impression made upon his (Mr. Savage's mind at that interview was that Mr. Cutter had reported that the complainant had some title. The facts thus communicated to the defendant, that the railroad had through its counsel examined the records in Staten island, and that the counsel had personally inspected the property and was satisfied that the complainant had title to an undivided one-half interest in the

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therein involved to a third person for an inadequate price, the latter having, without the client's knowledge, entered into an agreement with his attorney to purchase the property and share the profits with him, the conveyance cannot be sustained. Miles v. Ervin, supra.

And where it appears that an attorney who had been prosecuting a claim against the government, knew it had been allowed and, without so informing his client, purchased it for one third of the value thereof, and afterward received the full amount of the claim from the government, the client may repudiate the transaction and recover the difference between what the attorney received and what he paid his client for the claim, less the fee agreed upon, irrespective of any false representations made by the attorney to the client. Lane v. Black, supra.

An assignment to an attorney by two incompetent persons who were related to him, of certain claims he was prosecuting for them against the government, which he afterward succeeded in collecting, will be set aside where the assignment was obtained without requiring the assignors to act under independent advice, the attorney requesting them not to mention the assignment and, on several occasions, making incorrect statements to them as to the status of the claim. Brooks v. Pratt, 55 C. C. A. 515, 118 Fed. 725.

Where an attorney for $2,000 obtains an assignment of an interest in an estate worth about $15,000, although he states to the heirs that it was assessed for $10,000, and also informed them of the claims of remote kindred to the estate, it will be set aside, as such gross inadequacy in price will make the chancellor indulge his suspicion of wrong, especially where an attorney and an administrator have entered into an agreement to purchase the interest of the heirs and reap a benefit therefrom, and the court will not examine the evidence of good faith or the knowledge of the heirs of the condition of the estate on the litigation pertaining thereto, but will annul the transaction, notwithstanding it may be conceded that no improper influences were used, as the confidential relation existing and the great inadequacy of consideration will control the disposition of the case. Handlin v. Davis, 81 Ky. 34.

Where an attorney obtained a conveyance from his client of land which was the subject of a litigation, the attorney advising him that he had acquired title under a judicial sale which extinguished the client's title, leaving in the latter only a right to redeem, which was erroneous and misleading, as in fact all the right the attorney had was to be reimbursed by his client for the money he had paid in purchase of the property, the conveyance will be set aside. Roby v. Colehour, 135 Ill. 300, 25 N. E. 777.

Where an attorney who held a mortgage for the purpose of collecting the interest thereon purchased it from his client, who resides in another city, for about one quarter of its value, the purchase will not be upheld, unless the former affirmatively shows that he gave his client full information and disinterested advice, and that the whole transaction was conducted in perfect good faith and without pressure or influence on his part, and the client acted with entire freedom and with complete knowledge of the situation and circumstances. Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

Where an attorney who is employed to foreclose a mortgage and to sell thereunder bids in the property in the name of his client, who resides in a distant state, and who, upon the false representations of the attorney as to the value of the property, conveys it for much less than its value to a third person, without being informed of the fact that he purchased for the attorney, who has also acquired the equity of redemption without the knowledge of his client, the conveyance will be set aside, as the duty of the attorney does not cease until the expiration of the time for redemption, and under the circumstances the latter failed to exercise that degree of good faith demanded by the confidential relation of attorney and client. Zeigler v. Hughes, 55 Ill. 288.

An attorney is not relieved from the obligation imposed by his confidential relation merely because negotiations are carried on

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property, are important, because, as appears from the evidence on both sides, Mr. Savage became convinced at this time that the railroad now had before it such facts that it must recognize the complainant's claim, and from this he must have formed the professional opinion that the result of negotiations or of a legal contest must eventually be an award to his client, and hence that the value of the client's interest was greater than either he or she had theretofore believed. After this interview nothing more seems to have been done, and no communications passed between any of the parties until the 3d of January, 1906, when the defendant, without previous notice to the complainant, went to her residence at Rossville, on Staten island, with the admittedly preconceived intention of buying her interest in the property. He took with him a deed, containing a description of the property, and ready for execution except as to the names of the parties, and, what is quite as significant, he provided himself with $200 in currency, with which to pay for the property.

Taking the defendant's version of the interview with the plaintiff and her son, he first mentioned the subject of the proposed purchase to the son, and told him that he had spent all the time and all the money he was going to spend on the matter, unless he commenced litigation That he had been referred from one official to another and was no better off than he was three years before. The only offer they had ever made

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through a third person for the benefit of the former, without the knowledge of the client. Ibid.; Lewis v. Hillman, 3 H. L. Cas. 607; Howell v. Ransom, 11 Paige, 538.

The fact that such purchase was made in the name of the attorney's father-in-law creates strong suspicion as to its validity. Howell v. Ransom, supra.

It is the duty of an attorney, before purchasing from his client, to disclose the names of all persons interested with him in the purchase. Rogers v. Marshall, 3 McCrary, 76; Jones v. Byrne, 149 Fed. 457, reversed on other grounds in 90 C. C. A. 101, 159 Fed. 321.

So, a sale will be set aside where an attorney does not inform his client of the fact that he has contracted with a third person to advance the money to make the purchase, and that he is to receive a one-half interest therein. Jones v. Byrne, supra.

The purchase by an attorney from his client of the subject-matter of litigation will not be sustained where there is a dispute as to whether the attorney informed his client that he or a third person with whom negotiations had been pending was the purchaser, and the consideration was but one third of what the attorney received upon the settlement of the matter. Re Demarest, 11 App. Div. 156, 42 N. Y. Supp. 444.

Where a litigant assigned his cause of action to a third person, and thereafter one who subsequently became the former's attorney, pending negotiations between the litigant and the assignee for a repurchase of the cause of action, agreed with his client to advance money for that purpose, and in fact took an absolute interest therein by assignment, for which his client received no consideration, and the attorney afterward collected the money upon the cause of action, a judgment in favor of the client against the attorney will not be disturbed where the jury finds, under such circumstances, that the attorney had not established the fairness of the transaction and that he took no advantage of the client. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836.

Where an attorney is retained concerning two leases and he places one of them in

judgment, but does not issue execution thereon, although the judgment was collectable, and purchases from his client, who resided at a distance, at a grossly inadequate price, the judgment as well as the other lease in the name of his father-in-law, the purchase will be set aside. Howell v. Ransom, supra.

The neglect of the attorney to ascertain the true state of facts will not be sufficient to sustain his purchase. Ibid.

Where an attorney has advised his client not to redeem from a judicial sale, and that a third person would aid him in making redemption through the judgment creditor, the attorney cannot, after the expiration of the redemption period, obtain the title to land worth four times the amount of the judgment from such third person, and hold it against his client, as, the attorney having advised in relation to the transaction, it will not be upheld by the courts. Trotter v. Smith, 59 Ill. 240.

Where an attorney who had been recommended to his client as trustworthy advised the latter, an executor, who resided in another state, who had never seen the lands or assets belonging thereto, that he was unable to collect the assets of the estate, when in fact he had already collected $925, and informed his client that an unnamed person was willing to give $2,000 for the entire estate, and also furnished his client with a sworn statement by which it appeared that the property of the estate was not worth more than the price offered, when in fact it was worth fully $5,000, and made no report of the amount of money already collected, and the client, relying upon such statement, sold the assets to one who, in fact, was the attorney's stenographer, and who subsequently conveyed the property to him,—the conveyance will be set aside, as it was the attorney's duty to acquaint his client with the fact that the purchase was being made for his benefit, and also with the amount he had already collected. Thweatt v. Freeman, 73 Ark. 575, 84 S. W. 720.

And the fact that the attorney testifies that when he made his estimate of value he had no intention of becoming the purchaser is of no effect, as it was his duty to furnish

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was an offer of $100. And that, if his mother wanted to go on with the suit, an action in partition would have to be brought that might result in a division of the property and the recovery of her half interest. To this the son replied, "The other half is not worth anything," and then defendant, without advising him, said, "That is something for you to determine." The defendant told the complainant that the best offer that he could get for her was $100, and that he would rather give her $200 for her interest and fight the railroad himself, than give up the fight. He told her plainly that he could not do anything more for her without a lawsuit, and that he offered her $200, with the understanding that he was going to fight the railroad through and find out whether they had a half interest in the property or not. Again, in the presence of the mother, he repeated to the son that $100 was the only offer that he had ever been able to get them to make, and the question was whether the complainant should give up the right or bring an action to maintain her title, and in his opinion the railroad would not pay anything until they were beaten. The son thereupon said to his mother that she could do as she pleased. Complainant said that she would rather have the money, and the defendant again reiterated his statement that he would give her $200 just for the privilege of fighting the railroad; as he thought they had tried to make a fool of him. She asked for delay to consider the matter, but he

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his client with knowledge of this fact as well as of the amount collected, and it is unnecessary that there should be actual fraud or intentional imposition in the transaction, as the result was the same. Ibid.

Nor does the fact that as part of the consideration the client required that the attorney should seek his fees out of the price obtained in excess of the sum named absolve the latter from his duty to make full disclosure as to his connection with the purchase. Ibid.

An attorney who misrepresents to his client the responsibility of the person against whom the latter has a demand, and purchases it from him at a large discount, and subsequently collects the whole amount, will be liable to his client therefor. Marshall v. Joy, 17 Vt. 546.

Where an attorney was consulted professionally by the father of a decedent and he prepared the necessary papers to obtain administration upon his estate, and subsequently represented the administrator, he cannot acquire the portion of the estate of the deceased which is held in another state by purchase from the father at much less than its value, where he knows that the parent was entitled to all of the property, and not a portion thereof as the latter supposed. Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865.

Where an attorney brings an action for a husband against his wife to obtain a cancelation of a deed from the former to the latter, and also for a divorce, both of which, however, are subsequently dismissed, and afterwards he brings an action for the wife and obtains a divorce against the husband, and in settling alimony one half of the land conveyed by such deed was set off to her as alimony and the other half to the husband as his own property, the attorney cannot subsequently become the purchaser of the latter half at a judicial sale upon execution against the husband, as such land was the property of the wife, who was the attorney's client, and therefore that relation between them prevented him from acquiring his client's title in such manner. Bucher v. Hohl, 199 Mo. 320, 116 Am. St. Rep. 492, 97 S. W. 922.

Under such circumstances the client is not estopped by acquiescing in the decree of divorce from claiming as her own the interest that her attorney acquired in such land. Ibid.

Where the land purchased by the attorney is not in the actual possession of his client, but afterward she obtains possession as the wife of a man she subsequently marries, who is the lessee from the attorney, the statute of limitations does not run against her. Ibid.

A woman for whom an attorney obtained a divorce and acquired an interest in her land in such a manner will not be estopped by laches where, up to the time of bringing suit, she had implicitly trusted her attorney, and was not aware of the fact that the land could not be decreed away from her in the divorce proceedings. Ibid.

There can be no acquiescence or ratification of such purchase unless the client, at the time of the alleged ratification, is aware of the nature and extent of his actual rights, or that the advice of his attorney was incorrect. Roby v. Colehour, 135 Ill. 300, 25 N. E. 777.

But eighteen years' delay in moving to set aside such a sale will be fatal where the client fails to show any adequate reason for the delay. Champion v. Rigby, Tamlyn, 421.

Sixteen years' delay in moving to set aside such a sale is no bar where the solicitor who purchased it practised deception upon his client, the purchase being made in the name of a third person. Atkins v. Delmege, 12 Ir. Eq. Rep. 1.

The rule that applies to attorney and client as to purchases of property which is the subject of the retainer was applied in Poillon v. Martin, 1 Sandf. Ch. 569, where an attorney's clerk purchased of a client a mortgage which had been brought to the attorney for foreclosure, and paid for it in worthless bank notes, assuring the client of their validity.

Where attorney is employed to sell client's property.

An attorney who is employed to sell his client's land cannot become the purchaser

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urged immediate action on her part. He then filled out the deed, she executed it, and he paid her the $200. He also agreed to pay the fees of a former lawyer ($50), and agreed to send a letter explaining the deed which might be sent to the Virginia heirs.

It is admitted that, whether intentionally or otherwise, the defendant failed to make any mention to the complainant of his interview with the counsel for the railroad, or that he had since that time formed any further or other opinion as to the value of the complainant's interest or her chances of succeeding in bringing the railroad to terms. On the contrary, he at once wrote a letter to the complainant to be sent to the Virginia heirs, saying in part: "The best price that I could offer to you for your undivided interest in the 3-acre tract is $200. This is $100 more than the railroad company offered and in my opinion is its full value at the present time. It has really no value outside of the fact that it may be of some value to me eventually, and therefore I have offered $200." The defendant's negotiations with his client were based upon the position of affairs prior to his interview with the railroad's counsel, and not upon the situation as changed by that interview. He made to her no statement of fact and expressed no opinion as to the changed attitude of the railroad. He failed to disclose the impression made upon his mind by the admissions of Mr. Cutter, the railroad's attorney, but refrained from advising her as to the probabilities of success of the suit, without which he declared nothing could be obtained. On the other hand, immediately after he became the purchaser, in his further dealings and negotiations with the railroad, he boldly stood upon his interview with Mr. Cutter as establishing the recognition of his client's title. A side light is thrown upon the conduct of the attorney in not affording the complainant time for reflection and independent advice, but that when she requested delay he urged an immediate execution of the deed. Four days after acquiring the title, the defendant wrote to the railroad, not disclosing his purchase, but

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thereof unless he withdraws from such connection or puts himself completely at arm's length, and shows that he gave his client the same benefit of his advice as he would have done had the sale been to a stranger; and he is also bound to communicate to his client all the knowledge he has acquired as to the value of the estate. Cane v. Allen, 2 Dow, P. C. 289.

And where a solicitor is consulted regarding the sale of realty and agrees to find a purchaser, he cannot nominally purchase it for his brother, but really for himself, without disclosing that fact to his client, although such a sale might be sustained had there been a full disclosure. McPherson v. Watt, L. R. 3 App. Cas. 254.

So, a solicitor who is employed to conduct a sale of the client's property cannot, without full explanation to his client of all the facts, become the purchaser, and a deed taken in the name of a third person will be set aside as fraudulent. Re Bloye, 1 Macn. & G. 488. The lord chancellor said that he did not say to what extent solicitor and client might not deal with the property of the latter where he knows all the facts, but beyond all question the solicitor cannot surreptitiously, by which is meant without the knowledge of the client, become the purchaser.

Where an attorney who is employed to sell his client's property at auction, succeeds in disposing of but a small portion thereof, his subsequent purchase of a portion thereof, in consideration of a previous debt for costs and also for such an annuity for his client as the balance of the purchase price would obtain, will be set aside even after the client's death, where the latter was of intemperate habits, and the attorney did not make any special inquiries as to his health or habits, nor did it appear, as it must in order to sustain the sale, that the attorney exerted himself to obtain any better bargain for his client. Holman v. Loynes, 4 De G. M. & G. 270.

Where lands that a solicitor was employed to sell were appraised without his client's knowledge by a land valuer for a greater sum than the client had agreed to accept, the solicitor cannot, where one parcel sells for more than the appraised value, conceal that fact from his client, and purchase the remaining parcel in the name of a third person at a less figure than its valuation, the price of both parcels thus equaling the client's figure. Charter v. Trevelyan, 11 Clark & F. 714.

And such sale will be set aside when the facts are not dislosed to the client until thirty-seven years afterwards. Ibid.

Where a solicitor superintends an auction sale of his clients' property, one of whom is a minor, he cannot purchase a portion thereof at the sale, unless he shows special circumstances taking it out of the general rule against such transactions. Salmon v. Cutts, 4 De G. & S. 125, affirmed in 21 L. J. Ch. N. S. 750. The court observed that the attorney should have advised his clients upon the subject or given them the advice of disinterested counsel before he became the purchaser.

There can be no acquiescence in such a purchase where the clients are all young. Ibid.

If acquiescence exists in any case the facts must be strong and plain, and show that the clients acted free from the solicitor's influence, and were aware of all the material circumstances, as well as the infirmity in the transaction. Ibid.

In Clarke v. Swaile, 2 Eden, 134, the pur-

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assuming to still represent the complainant, and stated that Mr. Cutter had finally concluded that the meadow property purchased by the railroad from Meyer was only a half interest, and not the whole property, and that the undivided one-half belonged to his client. He suggested an actual partition, and stated that he had had the property surveyed, and expressed the hope that they could agree upon a fair and equitable division.

After the ownership of the defendant became known, negotiations continued between him and the railroad on various lines, for a division of land by conveyances each to the other, by adopting a line of division or drawing by lot, for an exchange of contiguous properties owned by the parties, in which the 3-acre tract was included, for the purchase or sale at a figure to be fixed by the railroad. In fact, the evidence abundantly shows that the defendant made every effort in his power to realize upon the property without resorting to a lawsuit, to obtain an actual partition by agreement, to effect an exchange of properties, to realize cash upon his half interest by an actual sale at a figure, or to purchase the interest of the railroad at the same figure. Throughout the entire negotiations, the value placed upon the property by the defendant was $7,500, or in that immediate neighborhood. The negotiations having failed, the defendant brought a suit in equity against the railroad, claiming title to the land in question, asking for an accounting and a mandatory injunction against the railroad, enjoining and directing the removal of all the piers, docks, stores, buildings, and obstructions, and directing the restoration of Thorp's creek to its natural and navigable condition. The present suit was commenced nearly two years after the execution of the deed in question and shortly after the suit was brought by the defendant against the railroad.

As to the law applicable to this case, it is well settled. Mr. Justice (subsequently Chancellor) Magie in this court stated the rule as follows: "When two parties stand toward each other in any relation which necessarily induces one to put confidence in the

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chase by an attorney from his client of land for which he had been appointed trustee to sell, which he had failed to accomplish, was sustained where there was no fraud, and the purchase had been recognized and approved by the *cestui que trust*.

Right of attorney to purchase after termination of relation of attorney and client.

Even after the termination of the relation of attorney and client, the former will not be permitted to purchase the subject-matter of his retainer without clearly showing the fairness and equity thereof, as well as the adequacy of the consideration. Mason v. Ring, 2 Abb. Pr. N. S. 322; Brown v. Bulkley, 14 N. J. Eq. 451; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865; Broun v. Kennedy, 4 De G. J. & S. 217, affirmed in 33 Beav. 133.

Or that the conveyance was the purely voluntary act of the client. Mason v. Ring, supra.

This doctrine was applied where, nine months after termination of the relation of attorney and client, the latter conveyed land to the attorney in compensation for his services. Ibid.

And this rule was applied in Broun v. Kennedy, supra, where, without independent advice, two months after the close of protracted litigation, a client conveyed to her solicitor a reversion of considerable value, charged with her debts and certain legacies, as such transaction is against public policy, and entitles the client to complain that she labored under a want of sufficient advice, information, and assistance on the subject before and when she executed the conveyance, which was, said the court, an instrument of great and substantial impropriety.

The reason for the rule being that a controlling influence over the client even then will be presumed to exist more or less. Barrett v. Ball, supra.

But it was held in Jinks v. Moppin (Tex. Civ. App.) 80 S. W. 390, that, where the relation of attorney and client has terminated, the purchase by the former in payment of his fees of property which was the subject of litigation is not affected by the usual rule in such cases, and the burden rests upon the client to prove fraud in the transaction.

Permitting conveyance to stand as security for attorney's advance and fees.

In general, in canceling such a sale by client to attorney, the latter will be allowed the amount paid his client therefor. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Trotter v. Smith, 59 Ill. 240; Zeigler v. Hughes, 55 Ill. 288; Dunn v. Record, 63 Me. 17; Re Demarest, 11 App. Div. 156, 42 N. Y. Supp. 444.; Lane v. Black, 21 W. Va. 617.

In setting aside such a transaction, the attorney will be allowed his reasonable fees and expenses pertaining to the matter of his employment. Barrett v. Ball and Lane v. Black,—supra.

As well as his reasonable compensation. Keenan v. Scott (W. Va.) 61 S. E. 806.

And such a conveyance will be permitted to stand as security for what is actually due the attorney for his services and disbursements. Mason v. Ring, supra; Wood v. Downes, 18 Ves. Jr. 120.

But is was held in Marden v. Dorthy, 12 App. Div. 176, 42 N. Y. Supp. 834, where an attorney is guilty of fraud in purchasing the subject-matter of his retainer, that the transfer will not be permitted to stand even as security for the money advanced by him thereon to his client.

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other, and gives to the latter the influence which naturally grows out of such confidence, and a sale is made by the former to the latter, equity raises a presumption against the validity of the transaction. To sustain it the buyer must show affirmatively that the transaction was conducted in perfectly good faith, without pressure of influence on his part, with complete knowledge of the situation and circumstances, and of entire freedom of action on the part of the seller. When the confidential relation is that of attorney and client, the attorney who buys must also show that he gave to his client who sells full information and disinterested advice. Dunn v. Dunn, 42 N. J. Eq. 431, at page 443, 7 Atl. 842. The same principle is found in the English reports, following the leading case of Gibson v. Jeyes (1801) 6 Ves. Jr. 266. See Holman v. Loynes (1854) 4 De G. M. & G. 270; Savery v. King (1856) 5 H. L. Cas. 627; McPherson v. Watt (1877) L. R. 3 App. Cas. 254. Luddy v. Peard (1886) 55 L. J. Ch. N. S. 884, is closely analogous to the present case. There a solicitor who had acted for a bankrupt purchased the interest of the latter in a trust estate. The solicitor had, apparently, in good faith and without intention to mislead, represented to the trustee in bankruptcy and to his solicitor and to the bankrupt himself that the interest was a life interest only, having no salable value; but before the purchase the solicitor's professional skill had led him to believe that this construction of the will was doubtful, and that it was possible that the bankrupt's interest was, after all, an absolute one, and he also formed the opinion that the estate was much more valuable than appeared from the rental, which he admitted was nothing like its true value. The solicitor purchased from the trustee in bankruptcy for £77 an estate which was worth £2,000. The opinion contains the following: "From a time anterior to the death of the testatrix until after his purchase from Sperring [the bankrupt's trustee], J. D. Peard acted as solicitor for Luddy in respect of this property. In the course of that employment he was called upon to consider carefully the extent of Luddy's interest under the will. He evidently formed an opinion that it was probably an absolute interest, and not merely . . . a life interest, as described in his letter of the 11th of December, 1876, . . . and his subsequent communications with Luddy and his trustee. In the course of the same employment he also formed an opinion that the property was more valuable than the actual rental showed. He did not disclose his opinion on these points either to Luddy or his trustee or the trustee's solicitor. . . . Putting aside the circumstance of secrecy and supposing Luddy not to be bankrupt, the case would be one in which Peard could not have maintained such a purchase from Luddy himself, unless he could show that he had made a full communication to his client of all he knew or believed respecting the property, and, as Lord Eldon said in Gibson v. Jeyes, supra, had given his client all that reasonable advice against himself that he would have given against a third person." As to the distinction made in the English cases between an attorney *in hac re* and one otherwise situated, see Montesquieu v. Sandys, 18 Ves. Jr. 302, at page 313; Holman v. Loynes and McPherson v. Watt, supra. There is no force in the contention here that Mr. Savage was not the attorney *in hac re*.

It is not necessary to find that the attorney was guilty of intentional wrongdoing. The reason why he did not disclose the material facts upon which we have commented is not important. The fact that he did not disclose them is sufficient. The law looks on transactions of this kind between an attorney and his client with suspicion, and will not permit a conveyance to the attorney to stand unless the attorney demonstrates the entire good faith of the transaction. It requires him to be absolutely frank and open with his client, to disclose every fact of which he has knowledge, and as well any professional opinion he may have formed, which could in any way affect the client in determining whether or not to make the conveyance. The conduct of Mr. Savage does not measure up to this standard of frankness.

The contention of the defendant's counsel that the Port Reading Railroad Company instigated the present action, and that it is intended to be and is a counter move on the part of the railroad to defeat the injunction suit brought by Mr. Savage against the railroad, or, as counsel graphically puts it, that "the hand of the railroad sticks up like a sore thumb throughout the entire suit from its commencement down to date,"—is interesting, but is no defense. The defendant is answered by the language of Vice Chancellor (now Mr. Justice) Reed in Ocean City R. Co. v. Bray, 57 N. J. Eq. 164, at page 167, 37 Atl. 604, 605, where he says: "In respect to those actions at law wherein malice is not an essential element in the plaintiff's case, or in those suits in equity where intent does not lie at the bottom of the right to relief, the courts will take no notice of the purpose in the mind of the parties in asserting or defending such legal or equitable rights. The right of a party to redress in such instances is *exdebito justitiæ*, and a court has no discretionary power to determine whether it will or will not award

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to a party his legal or equitable remedy, according to whether the party may or may not be actuated by a malicious or impolitic motive." In another case Vice Chancellor Reed aptly said: "In such case as this, bad motive in the complainant will not defeat the relief. At best it will arouse a suspicious scrutiny of the proofs as to the existence of the conditions upon which the remedy is given." Ft. Wayne Electric Corp. v. Franklin Electric Light Co. 57 N. J. Eq. 16, at page 21, 41 Atl. 666, 668. The United States Supreme Court has also held: "If the law concerned itself with the motives of parties, new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive." Dickerman v. Northern Trust Co. 176 U. S. 181, at page 191, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311, 314; see also McFadden v. Mays Landing & E. H. City R. Co. 49 N. J. Eq. 176, at page 183, 22 Atl. 932; Davis v. Flagg (1882) 35 N. J. Eq. 491 (opinion by Beasley, Ch. J.); Roberts v. Tompkins (N. J.) 73 Atl. 505 (opinion by Parker, J.); M'Donald v. Smalley, 1 Pet. 620, 7 L. ed. 287; Morris v. Tuthill, 72 N. Y. 575, at page 577; Raughley v. West Jersey & S. R. Co. 202 Pa. 43, 51 Atl. 597.

The decree below is therefore reversed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA
v.
GEORGE EHRLICK et al., Appts.

(— W. Va. —, 64 S. E. 935.)

County attorney — authority — civil proceedings.

1. The prosecuting attorney of a county has authority, independent of the attorney general, to institute and prosecute all criminal actions and proceedings cognizable in the courts of his county, but has no such power or authority respecting the prosecution of civil proceedings on the part of the state, beyond that expressly conferred by statute.

Attorney general — powers.

2. As the chief law officer of the state, the attorney general is clothed and charged with all the common-law powers and duties pertaining to his office, except in so far as they have been limited by statute.

Same — civil litigation.

3. In the absence of any statutory provision to the contrary, the attorney general has the management and control of civil litigation on behalf of the state.

Pleading — signature to bill by state — demurrer.

4. A bill in equity on behalf of the state, signed by counsel other than the attorney general, is not demurrable for lack of disclosure on its face of authority or direction from him to file the same. Such an objec-

Headnotes by POFFENBARGER, J.

23 L.R.A. (N.S.)

Case Note. — Injunction at the suit of the state against public nuisance which is also a crime or misdemeanor.

This note is supplemental to that appended to the case of State ex rel. Crow v. Canty, 15 L.R.A. (N.S.) 747.

It was held in State ex rel. Lyon v. City Club (S. C.) 65 S. E. 730, that the fact that an unlawful sale of intoxicating liquor might be punished as a crime did not affect the equitable jurisdiction of the court to enjoin it as a public nuisance, at the suit of the state.

And this doctrine was applied in State ex rel. Lyon v. Columbia Water Power Co. 82 S. C. 181, 22 L.R.A. (N.S.) 435, 63 S. E. 884, notwithstanding the obstruction of a public navigable canal was also an indictable offense.

So, in Com. ex rel. Breathitt v. Respass (Ky.) 21 L.R.A. (N.S.) 836, 115 S. W. 1131, it was held that a court of chancery may, at the suit of the attorney general, enjoin as a common nuisance the maintenance of a place where pools upon horse racing are sold, notwithstanding it may also be a crime, where the criminal laws have proved ineffectual to afford relief. The court said that if the use of respondent's property was such as to require it to be restrained by injunction, the chancellor's jurisdiction was not affected by the fact that this use might be also a criminal offense. The remedy in equity being purely preventive, the chancellor does not punish for what has already been done, this being left for the criminal courts; but the only thing he does determine is that, in future, the property must be so used as not to be a nuisance.

The power to enjoin a public nuisance at the instance of the state or an individual, although an act is punishable as a crime, is conferred by statute in some instances. Attention is here called to a few cases in which such a statute has been construed. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; State ex rel. Duensing v. Roby, 142 Ind. 168, 33 L.R.A. 213, 51 Am. St. Rep. 174, 41 N. E. 145; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; Clopton v. State (Tex. Civ. App.) 105 S. W. 994; Ex parte Allison, 99 Tex. 455, 2 L.R.A. (N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870; Ex parte Allison, 48 Tex. Crim. Rep. 634, 3 L.R.A. (N.S.) 622, 90 S. W. 492, 13 A. & E. Ann. Cas. 684; State ex rel. Rhodes v. Saunders, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588, and cases therein cited.

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tion must be raised by a motion to dismiss or plea in abatement.

Equity — jurisdiction — criminal matters.

5. If a charge is of a criminal nature, or an offense against the public, and does not touch the enjoyment of property or health, it is not within the jurisdiction of a court of equity.

Same — nuisance — abatement.

6. Equity has no jurisdiction to abate a public nuisance, either civil or criminal, at the instance of an individual or the state, not affecting or injuring the enjoyment of property or other personal rights.

Public nuisance — abatement — injunction.

7. In so far as a public nuisance injures property, or substantially interferes with the enjoyment thereof, directly or indirectly, or constitutes a purpresture, excluding citizens from the enjoyment of their civil rights in highways and other public grounds and places, or obstructing or interfering with the execution of the public business, it is abatable by injunction.

Injunction— protection of public rights — effect of criminality.

8. If an injunction is necessary and proper for the protection of such rights, criminality of the injurious act does not bar the remedy in equity.

Equity — criminal nuisance — gaming house — abatement.

9. Though the keeping of a gaming house is a criminal nuisance, punishable and abatable by indictment and conviction, there is no jurisdiction in equity to abate it, at the instance of either an individual or the state, unless it appears to be injurious to personal or property rights, and the injury is not otherwise adequately remediable.

Same — jurisdiction — criminal remedies — adequacy.

10. Criminal remedies and procedure must be deemed adequate to the maintenance of the public right in respect to moral and political principles, except in so far as the legislature may have provided others, since that body, having plenary power over such matters, has seen fit to rely upon existing remedies, and courts of equity are powerless to ordain jurisdiction for themselves.

(May 11, 1909.)

APPEAL by defendants from a decree of the Circuit Court for Brooke County, perpetually enjoining them from conducting a business known as a "turf exchange." Reversed.

The facts are stated in the opinion.

Mr. J. J. Coniff for appellants.

Messrs. G. W. McClery, H. M. Russell, and William G. Conley for appellee.

Poffenbarger, J., delivered the opinion of the court:

On a bill purporting to be that of the state of West Virginia, not signed, however, by the attorney general, nor showing in any way that that officer authorized the filing of the same, but signed by the prosecuting attorney of a county, and an individual, describing himself as attorney for the state, the circuit court of Brooke county awarded a preliminary injunction, inhibiting the defendants, George Ehrlick and others, from carrying on or conducting what is known as a "turf exchange" in said county, extensively resorted to by people from other counties and states, for the purpose of betting on horse races occurring in different parts of the country, and reported by telegraph. On the maturing and submission of the cause to the court, a decree was made, perpetuating the injunction, from which the defendants have appealed.

The first objection to the bill is its failure to disclose any direction by the attorney general to institute the suit, his employment of counsel therefor, or his assent to the prosecution thereof; the record being entirely silent as to his attitude. Much authority is cited indicating power and authority in the attorney general to institute suits on behalf of the state, in proper cases, and the propriety of his doing so, but none indicating that such suits cannot be instituted by the prosecuting attorney of the county, either by virtue of his office, considering it as being independent of, and not subordinate to, that of the attorney general, or regarding it as a subordinate office in the executive department of justice of the state. The relation of the two offices to one another, their respective powers and duties, and the nature of the litigation, all enter into the solution of this question. The office of attorney general is of very ancient origin, and its duties and powers were recognized by the common law. That of prosecuting attorney is of modern creation, it seems, and its powers and duties are given, imposed, and prescribed by statutory law. 4 Cyc. Law & Proc. p. 1028; Atty. Gen. v. Forbes, 2 Myl. & C. 129. Prosecuting attorneys are generally described as deputies or assistants of the attorney general (4 Am. & Eng. Enc. Law, p. 1026), but they are not dependent upon him for their powers in all cases, nor in all respects subject to his control (23 Am. & Eng. Enc. Law, p. 275). In the exercise of his common-law powers, the attorney general may, no doubt, advise the prosecuting attorney, as he does other officers, since he is regarded as the chief law officer of the state. As the Constitution and laws of the state make the two offices separate and distinct, and vest in the prosecuting attorney certain powers and impose upon him certain duties, it seems clear that the attorney general cannot strip him of the powers express-

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ly given, nor increase the burdens laid upon him. The sense in which the local officer is subordinate to the general one seems to be that they are engaged in the same branch or department of the public business. This makes the relation theoretical, rather than practical. The business once pertaining actually as well as theoretically to the office of attorney general has been divided between the two offices for purposes of convenience. We may say the office of prosecuting attorney has been carved out of that of attorney general and made an independent office, having exclusive control, to some extent, of business of the state arising within the county.

No doubt the attorney general may assist the prosecuting attorney in the prosecution of such business, or perform it himself, in case of the nonaction of the prosecuting attorney, but he cannot displace that officer. He has neither power of removal nor control over him within his own province, so far as it is defined by statute, for, if the division of powers made by the statute were not respected nor observed nor susceptible of enforcement, the object and purpose of the division would be defeated. There would be no individual responsibility, if the powers of the attorney general and prosecuting attorney were coextensive and concurrent. The one would be no more responsible than the other for the nonenforcement of the laws. Concurrence would produce interference, conflict, and friction in many instances, delaying the disposition of business, to the detriment of the state. We think it plain, therefore, that, in a practical sense, the two offices are distinct and independent; but all the business does not seem to have been divided. Part of the civil business of the state in the county seems to have been reserved to the attorney general. Section 6, chap. 120, Code 1899 (Code 1906, § 3778), defines generally the duties of the prosecuting attorney, in the following terms: "It shall be the duty of every prosecuting attorney in this state to attend to the criminal business of the state in the county in which he is elected and qualified, and also to civil cases in which the state is interested in such county, when required by and under the direction of the auditor; and, when he has information of the violation of any penal law committed within his county, shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. He shall also represent the county in all suits and proceedings for and on behalf of or against the county, or county court, overseers of the poor, or other public authorities of the county, and carefully look after and give attention to the general interests of the county." His authority extends to all the criminal business of the state in his own county. As to civil business in which the state is interested, he can act, on behalf of the state, only when required by the auditor, and under the direction of the latter, or when the duty is enjoined by some statute. There are many other provisions imposing specific duties concerning particular matters, but there is no statute giving him power to represent the state generally in respect to its civil business.

The conclusion just stated implies that the authority of the prosecuting attorney to institute this suit depends upon its character. If it is a criminal proceeding, he had such authority; but, if it is a civil one, he had not, unless it was given by the auditor, and, in the latter case, an inquiry might arise as to whether the auditor is chargeable with any duty or given any authority respecting a matter of this kind. As the bill was framed and is now regarded by its defenders, it is a criminal information, filed for the purpose of enforcing the criminal law. If it can be maintained as such, the filing and prosecution thereof are within the statutory jurisdiction and power of the prosecuting attorney; but if the procedure is not authorized by the criminal law, nor its object within the auditor's power of direction, it should have been instituted by the attorney general. Whether the absence of the signature of the latter to the bill, or the lack of disclosure in the bill of his direction to institute the suit, makes the pleading bad on demurrer, is the question most extensively discussed in the briefs; but no authority for any of the contentions is cited. It seems to us, however, that such an objection ought to be raised by a plea in abatement or motion to dismiss. It is not the bill of the attorney general. The state of West Virginia is the plaintiff, and there is a presumption that no attorney would institute such a suit without authority. It would be inconsistent with his duty and obligation as an officer of the court. When the question is properly raised, the authority of the attorney must be shown (Mullan v. United States, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; Western P. R. Co. v. United States, 108 U. S. 512, 27 L. ed. 806, 2 Sup. Ct. Rep. 802); but we think the question was not properly raised.

The charge against the defendants is the keeping and conducting of a gaming house, constituting a public nuisance. Nothing of detriment to the community or the public at large is alleged against them other than the unlawfulness of the enterprise. The bill says they take dishonest profits from the betting, and carry it on with great profit

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to themselves and at slight risk of loss. It is not alleged that anybody's property is injured, or that the place is in any sense disorderly. The theory of the bill, adhered to in the argument, is that the enterprise tending to corrupt the morals of the public makes it a nuisance, abatable by injunction.

Jurisdiction in equity to abate nuisances is undoubted and of universal recognition. It is equally well settled that the state may institute suits for that purpose in proper cases, but it is nowhere asserted that either the state or a private individual may maintain such a suit in any and all cases of nuisance. In other words, relief in equity by abatement is not the necessary sequence of the establishment of the charge of nuisance. Some nuisances are criminal, while others are not. Criminal nuisances are abatable by criminal process; and, where this process is adequate, jurisdiction in equity fails, either because adequate legal remedy precludes jurisdiction in equity, or the subject-matter is beyond the scope of equity jurisdiction. If a nuisance purely criminal injures or affects a private plaintiff in certain respects, he may resort to equity for relief; but the existence of neither a civil nor criminal public nuisance necessarily calls for interposition by a court of equity. A private person cannot abate it unless it is specially injurious or prejudicial to him, and the state cannot proceed against it in equity if it be merely a criminal nuisance, unattended by injury to a personal or property right of some sort, creating necessity for prevention of irreparable injury.

"The cases in which chancery has interfered by injunction, to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other party had long previously enjoyed. It must be a strong and mischievous case, of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this court." Van Bergen v. Van Bergen, 3 Johns. Ch. 287, 8 Am. Dec. 511; Fisk v. Wilber, 7 Barb. 395; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14. "To obtain relief in equity for a private nuisance, the threatened injury must be irreparable, incapable of compensation in damages, and not doubtful or contingent." Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378. "There is no case for equity unless the charge be for injury to the enjoyment of property or other personal rights." Sparhawk v. Union Pass. R. Co. 54 Pa. 401. It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property." Sheridan v. Colvin, 78 Ill. 237, 247; People v. Condon, 102 Ill. App. 449, 457; Ocean City Assn. v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914. "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate; nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful it must be exercised with great discretion, and when necessity requires it." Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 378; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 530, 536. "A court of equity has no jurisdiction in matters merely criminal or immoral. It leaves the correction of these matters to the criminal courts. The remedy at law is presumed to be adequate, but, if it is not so, the relief must come from the lawmaking power, and not from the courts." People v. Condon, 102 Ill. App. 449, Syl. point 4; Cope v. District Fair Asso. 99 Ill. 489, 39 Am. Rep. 30; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371.

The text in Story's Equity Jurisprudence (§§ 921 to 924), according equity jurisdiction great latitude to interfere, by injunction, to abate nuisances, is to be taken and understood, not literally, but subject to the principles above stated. Although the language of these sections is very broad, it does not import in terms jurisdiction in equity to enforce the criminal laws or to interfere where the purpose is other than the vindication of personal and property rights. The English decisions referred to by Story, as showing the ancient origin of such jurisdiction, at the suit of the attorney general, all had such objects. None of them contemplated mere enforcement of criminal laws or the maintenance of public policy. Atty. Gen. v. Cleaver, 18 Ves. Jr. 211, had for its object the inhibition of the manufacture of soap, and the preparation of materials used in the manufacture thereof, in a certain place, on the ground that it was offensive and injo-

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rious to the health of the inhabitants of the community. No questions of morality or criminality entered into the cause. The court, having concluded that the carrying on of such a trade was not *per se* a nuisance, directed an issue to a jury to determine whether it was in fact a nuisance. Atty. Gen. v. Forbes, 2 Myl. & C. 123, related to a public highway; its object being to prevent, by injunction, municipal authorities from leaving a highway bridge open so that the general public could not pass over it. Crowder v. Tinkler, 19 Ves. Jr. 618, involved an injunction to prevent the defendants from using certain premises as a powder magazine, on the ground that it was a public nuisance; it having been erected near a public road and the premises of the plaintiffs, and having also been improperly constructed. This clearly involved a property right. It was so peculiarly and distinctively a bill of that kind that it was entertained at the instance of private parties; but the court, being of the opinion that the evidence did not make out a clear case of nuisance, directed an indictment to be drawn and the question put in issue, in the meantime withholding the injunction. This course was taken because courts of equity are reluctant to exercise this jurisdiction at all, and will not do so except in clear cases. The indictment was directed, not for the purpose of enforcing the criminal law, but to the end that, through it, the chancellor might know whether the carrying on of that trade was unlawful under all the circumstances; it not being *per se* a nuisance.

Another extensive class of cases, cited in the text of Story's Equity Jurisprudence, is composed of those having for their object the vindication of public rights in respect to property, such as obstructions to highways, public grounds, harbors, and landings. These obstructions are classed by the old writers as "purprestures," signifying inclosures. One who erects a structure in a street, road, park, harbor, or river, or makes inclosures thereon, may be said to take over to himself, or inclose for his sole benefit, the portion so occupied, and withdraw it from the use and enjoyment of all the citizens, to the injury and detriment of the general public. It may be no more to the detriment of one person than to another, so that no individual could enjoin the act as being peculiarly and especially injurious to him. In such cases the attorney general may proceed in equity on behalf of the public to abate the nuisance, if it be one. Whether it be a criminal nuisance or not is wholly immaterial. If it is indictable as a crime, it does not bar the remedy in equity, because the citizen and the general public have an immediate right to the enjoyment of the thing interfered with. A criminal prosecution is inadequate in such cases, because it does not prevent the doing of the unlawful act. It may ultimately correct the wrong, but, while the process of correction is going on, the public is deprived of an important and valuable right, wherefore the injury is irreparable. In such cases it is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed, or taken away by the unlawful act. For the mere vindication of the criminal law and the enforcement of the public policy of the state, let it be founded upon moral or other considerations, the legal remedy by indictment and prosecution is fully adequate and peculiarly appropriate.

The decisions in this country, awarding injunctions to abate purprestures, are numerous. The principle upon which they proceed underlies the decision in the notable case of Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900. After he had been committed for contempt in refusing to obey an injunction, Debs tested the jurisdiction in equity by a writ of habeas corpus from the Federal Supreme Court. In reply to his contention, that court asserted right in the government to proceed by injunction to clear from obstruction the artificial highways of the country for the passage of interstate commerce and the transmission of the mails. Debs was the leader of a great strike of railway men, and their organization and method of operation were such as to wholly prevent transportation of every kind through the city of Chicago and other places. The blockade or interference was as complete and effectual as would have been that of structures built entirely across the railroads. Though there were no buildings or structures interposed, there was an occupation of the railroads, the great common carriers of the country, so that nothing could pass. It wrought injury, personal and financial, to all the citizens of the United States, and deprived them of personal rights, such as those of travel and communication. All this constituted more than a crime. It was a material, substantial, incalculable injury to the people. The interference produced the same results that would have come from the erection of buildings or other structures on the railroad so as to prevent transportation. It fell completely and perfectly within the definition of a "purpresture." Other cases illustrating this doctrine are the following: Raritan Twp. v. Port Reading R. Co. 49 N. J. Eq. 11, 23 Atl. 127; People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; Biddle v. Ash, 2 Ashm. (Pa.) 211; People ex rel. Robarts v. Beaudry, 91 Cal. 213, 27 Pac. 610; State v. Mobile, 5 Port. (Ala.)

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279, 30 Am. Dec. 564. By far the greater number of cases cited by Story are those of purpresture. All the balance involved injuries to property or to the health of individuals. Of course, a direct injury to the health of an individual is not remediable by anything other than a preventive process. Besides, offensive trades or pursuits, poisonous and injurious to the health, affect the property of citizens in the vicinity thereof, detracting from the right of enjoyment of dwellings, and interfering with trade in business houses, and sequentially impairing the value of the properties. All these elements enter into the cases holding it to be within this branch of equity jurisdiction.

Such has been the interpretation by the American courts, including the Supreme Court of the United States. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, is relied upon by counsel for the appellee as having interpreted it otherwise, but it does not do so. The statute involved expressly conferred the jurisdiction exercised in that case, namely, to prevent the use of real estate in the manufacture of intoxicating liquors. It declared all places where intoxicating liquors were manufactured, sold, bartered, or given away, in violation of the provisions of the act, to be common nuisances, and authorized the attorney general, county attorney, or any citizen of the county in which such nuisance existed, to sue in the name of the state to abate and perpetually enjoin it. Plainly this was a jurisdiction created by statute. It is true that Mr. Justice Harlan, in the discussion of the case, refers to the text in Story as justifying such use of the writ of injunction; but the main purpose of that argument was to sustain the constitutionality of the statute giving the remedy. In Com. v. McGovern, 116 Ky. 212, 66 L.R.A. 280, 75 S. W. 261, the court granted an injunction to prevent the use of certain premises for the holding of a prize fight, on the ground that such use of the property would constitute a public nuisance, but declared, at the same time, that it could not grant an injunction to prevent the prize fight, because the process of the criminal court was adequate for that purpose. It limited the injunction to the prevention of the illegal use of the property only, and this was done under a statute which enjoined upon all judges of courts the duty to suppress or prevent prize fights by the exercise of all the powers vested in them for the prevention of crime. The court interpreted this statute as inhibiting the use of real property for the maintenance or giving of a prize fight. In Cella v. People, 112 Ill. App. 376, an injunction was awarded to restrain the maintenance of a pool room—a turf exchange—similar to the one involved here, in the village of Venice, just across the river from the city of St. Louis; but in that case the court emphasized the want of equity jurisdiction to prohibit the mere commission of the offense of operating the pool room, or the repetition thereof. It entertained jurisdiction and awarded the injunction, however, on the ground that the maintenance of the turf exchange at that place was a civil nuisance, because the evidence showed that the citizens of the village were greatly annoyed and disturbed by the existence and operation thereof, and that direct financial injury to real estate in the vicinity resulted from it. In closing its opinion the court said: "In our opinion, unless the relief prayed in the bill can be granted, the evidence warrants the conclusion that the law-abiding citizens most directly interested in this case will be driven to the alternative of continuing to suffer intolerable annoyance and disturbance and great financial injury amounting to an insufferable nuisance, or of disposing of their property and business for what it may bring, and abandoning their homes, and going with their families elsewhere, to their great loss, to the great public loss to the community in question, and to the state." Among other things, it was alleged and proven that the operation of the pool room interfered with the operation of mills and factories in the community by attracting the employees therefrom.

The Kentucky and Illinois cases just analyzed are all we have found which go even to the extent of their holdings, and in both of them the inability of a court of equity to enjoin the mere commission of crime, or to abate mere criminal nuisances, when the vindication of no personal or property right is involved, is reiterated and emphasized. They adhere to the long line of cases asserting it among which are the following: State ex rel. Circuit Attorney v. Uhrig, 14 Mo. App. 413, holding that equity will not restrain the keeping of an unlicensed dramshop, though the keeping of it is a public nuisance; Cope v. District Fair Asso. 99 Ill. 489, 39 Am. Rep. 30, refusing an injunction to restrain gambling at a fair; People v. Condon, 102 Ill. App. 449, refusing an injunction to restrain gambling, pool selling, etc.; Tiede v. Schneidt, 99 Wis. 201, 74 N. W. 798, refusing an injunction to prevent the keeping of slaughterhouses on the banks of a running stream, or depositing therein dead animals, such acts being illegal, but no injury to property or property rights being alleged; Ocean City Asso. v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914, refusing an injunction to restrain the breach of a covenant on the ground that the act covenanted against was

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criminal, injury to property resulting therefrom having been waived. To these authorities may be added a *dictum* of the United States Supreme Court in the Debs Case, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, saying: "Again it is objected that it is outside the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but, when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

That criminal procedure and remedies are adequate to maintain and uphold the public right in so far as moral and political principles and general state policy are involved is perfectly obvious. In cases of criminal nuisances, there may be, on conviction of the defendant, a judgment of abatement, effectually preventing repetition. 1 Bishop, Crim. Law, § 1079; State v. Noyes, 30 N. H. 279; Wroe v. State, 8 Md. 416; R. v. Stead, 8 T. R. 142; Barclay v. Com. 25 Pa. 503, 64 Am. Dec. 715; Crippen v. People, 8 Mich. 117. It is also competent for the legislature, within the constitutional limits of its powers, to declare any act criminal, and make the repetition or continuance thereof a public nuisance, so as to enable the courts, on conviction, to pronounce judgments of abatement, or to vest in courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves. We have some statutes of that character now, relating to violation of the laws regulating the liquor traffic, and others. They stand on the principle underlying the Kansas statute construed and upheld in Mugler v. Kansas, cited.

It would be a waste of time to examine and discuss the numerous cases declaring the maintenance or operation of a gaming house a criminal nuisance, and as such indictable. Its criminality gives no right to injunction. An additional element, not shown by this bill, is required; namely, some injury to property or person. Immorality is not enough. There is a broad distinction between immoral acts and those injurious to health. A man can keep himself pure in an immoral atmosphere, but he cannot keep himself well in a poisonous atmosphere. Immorality does not kill or injure the body. Foul air or poisonous water does. If we should sustain an injunction on the ground that the act is immoral as well as criminal, we would be bound to award it in all criminal cases, for, in every instance, there is some reason, affecting the body politic, for prohibiting acts and making the commission thereof criminal, and soon there would be no distinction between courts of law and courts of equity in respect to criminal jurisdiction.

From the principles and conclusions stated, it results that the decree complained of must be reversed, the preliminary injunction dissolved, and the bill dismissed.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN
v.
ALEX SBRAGIA.

(138 Wis. 579, 119 N. W. 290.)

Sale — cigarette paper — sealed package.

1. The sale by a retailer of a sealed package of tobacco put up by the manufacturer, which contains a coupon entitling the purchaser to cigarette papers when presented by him to the manufacturer, will support a conviction of the former under a statute forbidding the sale or giving way, directly or indirectly, of such paper.

Interstate commerce — cigarette papers — coupon.

2. The sale of a package of tobacco which contains a coupon entitling the purchaser to cigarette papers if sent to the manufacturer in another state does not, by reason of the fact that it must be so sent, become interstate commerce, so as not to be subject to the operation of a state statute forbidding the sale of such paper, directly or indirectly, or upon any pretense, or by any device.

(Dodge, J., dissents.)

(January 26, 1909.)

REPORT by the Municipal Court for Milwaukee County for the opinion of the Supreme Court of a prosecution for an alleged violation of a statute prohibiting the offering for sale of cigarette wrappers and papers. Cause remanded for judgment upon the conviction.

Statement by **Marshall, J.**:

Action reported from the municipal court for Milwaukee county under § 4721, Stat. 1898.

The question involved in the action was

Note. — No other cases have been found upon the precise questions presented by the above case.

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whether the defendant was guilty of having violated chapter 82, p. 143, Laws 1905.

The cause was duly submitted on the charge, made in due form, and a plea of not guilty and a stipulation of facts.

The facts agreed upon were, in substance, as follows: The defendant, on June 16, 1908, in Milwaukee county, Wisconsin, sold and delivered to Samuel Burden a sealed package of smoking tobacco, labeled as "Duke's Mixture Smoking Tobacco." Upon opening the package it was found to contain a coupon, so called, to the effect that, upon receipt of three of such coupons through the mails by "Duke's Mixture Department 8, 111 5th Ave., New York City, The American Tobacco Company, Mfgr., Factory No. 42, 4th Dist. N. C.," would send to the one transmitting them a specified amount of Duke's Mixture cigarette paper. The Duke's Mixture Department named in the coupon is a department of the tobacco company mentioned, which is a foreign corporation. The defendant is a retail merchant in the city of Milwaukee, dealing, among other things, in tobacco at retail. He purchased the package sold as aforesaid in the open market, in the regular course of business, from a wholesale dealer, for the purpose of supplying his retail trade.

The defendant was duly adjudged guilty of having unlawfully offered for sale cigarette wrappers and cigarette paper for the purpose of being filled with tobacco for smoking, contrary to chapter 82, p. 143, Laws 1905. Thereupon further proceedings in the cause were stayed pending the result of a report of the same to this court, as to the question of law involved.

The trial court, being of the opinion that the facts stipulated as aforesaid presented a question of law of such importance and doubtful character as to require final solution by this court, certified the case for such solution, pursuant to § 4721, Stat. 1898, the defendant consenting thereto.

Messrs. **F. L. Gilbert**, Attorney General, **A. C. Titus**, and **Norman L. Baker** for the State.

Messrs. **Winkler, Flanders, Bottum, & Fawsett**, for defendant:

The significant fact which gives to the sale the character of interstate commerce is that the article sold is in another state, and, to effectuate the transaction as a sale, requires to be transported into the state where the sale is made.

Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; L. Miller & Co. v. Goodman, 91 Tex. 41, 40 S. W. 718; Cook v. Rome Brick Co. 98 Ala. 409, 12 So. 918; Ware v. Hamilton Brown Shoe Co. 92 Ala. 145, 9 So. 136; Culberson v. American Trust & Bkg. Co 107 Ala. 457, 19 So. 34; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; 17 Am. & Eng. Enc. Law, pp. 65, 66; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

On Petition for Rehearing.

Sales or offers of sale, made by or through persons acting for nonresidents, of goods in fact outside the state at the time of sale, and every phase of the negotiations leading up to the ultimate act of delivery, are acts of interstate commerce, and beyond state influence.

State v. Scott, 98 Tenn. 254, 36 L.R.A. 461, 39 S. W. 1; Kirkpatrick v. State, 42 Tex. Crim. Rep. 459, 60 S. W. 762; French v. State, 42 Tex. Crim. Rep. 222, 52 L.R.A. 160, 58 S. W. 1015; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; United States v. Swift, 122 Fed. 529, affirmed in 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Ex parte Loeb, 72 Fed. 657.

Marshall, J., delivered the opinion of the court:

The question presented for solution is this: Is a sale or gift of an order or paper, characterized as a coupon in this action, by a person in this state to another therein, as part of an entire transaction including the sale of a package of tobacco, entitling the recipient, in case of his obtaining two other like papers, and sending all by mail to a designated dealer in tobacco products and cigarette paper outside the state, to receive therefrom a specified quantity of cigarette paper,—a violation by such person of § 1, chap. 82, p. 143, of the Laws of 1905, prohibiting "any person by himself, his servant or agent, or as the servant or agent of any other person, directly or indirectly, or upon any pretense, or by any device," from selling, offering for sale, keeping for sale, giving away, or otherwise disposing of, "any such cigarettes, cigarette paper," etc.?

That a transaction of the nature stated falls within the spirit of the statute seems beyond reasonable controversy, and that it falls within its letter seems hardly less plain.

It appears that the scheme is but a bald subterfuge to cloak the real purpose to sell

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or give away cigarette paper to persons in this state, in circumvention of the law, the local dealer being the principal in the sense that a sale of a package includes the sale of a coupon, and an agent in the sense that he acts for the foreign dealer in the latter's efforts to supply customers in this state with cigarette paper.

Counsel for the defendant do not seem to seriously contend to the contrary of the foregoing, and the learned attorney general appears to unite with them in presenting the matter from a common view point, exempting the defendant from liability upon the ground hereafter stated.

We have the anomalous situation of counsel for defendant contending, in the main, that the stipulated facts do not show a punishable violation of the cigarette law because such law is ineffective as regards an act requiring interstate commerce to effectuate it by putting the consumer in possession of the prohibited article, and the learned attorney general subscribing to the same view, and joining with defendant's counsel in urging the position upon the attention of this court as unavoidably requiring an answer to the submitted question in defendant's favor. Doubtless, the state's officer was unable to see any escape from such position, and so, in justice to the defendant and the court as well, frankly made known his opinion in that regard instead of contending to the contrary. That is commendable, but does not preclude the court from considering, or perhaps more correctly stated, excuse it for failing to consider, the question as involving the element of serious doubt discovered by the learned trial court, warranting the certification to this court.

The statute seems in effect to prohibit, as plainly about as English words could be used to that end, anyone in this state, as principal or agent, directly or indirectly, from being concerned in selling or giving away to any person in this state cigarettes or cigarette paper. Significant to that effect are the words "directly or indirectly, or upon any pretense, or by any device." The sale of the package of tobacco with the coupons inclosed, exchangeable for cigarette paper, would not have been any different if the package had contained such paper instead of the equivalent. Can anyone fairly say that was not a mere pretense or device resorted to for disposing of such paper while giving the transaction a different color? In the opinion of the court the answer must be as here indicated.

The stipulated facts, as we view them, do not raise any question of interstate commerce, and therefore the able arguments of counsel on both sides that they do, and that the proper solution thereof is fatal to the prosecution, we omit to consider.

The question submitted is answered in the affirmative, and the cause remanded for judgment upon the conviction.

Dodge, J., dissenting (filed January 29, 1909):

In the statement of facts should be noted absence of any knowledge on defendant's part that the sealed package contained the so-called coupon. I am unable to bring my mind to the view that the sale and delivery of a sealed package of tobacco, purchased by the seller of a wholesaler, is, in any reasonable sense, a sale of, or an offer to sell, cigarette papers in Wisconsin, merely because the manufacturer has clandestinely inserted in such package an offer that, upon performance of certain conditions, he will sell at New York cigarette papers to any person producing that and two other similar notices. No argument can add to the mere statement of the proposition. I think, too, that several phases of interstate commerce must be involved before the acts of defendant can in any way be connected with the sale of cigarette papers to anyone. The sale of a magazine containing an advertisement of the same offer by a New York merchant would, to my mind, present exactly the same questions.

I therefore am constrained to agreement with the attorney general that no crime is disclosed, and to dissent from the judgment of the court.

Petition for rehearing denied March 30, 1909.

CALIFORNIA SUPREME COURT.

HERBERT M. PETERS, Appt.,
v.
MARY GIRD PETERS, Respt.
(— Cal. —, 103 Pac. 219.)

Husband and wife — personal injury — action.

1. A husband cannot maintan an action against his wife for injuries inflicted upon him by her act in deliberately wounding him with a gun, either at common law or under statutes gving her the right to separate property, and permitting them to contract with each other.

Same — statutory authority.

2. A mere statutory provision that, when the action is between a married woman and her husband, she may sue and be sued alone,

Case Note. — Husband's right to sue wife for personal tort.

A careful search has brought to light no other decisions upon this question, but the point was commented on in Kujek v. Gold-

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whether the defendant was guilty of having violated chapter 82, p. 143, Laws 1905.

The cause was duly submitted on the charge, made in due form, and a plea of not guilty and a stipulation of facts.

The facts agreed upon were, in substance, as follows: The defendant, on June 16, 1908, in Milwaukee county, Wisconsin, sold and delivered to Samuel Burden a sealed package of smoking tobacco, labeled as "Duke's Mixture Smoking Tobacco." Upon opening the package it was found to contain a coupon, so called, to the effect that, upon receipt of three of such coupons through the mails by "Duke's Mixture Department 8, 111 5th Ave., New York City, The American Tobacco Company, Mfgr., Factory No. 42, 4th Dist. N. C.," would send to the one transmitting them a specified amount of Duke's Mixture cigarette paper. The Duke's Mixture Department named in the coupon is a department of the tobacco company mentioned, which is a foreign corporation. The defendant is a retail merchant in the city of Milwaukee, dealing, among other things, in tobacco at retail. He purchased the package sold as aforesaid in the open market, in the regular course of business, from a wholesale dealer, for the purpose of supplying his retail trade.

The defendant was duly adjudged guilty of having unlawfully offered for sale cigarette wrappers and cigarette paper for the purpose of being filled with tobacco for smoking, contrary to chapter 82, p. 143, Laws 1905. Thereupon further proceedings in the cause were stayed pending the result of a report of the same to this court, as to the question of law involved.

The trial court, being of the opinion that the facts stipulated as aforesaid presented a question of law of such importance and doubtful character as to require final solution by this court, certified the case for such solution, pursuant to § 4721, Stat. 1898, the defendant consenting thereto.

Messrs. **F. L. Gilbert**, Attorney General, **A. C. Titus**, and **Norman L. Baker** for the State.

Messrs. **Winkler, Flanders, Bottum, & Fawsett**, for defendant:

The significant fact which gives to the sale the character of interstate commerce is that the article sold is in another state, and, to effectuate the transaction as a sale, requires to be transported into the state where the sale is made.

Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; L. Miller & Co. v. Goodman, 91 Tex. 41, 40 S. W. 718; Cook v. Rome Brick Co. 98 Ala. 409, 12 So. 918; Ware v. Hamilton Brown Shoe Co. 92 Ala. 145, 9 So. 136; Culberson v. American Trust & Bkg. Co 107 Ala. 457, 19 So. 34; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; 17 Am. & Eng. Enc. Law, pp. 65, 66; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

On Petition for Rehearing.

Sales or offers of sale, made by or through persons acting for nonresidents, of goods in fact outside the state at the time of sale, and every phase of the negotiations leading up to the ultimate act of delivery, are acts of interstate commerce, and beyond state influence.

State v. Scott, 98 Tenn. 254, 36 L.R.A. 461, 39 S. W. 1; Kirkpatrick v. State, 42 Tex. Crim. Rep. 459, 60 S. W. 762; French v. State, 42 Tex. Crim. Rep. 222, 52 L.R.A. 160, 58 S. W. 1015; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; United States v. Swift, 122 Fed. 529, affirmed in 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Ex parte Loeb, 72 Fed. 657.

Marshall, J., delivered the opinion of the court:

The question presented for solution is this: Is a sale or gift of an order or paper, characterized as a coupon in this action, by a person in this state to another therein, as part of an entire transaction including the sale of a package of tobacco, entitling the recipient, in case of his obtaining two other like papers, and sending all by mail to a designated dealer in tobacco products and cigarette paper outside the state, to receive therefrom a specified quantity of cigarette paper,—a violation by such person of § 1, chap. 82, p. 143, of the Laws of 1905, prohibiting "any person by himself, his servant or agent, or as the servant or agent of any other person, directly or indirectly, or upon any pretense, or by any device," from selling, offering for sale, keeping for sale, giving away, or otherwise disposing of, "any such cigarettes, cigarette paper," etc.?

That a transaction of the nature stated falls within the spirit of the statute seems beyond reasonable controversy, and that it falls within its letter seems hardly less plain.

It appears that the scheme is but a bald subterfuge to cloak the real purpose to sell

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or give away cigarette paper to persons in this state, in circumvention of the law, the local dealer being the principal in the sense that a sale of a package includes the sale of a coupon, and an agent in the sense that he acts for the foreign dealer in the latter's efforts to supply customers in this state with cigarette paper.

Counsel for the defendant do not seem to seriously contend to the contrary of the foregoing, and the learned attorney general appears to unite with them in presenting the matter from a common view point, exempting the defendant from liability upon the ground hereafter stated.

We have the anomalous situation of counsel for defendant contending, in the main, that the stipulated facts do not show a punishable violation of the cigarette law because such law is ineffective as regards an act requiring interstate commerce to effectuate it by putting the consumer in possession of the prohibited article, and the learned attorney general subscribing to the same view, and joining with defendant's counsel in urging the position upon the attention of this court as unavoidably requiring an answer to the submitted question in defendant's favor. Doubtless, the state's officer was unable to see any escape from such position, and so, in justice to the defendant and the court as well, frankly made known his opinion in that regard instead of contending to the contrary. That is commendable, but does not preclude the court from considering, or perhaps more correctly stated, excuse it for failing to consider, the question as involving the element of serious doubt discovered by the learned trial court, warranting the certification to this court.

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I therefore am constrained to agreement with the attorney general that no crime is disclosed, and to dissent from the judgment of the court.

Petition for rehearing denied March 30, 1909.

CALIFORNIA SUPREME COURT.

HERBERT M. PETERS, Appt.,
v.
MARY GIRD PETERS, Respt.

(— Cal. —, 103 Pac. 219.)

Husband and wife — personal injury — action.

1. A husband cannot maintan an action against his wife for injuries inflicted upon him by her act in deliberately wounding him with a gun, either at common law or under statutes gving her the right to separate property, and permitting them to contract with each other.

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2. A mere statutory provision that, when the action is between a married woman and her husband, she may sue and be sued alone,

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Case Note. — Husband's right to sue wife for personal tort.

A careful search has brought to light no other decisions upon this question, but the point was commented on in Kujek v. Gold-

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does not give him a right to sue her for a personal tort inflicted upon him by her.

Appeal — nonprejudicial error.

3. Although there is no appeal from the judgment, the cause will not be reversed for error in denying plaintiff's motion for new trial because defendant's evidence was not sufficient to support his defense, if the complaint on its face shows that no recovery can be had on the cause of action set forth therein, and that no amendment can correct it, so that the error, if any, is without prejudice.

(July 3, 1909.)

APPEAL by plaintiff from an order of the Superior Court for San Diego County denying a new trial after verdict and judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been deliberately inflicted upon plaintiff by defendant, his wife. Affirmed.

The facts are stated in the opinion.

Messrs. **H. S. Utley** and **Haines & Haines** for appellant.

Messrs. **Daney & Lewis**, for respondent:

Neither the husband nor the wife can successfully maintain an action for damages against the other for a tort committed by one upon the other while the marriage relation exists.

People v. Miller, 82 Cal. 107, 22 Pac. 934; Peters v. Peters, 42 Iowa, 182; Hobbs v. Hobbs, 70 Me. 382, 70 Me. 383; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25; Kujek v. Goldman, 9 Misc. 34, 28 N. Y. Supp. 294; Longendyke v. Longendyke, 44 Barb. 366; Schultz v. Schultz, 89 N. Y. 644; Main v. Main, 46 Ill. App. 106; 9 Am. & Eng. Enc. Law, p. 795; 15 Am. & Eng. Enc. Law, 2d ed. p. 857; 21 Cyc. Law & Proc. p. 1519; Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 758, 72 Am. St. Rep. 550, 75 N. W. 287; Deeds v. Strode, 6 Idaho, 317, 43 L.R.A. 209, 96 Am. St. Rep. 263, 55 Pac. 656.

Shaw, J., delivered the opinion of the court:

This is an appeal by the plaintiff from an order denying his motion for a new trial. There is no appeal from the judgment.

The plaintiff and defendant, at the time the alleged cause of action arose, were, and still are, husband and wife. The wife severely wounded the husband by wilfully, without just cause or excuse, shooting him in the leg with a shotgun, injuring him so severely that he was confined to his bed for more than a month and was disabled from doing his ordinary work for several months thereafter. The verdict and judgment were in favor of the defendant.

The appellant complains of a number of rulings of the court below upon the introduction of evidence and in the giving and refusing of instructions to the jury. He also assigns as cause for a new trial that the evidence was insufficient to justify the verdict. It is unnecessary to consider these assignments of error in detail. If we should concede that the plaintiff could maintain an action against his wife for battery, we should be compelled to hold that the evidence was wholly insufficient to support the verdict. According to her own testimony, she deliberately and wilfully shot her husband in the leg for no other reason than to prevent him from going into a bedroom of the house which she then occupied, for the purpose of taking therefrom a small amount of cotton batting which he claimed a right to take. She made no claim that she was in any real personal danger from him at the time, and there is no real foundation for the pretense that she was acting in self-defense. The shooting was entirely unjustifiable as a defense of her right to maintain possession of the cotton batting. The court below, upon its view of the right of the husband to maintain such an action, should have directed the jury to find for the plaintiff in such amount as they should believe from the evidence he was damaged. The defendant may consider herself fortunate that she was not prosecuted criminally for the act, and that such prosecution is now barred by lapse of time.

Notwithstanding this conclusion, we are satisfied that, under the law in this state as it is, an action cannot be maintained by one spouse against the other for a battery committed during the continuance of the marriage relation, and hence that the plaintiff has suffered no substantial injury to his rights by the verdict against him. The

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man, 9 Misc. 34, 29 N. Y. Supp. 294, affirmed in 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773, which was an action against a man who had been criminally intimate with the plaintiff's wife previous to their marriage, for fraud in inducing the marriage by falsely representing the woman to be chaste. The action was originally begun against both the defendant and plaintiff's wife, and although abandoned as against the latter, the court said: "The action was not maintainable by the plaintiff against his wife because of her participation in the fraud perpetrated upon him. The common-law unity of husband and wife operates to preclude either spouse from successfully maintaining an action for damages in tort against the other."

For a review of the authorities upon the right of a wife to sue her husband for a personal tort, see case note accompanying Strom v. Strom, 6 L.R.A. (N.S.) 191.

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question is entirely new in this state, and such cases are rare in other jurisdictions; but there is no case in favor of the right to maintain such an action.

The common law of England is declared to be the rule of decision in all courts of this state, so far as it is not repugnant to or inconsistent with our Constitution and statutes. Pol. Code, § 4468. By the common law the husband and wife were deemed to be one person, and no suit at law of any character could be maintained by one against the other. 21 Cyc. Law & Proc. p. 1517; 10 Enc. Pl. & Pr. p. 195; 1 Cooley's Bl. 442; Schouler, Dom. Rel. § 52; Phillips v. Barnet, L. R. 1 Q. B. Div. 436; Countz v. Markling, 30 Ark. 17; Crowther v. Crowther, 55 Me. 358; Hobbs v. Hobbs, 70 Me. 381. Owing to the modern statutes giving the wife the right to separate property and to make contracts with her husband concerning the same, it is now generally held that an action at law concerning property may be maintained between them. In many of the states such actions are expressly authorized by statute; but even where such actions are allowed, either expressly or by necessary implication, it has been uniformly decided, in the few states where the question has arisen, that neither can sue the other, even after a divorce, for personal wrongs inflicted upon one by the other during the marriage. 21 Cyc. Law & Proc. p. 1519; 15 Am. & Eng. Enc. Law, p. 857; Peters v. Peters, 42 Iowa, 182; Main v. Main, 46 Ill. App. 106; Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25; Schultz v. Schultz, 89 N. Y. 644, reversing same case in 27 Hun, 26; Freethy v. Freethy, 42 Barb. 641; Longendyke v. Longendyke, 44 Barb. 366; Chestnut v. Chestnut, 77 Ill. 350; Smith v. Gorman, 41 Me. 405; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Heyob v. Her Husband, 18 La. Ann. 41; Moore v. Moore, 18 La. Ann. 613. In New York the statute authorized a married woman to "bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character, the same as if she were sole." [Laws 1860, chap. 90, § 7.] Yet the courts of that state declared that this was not intended to and did not permit a suit by her against her husband to recover damages for battery or slander. Longendyke v. Longendyke; Freethy v. Freethy; and Schultz v. Schultz,—supra. In the Longendyke Case the court said that to allow such actions is "contrary to the policy of the law and destructive of that conjugal union and tranquillity which it has always been the policy of the law to guard and protect." In the Freethy Case it was further observed that "when the legislature intends to make such a striking innovation of the rules of the common law, and so much opposed to public policy and the peace and happiness of the conjugal relation, as would be the case if husband and wife were permitted to sue each other for alleged wrongs to character, it should use such language as will make it clearly manifest, and not leave it to the construction of the courts." These authorities clearly indicate what the rule should be in this state unless we find some statutory provisions to the contrary.

We discover in our statutes nothing that can be construed to show an intention to permit actions for tort between husband and wife. The Civil Code provides: That either husband or wife may "enter into any engagements or transaction with the other, or with any other person, respecting property, which either might if unmarried" (§ 158); that they cannot, "by any contract with each other, alter their legal relations, except as to property," except to make a written contract for separation (§ 159); and that they "contract toward each other obligations of mutual respect, fidelity, and support" (§ 155); also, that each has the power to manage and dispose of his or her separate property (§§ 1093, 1094, 1187, 325, 1273). The Code of Civil Procedure provides that "when a married woman is a party [to an action] her husband must be joined with her, except: (1) When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; (2) When the action is between herself and her husband, she may sue or be sued alone." The third subdivision of this action authorizes her to sue alone when she is living apart from her husband, by reason of his desertion or a separation agreement. Code Civ. Proc. § 370.

The provisions of the Civil Code relate solely to contract and property rights. They recognize the separate property of husband and wife, and authorize contracts between them concerning the same. This necessarily implies that actions by one against the other for the protection of such property and the enforcement of contracts relating thereto can be maintained. Our Code system authorizes but one form of action for all cases, either in law or equity. Suits between husband and wife have long been permitted in equity, and in actions for divorce the husband and wife were necessarily upon opposite sides of the case. It was necessary therefore, in a Code providing for but one form of action, to make a rule covering all cases. Hence, in the chapter of the Code of Civil Procedure relating to the parties to the single form of action provided, it

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was declared that, in actions between herself and her husband, a married woman can sue and be sued alone. This sufficiently accounts for the presence of that provision. It would be a forced interpretation to attempt to discern in that declaration, or in any of the provsions of the Civil Code, an intent to make a departure from the common law so radical, and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character. In the language of the supreme court of Maine in Abbott v. Abbott, supra, the relation of marriage, while it continues, so to speak, "acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." The only remedies for such wrongs, afforded by our law, as it stands, are to be found in the Penal Code and in the action for divorce or maintenance, with the additional portion of the community property which may be given to the wronged party where cruelty is the cause for which divorce is adjudged.

The appellant contends that, as his appeal is from the order denying a new trial only, and there is no appeal from the judgment, the sufficiency of the complaint cannot be considered,—citing Swift v. Occidental Min. & Petroleum Co. 141 Cal. 161, 74 Pac. 700. He urges that the only course this court can pursue, inasmuch as there is manifest error in denying the motion for new trial and in the rulings upon the trial, is to reverse the order and remand the case for a new trial. The question whether or not the error complained of has produced substantial injury to the appellant is always a proper question for consideration upon appeal. It is not the rule that in every case where the evidence is insufficient to establish some one or more of the material facts in issue, or where erroneous instructions have been given, and there is no appeal from the judgment, this court must reverse the order denying a new trial and remand the cause, directing the lower court to try the case anew, notwithstanding our conviction that, because of facts admitted by the pleadings, and of which there can be no dispute, no different verdict could ever be properly rendered. No error should suffice to reverse a judgment or order, if it appears that the appellant has not been and could not be injured thereby. Where the complaint on its face shows that the plaintiff could not, in any event, recover upon the cause of action set forth therein, and it appears that no amendment could cure it, no erroneous ruling at the trial will justify a reversal of the judgment against him. Gilbert v. Allen, 57 Ind. 524; McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; McCreery v. Wells, 94 Cal. 485, 29 Pac. 877; 3 Cyc. Law & Proc. p. 385; 3 Century Dig. cols. 1933, 1934; Code Civ. Proc. § 475. Here it appears affirmatively from the record that the plaintiff was not and could not be injured in any substantial legal right by the verdict against him, and that the greatest injury this court could inflict upon him in the case would be to reverse the order without informing him, or the lower court, of his predicament, and allow him to go through the form of another trial, only to be met ultimately with a decision that he never had the cause of action against his wife for damages upon which he has sued, and that no judgment in his favor therefor could be sustained.

Our conclusion is that, notwithstanding the fact that the evidence is insufficient to support any finding that the defendant was justified in shooting the plaintiff, or any of the defenses set up in the answer, the verdict against the plaintiff is harmless because of the fact that he has no right to maintain the action at all.

The order denying a new trial is affirmed.

We concur: **Angellotti, J.; Sloss, J.**

COLORADO SUPREME COURT.

EMIL TOBLER et al., Appts.,
v.
JOHN NEVITT.

(45 Colo. 231, 100 Pac. 416.)

Attorney — authority — appeal.

The employment of an attorney to conduct a trial to final termination in the nisi prius court does not authorize him to appeal from an adverse decision or bind his client for the cost of a transcript of evidence to be used for that purpose.

(February 1, 1909.)

Case Note. — Implied power of attorney to bind client for expenses incidental to trial, including associate counsel fees.

This note does not cover the question as to an attorney's power to bind his client for witness fees and like items which are commonly taxed as costs. Neither are cases involving the power of attorneys to execute bonds on behalf of their clients included. The note deals only with the implied power of attorneys at law and excludes cases of attorneys in fact.

Implied authority to incur incidental expenses.

As a general rule an attorney at law has implied authority to bind his client for ex-

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APPEAL by defendants from a judgment of the District Court for Saguache County in plaintiff's favor in an action brought to recover for certain personal services rendered. Reversed.

The facts are stated in the opinion.

Mr. **John W. Davidson**, for appellants:

The authority of an attorney to represent his client in an action ceases upon the entry of judgment, except for a year and a day, during which he has authority to enforce the judgment by execution.

1 Coke, Inst. 378; 1 Tidd. Pr. 33; Kronschnable v. Knoblauch, 21 Minn. 56; Hinkley v. St. Anthony Falls Water Power Co. 9 Minn. 55, Gil. 44; McMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852; Weeks, Attorneys at Law, p. 496, § 242; Magnolia Metal Co. v. Sterlingworth R. Supply Co. 26 Misc. 63, 56 N. Y. Supp. 478.

An attorney employed to try a case in the district court has no authority to appeal.

Richardson v. Talbot, 2 Bibb, 382; Weeks, Attorneys at Law, pp. 510, 513, §§ 248, 249; Hopkins v. Mallard, 1 G. Greene, 117; Ikerd v. Borland, 35 La. Ann. 337; Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265; Coles v. Anderson, 8 Humph. 489; Covill v. Phy, 24 Ill. 37; National Park Bank v. Lanahan, 60 Md. 477; Clark & S. Agency, p. 1433; Hooker v. Brandon, 75 Wis. 8, 43 N. W. 741.

The presumption of authority from his employment in the trial court does not apply after judgment, and those dealing with him under such circumstances must inform themselves as to his authority.

Weeks, Attorneys at Law, 2d ed. 496, § 242.

Messrs. **George T. Sumner** and **John Nevitt**, for appellee:

An attorney has implied power, without special authority, to employ a stenographer to transcribe evidence to be used in the trial

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penses incidental to the trial of the cause in which he is retained.

Stenographer's fees.

A stenographer is entitled to recover from a party for services rendered in taking testimony upon a reference of a special issue at the request of such party's attorney. Thornton v. Tuttle, 20 Abb. N. C. 308, 7 N. Y. S. R. 801. The court said: "The relation of an attorney to his client is that of agency in respect to such matters as come within the conduct and management of the action in which he is employed. The method of taking evidence with a view to completeness and accuracy, as well as expedition, is a matter for the judgment of the attorney, relating to the trial of actions and to the preservation and presentation of the proofs for consideration. The use of stenography for that purpose is neither unusual nor unreasonable. And, ordinarily, the employment of the means to take the testimony in that manner and to furnish a longhand copy of it thus taken would come within the scope of the authority of the attorney as such, and the liability for the service be that of the client."

And the fact that such party instructed the attorney not to employ a stenographer will not affect the right of recovery where the instruction was unknown to the stenographer employed. Ibid.

So, the authority of the attorney is not qualified by the fact that the rules of the court in which the testimony is taken contemplate that the testimony shall be taken by the examiner and the depositions of the several witnesses read over to and signed by them. Ibid.

A client is likewise responsible for stenographer's fees where the stenographer is employed by his attorney to take the minutes of the proceedings before an auditor. Harry v. Hilton, 64 How. Pr. 199.

So, an attorney has implied power to bind his client for the payment of a court stenographer's services in transcribing evidence for use at the trial. Miller v. Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107, 58 N. E. 213.

And evidence that the client never authorized his attorney to employ such stenographer is immaterial. Ibid.

So, where a court reporter furnishes copies during the trial at an attorney's request and the client knows that they are being used by his attorney, he is liable therefor. Palmer v. Miller, 19 Ind. App. 624, 49 N. E. 975. To the same effect is Query v. Cooney, 34 Misc. 161, 68 N. Y. Supp. 800.

In Bonynge v. Field, 81 N. Y. 159, which was an action to recover from attorneys for stenographer's services, the court said that the rule that, when a person contracts as the agent of another and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible, applies to the relation of attorney and client.

And in a like action it was held in Bonynge v. Waterbury, 12 Hun, 534, that an attorney was not liable for the fees of a stenographer employed to furnish a copy of testimony, unless he expressly bound himself for their payment.

Printer's bill.

The employment of a printer by counsel to print their briefs at the client's expense is implied from the relation of attorney and client. But the client will not be bound for a greater number than the rules of court require. Weisse v. New Orleans, 10 La. Ann. 46.

To the same effect are Williamson-Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534, and Livingston Middleditch Co. v. New York College, 31 Misc. 259, 64 N. Y. Supp. 140, reversing 30 Misc. 831, 61 N. Y. Supp. 918.

So, where a client directs his attorneys

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of his client's cause, and to bind the client for such services.

Miller v. Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107, 58 N. E. 213; Harry v. Hilton, 64 How. Pr. 199; Williamson-Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534; Moulton v. Bowker, 115 Mass. 40, 15 Am. Rep. 72; Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252; Nelson v. Cook, 19 Ill. 453; Newberry v. Lee, 3 Hill, 523; Oestrich v. Gilbert, 9 Hun, 245; Jenney v. Delesdernier, 20 Me. 191; Schoregge v. Bishop, 29 Minn. 367, 13 N. W. 194; Thornton v. Tuttle, 20 Abb. N. C. 308; Bonynge v. Waterbury, 12 Hun, 535; Hogate v. Edwards, 65 Ind. 372; Keady v. Owers, 30 Colo. 1, 69 Pac. 509.

An official court reporter has a right to presume that the attorneys have authority to order a transcript of the evidence.

Miller v. Palmer, supra.

The attorney has the right to bind his clients for any service which may be necessary and proper, not only for the preparation of the case for trial, but for the convenient conduct of such trial and the proceedings thereafter taken.

Miller v. Palmer and Harry v. Hilton, supra; Covell v. Hart, 14 Hun, 254; First Nat. Bank v. Tamajo, 77 N. Y. 476.

The official court reporter's right of action was not affected by any secret or confidential instructions given by the defendant to his attorney.

Miller v. Palmer, supra; Judson v. Gray, 11 N. Y. 408; Bonynge v. Waterbury, 12 Hun, 534; Sheridan v. Genet, 12 Hun, 660; Covell v. Hart, 14 Hun, 252; Harry v. Hilton, supra.

Mr. James D. Pilcher also for appellee.

Campbell, J., delivered the opinion of the court:

Emil Tobler and Frances Tobler were plaintiffs in an action which was tried in the district court of Saguache county. Its object was to obtain an injunction against

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to appeal and they engage a printer to print the case and points, the client is liable for such printing. Tyrrel v. Hammerstein, 33 Misc. 505, 67 N. Y. Supp. 717.

And where an interested party has agreed to pay the expenses of litigation, except the attorney's fees, and the attorney orders a brief printed for use in the appellate court, the attorney is authorized to contract for the printing and such person is liable therefor, especially where his correspondence shows that he apparently considered that the attorney had such authority. Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512.

And it was held in Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291, that, where an attorney contracts for printing briefs and arguments, the contract is his until he makes the contrary appear by proof.

Bookkeeper's or expert's fees.

It is held, too, that an attorney has authority to bind his client for services rendered in preparing a statement of accounts for use in a legal proceeding. Foland v. Dayton, 20 N. Y. Week. Dig. 59. The court here said that an attorney has authority, from the existence of the relation, to do all legal acts in the prosecution of the legal proceedings, or required to secure an intelligent and just disposition thereof.

And in Covell v. Hart, 14 Hun, 253, it was said that the services of a bookkeeper employed by an attorney to examine books, in order to enable him to prepare for trial, were such as he might cause to be performed for his client, since he might bind his client for any service necessary to the preparation of the case for trial. The suit was against the attorney, however, and it was held that he was not liable.

So, an attorney employed by the general manager of a foreign corporation to defend an expected case has authority to employ an engineer and expert to examine the collapsed building, which caused the injury, although at the time no suit was actually pending. Brown v. Travellers' Life & Acci. Ins. Co. 21 App. Div. 42, 47 N. Y. Supp. 253. The court, after stating that the client would be liable in case a suit was pending at the time, said: "Does the fact that no action had been instituted at the time make this principle inapplicable? We think not. Where the case is that of the prosecution of a claim, it is clear that the authority of the attorney must precede the commencement of the action and begin at the time of his retainer. The rule should be the same where an attorney is retained to defend an expected suit. By the Code, evidence can be perpetuated for use in an anticipated litigation as well as in a pending suit. Often evidence, if not obtained at the time of the occurrence, cannot be subsequently procured. This was especially true of that which it was expected the plaintiff might be able to give. We do not say that Johnson, by virtue only of his general employment as legal adviser, might incur this liability for the defendant, but the admission is that he was the attorney of defendant in this particular matter, and he was called upon to act by the New York manager. Now, the particular matter was the expected actions against the Cornells, against which the defendant had agreed to indemnify the Cornells and the defense of which the defendant was entitled to control. It is therefore the same as if Johnson had been retained to defend a particular suit. His authority would be as great in one case as in the other, and sufficient to render his client liable for any reasonable expenditure."

The question of employment by the client in such case is for the jury. Ibid.

And a client is liable to an expert witness employed by his attorney to testify in

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threatened acts of defendants therein. The judgment went against plaintiffs, and the action was dismissed. John Nevitt was the official stenographer of that court and took notes of the proceedings at the trial. After the trial was finished and the case was submitted to, and taken under advisement by, the court, the plaintiff says that Ira J. Bloomfield, who was one of the attorneys retained by the Toblers in, and who helped try, the action, ordered Nevitt to write out in longhand a copy of the evidence, which he did. The defendants refusing to pay for the same, Nevitt brought this action against them, and recovered judgment, from which they appealed.

There is a direct conflict between Nevitt and Bloomfield; the former asserting, the latter denying, the employment. As the law applicable to the facts as testified to by plaintiff is not what the court gave to the jury, we assume, for our present purpose, that his version of the controversy is correct. The plaintiff does not claim that the evidence was used in the trial of the case for the convenience of counsel, or for the benefit of the trial judge in making findings, or that it was ordered for either purpose; but he says that there was no restriction made by him as to the use defendants were to make of it, though he was not employed to write it out until after the trial was over and the court had taken the case under advisement. Bloomfield was not the general attorney for the Toblers. He was retained by them for a special purpose, which was to conduct the trial in the district court to a final determination therein, and at its conclusion his fee was paid, and his connection with the case ceased. He was not retained or authorized to appeal the case or sue out a writ of error to the final judgment in case it went against his clients, unless the special retainer above mentioned, in law, gave him such authority. While the plaintiff says that no restriction or limit was placed upon the use

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a proceeding, in the absence of evidence that the witness knew of a limitation of the attorney's authority or agreed to look solely to the attorney for his compensation. Mulligan v. Cannon, 25 N. Y. Civ. Proc. Rep. 348, 41 N. Y. Supp. 279.

But, where the witness has notice that the attorney has no right to incur the expense, the client is not liable. Packard v. Stephani, 85 Hun, 197, 32 N. Y. Supp. 1016.

And where an attorney and client live in the same city, the attorney is not impliedly authorized to employ a patent expert at the expense of his client to assist in the preparation of the case. Knight v. Buser, 6 Ohio Dec. Reprint, 772. The court said: "In answer to this last proposition, I hold that, whatever might be the authority of an attorney in such matters under other circumstances, as, for instance, when a sudden emergency arose and his client could not be communicated with in time for him to receive instructions, no such authority existed here. Where an attorney and his client are living and doing business in the same city, and can confer with each other at any hour, the attorney cannot, by virtue of his employment as an attorney, exercise any such authority as that which is claimed here."

Employment of associate counsel—in general.

It is a general rule that an attorney has no implied authority to employ associate or additional counsel.

This was held to be the rule in the following cases: Continental Adjustment Co. v. Hoffman, 123 Ill. App. 69; Kneeland v. Hurdy, 97 N. Y. Supp. 957; Johnson v. Cunningham, 1 Ala. 249; Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 127 Am. St. Rep. 837, 69 Atl. 202; Lathrop v. Hallett, 20 Colo. App. 207, 77 Pac. 1095; Chicago & S. Traction Co. v. Flaherty, 222 Ill. 67, 78 N. E. 29; Paddock v. Colby, 18 Vt. 485; Young v. Crawford, 23 Mo. App. 432; Taylor v. Alexander, Rap. Jud. Quebec, 12 C. S. 159; Auge v. Filiatrault, Rap. Jud. Quebec, 10 C. S. 157; Ex parte James, 8 N. B. 286.

In passing upon the power of attorneys to employ assistant counsel, the court in Briggs v. Georgia, 10 Vt. 68, said: "An attorney who has the management of a suit, and who is both the agent and attorney for the party, may employ assistant counsel at the charge of his client. The counsel employed may charge his fees to the attorney employing him, who may recover the same of the party, or they may be charged directly to the party. But when the attorney is only employed to attend to the suit, and the party is in the immediate vicinity, and directs as to the management of the suit, no general authority in the attorney to employ assistant counsel would be implied. If the attorney, who has the management of the suit, employ an assistant at the trial, and the client is present and sees the person, thus employed, assist in managing and conducting the suit, the inference would be strong, if not irresistible, that he consented to such employment, and he would be liable for the fees of the assisting counsel."

In Ex parte James, supra, the court said: "Situated as the profession is in this province, we are of opinion that the mere employment of a gentleman to act as an attorney in any cause or matter does not carry with it an authority to engage the services of counsel at the expense of the client. We do not mean to say that express authority would be necessary in every case, because it may occasionally happen that the interest of the client requires the employment of counsel where there is no opportu-

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to be made of the transcript when prepared, he must have known, as the evidence conclusively shows, that it was not, and could not be, used by Bloomfield or his clients in the trial of the case, for that had theretofore terminated; and that it was not to be read by the judge preparatory to his findings, since plaintiff did not have it prepared until after the entry of judgment. At the time plaintiff says he was employed to transcribe the evidence, the cause had been, as as we have seen, submitted to the trial court. In a letter written by him to Bloomfield several weeks later, and after entry of judgment against Bloomfield's clients, plaintiff referred to that judgment, and in that connection said, in substance, that he supposed an appeal would be taken, and his transcript, though not then, soon would be, completed. This shows that plaintiff himself supposed that the transcript was to be used, if at all, by plaintiffs in connection with a review in the supreme court, and not by the trial judge in reaching his conclusion. The case then is one where the action is against the client, and where an attorney retained specially to try a litigated issue in the district court, and without special authority from his client, employs the official stenographer in advance of judgment, and before it can be known what that judgment will be, to write out, from his notes, the evidence introduced at the trial for use on a review of the judgment in the supreme court.

The court specifically instructed the jury

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nity of conferring with him or his agent, and, from the very nature of the employment and the communication between the resident attorneys and clients residing out of, or absent at the time from, the province, such authority may sometimes be implied; but in all cases where the client can be referred to, it should be done, and his consent obtained, where no express authority has been given; indeed we all know that generally the client expects to be consulted in the selection of counsel."

So, an attorney who has employed a substitute cannot recover for such substitute's services where his client has not, with knowledge of the facts, consented to the attorney's act. Meaney v. Rosenberg, 32 Misc. 96, 65 N. Y. Supp. 497. To the same effect is Voorhies v. Harrison, 22 La. Ann. 85.

And an attorney cannot recover of his client fees of counsel associated with him where he fails to prove his employment of such counsel at the client's request, or that with the client's sanction he has paid such fees. Cook v. Ritter, 4 E. D. Smith, 253.

Likewise, where associate counsel is employed under a personal contract with an attorney, the client of the latter is not liable for the services rendered. Gillilland v. Brantner (Iowa) 121 N. W. 1047.

And where an attorney employs associate counsel without authority, he does not have a lien for the joint services rendered, but only for his personal services. Gibson v. Chicago, M. & St. P. R. Co. 122 Iowa, 565, 98 N. W. 474. Neither has such associate counsel a lien. Lathrop v. Hallett, 20 Colo. App. 207, 77 Pac. 1095.

So, an attorney making a contract for a contingent fee, which provides that in the event of recovery the "necessary expenses" of the attorney are to be first paid, cannot deduct as necessary expenses fees for associate counsel employed by him. Whitlow v. Whitlow, 109 Ky. 573, 60 S. W. 182.

The attorney for a town has no implied authority to bind the town by the employment of assistant counsel although the agent of the town was not at the place of trial, where it does not appear that the attorney could not have seasonably consulted with such agent or that anything transpired rendering counsel necessary which was not known at the original consultation with the agent. Willard v. Danville, 45 Vt. 93.

And an attorney has no general power to employ associate counsel where his contract expressly reserved to the client the right to determine whether such counsel should be employed and the right to make the selection. Gillilland v. Brantner, supra.

Clearly, where the employing counsel has not himself been engaged, the assistant counsel retained by him cannot recover from the supposed client. Brown v. Underhill, 4 Ind. App. 77, 30 N. E. 430.

But it has been held that, although the relation of attorney and client does not imply authority to the attorney to employ other counsel at the client's expense, yet the attorney may employ an assistant to aid him in his work, and charge the client with the reasonable value of the entire labor. Vilas v. Bundy, 106 Wis. 168, 81 N. W. 812.

And it was held in Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93, that, while an attorney cannot employ a new counsel without the authority of his client, yet he may engage assistance at his own expense, and this will not prejudice his right to recover the reasonable value of such services rendered under his own employment.

So, where the attorney for a company is also the agent and manager of the company's property, he has authority to employ an attorney to take and prosecute an appeal from an order appointing a receiver. Fowler v. Iowa Land Co. 18 S. D. 131, 99 N. W. 1095.

And in Armour v. Kilmer, 28 Ont. Rep. 618, it was held that solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees, and that a legal privity exists between client and counsel though a solicitor intervenes in the usual way. The court said that this should be the rule because of the general authority which the retainer from the client to the solicitor imports to do all that needs to be done for the proper and effective conduct of the litigation.

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that if Bloomfield was attorney for defendants in the case in the district court, and ordered plaintiff to write out the evidence produced in the trial of that case, or to make a transcript thereof, even though they should find that Bloomfield had no special authority from his clients to give the order, plaintiff was entitled to recover, unless he then knew of the termination of the relation of attorney and client. In this we think the court was wrong as applied to the facts of this case. At common law the general rule is that the authority of an attorney to represent his client in an action ceases upon its final determination and the entry of judgment. Especially was this true as to the defendants' attorney, or, more accurately speaking, the attorney for the defeated party. The attorney for the prevailing party was empowered, under his employment as attorney, to enforce collection of that judgment by suing out a writ of execution. A distinction is also made by some of the authorities between the power of an attorney who is retained to try a litigated issue and one employed to collect a debt. In the former case his authority is usually regarded as ending with the trial of the case. In the latter he may, it seems, appeal from the judgment, if it is against his client, or sue out a writ of error to reverse it, without a new retainer. If Bloomfield had ordered plaintiff to write out a transcript of the evidence for use in the trial of the case in the district court, or for the benefit of the judge as an aid to him in making findings, de-

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Employment of resident counsel.

An attorney retained to conduct a case pending in another county may employ local counsel to attend to necessary formal matters, and the charges paid therefor are a proper item in the employing attorney's account. Dillon v. Watson, 3 Neb. (Unof.) 530, 92 N. W. 156. The court said: "It is no doubt true that a client is not liable for fees of other counsel employed by those whom he has retained to conduct his case, to assist therein, unless he authorizes or ratifies such employment. Sedgwick v. Bliss, 23 Neb. 617, 37 N. W. 483. But where a case is pending in another county, it frequently happens that orders have to be obtained, leave of court taken in matters of course, and calls of docket attended, which do not require personal attention of counsel familiar with the cause, but may be left to one person as well as to another. Expense is necessarily involved whether counsel retained by the party go in person or whether local counsel are employed to act for them. If the latter course is taken and the fees paid are less, or at least not more, than the expense necessarily involved in going in person, we see no reason why the sums thus expended are not as properly chargeable to the client as the traveling and other expenses would have been. It is in evidence that the fees paid in this case were less than the expense of attending the courts in person, and we think the items should be allowed."

It does not appear in People ex rel. Simon v. Pack, 115 Mich. 669, 74 N. W. 185, that the employing attorney had express authority, and resident counsel retained by the defendant's attorneys was held entitled to a lien for his services where he had actively assisted in the preparation and trial of the case.

Where fixed fee agreed upon.

An attorney who has agreed to conduct a suit for a certain sum is not entitled to recover extra compensation for an associate retained by him without the client's authority, where it appears that the only service rendered by the associate was sitting in court during the trial. Re Borkstrom, 63 App. Div. 7, 71 N. Y. Supp. 451, affirmed in 168 N. Y. 639, 61 N. E. 1127.

So, where counsel makes a written contract to transact certain business for a given per cent of the sum realized, he cannot charge his client with the fee of other attorneys whom he employs to perform the work. Hughes v. Zeigler, 69 Ill. 38.

And there is *dicta* in Re Hynes, 105 N. Y. 560, 12 N. E. 60, to the effect that a counsel retained for a fixed fee cannot bind his client for the expense of associate counsel.

Where attorney employed forms partnership.

Ordinarily where one member of a partnership is employed, the firm is employed, and the employer is entitled to the services of all the members of the firm. Williams v. More, 63 Cal. 50.

And an understanding between partners that each shall act as an individual, and charge and receive compensation therefor as individuals, cannot affect the client in the absence of knowledge of such agreement. Ibid.

And where an attorney after being retained enters into a partnership, the partner of such attorney is entitled to compensation only under the original contract. King v. Barber, 61 Iowa, 674, 17 N. W. 88.

And after the dissolution of a partnership, the client is not liable to the original attorney's partner in the absence of a new contract, unless he has knowledge that such partner was not rendering his services under the original contract, but expected to receive individual compensation. Ibid.

So, it is said that a person employing a lawyer who afterwards takes a partner who assists him in the case does not become liable to the firm for the fee contracted by simply talking or consulting with such partner about the case. Carr v. Wilkins 44 Tex. 424.

To have the effect above referred to, the recognition must be such as to incorporate the incoming partner into the contract of employment as a party to it, by express terms or by unmistakable implication. Ibid.

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fendants would have been bound thereby. It does not follow, however, that Bloomfield, merely by virtue of his retainer to try the litigated issue in the district court, had authority to appeal, or bind his client by a direction of the stenographer to transcribe the evidence for use in the reviewing court. The testimony is uncontradicted that Bloomfield was employed by defendants as one of several attorneys to try the litigated issues in, and his employment ceased when the case was submitted to, the district court. He was not specifically authorized by defendants to take any steps looking to a review or reversal of such judgment as the court might thereafter pronounce against his clients The plaintiff is a lawyer, as well as official stenographer of the court, and is presumed to know what authority an attorney possesses by virtue of his retainer to try a litigated issue.

A review of some of the leading authorities will show the extent and duration of the authority of an attorney. Plaintiff says that an attorney has implied power, without special authority, to bind his client by an order to an official stenographer to transcribe evidence to be used in the trial of his client's cause. Miller v. Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107, 58 N. E. 213, so holds. The decision was right in that case, for the evidence was ordered to be, and in fact was, used in the progress of trial of the cause in the trial court. Harry v. Hilton, 64 How. Pr. 199, is to the same effect. There also the evidence was tran-

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And where there is no evidence of an agreement with the client of one who, during the relation of attorney and client, forms a partnership, to substitute the firm as counsel, the attorney retained may recover for the services rendered without joining his partner. Davis v. Peck, 54 Barb. 425.

Ratification of employment.

The client, however, may ratify the unauthorized employment of associate counsel, and thereby render himself liable.

Thus, an attorney employed by counsel to assist in the case is entitled to recover from the client where such client is informed of the employment, expresses his satisfaction therewith, verifies pleadings drawn by the attorney, and accepts the results of the suit without protest. Dorr v. Dudley, 135 Iowa, 20, 112 N. W. 203.

And the performance of the services by a substitute is sufficient to warrant a recovery by the original attorney where the client knows of the substitution and accepts the services without objection. Smith v. Lipscomb, 13 Tex. 532.

So, recovery may be had for the service rendered by an attorney although he employed associate counsel to argue the client's cause, where the client was present and made no objection thereto. Eggleston v. Boardman, 37 Mich. 14.

And an implied consent which will render the client liable to his attorney for services of associate counsel is shown by evidence that the client knew that his attorney agreed to change off services with the one employed as associate, and that he acquiesced in it, was present at the trial, and consulted with the asociate with reference to the case. Calhoun v. Akeley, 82 Minn. 354, 85 N. W. 170.

So, where nonresident attorneys without authority from their client employ resident attorneys to file pleadings and look after the answering of interrogatories, and such attorneys, after attending to these matters, without being requested, assist at the trial with the client's knowledge they are entitled to recover for the services rendered, since the client's conduct in allowing them to serve him at the trial amounts to an implied ratification of the employment. Hogate v. Edwards, 65 Ind. 372. To the same effect is Moore v. Orr, 10 Ind. App. 89, 37 N. E. 554.

Where a client accepts the benefit of a lawyer employed by his attorney on account of the latter's illness, a privity of contract is created which will entitle the lawyer to recover according to contract made with the original attorney. Reese v. Resburgh, 54 App. Div. 378, 66 N. Y. Supp. 633.

So, evidence that soon after associate counsel were employed the attorney engaging them informed his client of the fact, and that the client did not dissent therefrom, is proper for submission to the jury, to enable them to determine whether or not the client actually assented to the employment. King v. Pope, 28 Ala. 601.

But the fact that a client is present at the trial and sees another attorney assisting his counsel does not of itself render the client liable for such attorney's compensation. Young v. Crawford, 23 Mo. App. 432. The court said: "While the employment of an attorney is one that presupposes personal trust and confidence by the employer in the employee, there is nothing in the nature of the employment precluding one attorney from retaining another to aid him in the prosecution or defense of a suit, under a promise, express or implied, that the attorney thus employed shall look to the attorney employing him for compensation."

And where the client does not know that associate counsel have rendered service in the case until after the service has been performed, he is not liable therefor on the ground of acquiescence or ratification. Gilliland v. Brantner (Iowa) 121 N. W. 1047.

So, ratification of the acts of an attorney employed by counsel without authority from his client is not shown by the acceptance of an award recovered, where there are no accompanying circumstances which put the client upon inquiry as to how the award was obtained. Bassford v. Swift, 17 Misc. 149, 39 N. Y. Supp. 337.

The question as to whether an attorney

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scribed for use at the trial. In Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72, Gray, chief justice, thus expressed the rule, which has often been quoted with judicial approval: "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action." The principle was applied to the case then before the court, and it was held that an attorney had power to release an attachment, at least before judgment. In Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252, it was held that an attorney for a foreign client or one residing at a distance, who was intrusted with the collection of a debt, had an implied authority to indemnify the officer in making a levy. In Jenney v. Delesdernier, 20 Me. 183, it was said that the attorney for plaintiff, without any special authority, may approve of the receipt taken by the sheriff for personal property attached by him, and thereby relieve the officer of his obligation to retain and produce the property. This upon the principle that the attorney has the power to elect and control the remedy, and all proceedings arising out of and connected with it. Thornton v. Tuttle, 20 Abb. N. C. 308, ruled that the attorney could bind his client by the employment of a stenographer to take and write out the testimony of witnesses upon a reference of a special issue. In Brown v. Arnold, 67 C. C. A. 125, 131 Fed. 723, it was held that the retain-

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was employed by a railroad is for the jury where a division attorney's employment covered litigation in an adjoining state in which such attorney had not been admitted, and it had previously always employed special counsel with the ratification of the general counsel. Northern P. R. Co. v. Clarke, 45 C. C. A. 635, 106 Fed. 794.

Effect of special contract.

The fact that a client is present and sees an assistant counsel aiding at the trial does not estop him to deny his liability to his attorney for such services, where he has a contract with his attorney by which the latter undertakes to handle the cause for an agreed percentage. Whitlow v. Whitlow, 109 Ky. 573, 60 S. W. 182.

To the same effect are: Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899; Lathrop v. Hallett, 20 Colo. App. 207, 77 Pac. 1095; Price v. Hay, 29 Ill. App. 552, affirmed in 132 Ill. 543, 24 N. E. 620; McCarthy v. Crump, 17 Colo. App. 110, 67 Pac. 343.

And a statement by assistant counsel that the client whom he purported to represent would pay all of the attorney's fees in the case will not estop the client to dispute her liability to the assistant counsel, where such counsel was employed without her authority by attorneys with whom she had made a contract to conduct the case for a certain percentage. Porter v. Elizalde, supra.

And the fact that the client knows that other counsel than those employed by him are assisting in the case will not render him liable to such counsel, where the contract with his attorney provides that the client shall have the right to determine whether associate counsel are to be employed and who such counsel shall be. Gillilland v. Brantner, supra.

But counsel called in to argue a case by an indisposed attorney who had agreed with his client to handle the litigation for a stipulated fee is entitled to recover for his services where the client had knowledge of the employment, and the substituted counsel did not know of the special agreement. Allen v. Parish, 65 Kan. 496, 70 Pac. 351.

So, a lawyer employed by defendants' attorney is entitled to recover from the defendants where they accepted his service, notwithstanding a special contract with their attorney that he was to pay for assistant counsel out of his fee, it appearing that the lawyer employed had no knowledge of this agreement. McCrary v. Ruddick, 33 Iowa, 521.

So, a client is liable to resident counsel employed by her nonresident attorney, where, she called upon them several times and they assisted in the trial of the case, notwithstanding an agreement with her attorney to prosecute the action to final judgment for a stipulated sum, of which the resident counsel were not informed. Sedgwick v. Bliss, 23 Neb. 617, 37 N. W. 483.

Where, however, the attorney employed knows of the special agreement, he cannot recover from the client. Hudspeth v. Yetzer, 78 Iowa, 13, 42 N. W. 529.

And it has been held that a client is liable to a senior counsel, called in by his attorney, where such counsel conducts the trial in the client's presence and consults with him without objection, notwithstanding a secret agreement between the original attorney and the client, that if senior counsel became necessary, it should be paid for by the attorney. Brigham v. Foster, 7 Allen, 419. The court said: "This was a secret arrangement, unknown to the plaintiff, and one which, in the ordinary course of professional services, he had no reason to suppose might exist. It may operate as a valid contract between the parties to it; but as respects the plaintiff, it cannot under the circumstances avail the defendant. These circumstances are the facts above stated, that the services of the plaintiff were performed in the presence and with the co-operation of the defendant, he adopting him as his counsel and consulting with him as such. We think it was the defendant's duty, before thus knowingly receiving the plaintiff's services and accepting him as counsel to manage his case, to inform him of the special agreement with Mr. Porter, and that the defend-

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er of an attorney to conduct an action confers upon him authority to stipulate with opposing counsel, after the rendition of judgment in favor of his client and after the expiration of the term of court, but within the time for procuring of a writ of error, that the case shall abide the final decision of another action which involves the same question and is conducted by the same attorneys. In that case the court said that the stipulation was manifestly for the benefit of the clients and was acted upon by the opposing party. The court said the case came within the exceptions to the general rule, and that, by virtue of his general retainer, an attorney for the prevailing party has the power to collect or enforce the judgment, to admit service of a citation issued upon a writ of error or appeal to review it, and authority to oppose any steps that may be taken within a reasonable time by the defeated parties to reverse it. The court held that the action of the attorney in this case tended to an enforcement of the judgment which he had secured for his clients.

It will be observed that in all of these cases, relied upon by plaintiff as deciding that an attorney has implied authority to bind his client, such acts related to the proceedings in the trial court and which tended to enforce the judgment therein rendered. In none of them is it held that an attorney, merely by virtue of his retainer to try a litigated issue, has power to take an appeal or sue out a writ of error to reverse a judgment, and to bind his clients to pay for transcribing the evidence to be used upon such review. Two cases from Massachusetts, and possibly others may be found, are said to go to the full length claimed by plaintiff. In Grosvenor v. Danforth, 16 Mass. 74, it was held that an attorney of record in an action in which an erroneous judgment has been rendered against his client may sue out a writ of error for its reversal without special authority. This, apparently, was based upon a previous decision of the same court in the case of Dearborn v. Dearborn, 15 Mass. 316. In that case the attorney was employed to undertake the collection of a debt. After obtaining his judgment he sued out process against the bail. It was claimed that that was a new suit, and that he had no authority to bring it without a fresh direction from his client. It was held, however, that the scire facias against the bail is not to be considered a new suit. There are decisions to the contrary. The court, however, said further that, when an attorney undertakes to collect a debt, he is bound to sue out all process necessary to that object, and that the prosecuting of a scire facias is but a regular step in collection of the original demand. The Dearborn Case seems not to go to the length reached by the decision in Grosvenor v. Danforth. Dearborn v. Dearborn we think is clearly distinguished from

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ant was to be at no expense for the fees of the senior counsel. Not having done so, but remaining silent on the subject when he should have spoken, and when the plaintiff might have withdrawn from the case, the defendant, after choosing to avail himself of the professional services of the plaintiff, cannot now avoid a personal liability for the payment of a reasonable compensation therefor." To the same effect is Emblem v. Bicksler, 34 Colo. 496, 83 Pac. 636.

Miscellaneous.

The authority to sue out a commission to take a deposition of a nonresident witness is included in the powers of an attorney employed to defend a suit. Fairchild v. Michigan C. R. Co. 8 Ill. App. 591. The court said: "This testimony is not contradicted; but it is urged that the attorney, in making such agreement, transcended the limits of his authority and did not bind his client. That he was the attorney for the defendant in the suit in which the deposition was taken is proved, and is not disputed; and it will be presumed that he was vested with the authority ordinarily appertaining to that relation. He was clearly authorized to take all such steps as were necessary to a proper defense of the suit; among which may fairly be included the suing out of a commission to take the deposition of a nonresident witness, as well as procuring the services of a suitable person to execute such commission. This seems to be conceded, as the defendant does not contest the propriety of its attorney's acts in suing out the commission or in employing the plaintiff to take the deposition."

So, attorneys have power to bind their clients by a stipulation for a different rate of compensation to referees than that fixed by the Code. Mark v. Buffalo, 87 N. Y. 184.

And where a nonresident corporation directed its attorney to bring suit and recover property claimed, authority is implied to bind the client to pay the expenses of removing the property from the premises of the defendant. Fox v. William Deering & Co. 7 S. D. 443, 64 N. W. 520.

But an attorney has no authority under a general employment to instruct a sheriff to conduct the business in a restaurant which has been levied upon, and the client is not liable to the sheriff for the expenses incurred. Alexander v. Denaveaux, 53 Cal. 663.

And where an attorney employed to contest a claim turns the matter over to another attorney, who incurs costs for sheriff's fees, the client is not liable therefor, since no power of delegation exists. Antrobus v. Sherman, 65 Iowa, 230, 54 Am. Rep. 7, 21 N. W. 579.

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the one at bar by the supreme court of Iowa in Hopkins v. Mallard, 1 G. Greene, 117. The court, speaking by Greene, justice, said there was nothing in the Dearborn Case conflicting with the decision announced in the case then under consideration, for it was said that the attorney there was employed and undertook to collect a debt, and that it was justly held therein that he was bound to sue out all process necessary to that object; whereas, in the case in hand the retainer to try a cause in a trial court did not authorize the attorney to prosecute an appeal. In Weeks on Attorneys at Law, 2d ed. 248, the rule is stated to be that an attorney once appointed continues in that character until judgment or other termination of the suit, and that, "where a scire facias is necessary to revive a judgment a fresh authority is necessary," and, also, it is necessary to justify bringing a writ of error. At § 249a, the author says that "the employment of an attorney to defend an action pending in a trial court does not, under ordinary circumstances, authorize him to take an appeal to a higher court from the judgment rendered against his client." To this is cited Hooker v. Brandon, 75 Wis. 8, 43 N. W. 741, where the court, speaking by Taylor, justice, announced the rule and gives clearly the reasons for it. Connett v. Chicago, 114 Ill. 233, 29 N. E. 280, held that a city attorney, whose duty it is to look after and protect the interests of the city in all legal controversies, has the power on behalf of the city to pray for an appeal from a judgment against the city and prepare the necessary steps for taking the same, but the court recognized the general rule that the retainer of an attorney by a private party to prosecute or defend in a trial court does not authorize him to prosecute an appeal or writ of error in the same case, adding that a city attorney occupies a different position; the general scope of his powers and duties being much larger than that of an attorney for a private litigant especially retained for a single case. In 2 Clark & Skyles on the Law of Agency, § 650, the authors say that the general rule is that an attorney cannot begin proceedings for an appeal from a judgment against his client without further authority from the latter. In Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265, it was held that the retainer in the original suit did not, of itself, constitute a retainer to bring a writ of error. To the same effect is Richardson v. Talbot, 2 Bibb, 382. Ring v. Charles Vogel Paint & Glass Co. 46 Mo. App. 374, is not authority for plaintiff's contention. The court there held that, under conflicting evidence, the legal presumption that an attorney appearing in a case has proper authority of his client was not overcome by the proofs.

Our conclusion therefore is that an attorney at law, employed only to try a litigated issue in a nisi prius court, has not thereby the implied authority to appeal from, or sue out a writ of error to, a judgment rendered against his client, or to bind the client to the payment of stenographer's fees for services rendered at the instance of the attorney in transcribing the evidence to be used in prosecuting a review in the supreme court. There is no evidence in this case of ratification of, or acquiescence in, such employment of plaintiff by defendants in this action. The cause having been tried by plaintiff's counsel upon the theory, which the trial court adopted by so instructing the jury, that the special retainer of Bloomfield to try the case in the district court necessarily carried with it the implied power, without any special authority from his clients, to perfect an appeal and represent his clients therein and to bind them to pay all the costs and expenses necessarily incurred in the prosecution of such review, its judgment cannot stand. It therefore is reversed, and the cause remanded.

Petition for rehearing denied.

Steele, Ch. J., and Gabbert, J., concur.

INDIANA SUPREME COURT.

INDIANAPOLIS TRACTION & TERMINAL COMPANY, Appt.,
v.
THOMAS J. KINNEY, by Next Friend.

(171 Ind. 612, 85 N. E. 954.)

Master — railroad — increased liability — validity.

1. Applying to proprietors of railroads a rule of liability with respect to injuries of employees different from that applied to other classes of employers does not deprive them of the equal protection of the laws.

Same — character of employment — street railroad.

2. A member of a repair and construction gang on a street railway is not, while engaged in unloading rails from a standing car, exposed to any of the peculiar hazards of using and operating a railroad, so as to come within the protection of a statute by

Note. — Upon the general question, What is a railroad hazard within the statutes abolishing or restricting the fellow-servant rule as to railroad employees, see case notes to Johnson v. Great Northern R. Co. 18 L.R.A.(N.S.) 477, and Hanson v. Northern P. R. Co. 22 L.R.A.(N.S.) 968.

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increasing the liability of railroad companies for injuries to their employees.

Pleading — negligence — duty.

3. A complaint of a servant against his master for injuries received in the performance of the work because of negligence in failing to furnish sufficient help to do the work with safety is insufficient which does not allege that any particular number of men were promised or necessary for that purpose.

Master — negligence of boss — liability.

4. A master is not liable to a member of a repair gang on a street railway for injuries due wholly and entirely to the gang boss, in failing to place skids safely for the unloading of rails from a car.

(October 27, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. **F. Winter and W. H. Latta** for appellant.

Messrs. **George W. Galvin** and **Elliott & Elliott,** for appellee:

Railroads are complex and extensive, with various departments, and their service is universally recognized as peculiarly dangerous or hazardous, not merely in detail, but as a whole; so that the basis for the classification is the danger or hazard of that service or business as a whole; and the statutes may, and usually do, cover all that class. Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

The test is not comparative danger of different parts or features of that work with each other or with other business, but in the peculiar hazards of that class as a whole; and it is sufficient if an injured employee is in that class, and is injured in that service or employment.

Hancock v. Norfolk & W. R. Co. 124 N. C. 222, 32 S. E. 679; Nicholson v. Transylvania R. Co. 138 N. C. 516, 51 S. E. 40; Union P. R. Co. v. Harris, 33 Kan. 416, 6 Pac. 571; Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; Galveston, H. & S. A. R. Co. v. Gibson (Tex. Civ. App.) 54 S. W. 779; Missouri, K. & T. R. Co. v. Smith, 45 Tex. Civ. App. 128, 99 S. W. 743; Sherman v. Texas & N. O. R. Co. 99 Tex. 571, 91 S. W. 561; Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486.

The injury need not be directly due to the movement or operation of a train.

Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, affirmed in 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; Louisville & N. R. Co. v. Melton, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618; Chicago, R. I. & P. R. R. Co. v. Stahley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Georgia R. Co. v. Ivey, 73 Ga. 504; Georgia R. & Bkg. Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Georgia R. & Bkg. Co. v. Hicks, 95 Ga. 301, 22 S. E. 613; Mott v. Southern R. Co. 131 N. C. 234, 42 S. E. 601; Atchison, T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814; Atchison, T. & S. F. R. Co. v. Vincent, 56 Kan. 344, 43 Pac. 251; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

It was for the jury to determine whether plaintiff's employment involved such a hazard as was peculiar to the railroad business. Tay v. Willmar & S. F. R. Co. 100 Minn. 131, 110 N. W. 433; Sandusky Portland Cement Co. v. Rice, 40 Ind. App. 726, 82 N. E. 1007.

The duty to furnish and to maintain safe and proper skids, and the duty to provide and have working a sufficient number of men, were both primary and non-delegable duties of the master, and negligence of the foreman in either or both was negligence of the master.

Sandusky Portland Cement Co. v. Rice, supra; Linton Coal & Min. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; National Biscuit Co. v. Wilson (Ind. App.) 78 N. E. 251, 80 N. E. 33, 81 N. E. 947; Johnson v. Ashland Water Co. 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 826; El Paso & N. W. R. Co. v. McComas (Tex. Civ. App.) 72 S. W. 629; Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 29 L.R.A. 104, 38 N. E. 67; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92; Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225; Morton v. Detroit, B. C. & A. R. Co. 81 Mich. 423, 46 N. W. 111; Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; Noblesville Foundry & Mach. Co. v. Yeaman, 3 Ind. App. 521, 30 N. E. 10; Cleveland, C. C. & St. L. R. Co. v. Beale, 42 Ind. App. 588, 86 N. E. 431; American Tin-Plate Co. v. Williams, 30 Ind. App. 46, 65 N. E. 304; American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620.

Hadley, J., delivered the opinion of the court:

Appellee was an employee of appellant.

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He and five others were employed to do service as common laborers, as a gang, in repairing and constructing tracks for the defendant, a street car corporation. He claims that his injury was caused by the negligent act of John Wilson, another employee of appellant, and who was at the time foreman of said gang. The gang was taken by Wilson to a flat car standing on a siding, to unload some steel rails. The plaintiff was ordered by Wilson to bring an implement from the tool car. In the plaintiff's absence, Wilson superintended the placing of some skids on the side of the flat car, down which to slide the rails, and, upon plaintiff's approach to the car, Wilson ordered him to step up, and, with the implement he had, turn the rails off the car onto the skids. In obedience to the order, plaintiff turned a rail off, which, when it dropped onto the skids, one of the latter slipped off the car, and caused the rail to drop upon and injure the plaintiff. The complaint is in a single paragraph, and rests on the second clause of § 7083, Burns's Anno. Stat. 1901 (§ 8017, Burns's Anno. Stat. 1908), known as the "employers' liability act." It is alleged: "That while so employed, on the 15th day of June, as aforesaid, this plaintiff was directed and instructed by one John Wilson, a foreman of the work gang, who had power and control over said plaintiff, and to whose orders and directions he was bound to conform, and did conform. . . . That said Wilson directed the construction of, and saw to the placing of, certain skids for the movement of said rails from said car, but in such a careless and negligent manner as to make them unsafe and dangerous to use. . . . The falling of said skids was caused wholly and entirely by the negligence and carelessness of said defendant, and of said John Wilson in the erection of said skids, and by the negligence and carelessness of said defendant and John Wilson in not furnishing sufficient men to handle, control, and carry the irons at the time being moved, etc. . . . That, at the time of said accident, said plaintiff was obeying orders of said Wilson, to whose orders, by reason of his employment, he was bound to conform, and did conform. . . ." Knowledge of the unsafe and dangerous condition of the skids on the part of the defendant and Wilson is averred, and on the part of the plaintiff denied. There was no demurrer to the complaint.

The answer, so far as material in this appeal, was the general denial. There was a verdict and judgment for appellee, and, appellant's motion for a new trial having been overruled, it appeals.

The errors assigned call in question the sufficiency of the complaint and the overruling of the motion for a new trial. The court instructed the jury, over appellant's objection, in substance, if they found from the evidence that the plaintiff was in the employ of the defendant, and under the direction of another employee of the defendant, in charge of the work, and if such other employee, or superintendent, negligently constructed or placed the skids, if plaintiff had no knowledge, or means of knowledge, of such condition, and, while performing the work he was directed to perform by said boss or superintendent, said skids fell by reason of said negligence, and injured the plaintiff, then they should find for the plaintiff, unless the plaintiff himself was negligent. The complaint and instruction each presents the same question, and assumes that the employers' liability act applies to the facts stated. Is appellee correct in this assumption? Appellant, in maintaining the negative, contends: First, that the statute referred to contravenes the 14th Amendment to the Federal Constitution, in that it denies to the appellant the equal protection of the law in its capacity as an employer. This question received the consideration of the court in Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582, and has been before the court in a number of cases since. Pittsburgh, C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412, 416, 53 N. E. 419; Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Bedford Quarries Co. v. Bough, 168 Ind. 672, 14 L.R.A.(N.S.) 418, 80 N. E. 529. But in no subsequent case has any reason been suggested to impair our confidence in the rule as laid down in the Montgomery Case, on this point; and, being satisfied therewith, we deem it unprofitable to repeat the reasons for such holding.

It has always been held in this state that § 23 of the Bill of Rights, in spirit and meaning, did not forbid the making of such classification of subjects, for legislative purposes, as are demanded by reasons of economy, convenience, and the best interests of the public, and it is found that any such classification can be made as will treat all alike, and bring within its influence all who are under the same conditions. To illustrate: It would be found burdensome, wasteful, and even impracticable for our cities of the smaller class to be compelled to maintain the expensive municipal machinery found necessary to the successful government of our larger cities. The constitutionality of the employers' liability statutes is upheld on the ground that the inclusion of railroads only is a proper classification, because it relates to the peculiar hazards inherent in the use and operation of railroads,

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and refers to the character of the employment, and not to the employer. Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, supra; Bedford Quarries Co. v. Bough (1907) 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; Missouri P. R. Co. v. Haley, 25 Kan. 35; Potter v. Chicago, R. I. & P. R. Co. (1877) 46 Iowa, 399. The peculiar and superlative dangers to which employees are necessarily exposed in the running of trains form the basis of such classification, and it is not therefore material whether the employer in railroad service is a corporation, partnership, or an individual. The liability is the same in one case as in the other. Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 464, 78 N. E. 1033. To separate railroading from all other kinds of business is not an unconstitutional discrimination, because no other business is beset with so many and severe dangers as those encountered by employees in preparing for, and during, the movement and operation of railroad trains. Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943. Such classification cannot be arbitrarily made. There must exist some good and natural reason for it. We said in Bedford Quarries Co. v. Bough, 168 Ind. 671, 674, 14 L.R.A.(N.S.) 418, 80 N. E. 529, touching this subject: "Such legislation must not only operate equally upon all within the class but the classification must furnish a reason for, and justify the making of, the class; that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial." See a large line of authorities collated on pages 674 and 675 of 168 Ind. Laws are general and uniform, not because they operate on all alike, for they do not, but because everyone who is brought within the circumstances and conditions provided by the law is affected thereby. Notwithstanding the language of the statute is "that every railroad, or other corporation except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employee while in its service," [Burns's Anno. Stat. 1908, § 8017] etc., it must not be for a moment understood that the benefits of the statute are extended to all employees of a railroad corporation, or to any other class of employees than those whose duties expose them to the peculiar hazards incident to the use and operation of railroads. There is no reason, in fact or fancy, why the benefits of the statute should be extended to the office and shop employees of railroad corporations, or to others removed from the dangers of train service, and denied to the multitude of other workmen engaged in businesses of like and equal hazard.

So far as our researches have gone, no court has attempted to set up an arbitrary line of demarcation by which the application of the statute may be determined. It is apparent that no reliable test can be established by any general rule. Each case must be decided upon its own facts, the court bearing in mind that, to keep within constitutional limitations, the statute must be construed as designed exclusively for the benefit of those who are, in the course of their employment, exposed to the particular dangers incident to the use and operation of railroad engines and trains, and whose injuries are caused thereby. Bedford Quarries Co. v. Bough, 168 Ind. 671, 678, 14 L.R.A.(N.S.) 418, 80 N. E. 529. By this, we do not mean that it is essential to the bringing of an employee within the statute that he should be connected in some way with the movement of trains, but it seems sufficient if the performance of his duties brings him into a situation where he is, without fault, exposed to the dangers and perils flowing from such operation and movement, and he is, by reason thereof, injured by the negligence of a fellow servant described in the act. Frandsen v. Chicago, R. I. & P. R. Co. 36 Iowa, 372; Williams v. Iowa C. R. Co. (1903) 121 Iowa, 270, 96 N. W. 774, and cases cited. To illustrate more fully by the Frandsen Case, supra: The plaintiff was a section hand, and belonged to a gang of five. He, with the boss and three others, started east on the hand car with their tools. The passenger train going west was then due, but the boss directed the men to proceed east. The train coming in sight around a curve 250 feet distant, the boss directed an immediate stop and removal of the car from the track. An effort was made to do so, but, on seeing that they were about to get caught by the onrushing train, and when the hand car was but partly off the track, the boss commanded the gang to flee, but the engine, striking the hand car with great force, threw it in the direction the plaintiff was fleeing, and it struck and injured him. Held that the plaintiff's employment related to the perilous business of railroading, and entitled him to the benefits of the statute. Do the facts pleaded show the plaintiff within the protection of the statute? He was employed as a common laborer, to do service with a repair and construction gang of a street car company. When injured, he was engaged in unloading rails from a flat car standing on a siding of the street car tracks. His gang was not engaged in hauling iron on the car. He was not working with a

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train, not even with the particular car, beyond helping to discharge its load. He was in no sense a train man. He was not injured by a moving car, nor because the car was designed to move in short trains and on fixed rails. His duties had no connection with the car, nor with the use and operation of the railroad, except to relieve the car of its load. The injuring skid did not slip off and fall upon the plaintiff because it had rested on a car. If negligently placed, it might have slipped from a standing wagon with precisely the same result. We are unable to see how the duties of the plaintiff exposed him to any of the peculiar hazards of using or operating a railroad, within the protection of the statute.

Iowa, in 1862, enacted a statute in substance the same as ours; and, to meet constitutional demands, it was construed by the Iowa supreme court, in a number of cases, to relate only to such employees of a railroad as were exposed, in a performance of their duties, to the dangers and hazards arising from the use and operation of railroads. Deppe v. Chicago, R. I. & P. R. Co. (1872) 36 Iowa, 52. In 1873 the statute was amended by inserting in it the following words: "When such injuries are, in any manner, connected with the use and operation of any railroad, on or about which they shall be employed,"—thus writing into the statute what the courts had previously read into it by construction. Schroeder v. Chicago, R. I. & P. R. Co. (1875) 41 Iowa, 344. Kansas copied the Iowa statute of 1862, and Minnesota and Indiana have adopted it in substance. With respect to the adjudications in Iowa, it is said in Foley v. Chicago, R. I. & P. R. Co. 64 Iowa, 644, 649, 21 N. W. 124, 127: "With the exception of Deppe's Case, all the actions in which this court has determined that railroad companies are liable in this class of cases are those where the injury was received by the movement of cars or engines upon the track,"—citing seven other Iowa cases to establish the statement. Among the many instances in which the benefits of the statute have been denied are the following: The plaintiff's duties were to wipe engines, open and close doors of the engine house, remove snow from the turntable and connecting tracks. He was not, by reason of such duties, employed in the operation of the railroad. Malone v. Burlington, C. R. & N. R. Co. 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756. The plaintiff was employed in a coal house of the railroad, and was injured by the negligence of a fellow servant while loading coal upon a car. He was denied the benefit of the statute because his injuries were connected in no way with the operation of the railroad. Luce v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 75, 24 N. W. 600. One Matson was a member of a construction gang, and his duties required him at times to ride upon the train, and to work on and about the cars and track. He was injured by the negligence of a coemployee striking his hand with a heavy stone while engaged in placing stones under the ends of the ties. It was held that the injury was not connected with the operation of the railroad. Matson v. Chicago, R. I. & P. R. Co. 68 Iowa, 22, 25 N. W. 911. Many other valuable illustrations may be found in Chicago, M. & St. P. R. Co. v. Artery, 137 U. S. 507, 34 L. ed. 747, 11 Sup. Ct. Rep. 129. In Minnesota the plaintiff was a bridge carpenter, engaged in repairing a bridge on the defendant railroad, and in doing the work it was necessary to leave the draw partly open. Through the negligence of a coemployee, the draw was left unfastened, was blown shut by the wind, and injured the plaintiff. Held, the company was not liable, because the employment did not embrace the peculiar hazard incident to the operation of a railroad, within the meaning of the statute. Johnson v. St. Paul & D. R. Co. (1890) 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156. The plaintiff was a section man, and while his crew was engaged in loading rails from the ground on a flat car, one of the crew negligently let a rail fall upon the plaintiff's arm and injured it. Held that the injury was not the result of any danger peculiar to, or directly connected with, the use and operation of the railroad, and not within the statute. Pearson v. Chicago, M. & St. P. R. Co. (1891) 47 Minn. 9, 49 N. W. 302. From these considerations we are led to conclude that the employment in which the plaintiff was engaged at the time of his injury does not belong to that distinctive and peculiarly hazardous class of service, necessary to the moving and operation of railroad trains, for which special statutory protection finds constitutional sanction.

The conclusion just announced renders it unnecessary to consider whether the statute under consideration applies to street railroads. But see majority opinion of Justices Gillett, Monks, and Hadley in Kinsey v. Union Traction Co. 169 Ind. 601, 81 N. E. 922; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247, 35 S. W. 826; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Railroad Comrs. v. Market Street R. Co. 132 Cal. 677, 64 Pac. 1065; Front Street Cable R. Co. v. Johnson (1891) 2 Wash.

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112, 11 L.R.A. 693, 25 Pac. 1084; Fidelity Loan & T. Co. v. Douglas, 104 Iowa, 532, 73 N. W. 1039.

But it is urged that the complaint states facts sufficient to constitute a cause of action at common law. We do not think so. It is alleged that the incident occurred "wholly and entirely" from the negligence of John Wilson, the foreman in charge of the work gang to which the plaintiff belonged, in the placing of the skids, and in not furnishing sufficient men to handle and carry the rails. With respect to the failure to furnish an adequate number of men to handle the rails, it is enough to say there was no charge in the complaint that any particular number of men were promised or necessary in handling the rails. It is a familiar rule, pertaining to the relation of master and servant, that the master shall observe reasonable care, in the selection of his servants, to choose none but efficient and careful workmen; and this done, all those engaged in the same general employment are fellow servants, and must look out for each other's carelessness, and can have no recourse to the master for an injury that may happen from the negligent act of a fellow workman. It is a further duty of the master to furnish his employees not only a safe working place, but proper and safe tools and instrumentalities to work with; and their correlative duty is to use those tools and instrumentalities in a proper and safe manner. Bedford Quarries Co. v. Bough, 168 Ind. 671, 680, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Chicago, I. & L. R. Co. v. Barker, 169 Ind. 670, 17 L.R.A.(N.S.) 542, 83 N. E. 369, 14 A. & E. Ann. Cas. 375; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 699, 63 L.R.A. 460, 68 N. E. 262; Southern Indiana R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769. In this instance it was the duty of the company to furnish proper and safe skids for unloading the rails, and the corresponding duty of those employed to unload them to so carefully use and place the skids as to avoid injuring one another. Chicago, I. & L. R. Co. v. Barker, 169 Ind. 670, 678, 17 L.R.A.(N.S.) 542, 83 N. E. 369, 14 A. & E. Ann. Cas. 375; Hodges v. Standard Wheel Co. 152 Ind. 680, 52 N. E. 391, 54 N. E. 383. It may be said that the following principles are as old as the common law itself: First, the master is not liable for injuries received by an employee through the negligence of a coemployee engaged in the same common service; second, the boss of a gang of four or five section men or track repairers is, when not charged with duties of the master, the fellow servant of those working under him, and this is true even though it be shown that the boss had been expressly authorized by the master to give orders and directions to those working with him, with respect to the performance of all their duties, not involving duties of the master. Indianapolis Street R. Co. v. Kane, 169 Ind. 25, 30, 80 N. E. 841, 81 N. E. 721; Dill v. Marmon, 164 Ind. 507, 515, 69 L.R.A. 163, 73 N. E. 67; Southern Indiana R. Co. v. Martin, 160 Ind. 280, 288, 66 N. E. 886; Hodges v. Standard Wheel Co. 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843. It is charged in the complaint that the accident was caused "wholly and entirely" by the negligence of the gang boss, John Wilson. This alone was sufficient to carry the case beyond the limits of the common law. There are other questions presented, arising under the motion for a new trial, which will probably not arise again, and which we do not consider.

Judgment reversed, with instructions to grant appellant a new trial.

Petition for rehearing denied.

IOWA SUPREME COURT.

HAMILTON SCOTT et al.
v.
NANCY R. SCOTT, Appt.

(137 Iowa, 239, 114 N. W. 881.)

Evidence to explain will.

1. In the absence of ambiguity in a will, parol evidence of declarations of testator as to his intention is not admissible.

Life tenant — bond.

2. A life tenant of money or its equivalent, which is to go into his possession, but not to be diminished by him, may be required to give security for the benefit of the re-

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Case Note. — Right to require legatee of life interest in money or its equivalent, to give security for benefit of remainderman.

In general it may be said that where the legacy consists of money or its equivalent, the holder of the life interest may be required to give security to the remainderman for the forthcoming of the principal of the fund upon the termination of the life estate. The reason for this rule is to be found in the fact that money and securities are of such a nature that they may be more easily lost or wasted than other personal property. The rule followed in SCOTT v. SCOTT is one of general application among the reported

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(February 12, 1908.)

APPEAL by defendant from a decree of the District Court for Iowa County requiring a life tenant to give bond for property to the possession of which she was entitled under a will. Affirmed.

Statement by Ladd, Ch. J.:

Application of the legatees entitled to certain moneys, mortgages, and stocks after the death of the life tenant for an order requiring said life tenant to give security that the corpus of the legacy be forthcoming at her death. The relief was granted as prayed, and defendant appeals.

Mr. Tom H. Milner for appellant.

Messrs. Popham & Havner, for appellees:

Where a life estate is created in personal property, a court of chancery may require the legatee to give security that the funds shall not be wasted or misapplied.

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In Whittemore v. Russell, supra, the court said: "Where the use of money is given, the gift is of the interest only; and as such property may be easily lost or wasted, the general rule is that the legatee must give some reasonable security to safely preserve the funds for the remainderman, or the money may go into the hands of a trustee, of whom a bond would be required."

And note the language of the opinion in Kinnard v. Kinnard, supra: "But, so far as the legacy consists of money, or is to be converted into money, before paid over, it has been the invariable practice to require security of the first legatee, notwithstanding he may be perfectly responsible, and no cause shown to induce a belief that there is danger of his wasting it, and that his estate may not be sufficient to replace it. . . . But it has been contended that this case does not come within the rule, because the testator did not so intend it. It is said that he designed his widow should have the right of using the principal, as well as the interest, of the legacy, if she should find it necessary or convenient for her support and maintenance; and to show that he so intended it, that clause of the will by which he 'directs that his personal property that may be left at the decease of his wife shall be sold,' etc., is relied on; but this direction cannot well be applied to any part of the personal estate except the specific goods bequeathed, and would, therefore, more reasonably seem to mean, when taken in connection with the residue of the will, those things only which should not be worn out or consumed by use."

A life legatee was required to give a bond for the benefit of remaindermen in Re Lowery, 19 Misc. 83, 43 N. Y. Supp. 972, although it was said there could be no doubt but that the testator intended to vest the possession, management, and control of the principal unreservedly in the holder of the life estate. No danger to the fund or other special reason appeared for requiring security in this case.

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Even where a will directed that certain legacies be paid to life tenants "on their own responsibility," thus indicating the intention that they should be entitled to receive their shares in the fund without giving security, nevertheless equity will require security where one of the legatees of a life interest has disposed of part of the corpus of the fund, and threatens to dispose of all of it, with an expressed view to depriving a remainderman, whose interest she denies, of his interest. Sherman v. Sherman, 36 N. J. Eq. 125.

A life tenant will be required to secure the interests of remaindermen when the former has expended from the principal in excess of that necessary for her support, as provided by the will, and by other misconduct has hazarded the estate. Reed v. Reed, 80 Conn. 411, 68 Atl. 852.

And security is always to be required from a life tenant of moneys, etc., where there is shown to be special reason for protecting the remaindermen, either because of the irresponsibility of the life tenant, her removal of the estate beyond the court's jurisdiction, or her dangerous management of the same. Langworthy v. Chadwick, 13 Conn. 42.

Under the authority of a statute requiring testamentary trustees to give security in the same manner as provided in the case of executors and administrators, security may be required from a life tenant of a sum of money bequeathed to him "in trust, to be invested for the benefit of his heirs, he having the use or interest of the same." Montfort

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ed. § 456, p. 1087; 16 Cyc. Law & Proc. p. 618; 18 Am. & Eng. Enc. Law, 2d ed. p. 790; Kinnard v. Kinnard, 5 Watts, 110; Healey v. Toppan, 45 N. H. 263, 86 Am. Dec. 159; Evans v. Iglehart, 6 Gill & J. 171; Re McDougall, 141 N. Y. 21, 35 N. E. 961; Hudson v. Wadsworth, 8 Conn. 348; Field v. Hitchcock, 17 Pick. 182, 28 Am. Dec. 288; Eichelberger v. Barnetz, 17 Serg. & R. 293; Whittemore v. Russell, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; Fuller v. Fuller, 84 Me. 475, 24 Atl. 946; Mansfield v. Mansfield, 75 Me. 509; Welsch v. Belleville Sav. Bank, 94 Ill. 191; Hetfield v. Fowler, 60 Ill. 45; Tyson v. Blake, 22 N. Y. 558; Re Fernbacher, 17 Abb. N. C. 339; Van Dusen's Appeal, 102 Pa. 224; Amiss v. Williamson, 17 W. Va. 673.

When there is reasonable ground to believe that property subject to an estate for life will be either wasted, secreted, or removed out of the state, a court of chancery will protect the interest in remainder by compelling the tenant for life to give security.

Langworthy v. Chadwick, 13 Conn. 42; Cheshire v. Cheshire, 37 N. C. (2 Ired. Eq.) 569; Re McDougall and Re Fernbacher, supra; 2 Perry, Tr. 3d ed. § 451; Security Co. v. Hardenburgh, supra; Howard v. Howard, 16 N. J. Eq. 486; Security Co. v. Pratt, 65 Conn. 161, 32 Atl. 396; Re Garrity, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; Re Camp, 126 N. Y. 377, 27 N. E. 799; Story, Eq. Jur. § 604; Homer v. Shelton, 2 Met. 194; Sherman v. Sherman, 36 N. J. Eq. 125; 18 Am. & Eng. Enc. Law, 2d ed. p. 789.

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v. Montfort, 24 Hun, 120, and see Little v. Geer, 69 Conn. 411, 37 Atl. 1056.

In Schenk's Estate, 17 Lanc. L. Rev. 369, a life estate in personal property consisting of certificates of deposit, stocks, etc., was given to the testator's widow, with the privilege, in addition to the life use, of taking from the principal as necessary for her comfortable support, so long as she remained unmarried. The widow was executrix, and her conveyance to herself, individually, of all the personal estate, just previous to her remarriage, resulted in the court's requiring her to give security to protect the remainder interests.

And it has been held that a legatee of a life estate may be required to give a bond for the faithful management and preservation of the fund bequeathed, even where the will gave not only the use and income during life, but the right to any part of the principal, if needed, making the life tenant the sole judge of the need. Pierce v. Stidworthy, 79 Me. 234, 9 Atl. 617.

The decision in Pierce v. Stidworthy, supra, was influenced by the peculiar circumstance found in the fact that the fund in question, being an award for damages to a vessel in which the testator was interested, could not have been known to the testator, as he died before the claim on which it was awarded was presented; and on a subsequent hearing (81 Me. 50, 16 Atl. 333), the life tenant was discharged from the obligation of giving a bond, the court saying: "On the evidence submitted in support of this petition it is evident that she cannot furnish the bond, and we think, on reconsideration of the matter in the new light afforded us, she should be discharged from the obligation to do so. It is not strange that she cannot, when we consider that sureties on a bond would have to undertake a very uncertain and indefinable liability; namely, what would be a fair discretionary use of the interest and principal of the property. If she commit waste of the property (and that would be a difficult thing to determine, where the will intrusts her with such enlarged discretion), an application can be made to the court to provide a remedy."

It will be found that few decisions draw the distinction between moneys and other forms of personal property in passing upon the question of requiring security, and in some cases it is difficult to determine the character of the personal estate. In many instances the residue of an estate consists of money, and so it has been held that where a life interest is given in the "residue" of an estate, the remaindermen may demand that the life tenant secure their interests. Clarke v. Terry, 34 Conn. 176; Re Gillespie, 18 Abb. N. C. 41.

And see Re Hunt, 38 Misc. 721, 78 N. Y. Supp. 291, where a husband, as executor of his wife's estate and life tenant under the will, was ordered to give security for the benefit of remaindermen, to cover a debt owing from the husband at the wife's death.

And in Burnett v. Lester, 53 Ill. 325, it was said that a life tenant of personal property which she had sold might be required to secure the remainder interest in the proceeds.

But it was held in Weeks v. Weeks, 5 N. H. 326, that no security should be required from the testator's widow as life tenant of a money legacy where it was undoubtedly the testator's intention that she should have possession. The court said: "It is true the widow may expend the property and leave nothing to answer for it. But this must have been known to the testator, and yet he did not see fit to provide that she should give security. It is, therefore, a fair presumption that he had entire confidence in her integrity, and thought that no security was necessary."

The payment of a money legacy to a life tenant was directed to be made without security in Green's Appeal, 42 Pa. 25, where the bequest in the will was of the "principal and interest (if she needs it), her lifetime."

No security except a receipt filed with the probate judge was required in Sampson v. Randall, 72 Me. 109, where several legacies in a will were of a life income only. It was said: "If testators do not desire to have the remainders provided for in their wills thus endangered, they can easily guard against the danger by the appointment of

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The requiring of a bond is within the sound discretion of the court.

Amiss v. Williamson, supra; Mason v. Pate, 34 Ala. 379.

Ladd, Ch. J., delivered the opinion of the court:

The will of James Scott was construed in Scott v. Scott, 132 Iowa, 37, 109 N. W. 293, to bequeath $3,000 to his widow, Nancy R. Scott, and the use of the residue of the estate during life, with remainder over to his heirs, who are the appellees in this case. The estate consisted of personal property save a one-fourth interest in a hotel at Andes, New York, consisting of money and mortgages amounting to $18,600. After deducting the legacy to her, there remained $15,600 worth of property of which she is entitled to the use, and to the principal of which the appellees are entitled at her death. She was appointed executrix without bond, as recommended in the will, and has filed her final report, asking her discharge as such, and that she retain the $3,000 absolutely, and the residue subject to the title in the remaindermen. As a condition to so doing, they demanded that security be exacted, and the district court required the execution of a bond in the sum of $25,000, with sureties, to be approved by the clerk of court, conditioned that upon her death all property coming into her hands as life tenant will be promptly turned over to those entitled thereto.

The early practice in England was to re-

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trustees, and declaring that the income only shall be paid to the donees for life. Most wills creating remainders contain such provisions. The will now under consideration contains no such provision."

Where a testator willed his widow a certain sum in money for her sole use and benefit during her life, and at her death to revert to his children, and directed that it be paid to her within sixty days after his death, it was held that the bequest should be paid without requiring the widow to give security, although it had been alleged that she was insolvent and that the money would be squandered. Martin v. Martin, 69 Miss. 315, 13 So. 267.

In McGuire v. Gallagher, 99 Me. 334, 59 Atl. 445, a will was construed as giving a life tenant not only the use of the income of the real property and funds in the bank, but also of the corpus of the estate, as she desired; and as the testator had required no bond of the life tenant as executrix, there was held to be no necessity for any bond in regard to the life estate.

Even where security for remainder interests is provided for by statute, it may not be required where a testator gave his widow "full use" of a certain amount of money during her lifetime, and only expressed a desire that on her death it should go to others, if anything were left. Hambright's Appeal, 2 Grant, Cas. 320.

It was held in Boyd v. Boyd, 6 Gill. & J. 25, that, in the absence of proof that the interests of remaindermen were in danger, conformity to the plain and manifest intention of a testator who willed a sum of money "to be at your disposition and for your use, free of interest, during your natural life," would not warrant requiring the life tenant to give security.

In Flanagan v. Flanagan, 8 Abb. N. C. 413, where the donee of a life estate was held entitled under the will to dispose of the fund given for her life use as she saw fit during her life, even to a possible exhaustion, it was held that security could not be required.

A will which gives a life legatee "the custody and possession of all personal property" thereby constitutes such legatee a testamentary trustee of the principal of the testator's personal estate, and it should be turned over to the life tenant without requiring security, there being no proof of the latter's insolvency or any intention to dispose of the principal of the fund. Re Ungrich, 48 App. Div. 594, 62 N. Y. Supp. 975, affirmed in 166 N. Y. 618, 59 N. E. 1131.

A direction in a will that the beneficiary of a life estate in a certain fund should not be obliged to enter security was held valid in White's Estate, 1 W. N. C. 114, the right to require security being one which the testator could waive, and thus preclude remaindermen from setting up certain statutes which apparently allowed them to claim security.

In McClernan v. McClernan, 73 Md. 283, 20 Atl. 908, a testator gave one of his daughters a fourth part of the residue of his estate, to have, hold, use, and enjoy the same during her natural life, with full power to expend or appropriate any part or all of the same for her own use only, and any portion that might remain to go to her brothers. The will enjoined the daughter to hold the gift as a trust, and at once to make her will, so that the testator's wishes might be carried out. In refusing to exact security from this legatee, the court said: "Upon the allegations of the bill in this case, there does not seem to be any ground laid for the interference of a court of equity, and requiring her to give bond, as asked. Her duty is to make a will, and to make it at once. It is not alleged she has not done so. If there were charges that she had not done so and would not do so, and that she was wantonly and needlessly wasting the property, and perverting it from her own personal uses 'only,' to the use of others, there would possibly be ground for the court to interfere to prevent the misuse of the trust funds, and to secure to those designed to take after her death what might remain of the property given to her for life, with discretion as to its use for herself. Her discretion in the reasonable and honest use of principal or interest for her own self ought not to be restricted by the court, and she ought not to be subjected to any costs

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quire security from the life tenant for the protection of the remainderman before allowing the former the possession of personal property of any character to the use of which he had become entitled by bequest, but a distinction later was drawn between specific bequests of property and those of the residue of an estate; and the rule may be regarded as firmly established that, where specific articles are left to legatees for life, with remainder over, all required, in the absence of a showing of danger of loss or waste, is that an inventory thereof be indorsed by the life tenant, with acknowledgment that these are held for life only, with title in the remainderman. See Foley v. Burnell, 1 Bro. Ch. 274. Where that of which the use for life is bequeathed is money or its equivalent, or is the residue of an estate which is money or its equivalent, or is such property as must be converted into money, a different rule obtains. Unless it is to be inferred from the language of the will that the legatee is to have possession, he will be entitled to no more than the income to be derived from a proper investment of the funds by the executor or a trustee to be appointed. Hetfield v. Fowler, 60 Ill. 45. The will before us, however, plainly indicates the intention of the testator that his widow shall have custody of and manage the property during her life. The third clause reads: "The rest, remainder, and residue of my property, of every kind and nature, I will, devise, and bequeath to my beloved wife, Nancy R. Scott, to have, hold, use, and enjoy during the term of her natural life, except that I will, devise, and bequeath her the sum of $3.000 absolutely, and the balance to her exclusive use, benefit, behoof, and enjoyment during the term of her natural life, as aforesaid." The words "have" and "hold" as here employed manifest an intention that she receive the property into her custody and retain the same during the period named. Gee v. Hasbrouck, 128 Mich. 509, 87 N. W. 621; Rountree v. Dixon, 105 N. C. 350, 11 S. E. 159; Stansbury v. Hubner, 73 Md. 228, 11 L.R.A. 204, 25 Am. St. Rep. 584, 20 Atl. 904. But there is no intimation in the instrument that she may encroach at her discretion on the principal, in which event no security should be exacted. Pierce v. Stidworthy, 81 Me. 50, 16 Atl. 333; Re Ryerson, 26 N. J. Eq. 43; Re Garrity, 108 Cal. 463, 471, 38 Pac. 628, 41 Pac. 485. At her death, the bequest is of "the rest, residue, and remainder of my property, of every kind and nature, to my legal heirs, share and share alike. The expression "rest, residue, and remainder" is that portion of the estate not given to testator's wife absolutely in the previous clause. Had the previous clause given her the use only of the entire estate, the right of diminishing the property while in her hands might be implied. See Re Garrity, supra; Markley's Estate, 132 Pa. 352, 19 Atl. 138; Warren v. Webb, 68 Me. 133; Martin v. Martin, 69 Miss. 315, 13 So. 267. But it had given her a part and the use for life of the remainder, so that the expression has direct application to the portion undisposed of; *i. e.*, the corpus of that portion of the estate to which she is given the life use. The language employed furnishes no intimation of any exemption or requirement of security from the life tenant. That she was exonerated from executing a bond as executrix is not alone sufficient to warrant the inference that he also intended that no security should be exacted upon the determination of her duties as such, and when she assumed the management of the property herself and as trustee for the remainderman. There being no ambiguity in the language employed, parol proof of the declarations of the de-

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or supervision about the matter, so long as she exhibits upright purposes and conduct with reference to the estate and its uses."

But in view of a provision which gave a share of the residue of his estate to a daughter-in-law of the testator, and advised, recommended, and enjoined her to at once invest the same so that it might be "preserved for the use and benefit of" the legatee and her husband during their lives and for their children, it was said in McClernan v. McClernan, supra, that, as to this share, the testator clearly intended the preservation of the estate for the benefit of the legatee's children when the life estate terminated, and that section of the Code which entitled remaindermen to security for the proper administration of a trust would require the legatee in this instance to give bond as trustee to carry out the directions of the will.

Provisions of a will creating a life estate, and giving the tenant power to use all or any part of the testator's property as she wished, with the right to possession, without being required to give security, were held in Martin's Estate, 160 Pa. 35, 28 Atl. 575, to warrant the trustees, on her application, in advancing to her from the principal such sum as was needed for her suitable maintenance without requiring security whenever it affirmatively appeared that the income which was primarily devoted to it was insufficient to accomplish the testator's controlling purpose.

There has been no attempt to include in this review of authorities any cases upon the duty of an executor to require a life tenant to give security for the remainder interests, or upon the executor's liability for failure to exact such security. It should be noted also that the scope of this note does not cover cases where an estate is dependent upon a contingency.

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ceased as to his purpose was rightly excluded.

We have, then, the naked question whether, in the absence of any intimation on the subject in the will, security should be exacted from the life tenant for the protection of the remainderman when money or its equivalent is bequeathed to the former, with remainder over. The rules on the subject are clearly stated in Whittemore v. Russell, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197: "A gift of the use of personal property for a lifetime, with a gift over, as it is here, is to be regarded according to the nature of the property and other circumstances. If of perishable articles, the use of which consists in their consumption, it amounts from necessity to an absolute gift of the property. If of articles which may depreciate by using, but which will not necessarily be consumed or worn out in that way, a full title thereto is not given; but the life legatee, under ordinary circumstances and risks, is allowed to retain possession of the articles without giving security for their preservation. Circumstances may, however, alter the case as to such property. Where the use of money is given, the gift is of the interest only; and, as such property may be easily lost or wasted, the general rule is that the legatee must give some reasonable security to safely preserve the funds for the remainderman, or the money may go into the hands of a trustee, of whom a bond would be required." Re McDougall, 141 N. Y. 21, 35 N. E. 961; 18 Am. & Eng. Enc. Law, 2d ed. p. 790. In 2 Woerner's American Law of Administration, § 456, the author says: "Where a testator bequeaths a residue consisting of money, or property whose use is the conversion into money, with remainder to another, it is the duty of the executor either to take security from the life tenant, protecting the interest of the remainderman, or to convert the fund into cash, and invest it for the benefit of all who are entitled under the will. So, where the executor is himself the devisee for life, he may be compelled, after completing his duties as executor, to give security for the benefit of the remainderman, although relieved from bond as executor." In many of the authorities, however, the matter of exacting security is regarded as discretionary with the court, for, the testator having directed that the life tenant have possession of and management of the property, without suggesting indemnity, the fair inference seems to be that none was thought necessary. Thus it was said in Re Camp, 126 N. Y. 377, 27 N. E. 799, that "generally, before making an order for such security, there must be some fact alleged and proved tending to show the property would be unsafe and insecure in the hands of the tenant for life." In Re Garrity, supra, the court observes that "the rule is one of equity, established by courts for the protection of the remainderman, in the absence of any direction in the will; but the rule thus established must yield to the terms of the will, and if it appears, from a proper construction of the will, that it was the intention of the testator that the property should be placed in possession of the life tenant without security, such intention will be carried out. It is to be assumed that the testator intended the life tenant to have the full enjoyment during his lifetime of the property bequeathed to him, and that this enjoyment shall not be impaired, except for the protection of the remainderman. The testator has the right to make the life tenant the trustee of the property bequeathed, without requiring any security from him; and very slight indications in the will will be construed as showing that the testator intended the life tenant, rather than the executor, to be the trustee, subject, of course, to the general rules applicable to the obligations of a trustee to his *cestui que trust*. If the testator has not required such security to be given by the life tenant, courts are not authorized to require it, in the absence of any showing of danger or liability of waste; otherwise, the will of the testator that the life tenant shall enjoy the property will be frustrated." See Langworthy v. Chadwick, 13 Conn. 42; Hodge v. Hodge, 72 N. C. 616; Cheshire v. Cheshire, 37 N. C. (2 Ired. Eq.) 569; Howard v. Howard, 16 N. J. Eq. 486. We are inclined to regard this the more reasonable rule, for it is to be inferred from the giving the life tenant the management of the residue of the estate without fixing conditions or requiring security, that the testator intended to repose confidence in his fidelity. But the interest of the remainderman in moneys or securities is more precarious than that in specific articles of personal property, because ordinarily more readily lost, secreted, abstracted, or converted, and the courts will act with greater caution in guarding the respective interests of the parties. The record before us shows that the life tenant is not kindly disposed toward the remaindermen; that she has no property of her own save some household goods and the $3,000 left her under the will; that she does not maintain a home, but rooms while in the state; that she spends a large portion of her time in the state of New York, and expects to do so in the future; that she has buried her husband there, and expects to be buried at his side; that all her relatives live there; that she had considered moving there, but was not decided. There is no proof of loss in

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her care of the estate as executrix, nor that any of the funds in her hands as executrix have been unwisely invested. But it does appear that loans have been made without personal investigation or inquiry as to the security, and that at least $6,000 has been paid by her for stock in the German-American Coffee Company, a corporation with headquarters in Mexico, without any adequate inquiry as to its value. Possibly these investments are safe, and there is nothing in the record to show that they are or to justify a contrary conclusion; but the manner of making them does not exhibit the care and prudence ordinarily essential for the preservation and conservation of property. Indeed, they suggest the thought that the funds would be safer and she would be better assured of a continuing income were they in other hands. But the testator plainly indicated that she might have their custody and management; and, in view of this, the district court rightly ordered that they be delivered to her upon the giving of ample security that the corpus of the legacy be turned over to the remaindermen upon her death. While she testified that she was undecided as to whether she would leave the state, it was not denied but that she had and expected to pass most of her time in New York. In view of this, her feeling toward the appellees, and her manner of handling the funds intrusted to her care, we are not inclined to disturb the order of the trial court.

Affirmed.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

INTERSTATE LIFE ASSURANCE COMPANY, Plff. in Err.,
v.
CORA B. DALTON.

(91 C. C. A. 210, 165 Fed. 176.)

Appeal — findings — binding effect.

1. The reviewing court is bound by the findings of fact by the trial court, where it disposes of the case upon motions for directed verdicts, if there is any evidence in support thereof.

Insurance — rebate — validity.

2. The return to an applicant for life insurance by the agent of a part of his commission is not within the operation of a statute forbidding life insurance companies to make discrimination in favor of particular persons in rates charged for insurance, and further providing that no company or agent shall pay or allow, as an inducement to insurance, any rebate of premium payable on the policy, or any valuable consideration or inducement whatever not specified in the policy.

Same — violation of law — proof.

3. To relieve a life insurance company from liability for the death of an insured who came to his death while violating the statute prohibiting the carrying of concealed weapons, it must be shown that the offense was being committed, and that it brought about the death of the deceased.

(November 23, 1908.)

ERROR to the Circuit Court of the United States for the Western District of Kentucky to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. Affirmed.

The facts are stated in the opinion.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Mr. Charles Martindale for plaintiff in error.

Messrs. **Downer & Russell and Miller & Todd,** for defendant in error:

Case Note. — Applicability of statute against rebates and discrimination to allowance by agent to insured of part of former's commissions.

It was held in Quigg v. Coffy, 18 R. I. 757, 30 Atl. 794, that the relinquishment by a life insurance agent of his commissions to one whom he insured, in consideration of the latter's agreement to furnish the former with the names of persons to be insured, does not fall within a statute prohibiting discrimination by insurance companies as to the premiums charged, as such agreement was between the agent and the insured only, the company not being a party, and was based upon a sufficient consideration; and the agent had the right to make such disposition of his commissions as he saw fit.

And it was held in Equitable Life Assur. Soc. v. Com. 121 Ky. 543, 89 S. W. 537, 28 Ky. L. Rep. 550, 551, 89 S. W. 538 (three cases), that a life insurance company is not liable under a statute prohibiting any distinction or discrimination by an insurance company in favor of individuals between insurants of the same class in the amount of payment of premiums, or other agreement not plainly expressed in the policy, where its agent allows an applicant for insurance a rebate to the extent of the former's commissions, which is done without the knowledge, permission, or approval of the company. And to the same effect, see United States L. Ins. Co. v. Com. 28 Ky. L. Rep. 948, 90 S. W. 970.

However, the court said in Equitable Life Assur. Soc. v. Com. supra, there could be no doubt that the agent would be guilty of violating the provisions of such statute, which also prohibited any agent of an in-

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There was no evidence to show that any portion of the premium has been rebated, as the full premium was paid to the defendant by the settlement it made with its agent.

Equitable Life Assur. Soc. v. Com. 113 Ky. 126, 67 S. W. 388.

There was no evidence to show that the insured came to his death while violating a statute prohibiting him from carrying concealed upon his person a deadly weapon.

Com. v. Walker, 7 Ky. L. Rep. 219; Com. v. Sturgeon, 18 Ky. L. Rep. 613, 37 S. W. 680; Williams v. Com. 18 Ky. L. Rep. 663, 37 S. W. 680.

The loss of life must be connected with the crime or unlawful act, as its consequence.

Cluff v. Mutual Ben. L. Ins. Co. 13 Allen, 308.

The rebating of a portion of the first premium would not avoid the policy.

1 Cooley, Briefs on Insurance, p. 585; St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554.

Richards, Circuit Judge, delivered the opinion of the court:

The case below was a suit to recover on a $10,000 life insurance policy, which the defendant below wrote on the life of the plaintiff's husband.

It appears that the deceased, Dalton, was accidentally shot and killed within a year after the writing of the policy. The payment of the policy was resisted on the grounds: First, that the insurance company did not receive the entire amount due for the first premium, but only $20 thereof in cash, and in lieu of the balance accepted a note which was never collected, thus being guilty of the offense prohibited by § 656 of the Kentucky Statutes of 1903, forbidding any rebating; and, second, that the insured came to his death while violating § 1309 of the Kentucky Statutes of 1903, prohibiting him from carrying concealed upon his person a deadly weapon. At the conclusion of the testimony, both parties moved the court for a directed verdict. The court, after considering the motions, delivered an opinion overruling the motion of the defendant below, and sustaining that of the plaintiff, and directed a verdict in favor of the latter for the amount sued for.

The effect of the result of these motions was the withdrawal of the case from the consideration of the jury, and a submission of it to the court, the latter being requested to find the facts; and this court, in reviewing the action of the lower court, is limited to a consideration of the correctness of its finding on the law, if there is any evidence in support of the finding of fact. Anderson v. Messenger, 85 C. C. A. 468, 158 Fed. 250; Beuttell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; Defiance v. McGonigale, 80 C. C. A. 425, 150 Fed. 689.

With respect to the claim that the premium, with the exception of $20, was rebated, which invalidated the policy, the court below found, as a matter of fact, that under the testimony, the claim was not sustained. Section 656 of the Kentucky Statutes of 1903, forbidding discrimination and rebates, reads as follows:

"No life insurance company doing business in Kentucky shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for the policies of life or endowment insurance, or in the dividends or other benefit payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract

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surance company from paying or allowing, or offering to pay or allow, as an inducement to insurance, any rebate of premiums payable on a policy.

The basis of these decisions is stated to be that the principal cannot be held criminally liable for the acts of his agent, although performed within the scope of his agency, unless authorized or assented to by him, or he is made liable therefor by statute. United States L. Ins. Co. v. Com. supra.

But it was held in Metropolitan L. Ins. Co. v. People, 209 Ill. 42, 70 N. E. 613, that the rebate by an agent to an insurant of the former's commission renders the insurance company liable under a statute imposing a penalty upon both the company and its agent for making or permitting any discrimination or distinction between insurants of the same class and expectancy of life in its established rates.

And it was held in Heffron v. Daly, 133 Mich. 613, 95 N. W. 714, that the giving by an insurance agent of his own commissions to an insurant is within a statute making it a misdemeanor for a life insurance agent to pay or allow any rebate or premium as an inducement to obtain insurance.

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of insurance. Every company, or officer or agent thereof, who shall violate the provisions of this section, shall be fined in any sum not exceeding $500, to be recovered by action in the name of the commonwealth, and, on collection, paid into the state treasury."

The testimony would bear the construction that the general course of business pursued by the insurance company was such that the agent was entitled to a certain percentage of the premiums, which he retained as his own, and which, in this case, was much larger than the so-called rebate. It was possible for the court to find that the insured paid to the agent the customary premium, and that the latter returned to him a part of his commission, and also paid to the insurance company the full amount of the premium due to it on such an insurance. It might be that another construction would be a more reasonable one, but that would not justify the reversal of the finding of the court upon a question of fact. The finding of the court must be interpreted as a finding that the agent gave to the insured a part of his own money, and not a part of any money belonging to the company. We do not think that such a case is within the prohibition of the statute.

With regard to the second, the court took the view that there was no evidence in the record to show that Dalton lost his life while carrying concealed upon or about his person a deadly weapon. There was no testimony whatever to show that the deceased was carrying the pistol, whose discharge brought about his death, concealed upon his person. There is nothing to show that the pistol was concealed; and, if it was concealed, there is nothing to show that the death of the deceased was due to its concealment. Now, to sustain this defense, it is necessary to show that the offense of carrying a concealed weapon was being committed, and, further, that that offense brought about the death of the deceased.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

BERNARD HERMES, Admr., etc., of William Hermes, Deceased, Appt.,
v.
HATFIELD COAL COMPANY.

(— Ky. —, 120 S. W. 351.)

Unsafe premises — attracting children — liability.

A coal dealer who maintains near a public street a ladder affording access to the top of a chute is not, although children are accustomed to play on it, liable for the death of a child who climbs it and is killed by a fall down the chute.

(June 15, 1909.)

APPEAL by plaintiff from a judgment of the Criminal Common Law, and Equity Division of the Circuit Court for Kenton County dismissing the complaint in an action brought to recover damages for the death of plaintiff's intestate, for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. B. F. Graziani for appellant.

Mr. M. H. McLean, for appellee:

A property owner is not liable to trespassers who are injured by lawful instrumentalities on his property, except in the case of traps.

Kisler v. Kentucky Distilleries & Warehouse Co. (Ky.) 112 S. W. 913; Swartwood v. Louisville & N. R. Co. 33 Ky. L. Rep. 785, 19 L.R.A.(N.S.) 1112, 111 S. W. 305; Mayfield Water & Light Co. v. Webb, 33 Ky. L. Rep. 909, 18 L.R.A.(N.S.) 179, 111 S. W. 712; Hargreaves v. Deacon, 25 Mich. 1; Klix v. Nieman, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Missouri, K. & T. R. Co. v. Edwards, 90 Tex. 65, 32 L.R.A. 825, 36 S. W. 430; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Louisville & P. Canal Co. v. Murphy, 9 Bush, 522; Ball v. Middlesborough Town & Lands Co. 24 Ky. L. Rep. 114, 68 S. W. 6.

Barker, J., delivered the opinion of the court:

The appellant, Bernard Hermes, as administrator of the estate of his infant son, William Hermes, deceased, instituted this action in the Kenton circuit court to recover damages of the appellee, the Hatfield Coal Company, for the death of his son, caused, as he alleges, by the negligence of the appellee. The appellant, in his petition, alleges that the appellee, the Hatfield Coal Company, was and is engaged in the business of selling coal in the city of Covington, that it maintains and operates a coal elevator and coal chutes; that it is the owner of, and maintains, a certain coal chute on Eleventh street in the city of Covington, near the east end thereof; that appellee negligently and with gross and wanton carelessness erected a ladder in close proximity to Eleventh street, extending to

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Note. — See note to Cahill v. Stone, 19 L.R.A.(N.S.) 1094, on the doctrine of attractive nuisance.

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the top of its coal chute, a distance of about 60 feet; that the ladder and coal chute had been so erected for a period of nine or ten years; that children of the surrounding neighborhood were in the habit of resorting to and amusing themselves both by day and by night in and upon the ladder and in the building and on the chute; that the chute was a large opening, and children were in the habit of climbing the ladder and peering down the hole, all of which was known to the appellee and its officers; that the same was enticing and seductive to children to walk and play upon, and that a large number of small children were in the habit of resorting to and playing and amusing themselves upon the ladder and chute, all of which appellee well knew; that the elevator chute had not been in operation for about a year, and was not necessary to the conduct of the business of appellee; that the ladder and building had not been used for many months; that appellee knew the building, ladder, and chute were seductive and enticing to children to play in and upon, and that it was within 20 feet of Eleventh street; that on the 5th day of July, 1908, the decedent, a boy ten years of age, with other children, got upon the ladder and climbed from the botton to the top, and then went upon the building where the coal chute was erected, and where many children had been resorting for many years past; that, while the decedent was looking down the chute, he fell into it and broke his neck, from the effects of which he immediately died. To this petition a general demurrer was interposed and sustained, and, appellant declining to plead further, the petition was dismissed; from which ruling of the court this appeal is prosecuted.

The petition in this case, although evidently so intended by the pleader, does not fall within the principle of Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193. There the defendant maintained upon its property, adjacent to the public street, a pile of lumber, which was so arranged as to easily fall if interfered with. A child going upon the premises of the defendant, and playing upon the lumber pile, was hurt by the falling of the lumber, and it was held that these facts constituted a cause of action against the owner of the lumber for the death of the child; it being said that the owner maintained near the public highway a thing which, of itself, was an invitation to children to come in and play upon, and that under these circumstances, if the lumber was so piled as to readily fall under the influence of the children's play, the owner was liable in damages for the injury accruing. But the facts of the case at bar do not present the question adjudicated in the case cited. In that case the lumber was so piled as to be a trap for unwary infancy playing upon it. An examination of the case shows that the careless piling of the lumber so as to constitute a trap for the child was the basis of the cause of action for the injury. In the case at bar, the ladder upon which the infant climbed was, in itself, perfectly secure and safe, and well adapted to the purposes for which it was used. If the rounds of the ladder had been so arranged as to break under the weight of the infant climbing upon it, and thus caused his injury, the two cases would have been similar. But this was not the case. Here the ladder was perfectly safe for the purposes for which it was used. The infant climbed upon it to the top, and, after reaching this point, got upon the coal chute, and by his own negligence fell into the hole and was killed.

The case at bar falls within the principle of Mayfield Water & Light Co. v. Webb, 33 Ky. L. Rep. 909, 18 L.R.A.(N.S.) 179, 111 S. W. 712. In that case the defendant company maintained an electric line of such high voltage as to be deadly in its effects if touched. The wire carrying the deadly current was on a pole some 18 feet from the street or highway. An infant climbed the pole, came in contact with the dangerous wire, and was instantly killed. We held that a peremptory instruction should have gone in favor of the defendant company. In the opinion it is stated that the pole which the infant climbed in order to come in contact with the deadly wire was not an attraction to infancy, within the doctrine of Bransom v. Labrot. In the opinion many cases are reviewed, and the rule is stated that the doctrine announced in Bransom v. Labrot is rather to be limited than extended. If the defendant company is responsible in the case at bar, then it is difficult to limit the rule which would hold a defendant responsible for the trespasses of children. There are very few things which do not afford an opportunity for headlong infancy to injure itself. For instance, the ordinary steps which lead from the first to the second floor of a building, and the banisters which usually guard them, are the favorite playground of children, who run up the steps and slide down the banisters. In so doing they may receive a fall at any moment, and, if the defendant is guilty of negligence in the case at bar, it would be difficult to formulate a rule which would exculpate the owner of the banisters from which any heedless infant might fall and injure itself. A tree with low, projecting limbs is undoubtedly an attraction for infants inclined to climb, and yet we believe that no one would say

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that one who maintains such a tree in his yard would be liable for damages if a neighbor's child trespassed upon his premises, climbed the tree, fell, and was injured.

If the ladder maintained by the appellee herein had been unsafe for the purpose for which it was used, and the climbing infant had been precipitated to the ground and injured by the breaking of one of the rounds, then the case at bar would have fallen within the principle announced in Bransom v. Labrot. But such was not the case. The infant safely climbed the ladder, left it, and walked to the mouth of the coal chute to peer down into its depths, and by accident fell headlong, and received the fatal injuries to recover damages for which this action was instituted. The appellee was not guilty of any negligence in the premises. The infant was a trespasser, and was fatally injured, not because of any defect in the ladder or coal chute, but because, by his own carelessness, he fell into the hole of the chute.

We are of opinion that the demurrer was properly sustained, and the judgment is therefore affirmed.

LOUISIANA SUPREME COURT.

JOHN B. LEVERT, Appt.,
v.
DAILY STATES PUBLISHING COMPANY et al.

(123 La. 594, 49 So. 206.)

Libel — malice — damages.

1. Malice on the part of a publisher of statements selected from other journals that are injurious to the reputation or character of private individuals or public officials is conclusively inferred if the communications are false in fact. The good intentions of the publisher affect only the question of damages; and, where no special damages are proven, the plaintiff is entitled to such damages on account of injured feeling as must unavoidably be inferred from the nature of the libel.

Same — official misconduct.

2. A sweeping charge of official favoritism and misconduct, leveled against the members of a public board, without exception, necessarily points the finger of condemnation at every one of them, though none are named; and, if not proven, constitutes a libel, if the members are known and the publication is generally understood to apply to them.

Constitutional law — freedom of press — libel.

3. The "freedom of the press" consists in a right, in a conductor of a newspaper, to print what he chooses, without previous license, but subject to be held responsible therefor as anyone else for a similar publication.

Damages — libel — malice.

4. The absence of actual malice in the publisher of a libelous article on a matter of public concern will be considered in mitigation of damages; and, where no special damages have been sustained, nominal damages, at least, will be awarded for the purposes of vindication.

(April 26, 1909.)

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendants' favor in an action brought to recover damages for the alleged publication of a libel. Reversed.

The facts are stated in the opinion.

Messrs. **Clegg & Quintero** and **Miller, Dufour, & Dufour**, for appellant:

The publication of statements selected from other journals that are injurious to the reputation or character of private individuals or public officials, or editorial articles favorably commenting thereon, if false in fact, are libelous and defamatory, and are presumed to be malicious, and therefore objectionable.

Fitzpatrick v. Daily States Pub. Co. 48 La. Ann. 1135, 20 So. 173.

Plaintiff need not be named in the libelous publication if matters of description or other references therein, or the extrinsic facts

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Case Note. — Right of one not specially named to maintain action for libel or slander, based on charges made against a class or group of persons to which he belongs.

For the purposes of this note, each of the words "class" and "group" is to be used in separate and distinct senses. "Class" is to be regarded in its most general sense, and as having reference to a large number of persons who may be designated collectively by a single name, irrespective of geographical limitation, political division, place of abode, or any similar restriction. "Group" is to indicate a particular, local, or limited collection of the members of a general class. For example, the officers or soldiers of an entire army are a class, while the officers or soldiers of a particular regiment are to be regarded as a group. Likewise, professional men and public officers generally belong to classes. But if only those within a certain city are referred to, they may be said to form a group. As will be seen, these words are thus defined in order to simplify the presentation of the rules to be deduced from the cases.

The question here considered is, Admitting or conceding that the language used would be libelous if it had been directed at the plaintiff personally, is it actionable

Headnotes by LAND, J.

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and the circumstances, are sufficient to show that he was intended as the object of it, and it was so understood by others.

25 Cyc. Law & Proc. p. 362; 18 Am. & Eng. Enc. Law, p. 1054; Fenstermaker v. Tribune Pub. Co. 12 Utah, 439, 35 L.R.A. 611, 43 Pac. 112; Ryckman v. Delavan, 25 Wend. 186; Smart v. Blanchard, 42 N. H. 137; Ryer v. Fireman's Journal Co. 11 Daly, 251; Le Fanu v. Malcomson, 1 H. L. Cas. 668.

Mr. **William Stirling Parkerson** for appellees.

Land, J., delivered the opinion of the court:

This is a suit for $10,000 damages for an alleged newspaper libel against the plaintiff as a member of the board of administrators of the Tulane University of Louisiana. The case was tried before a jury, and the plaintiff appeals from a verdict and judgment in favor of the defendants.

On August 15, 1906, there appeared in the columns of the Daily States, a newspaper of general circulation, published and edited in the city of New Orleans by the defendants herein, the following article:

Affairs of Tulane University.

(From the Boston Herald, August 8, 1906.)

"A most unpleasant, and, as it appears, reprehensible, condition of affairs has been developed in respect of Tulane University of New Orleans. The newspapers of the city discuss it with much tenderness, but

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when directed impersonally at a class or group to which he belongs? It may be said generally that, if the language is so used as unerringly to point to plaintiff, his right of action is not affected by the fact that it is also applicable to others; and, although the language may not on its face refer to the plaintiff, he may maintain his action if he can establish its application to himself.

But if there is nothing in the language employed which, by proper inducement or colloquium, can be given personal application to the plaintiff, he has no right of action. Comes v. Cruce, 85 Ark. 79, 107 S. W. 185, 14 A. & E. Ann. Cas. 327; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874; Lewis v. Soule, 3 Mich. 514; McGraw v. Detroit Free Press Co. 85 Mich. 203, 48 N. W. 500; Watson v. Detroit Journal Co. 143 Mich. 430, 5 L.R.A. (N.S.) 480, 107 N. W. 81, 8 A. & E. Ann. Cas. 131; Merrill v. Post Pub. Co. 197 Mass. 185, 83 N. E. 419; Stewart v. Wilson, 23 Minn. 449; Kenworthy v. Journal Co. 117 Mo. App. 327, 93 S. W. 882; Miller v. Maxwell, 16 Wend. 9; Hauptner v. White, 81 App. Div. 153, 80 N. Y. Supp. 895.

Class.

Keeping in mind the sense in which the word "class" is used in this note, it may properly be said that an individual who is not named cannot maintain an action for the publication of matter in derogation of the class to which he belongs.

A dealer in antiquities cannot maintain an action for the publication of a libelous article describing certain leaden objects sold for antiquities, as fabrications, stating that they were being offered for sale, not only in London, but throughout the country, and characterizing the sale of them as a gross attempt at deception and extortion. Eastwood v. Holmes, 1 Fost. & F. 349.

And an individual concern engaged in the trading stamp business cannot maintain an action for libel against one publishing an article not referring to all persons engaged in that business in the city, but referring generally to concerns engaged in the business. Watson v. Detroit Journal Co. supra.

And a township supervisor cannot, simply because he was a candidate for re-election and a member of the election board, maintain an action for the publication of an article, conceding it to be libelous, which declared that it must be painful to conscientious persons to witness the frequent violations of truth at elections by those brought forward at the polls, and that the recurrence of false swearing was too common to pass unpunished. Lewis v. Soule, supra.

And it was doubted by the court in Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605, whether a soldier of the Civil War could have maintained libel for the publication of an article imputing cowardice to the whole Army, and improper treatment of persons of all ages and sexes to those bodies of soldiers that passed through, or occupied, four specified places.

It was said in People v. Eastman, 188 N. Y. 478, 81 N. E. 459, 11 A. & E. Ann. Cas. 302, that a Catholic clergyman could not maintain an action for libel against the author of a scurrilous and vile attack on Catholic clergymen generally.

Group generally.

In this connection another distinction, in addition to that between class and group, should be kept in mind. If the defamatory matter is used toward the entire group,—that is, includes all of them,—it may generally be said to refer to each, so that each may sue. On the other hand, if the language is used indefinitely or impersonally toward one or a few of several members of a group, any member must establish its application to him in order to maintain his action.

It was held in Foxcroft v. Lacy, Hobart, 89a, decided about 1725, that one of sixteen persons, of whom it was said that they murdered a certain person, could maintain an action for slander against the author of the charge, the court saying, in effect, that the words applied to each of them as forcibly as if he had been named.

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there appears to be a practically unanimous sentiment that the institution has been grossly imposed upon and abused by the management or mismanagement of its responsible officers of administration. Tulane University is one of the leading educational institutions of the South, and it has received endowments that give promise of enhancing its importance if they are prudently and intelligently managed. It has obtained from the state landed property in New Orleans which was valued, when prices were very much lower than now, at $200,000. It is also exempted from taxation on all property below $5,000,000. Being thus endowed and favored by the state, in addition to private endowments, it had high rank and promise. Dr. E. A. Alderman, now president of the University of Virginia, was for several years at its head, and he ranked among the best-equipped college presidents of the country, and gave prestige to the institution. It has 1,500 or more students, and more than 100 instructors.

"During last winter a movement was undertaken to obtain for it an annual subvention from the state treasury, and in this way to raise it to the position of the State University. Although there is already, at Baton Rouge, a recognized State University, the scheme was, we believe, to effect some kind of union of the two, making the Baton Rouge institution an agricultural and technical department of the complete State University. This movement to officialize Tulane University led to an investigation of its

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And it was held in Chandler v. Holloway, 4 Port. (Ala.) 17, that where the defendant spoke and published concerning the plaintiff and others, "You are a gang of murderers; you killed Taylor," the plaintiff's action for slander was maintainable.

One of two persons who have held a note at different times may maintain an action for a libelous publication importing that the note has been fraudulently altered. Forbes v. Johnson, 11 B. Mon. 48.

And an action for slander for the speaking of the words, "Those people upstairs keep a whore house," may be maintained by one of the people "upstairs." Cook v. Rief, 20 Jones & S. 302.

So, too, one of several occupants of a house may maintain an action for libel for the publication of an article characterizing it as a disorderly house. McClean v. New York Press Co. 46 N. Y. S. R. 706, 19 N. Y. Supp. 262.

But it was held in Smart v. Blanchard, 42 N. H. 137, that a woman who arranged a donation party could not maintain libel for the publication of an article characterizing the affair as a rumseller's benefit, and stating that the "more part" of those present went because of the good stuff in the cellar, where the spirits were kept, and in the ladies' chamber, unless she showed that the words were applied in their actionable sense to her, and that the persons to whom they were published so understood them. This case, if not unsupportable, is on the border line. It would seem that the language here used must necessarily have been understood as applying to the plaintiff, who got up the party.

—military bodies.

It was held in Shearlock v. Beardsworth (1816) 1 Murray, 196, that the lieutenant colonel of a regiment could maintain an action for the making of a slanderous statement that the regiment was composed of cowards and blackguards, and had, for that reason, been dismissed and sent home.

So, a member of a court-martial may maintain an action of libel for the publication of a caricature representing the court-martial in a ludicrous and contemptible light, position, and condition, if he is specifically and individually held up to hatred, contempt, and ridicule. Ellis v. Kimball, 16 Pick. 132.

On the other hand, it was held in Sumner v. Buel, 12 Johns. 475, that an officer of a regiment of militia could not maintain libel for the publication of an article reflecting on the officers thereof generally, since the article had no particular and personal application to him, and no special damages were alleged. This case was subsequently criticized in Ryckman v. Delavan, cited infra, under "Groups of persons in certain business, profession, or employment."

—jurors or witnesses.

A member of a jury may maintain an action for a libelous publication characterizing the jury's verdict as infamous, and stating that "we cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths," since the publication is clearly directed at the individual jurors, and not at the jury as such. Byers v. Martin, 2 Colo. 605, 25 Am. Rep. 755.

But one of seven witnesses at a trial cannot maintain libel for the publication of an article stating that another one of them, naming him, had been arrested for perjury, and that two or three others would be arrested on the same charge, unless he shows the application of the words to himself. Kenworthy v. Journal Co. 117 Mo. App. 327, 93 S. W. 882. It will be observed that this language expressly refers to but "two or three" out of seven.

—groups of municipal officers.

And a member of a board of town trustees may maintain an action for the publication of a libelous publication entitled "Ring," and stating that the trustees had the "wring" in the noses of the taxpayers in a most contemptible, illegal, and unjust

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management of the state aid already given to it. It was discovered that it had never rendered an account concerning the use of its endowment, given by the state in trust, and the press insisted that the board of management should make a report of its stewardship. The showing of facts that was made rather reluctantly was far from indicating that a prudent and wise discretion had been exercised, and one transaction was revealed that has the quality of a scandal and has been visited with severe criticism.

"There was a certain parcel of improved property for which, some time ago, a demand appeared. A citizen offered to purchase it for a sum specific in order to devote it to business purposes. The question to be considered, of course, was whether its sale at the price was advantageous to the university. The price was by some not deemed sufficient, in view of the fact that real estate in that quarter was appreciating in value. After protracted consideration, in which the person offering to purchase showed a wholly commendable purpose to do what was fair, it was finally voted by the board of managers, with his approbation, that the property should be put in the market by advertisement, he and the board practically agreeing that his proposal should rest in abeyance until it should appear by responses to the advertisement whether the university could dispose of the property to better advantage.

"While the subject was thus temporarily disposed of, a meeting of the board was

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manner, and charging them with a corrupt combination with a successful bidder for the construction of a culvert. Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290.

One member of a board of commissioners may maintain an action for a libelous publication charging the commissioners with wasting public funds by favoritism in letting public contracts, and is not precluded therefrom by the possibility that he may have voted against the letting of the contract, where the entire charge is false and malicious. Wofford v. Meeks, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625.

And one of four coroner's physicians in a borough of a city may maintain libel for the publication of an article referring impersonally to "the coroner's physician," and charging and detailing iniquitous practices in the coroner's office, and adding that the graft goes not to the underlings, but to those higher up. Weston v. Commercial Advertiser Asso. 184 N. Y. 479, 77 N. E. 660.

And a newspaper article stating, in reference to a city fire department, "The entire staff of harness makers of the department, being three in number, have been dismissed for alleged thefts of leather. . . . The rascals ought to feel thankful for getting off without more severe punishment," points with sufficient certainty to them individually to support the action of one of them for libel. Dwyer v. Fireman's Journal Co. 11 Daly, 248; Ryer v. Fireman's Journal Co. 11 Daly, 251.

The following words, spoken with reference to a city hall: "I was ejected by force from this building . . . by a gang of thieves, murderers, and robbers and pirates, at the head of whom stood that old gray-headed scoundrel. He committed an assault on me. We have some police officers on the force of whom I am proud, while there are others that cause me to blush with shame. There are burglars, geese stealers, murderers, and pirates,"—may be found to have been uttered of and concerning the chief of police. Woods v. Gleason. 18 App. Div. 401, 46 N. Y. Supp. 200.

A publication calling policemen "hogs and blood-sucking police officers who insist on sitting on juries," declaring that they neglect their duties as policemen and cheat honorable citizens out of jury fees, and adding that this has no reference to the chief of police, because he is beneath notice, makes an actionable libel upon him. Smith v. Utley, 92 Wis. 133, 35 L.R.A. 620, 65 N. W. 744.

On the other hand, it has been held that a member of a city police board cannot sue for libel for the publication of a charge of a corrupt combination of others with the board to promote gambling, lotteries, and brothels, unless he shows that it was published of and concerning him. Caruth v. Richeson, 96 Mo. 186, 9 S. W. 633. In this case the court intimated that the jury might have found that the charge was published of and concerning the plaintiff, but that its verdict to the contrary would not be disturbed in the absence of corruption, prejudice, or passion.

In Giraud v. Beach, 3 E. D. Smith, 337, the court doubted whether a member of a hose company could maintain an action for libel against one publishing an article stating that a theft had been committed by some of the members of the company. Here again is a case where charges were made against only a part of the group mentioned.

—groups of persons in certain business, profession, or employment.

In Ryckman v. Delavan, 25 Wend. 186, the court stated that it inclined to the reasoning in the opinion of the minority in Sumner v. Buel (supra, under "Military bodies"), in which the writer said that it was difficult to see how a person understanding English could hesitate in applying the libel to the plaintiff, and, in effect, that it would seem necessarily to follow that the complaint should prevail. Then taking up the question presented to it, the court held that a member of one of six firms engaged in brewing and malting in a certain locality, could maintain libel for the publication of an article charging that they engaged in unwholesome and filthy

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called without any notification to this person, at which, without any notice of such purpose, it was voted to lease the property for a term of ninety-nine years to a certain party at an annual rate which public opinion esteemed to be ridiculously low, and without any provision for reappraisal and readjustment of the condition during the uncommonly long term. The person to whom the lease was thus summarily voted was, we understand, not well known; in fact, he was either a dummy or had but a small interest in the matter, the real parties being two relatives, a son and a nephew, if our memory serves, of the president of the board of managers. Within the short period that has since elapsed, it is demonstrated that the lease was a highly profitable bargain for the lessees and a very unfortunate one for the university. It is altogether likely that in a growing city like New Orleans the property will, in the life of three generations, make the fortunes of those who have secured it.

"We hazard nothing in saying that such malversation on the part of trustees of an educational institution, accentuated by such favoritism to the family of one of them, would here result in a storm of righteous indignation that would forever debar those who committed it from public respect and confidence. But the president of the board of managers answers all criticism by defying anyone to show that the action was not "legal." It will occur to most people of uprightness to say that it is an action justly

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practices in the process of malting, where it was false and malicious.

It was held in Le Fanu v. Malcomson, 1 H. L. Cas. 637, that the proprietors of a factory in a certain county in southern Ireland could maintain an action for the publication of a libelous article calling attention to factory abuses in such county, stating that, in some factories in Ireland, tyranny, oppression, Sabbath-breaking, and extortion were practised, and that the author had one in mind in the south of Ireland, where the jury found that the article applied to the plaintiff's factory.

One of ten subordinate engineers of a construction company is entitled to maintain an action for a libelous publication charging collusion between a brick company and its subcontractors and the subordinate engineers, or some of them, to defraud the construction company, if he can satisfy the jury that the words referred especially to him. Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874.

And the president of a labor union may maintain an action for a libelous publication stating that a piano had been sold to the union, that it was a great victory, requiring great financiering, and that the one who sold it thought it was a great thing "to bribe a committee or officers;" and his right of action is not affected by the fact that no name was mentioned, since the article must have been generally understood as referring to the president and trustees of the union. Barron v. Smith, 19 S. D. 50, 101 N. W. 1105. The cases of Whitford v. Smith, 19 S. D. 158, 102 N. W. 1135, and Nichols v. Smith, 19 S. D. 159, 102 N. W. 1135, were disposed of with the remark that they involved identically the same question as the foregoing case, and were governed by its authority.

One of the house surgeons in a hospital is as clearly libeled in his professional capacity as if he had been referred to by name, by a newspaper article characterizing them as jackasses disguised as doctors, brutes graduated to care for the sick, ghouls graduated to mutilate the dead, and the like, and charging that they had inflicted indignities upon the dead body of an old man, who had been a patient at the hospital. Bornmann v. Star Co. 174 N. Y. 212, 66 N. E. 723.

A petition circulated by persons who describe themselves as reputable physicians and dentists occupying a building, and reciting that, endeavoring to uphold the honor and dignity of their professions, and desiring to encourage only the best and most desirable tenants for the building, they are emphatically opposed to the rental of offices to osteopaths, criminal practitioners, advertising specialists, patent medicine fakirs, quacks, charlatans, and other fraudulent concerns, is a libel upon an osteopath having an office in the building. Lathrop v. Sundberg (Wash.) 25 L.R.A.(N.S.) 381, 104 Pac. 176.

But one of a number of persons of a community, engaged in raising grapes and lawfully selling wine made therefrom, cannot maintain an action for the publication in a newspaper of an article stating that the killing of a negro was the result of the "wine joints," in one of which the trouble started; that the passions of the negroes were inflamed by the decoction sold as wine, which, in the general opinion, was adulterated, and possibly never saw a grape,—where no malice or ill-will can be legitimately construed to be indulged toward any individual of that class. Comes v. Cruce, 85 Ark. 79, 107 S. W. 185, 14 A. & E. Ann. Cas. 327. It will be observed that in this case reference is made to one of the wine joints as the place where the trouble started.

A publication concerning a public market, stating that it was not a howling success, and that at no time were there more than a dozen people therein on Saturday night, is not, conceding it to be libelous, a libel upon one who occupied a stall therein for the sale of cigars and the like, or against his business. McGraw v. Detroit Free Press Co. 85 Mich. 203, 48 N. W. 500.

—religious bodies.

A member of a church vestry, who voted to request the resignation of the rector, may maintain an action for a libelous publica-

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comparable with the actions of those former officials of the great New York life insurance companies, who used their offices to enrich themselves at the expense of policy holders. The faculties and students of Tulane University for a hundred years will, in a just sense, be the victims of this deed of selfish rapacity. Men who would do such a thing would seem quite capable of robbing an orphan asylum or a church if they thought they could do it and escape the penalties of the law.

"Still worse, a committee representing in some sense the university, having investigated the matter and reported the facts essential as we have recited them, have declared that nothing wrong was done. This is a finding that impugns their own character in the forum of probity and morals. It is condemned in earnest language by the city newspapers, which are proud of the university, and jealous of its good name and prosperity. They insist that the whole business shall be thoroughly investigated by a disinterested legislative committee, and that not another dollar of public money shall be intrusted to the university until the scandalous contract shall be canceled and a new board of managers chosen to conduct its financial interests. In this demand they are wholly reasonable, and we trust that they will succeed. A clearer case of mercenary graft by abuse of a fiduciary office we do not recall. It may be what a distinguished Tammany politician calls 'honest graft' because it was accompanied without violation

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tion stating that the "vestry . . . relentlessly turn their back upon legal and moral obligation, to the detriment of a rector . . . who suffered himself to become debilitated while plodding along the path of duty to his congregation," and charging that promises to the voting body of the church, made to prevent a change of the personnel of the vestry, had been violated, where the words lead fairly and naturally to the conclusion that the writer's purpose was to denounce the persons in the vestry as an entity. Goldsborough v. Orem, 103 Md. 671, 64 Atl. 36.

And a publication stating that the alleged ladies of the W. C. T. U. in a city ignorantly and brazenly lowered themselves in an attempt to prevent the circulation of a Sunday newspaper, and thus used up time that could have been more profitably used in scrubbing their filthy kitchens and patching their husband's trousers; that they had little Christianity except that which they flaunted on dress parade; that they were indifferently good mothers and wives, and intermeddlers who neglected the duties God had created for them; and expressing doubt that the city could be circumscribed by such a pair of petticoats,—was held, in an action by one of them for libel, to be libelous *per se*. Street v. Johnson, 80 Wis. 455, 14 L.R.A. 203, 27 Am. St. Rep. 42, 50 N. W. 395.

—families.

In Henacre v. —, (1675) 1 Keble, 525, it was held that where one person said to another, "Your daughters are whores and play the whore for their silk gowns," one of the daughters could maintain an action therefor, the court saying: "When words are spoken in the plural number, all may bring actions; but when they are in the singular number . . . it hath been a doubt long controverted for the uncertainty." This is the earliest case, and is one of the few that expressly refer to the distinction with respect to whether all or part of the members of a group are referred to.

One who publishes matter concerning a family in its collective capacity assumes the risk of its being libelous as to any member thereof; and such matter concerns a class of which any member can maintain an action for defamation of himself, personally, because the libel applies to each individual member, through the class, by the use, without discrimination, of the collective appellation. Fenstermaker v. Tribune Pub. Co. 12 Utah, 439, 13 Utah, 532, 35 L.R.A. 611, 43 Pac. 112, 45 Pac. 1097.

So, any member of a family, capable of maintaining an action, may sue, for slander, one uttering words imputing to them the crime of murder. Chandler v. Holloway, 4 Port. (Ala.) 17.

And the words, "Your boys stole my corn," spoken to a father, are slanderous *per se*, and will support an action for slander brought by one of the sons. Maybee v. Fisk, 42 Barb. 326.

A fortiori where a person says to another during a conversation concerning the latter's children, and one of them in particular, "Your children are thieves, and I can prove it," the child so mentioned in the conversation may maintain an action for slander. Gidney v. Blake, 11 Johns. 54.

A case in which the too rigid enforcement of technical rules of pleading led to a result that cannot be commended, in the light of later decisions, is Milligan v. Thorn, 6 Wend. 412, where it was held that a declaration in slander, alleging that the defendant said to plaintiff's father, "You have brought up your sons to break open letters and steal money out of them; they have broken open letters and stolen money out of them," was bad where it was not averred that the statement was made of and concerning the plaintiff, and of and concerning such sons, although it was averred in an antecedent part of the declaration that plaintiff was one of the sons.

One of three brothers cannot maintain an action of slander for words to the effect that one of them had stolen corn, unless he can be identified as the person of whom the words were spoken. Harvey v. Coffin, 5 Blackf. 566. Here again, as in the next case, reference is not made to all.

A mother cannot, where the father is al-

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of the written criminal statutes, but it rankly violates the rule of right and faithful services which gentlemen who have a nice sense of personal honor are careful to observe. The secret, stealthy, and ungenerous manner in which the action was accomplished, without affording any disinterested party an opportunity to offer better terms, or, we may add, fair business terms, for a lease of this peculiar character, is a sufficient condemnation of the proceeding. It has the aspect of a conspiracy against Tulane University by those who were charged with the duty of protecting its interests and rights. We are sincerely sorry for Tulane University, betrayed by its guardians, and hope there will arise a virtuous indignation of the people that will compel restitution of its property and prevent another similar misfortune to any educational institution in the state."

In the same paper, on the same page, and on the same day, there appeared as a leading editorial the following:

A Severe Arraignment.

We print on our editorial page to-day an editorial article that appeared a few days ago in the Boston Herald, one of the oldest, strongest, and most independent newspapers in New England, concerning the management of the affairs of Tulane University, as developed by the discussion of the Baronne street lease. While the administrators may complain of one or two slight verbal inaccuracies, the story of that transaction is told with dispassionate frankness, and the editorial comments of the Boston newspaper are much more severe than any that have been made by the States.

It shows how this astonishing transaction is viewed by unbiased critics, who are not influenced in their appraisement of deeds by the personal equation, which is so apt to warp the views and opinions of men. The eminently respectable character of the gentlemen who compose the Tulane board have made it extremely difficult for citizens of New Orleans to view the matter as they would view it should the incident take place in New York or Boston; hence, the personal equation has tempered criticism, and to a a very great extent softened and toned down the individual judgment.

It is an easy matter for us in New Orleans to denounce without reserve the Alexanders, the McCalls, and the McCurdys, because there is no personal attachment or provincial restraint upon us; but, when the same character of offenses are committed here by our 'oldest and best,' charity is mixed up in undue proportion in the formation of judgment and in the expression of opinion. The Boston Herald, being printed more than a thousand miles away from New Orleans, and viewing the Tulane board of administrators merely as several men among the eighty millions who compose the American commonwealth, discusses this action just as a citizen of New Orleans might be expected to discuss, without bias or prejudice, the acts of the board of governors of Harvard University. In its discussion of the Baronne street lease, the States has said nothing so severe as is contained in this dispassionate analysis of that transaction by the Boston Herald, a fact which ought to convince even Judge Fenner of the absurdity of his charge to the effect that the criticisms of the States have been 'absurd' and that they are 'insulting to the living members of the board and to the memory of the dead members.' If the studied temperateness of the States' criticisms are absurd and insulting, it would be interesting to know what the judge would think of the dispassionate frankness of the Herald's criticism.

The trouble with Judge Fenner and his board is that they live and move in an artificial atmosphere created by their own absurd assumption that men of their kind can do no wrong; that the code of morals was made for men of meaner clay, and that their exalted reputations give them license to fracture the Ten Commandments, or any other of the canons defining the obligations imposed by good morals. Blindly persisting in this fatuous course, they have added to

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so living, maintain an action for libel against a physician whose certificate of cause of death of their child stated that the constructive and contributing cause was the "neglect of parents," unless she alleges and shows that the words were intended, and were understood by others, to be applicable to her. Crane v. O'Reilly, 13 N. Y. Civ. Proc. Rep. 71, 11 N. Y. S. R. 277.

Conclusion.

From the foregoing cases the following general rules seem to be fairly deducible:

1. If defamatory words are used broadly in respect to a general class of persons, and there is nothing that points, or by colloquium or innuendo can be made to apply, to a particular member thereof, such member has no right of action.

2. But if the language is employed toward a comparatively small group of persons, or a restricted or local portion of a general class, and is so framed as to make defamatory imputations against all members of the small or restricted group, any member thereof may sue.

3. On the other hand, if the words used in respect to the small or restricted group expressly but impersonally and indefinitely refer to one or more of the several members thereof, one of the members, in order to maintain his action, must establish the application of the language to himself.

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their original offense by formally declaring a notoriously immoral transaction to be highly proper and moral, and they are preparing to prove that it is so, by packing a court to try the case against themselves, and, with unexampled generosity, they are voting the money belonging to Tulane University to pay the court of their own creation for defending and protecting them.

Poor Cotton Mather went down to his grave stoutly defending the righteousness of his course in burning witches at the stake. Judge Fenner and the members of his board, reversing the maxims of morality, and defying the protests of the people, seem determined to pursue their ill-starred and most indefensible course until the thunders of the people's righteous indignation shall sweep them and their miserable lease into ignominious retirement. We grieve to see such perverse moral obtuseness in gentlemen who have deservedly stood so high in this community in the past. Day after day the States has, calmly and without passion, written the story of the board's maladministration, with the sincere hope that the unvarnished facts, dispassionately stated, would lead them to see their error and to make reparation.

During all the discussion we have striven to be fair to Judge Fenner and the board, but not a hand has been raised in all this state in defense of the Baronne street transaction. Do these gentlemen think that, in a chivalrous community, the States or any other newspaper could be 'insulting to the living and to the dead members' of so highly distinguished a board for all these weeks, without a single voice in all this city of 300,000 souls being raised in protest? Doesn't that fact alone show the temper of the community and the estimate which the people have placed upon that transaction? Why should the board persist in 'kicking against the pricks' and tempting fate? There is a very distinct line between firmness and mere obstinacy, between persistence in a right course and dangerous pigheadedness. Let the board read the article clipped from the Boston Herald, and get an idea of the estimate put upon its course by an unbiased and very able critic.

Defendants' pleadings consist of a demurrer, followed by a general denial of all the averments of the petition, except such as are expressly admitted. The answer admits the publication of the article from the Boston Herald, but denies that it is libelous, and especially that it is a libel on the plaintiff in this suit, and that he has suffered any damage by reason thereof. They deny that plaintiff is named in said article, or so referred to by any collocation of words as to identify him with the statements, comments, and strictures made in said article. Defendants further aver that said publication was made of and concerning a corporation named the "Board of Administrators of the Tulane Educational Fund" and not of and concerning the plaintiff or any member of said corporation except its president, and that at the time of said publication defendants were ignorant of the membership of said corporation.

Defendants further deny that, in the republication of said article, they were actuated by malice or any intent to injure the plaintiff or any member of said corporation, but aver that they made the same from a sense of duty to the public, and in the conviction that it was not only their duty, but their privilege and right, as publishers of a public journal, to reproduce said article for the information and instruction of the people upon a subject deeply affecting their interests, the interests of the state, and the interests of the chief institution of learning within the state. "And they aver that all the material statements of fact and inferences drawn therefrom are true."

The answer then, going back to 1835, when the Medical College of Louisiana was established, gives the history of that and other institutions which succeeded it until their merger into the Tulane University of Louisiana by legislative act No. 43, p. 48, of Laws of 1884, which was ratified by constitutional amendment in 1886. The answer further sets forth that by act No. 94, p. 98, of Laws of 1890, the board of administrators of the Tulane Educational Fund was authorized to lease, sell, and dispose of any part of the immovable property transferred to it by the state, provided that the full amount of the proceeds be reinvested in immovable property in the city of New Orleans. The defendants further averred that the board in 1893 authorized the sale of the property for not less than $150,000, and thereafter received and rejected two offers of $125,000; that in June, 1896, the said board placed said property in the hands of Curtis & Walmsley, real estate brokers, for sale; that on December 11, 1896, the said board received an application from Dr. C. Edmund Kells, a prominent citizen of New Orleans, of well-known financial ability, for an option for a period of thirty days for the purchase of said property for the sum of $150,000 cash, and the chairman of the real estate committee received a letter from Dr. Kells urging that, for reasons stated, the said option should be granted; that on the same date the said committee was informed by Curtis & Walmsley that a member of the said firm was in the city of Chicago, pressing a project to lease the property for a term of ninety-nine years at an annual rental of $10,

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000; that said board being informed of the said application of Dr. Kells for an option, and of the said project of Curtis & Walmsley, then resolved that the real estate committee be authorized and directed to advertise for proposals to be submitted by the 1st of February, 1897, for the disposition of the property on Baronne, Common, and Dryades streets (exclusive of Tulane Hall), either for a lease thereof for ninety-nine years or by sale.

The answer further avers that notice of this resolution was communicated to Dr. Kells, but on December 18, 1896, a special informal meeting of said board was held to consider a proposition submitted in the name of Thomas Nicholson to lease said property for ninety-nine years at a rental of $10,000 per annum, payable in advance; that at said meeting Charles E. Fenner, the president, informed said board that his relative, Sam Henderson, Jr., was interested in said proposition, and that his son, Charles Payne Fenner, would also be interested therein; that said board then and there resolved that said Nicholson be informed that the proposed price and terms of payment were satisfactory, and instructed its committee to take no action until further instruction relative to the advertisement of the property; and that the said board, without notice to Dr. Kells and Curtis & Walmsley, and without advertising for proposals, according to its resolution, did, on March 11, 1897, by Charles E. Fenner, president, execute said lease to Nicholson of said property for the term of ninety-nine years from October 1, 1897, at an annual rental of $10,000, and gave immediate possession.

The answer further avers in substance that Charles E. Fenner, Sam Henderson, Jr., and Charles P. Fenner were members of the law partnership of Fenner, Henderson, & Fenner, and that the three were joint owners of an office building known as the "Medical Building," numbered 124 and 126 Baronne streets, and that, after Dr. Kells made his application for the option, as above stated, Sam Henderson, Jr., suggested to Charles E. Fenner a project to obtain a lease of said University property to said Henderson, Charles Payne Fenner, and Thomas Nicholson, John S. Rainey, and C. M. Soria for a term of ninety-nine years at an annual rental of $10,000; that said Charles E. Fenner immediately expressed approval of said project, and referred said Henderson to the chairman of the finance and real estate committee of said board for negotiation.

The answer further sets forth the subsequent transfer of the leased premises to the Tulane Improvement Company, organized by the said Nicholson, Henderson, Charles P. Fenner, John S. Rainey, and C. M. Soria; that one third of the stock of the concern stood in the name of Henderson for the equal account of himself and Charles P. Fenner, and that in April, 1897, one third of this third, or one ninth of the whole, was transferred by Henderson to the wife of Charles E. Fenner, and was paid for out of her personal funds, but that said stock remained in the name of said Henderson for a long time thereafter. It is further charged in the answer that Walter C. Flower, a member of the board, in 1899 purchased the stock which had been issued to John S. Rainey for account of himself and C. M. Soria, and that subsequently Charles E. Fenner purchased at par $10,000 of bonds issued by said Tulane Improvement Company, and that Walter C. Flower purchased at par $30,000 of the same issue of bonds.

In connection with the Nicholson lease, it is charged that the board warranted the exemption of the property from all state, parochial, and municipal taxes for the whole term of the lease. The answer, however, contains an admission that all the property of the Tulane board is exempt from such taxation under the act of 1884.

The answer further avers that the board was charged with and had knowledge of the fact that its president and his relatives and partners owned the Medical Building; that it was to their common interest that the option sought by Dr. Kells with the view of erecting a rival building should not be granted.

The answer further charges that the action of the board in the premises was favoritism to the individual interests of a member of said board, to the prejudice of the interests of the University, contrary to the duty of said board, and was maladministration of the trusts with which said board was charged.

The answer further charged that Nicholson, the lessee, was a party interposed, to the knowledge of the president of the board.

It is further charged that the lease was in legal effect tantamount to a sale, and that the board had no power or authority to warrant the lessee and his assigns against taxation.

The answer contains other averments of matters subsequent to the lease that need not be now mentioned, and winds up with the charge that the actions and doings of the board relative to said lease "were against good morals and the policy of the law, injurious to the trust they were charged by law to administer, and were acts of maladministration, malversation, and unfaithfulness to duty on the part of said board, and on the part of several members of said board who participated in and consented to said actions and doings."

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Act No. 94, p. 98, of Laws of 1890, authorized the Tulane board to lease, sell, and dispose of any part of or the whole of the immovable property transferred to it by the state, and to make title thereto: "Provided, that the price and terms of said transfer shall be first approved by the governor of the state."

In case of a sale or other disposition, the act provided that the full amount of the price should be reinvested in immovable property within the city of New Orleans, and, in case of a lease, that the rent received should be devoted exclusively to the purpose of the university. The board was also authorized, in its discretion, to demolish the old buildings, and to construct in their place buildings for commercial or other purposes.

In 1893 the board, having decided to remove the Tulane University to grounds on St. Charles avenue, purchased for that purpose, passed a resolution authorizing the real estate committee to sell all the property then occupied by the university (except the Tulane Hall) at not less than $150,000, or, including the janitor's house and Tulane Hall, at not less than $250,000. On May 9, 1895, the board passed a resolution authorizing a lease of the property (exclusive of Tulane Hall) for not less than $10,000 per annum. In June, 1895, Robinson & Underwood offered for said property $125,000, $25,000 cash, and the balance in ten equal payments, with 4 per cent interest. The board declined this offer, but authorized a sale for the price of $150,000, $25,000 cash, and the balance deferred payments, with 5 per cent interest, payable annually. In December 1895, Robinson & Underwood renewed their offer of $125,000, which was declined. In 1896, the property was placed in the hands of Curtis & Walmsley, real estate agents, for sale or long lease; but no results followed.

On December 11, 1896, at a meeting of the real estate committee, a letter of date December 5, 1896, written by C. Edmund Kells, Jr., and addressed to the board, was produced and considered. In this letter Dr. Kells applied for an option to purchase for a period of thirty days for the price of $150,000. The committee recommended to the board that it be vested with the power to grant the option asked by Dr. Kells on the 15th January next, if, in the meantime, no other desirable arrangements with regard to the property should have been developed. It seems that Curtis & Walmsley had a project on foot to lease the property for a term of ninety-nine years upon a valuation of $200,000, at 5 per cent per annum. At the same meeting of the board a letter from Dr. Kells was read, to the effect that he had plans of his proposed building drawn, an estimate of the cost of the same made, and that the time to lay the matter before the people he wished to interest in the matter was propitious. The letter concludes as follows: "$150,000 is no small sum to raise, you know, and that much now is preferable to more in the far distant future."

After a lengthy discussion, a resolution was passed, directing the real estate committee to advertise for proposals for the lease for ninety-nine years, or for the sale of the property, to be submitted by February 1, 1897. On December 15, 1896, Dr. Kells was notified by the secretary of this action of the board.

On December 18, 1896, an informal meeting of the board was called to consider the proposition of Thomas Nicholson to lease the property for ninety-nine years at an annual rental of $10,000, payable in advance, the contract to contain the usual clauses in leases of ninety-nine years used in Chicago and other cities.

The minutes contain the following recital:

"Judge Fenner also said that Mr. Sam Henderson, Jr., his relative and partner, being interested in the proposition for lease of the Old University Building, that was to be submitted at this meeting from Thos. Nicholson, he desired his position well defined in the matter, and would like the board to allow him not to take part in the deliberations, and to retire.

"A general discussion followed, and it was the sense of the meeting that there was no impropriety in Judge Fenner presiding at the meeting."

A motion to that effect was put and unanimously carried.

After discussion, a resolution was adopted that Nicholson be informed that the board was satisfied with the price offered and the term of payment, and that, if the other details could be satisfactorily arranged and the consent of the governor obtained, the board would be ready to conclude the contract. The lease was drafted, and was approved at a meeting of the board held on January 28, 1897. It was finally executed and approved by the governor of the state on March 11, 1897.

The fact that the property greatly enhanced in value in subsequent years has nothing to do with the case, beyond tending to show a want of prophetic foresight in the board of administrators.

The published articles charged, to use the language of defendants' counsel: "That the board of administrators had been unfaithful to their trust; that, in violation of their duty to Tulane University, (they) had so disposed of the property held by them in trust, as to injure the university to the ad-

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vantage of the president of the board, his relative and partners."

The gravamen of the charge is official favoritism, and misconduct to the prejudice of the university.

In the first place, the evidence does not show that a more favorable disposition of the property could have been made at that particular time. There is nothing to show that Dr. Kells, if given an option, would have purchased the property for $150,000, or that such a sum was preferable to an assured revenue of $10,000 per annum. A large majority of the members of the board testified on the trial of this case that the Nicholson offer was the best the board had ever received, and that they all rejoiced at the consummation of this lease. The testimony of a number of independent witnesses acquainted with the facts tends to show that, at that time, the Nicholson lease was considered a good bargain for the board and a poor investment for the lessees. The real estate agents of the board had endeavored in vain to lease on the same terms, and the board had never been offered more than $125,000 for the property. At the time there was no proposition pending save the application of Dr. Kells for an option, and there was no assurance that he would have exercised the option if it had been granted to him. The most that can be said on the undisputed facts of the case is that the board committed an error of judgment in not holding on to the property. The governor, who approved the lease, certainly considered the price and terms as fair to the university.

The record shows that Judge Fenner informed the board that his relative and partner, Mr. Henderson, had an interest in the lease. On the trial of the case the secretary and Judge Fenner testified that the latter also said that his son would have or probably have an interest in the lease. There was nothing in the statements of Judge Fenner to indicate to the board that their fellow member and presiding officer had any personal interest whatever in the transaction. A charge of favoritism to a particular individual necessarily implies actual knowledge of his interest in the subject-matter. Now, the evidence in the case is to the effect that Judge Fenner had no personal interest in the lease to Nicholson. That Judge Fenner and his wife subsequently acquired an interest in the subject-matter in no manner affects the bona fides of the members of the board who voted to accept the proposition made by Thomas Nicholson. The most that can be said on the evidence is that Judge Fenner, being the part owner of an office building across the street, had an interest in preventing the erection of a similar building on the Tulane property. There is no evidence that such collateral interest, if known to, influenced, any of the members of the board.

On the whole case, we are clearly of opinion that the plea of justification tendered by the defendants has not been sustained by the evidence.

The charge that the board has been guilty of maladministration in not seeking to annul said lease and to recover the property assumes the invalidity of the lease,—a question which cannot be determined in this suit for want of proper parties, if for no other reason. We express no opinion as to the validity of the lease. The question in this case relates to the motives of the members of the board, and not to the legality of the corporate action. The evidence fails to show that the members of the board acted from improper motives, as charged in the libel.

The Boston Herald retracted the offensive article and apologized. The defendants published the retraction, but have continued to affirm the truth of the charges made in said article.

Malice on the part of a publisher of statements selected from other journals that are injurious to the reputation or character of private individuals or public officials is conclusively inferred, if the communications are false in fact. Fitzpatrick v. Daily States Pub. Co. 48 La. Ann. 1135, 20 So. 173. The animus of the publisher affects only the question of damages; and, where no special damages are proven, plaintiff is entitled to such damages on account of injured feeling as must unavoidably be inferred from such a libel. Id.

The freedom of the press consists in the right to print without any previous license, but subject to responsibility therefor to the same extent that anyone else could be responsible for the publication. 25 Cyc. Law & Proc. p. 406.

The privilege of fair and reasonable criticism of public men does not embrace the right to publish false statements of fact, or to falsely impute to them malfeasance or misconduct in office. 25 Cyc. Law & Proc. pp. 402, 403.

That the plaintiff was not named, and that the defendants did not even know that he was a member of the board, is no legal excuse, but may be considered as a mitigating circumstance. The libel not only assailed the corporate action of the board, but impeached the integrity of every individual member who participated in the proceedings.

The wholesale charge of official favoritism and misconduct pointed to all the members of the board who participated in the proceedings. These gentlemen were citizens of more or less prominence in the community, and their official connection with the Tu-

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lane University was well known. It is manifest that the plaintiff, although not named in the libelous publication, was necessarily one of its objects, and it must have been so understood by those who knew that he was a member of the board. 25 Cyc. Law & Proc. pp. 352, 362, 363.

The evidence shows no actual malice on the part of the defendant, and no special damages sustained by the plaintiff, but the latter is entitled, at least, to nominal damages.

Assuming that the plaintiff is seeking the vindication of his good name rather than to enrich himself at the expense of the defendants, we fix the damages in the sum of $50.

It is therefore ordered that the verdict and judgment below be reversed, and it is now ordered that the plaintiff, John B. Levert, do have and recover of the Daily States Publishing Company, Limited, W. C. Chevis, and Robert Ewing, *in solido*, the full sum of $50, with legal interest from this date, and costs of suit in both courts.

Breaux, Ch. J. I concur in the decree.

Monroe, J., recused.

MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE
v.
PANIEL KAPICSKI.

(— Me. —, 73 Atl. 830.)

Indictment — continuing offense — proof.

1. To secure a conviction under an indictment for maintaining a common nuisance in a place of resort where intoxicating liquors are dispensed between certain dates, it is not necessary for the state to show that the place was used for such purposes during the entire period named in the indictment.

Intoxicating liquor — social club — nuisance.

2. An unlicensed social club which distributes among its members, to be consumed upon the premises, intoxicating liquors from a stock which had been bought in common by them, is a common nuisance under a statute providing that all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided by law are common nuisances.

(February 10, 1909.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Androscoggin County, made during the trial of an indictment charging him with maintaining a common nuisance. Overruled.

The facts are stated in the opinion.

Mr. George S. McCarty, for defendant:

In order to find the defendant guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment had been habitually, commonly used for the purpose.

State v. O'Conner, 49 Me. 594; 2 Bishop, Crim. Law, § 59; Com. v. M'Culloch, 15 Mass. 227; Com. v. Tubbs, 1 Cush. 3; Com. v. Davis, 11 Pick. 432; State v. Stanley, 84 Me. 561, 24 Atl. 983; State v. McIntosh, 98 Me. 401, 57 Atl. 83.

Mr. Frank A. Morey for the State.

Whitehouse, J., delivered the opinion of the court:

This is an indictment against the defendant under § 1 of chapter 22 of the Revised Statutes, for maintaining a common nuisance from the 1st day of May, 1908, to the day of the finding of the indictment at the September term, 1908, of court in Androscoggin county. It is alleged that "the defendant kept and maintained a certain tenement as a place of resort where intoxicating liquors were unlawfully kept, sold, given away, drunk, and dispensed in a manner not provided for by law."

The defendant was one of 204 members of the St. Bartholomew Society, occupying the premises mentioned in the indictment. The society had occupied the premises from April, 1908, to the time of the trial of the case, in September. The premises consisted of one large lodge room, a billiard room, and a small "barroom," so called, in connection with the latter. The society itself was regularly organized, having a constitution and by-laws, and from the dues assessed to the members sick and death benefits were paid. The billiard room was open practically all of the time for the recreation of the members. The defendant claimed that the barroom was open three times each week, and that at these times cigars and nonintoxicating drinks were sold to the members; the profits of the sales being devoted to the payment of rent, lights, heat, and other expenses incident to the running of the rooms. A member of the society acted as janitor and keeper of the barroom, each in turn for two weeks, and without compensation.

Note. — The above case, with others, was cited in the case note to Manning v. Canon City, ante, 192, where a reference will be found to notes covering the prior cases upon the question of the applicability of liquor laws to social clubs dispensing intoxicating liquors to their members.

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The state introduced evidence tending to prove that, on two separate occasions during the time mentioned in the indictment, intoxicating liquors were sold upon the premises by the respondent. The first occasion was on the evening of August 29th, when the officers, looking through a window, saw the defendant making numerous sales of what they claimed to have been ale. The other occasion, that of September 5th, when the officers, looking through a hole in the curtain overhanging this same window, saw the respondent making sales of beer alleged to be intoxicating, and, later in the evening, searched the premises and found the beer, which proved upon analysis to contain sufficient alcohol to be in fact intoxicating. The defendant claimed that the beer seized was bought in common by the members of the society in anticipation of Labor Day, September 7th; each contributing a certain amount, for which he was to receive his proportionate part of the beer. It was in evidence that some of the members began to drink their allowance during the afternoon of September 5th, and that the drinking continued and was in progress from that time to the time of the seizure, late in the afternoon.

The jury returned a verdict of guilty, and the case comes to this court on exceptions to certain instructions to the jury, given in the charge of the presiding justice.

It is provided by § 1 of chapter 22 of the Revised Statutes that "all places used . . . for the illegal sale or keeping of intoxicating liquors . . . [and] all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, are common nuisances."

It was obviously the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should, commonly and habitually, be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drunk, or dispensed in any manner not provided for by law." State v. McIntosh, 98 Me. 397, 57 Atl. 83; State v. Stanley, 84 Me. 555, 24 Atl. 983.

But it is not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment will warrant a conviction. Com. v. Mitchell, 115 Mass. 141, and cases cited. In Com. v. Gallagher, 1 Allen, 592, the defendants erected a temporary tent or booth, constructed of boards, and covered with cloth, and on the following day had there several kinds of intoxicating liquors, and, between the hours of 9 and 11 o'clock in the forenoon, made four or more sales of such liquors. The land on which the booth was erected was hired for three days; but the booth was torn down by the officers at 11 o'clock of the first day. The defendants were found guilty of maintaining a common nuisance. In the opinion the court says: "The evidence was sufficient to warrant the jury in convicting the defendants. A disturbance of the public peace by the assembly of noisy and dissolute persons, the illegal sale of intoxicating liquors, and other similar acts which tend to make disorder and injure public morals, and thus to create a common nuisance in a house or tenement, may be proved to have occurred in the course of a few hours, as well as during a number of days, a week, or a month. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense."

In the case at bar the presiding justice correctly defined the word "resort," and sufficiently explained the meaning of the phrase "place of resort," as employed in the statute. The following instruction was then given to the jury:

"All places of resort where liquors are 'given away,' and again, all places of resort where liquors are 'drunk,' even if they are not 'sold' or 'given away,' if it is a place of resort under the definition I have given you, and, when there, those men drank the liquor which is intoxicating, that makes it a nuisance under the laws of this state."

In further defining what constitutes a "nuisance" under the law, the presiding justice used the following quotation in instructing the jury, *viz.*:

"'Among other things, the legislature has said, and it applies to this case, that any place of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, is a nuisance; any place that is resorted to—that is, a place of resort—for the mere purpose of drinking intoxicating liquors is a nuisance; any place of resort where liquors are illegally kept is a nuisance; any place of resort where liquors are given away is a nuisance. It must be a place of resort, and then the statute goes on to say that any person keeping or maintaining such a place shall be found guilty and be punished therefor.

"'In this case the state says that between the 1st day of May last, and the day of the finding of this indictment, at some time be-

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tween those dates, this place described here, the tenement, and soforth, was a place contrary to the form of this statute,—a place of resort; and that at that place of resort, at some time during this space of time, liquors were kept, sold, given away, drunk, or dispensed in some manner not provided by law. The state need not prove that this place was so kept and used during the whole of that time. The case is made out, the offense is committed, if for a single day between those dates that place was so used. Nay, if for a single hour in the day it was so used; for that hour it was a common nuisance, and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.'

"It makes no difference, you see, under this statute, whether the men were joined as a club, and chipped in in advance, contributed their 16 cents and bought this liquor and paid for it and had it come, if when it came there it was drunk there on the premises resorted to, that would be no defense whatever."

To these instructions the defendant has exceptions; but it will be observed upon examination of the language used that it is, for the most part, essentially a restatement of the terms of the statute, and that the comments of the presiding justice, as well as the paragraphs quoted by him, are in entire harmony with the previous rulings and decisions of this court, as well as the authorities cited from Massachusetts, and are obviously a correct interpretation of the true meaning and purpose of the statute.

In support of the last paragraph of the instructions to which exceptions were taken, that "it makes no difference under this statute whether the men were joined as a club, and chipped in in advance and bought the liquor, if when it came there it was drunk on the premises resorted to," the case of Com. v. Baker, 152 Mass. 337, 25 N. E. 718, may be cited as an authority. That was an indictment for maintaining a nuisance under the Massachusetts statute of 1887 (chap. 206, § 1, which provided that "all buildings or places used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquors to their members or others shall be deemed common nuisances." In the opinion the court says: "A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members, intoxicating liquor owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member, upon his order, the liquor belonging to and kept for him, and kept the place for that purpose, the place was a common nuisance under the statute."

Finally, the defendant's counsel requested the following instructions: "In order to find the respondent guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment must have been habitually, commonly used for the purpose."

The presiding justice gave this instruction in the following language: "This is the law of the state; but there is no limit as to the time, as I have stated to you. A nuisance may be maintained and kept in two hours or two weeks or two days if you find the facts are sufficient.

It has already been seen that this instruction respecting the length of time during which it must appear that the nuisance was maintained in order to warrant a conviction is directly and fully supported by Com. v. Gallagher, 1 Allen, 592, above cited.

It is, accordingly, the opinion of the court that, when all of the instructions to which exceptions were taken are considered in their proper relation to the entire charge, and applied to the facts in evidence in this case, no exceptionable error is disclosed.

The certificate must therefore be: Exceptions overruled.

Judgment for the state.

MARYLAND COURT OF APPEALS.

WILLIAM F. DOWNS, Appt.,
v.
SHERLOCK SWANN et al.

(— Md. —, 73 Atl. 653.)

Criminal law — photographing and measuring prisoner — validity.

1. The photographing and measuring before trial for purposes of identification by the Bertillon system of one arrested on a criminal charge does not violate any of his constitutional rights if the photograph is not to be placed in the rogues' gallery, or the means of identification distributed prior to his conviction, unless he becomes a fugitive from justice.

Same — power of commissioners.

2. Police commissioners, who are required by statute to preserve the public peace, prevent crime, arrest offenders, and protect

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Case Note. — Right to take or retain in rogues' gallery picture of one accused of crime before conviction.

The earlier cases upon this subject are collected and discussed in a case note to Schulman v. Whitaker, 7 L.R.A.(N.S.) 274. The question has arisen in a few cases de-

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The state introduced evidence tending to prove that, on two separate occasions during the time mentioned in the indictment, intoxicating liquors were sold upon the premises by the respondent. The first occasion was on the evening of August 29th, when the officers, looking through a window, saw the defendant making numerous sales of what they claimed to have been ale. The other occasion, that of September 5th, when the officers, looking through a hole in the curtain overhanging this same window, saw the respondent making sales of beer alleged to be intoxicating, and, later in the evening, searched the premises and found the beer, which proved upon analysis to contain sufficient alcohol to be in fact intoxicating. The defendant claimed that the beer seized was bought in common by the members of the society in anticipation of Labor Day, September 7th; each contributing a certain amount, for which he was to receive his proportionate part of the beer. It was in evidence that some of the members began to drink their allowance during the afternoon of September 5th, and that the drinking continued and was in progress from that time to the time of the seizure, late in the afternoon.

The jury returned a verdict of guilty, and the case comes to this court on exceptions to certain instructions to the jury, given in the charge of the presiding justice.

It is provided by § 1 of chapter 22 of the Revised Statutes that "all places used . . . for the illegal sale or keeping of intoxicating liquors . . . [and] all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, are common nuisances."

It was obviously the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should, commonly and habitually, be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drunk, or dispensed in any manner not provided for by law." State v. McIntosh, 98 Me. 397, 57 Atl. 83; State v. Stanley, 84 Me. 555, 24 Atl. 983.

But it is not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment will warrant a conviction. Com. v. Mitchell, 115 Mass. 141, and cases cited. In Com. v. Gallagher, 1 Allen, 592, the defendants erected a temporary tent or booth, constructed of boards, and covered with cloth, and on the following day had there several kinds of intoxicating liquors, and, between the hours of 9 and 11 o'clock in the forenoon, made four or more sales of such liquors. The land on which the booth was erected was hired for three days; but the booth was torn down by the officers at 11 o'clock of the first day. The defendants were found guilty of maintaining a common nuisance. In the opinion the court says: "The evidence was sufficient to warrant the jury in convicting the defendants. A disturbance of the public peace by the assembly of noisy and dissolute persons, the illegal sale of intoxicating liquors, and other similar acts which tend to make disorder and injure public morals, and thus to create a common nuisance in a house or tenement, may be proved to have occurred in the course of a few hours, as well as during a number of days, a week, or a month. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense."

In the case at bar the presiding justice correctly defined the word "resort," and sufficiently explained the meaning of the phrase "place of resort," as employed in the statute. The following instruction was then given to the jury:

"All places of resort where liquors are 'given away,' and again, all places of resort where liquors are 'drunk,' even if they are not 'sold' or 'given away,' if it is a place of resort under the definition I have given you, and, when there, those men drank the liquor which is intoxicating, that makes it a nuisance under the laws of this state."

In further defining what constitutes a "nuisance" under the law, the presiding justice used the following quotation in instructing the jury, *viz.:*

"'Among other things, the legislature has said, and it applies to this case, that any place of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, is a nuisance; any place that is resorted to—that is, a place of resort—for the mere purpose of drinking intoxicating liquors is a nuisance; any place of resort where liquors are illegally kept is a nuisance; any place of resort where liquors are given away is a nuisance. It must be a place of resort, and then the statute goes on to say that any person keeping or maintaining such a place shall be found guilty and be punished therefor.

"'In this case the state says that between the 1st day of May last, and the day of the finding of this indictment, at some time be-

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tween those dates, this place described here, the tenement, and soforth, was a place contrary to the form of this statute,—a place of resort; and that at that place of resort, at some time during this space of time, liquors were kept, sold, given away, drunk, or dispensed in some manner not provided by law. The state need not prove that this place was so kept and used during the whole of that time. The case is made out, the offense is committed, if for a single day between those dates that place was so used. Nay, if for a single hour in the day it was so used; for that hour it was a common nuisance, and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.'

"It makes no difference, you see, under this statute, whether the men were joined as a club, and chipped in in advance, contributed their 16 cents and bought this liquor and paid for it and had it come, if when it came there it was drunk there on the premises resorted to, that would be no defense whatever."

To these instructions the defendant has exceptions; but it will be observed upon examination of the language used that it is, for the most part, essentially a restatement of the terms of the statute, and that the comments of the presiding justice, as well as the paragraphs quoted by him, are in entire harmony with the previous rulings and decisions of this court, as well as the authorities cited from Massachusetts, and are obviously a correct interpretation of the true meaning and purpose of the statute.

In support of the last paragraph of the instructions to which exceptions were taken, that "it makes no difference under this statute whether the men were joined as a club, and chipped in in advance and bought the liquor, if when it came there it was drunk on the premises resorted to," the case of Com. v. Baker, 152 Mass. 337, 25 N. E. 718, may be cited as an authority. That was an indictment for maintaining a nuisance under the Massachusetts statute of 1887 (chap. 206, § 1, which provided that "all buildings or places used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquors to their members or others shall be deemed common nuisances." In the opinion the court says: "A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members, intoxicating liquor owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member, upon his order, the liquor belonging to and kept for him, and kept the place for that purpose, the place was a common nuisance under the statute."

Finally, the defendant's counsel requested the following instructions: "In order to find the respondent guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment must have been habitually, commonly used for the purpose."

The presiding justice gave this instruction in the following language: "This is the law of the state; but there is no limit as to the time, as I have stated to you. A nuisance may be maintained and kept in two hours or two weeks or two days if you find the facts are sufficient.

It has already been seen that this instruction respecting the length of time during which it must appear that the nuisance was maintained in order to warrant a conviction is directly and fully supported by Com. v. Gallagher, 1 Allen, 592, above cited.

It is, accordingly, the opinion of the court that, when all of the instructions to which exceptions were taken are considered in their proper relation to the entire charge, and applied to the facts in evidence in this case, no exceptionable error is disclosed.

The certificate must therefore be: Exceptions overruled.

Judgment for the state.

MARYLAND COURT OF APPEALS.

WILLIAM F. DOWNS, Appt.,
v.
SHERLOCK SWANN et al.

(— Md. —, 73 Atl. 653.)

Criminal law — photographing and measuring prisoner — validity.

1. The photographing and measuring before trial for purposes of identification by the Bertillon system of one arrested on a criminal charge does not violate any of his constitutional rights if the photograph is not to be placed in the rogues' gallery, or the means of identification distributed prior to his conviction, unless he becomes a fugitive from justice.

Same — power of commissioners.

2. Police commissioners, who are required by statute to preserve the public peace, prevent crime, arrest offenders, and protect

Case Note. — Right to take or retain in rogues' gallery picture of one accused of crime before conviction.

The earlier cases upon this subject are collected and discussed in a case note to Schulman v. Whitaker, 7 L.R.A.(N.S.) 274. The question has arisen in a few cases de-

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rights of persons and property within a city, and cause to be followed any person whom they have reason to believe intends leaving the city for the purpose of violating the laws of the state, have a right to adopt the most approved means of identifying probable wrongdoers, including that of photographing and measuring persons arrested for crime.

(June 30, 1909.)

APPEAL by plaintiff from an order of the Circuit Court of Baltimore City dissolving a preliminary injunction theretofore issued by it in a suit to restrain the police authorities of Baltimore City from photographing and measuring plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. **Harry B. Wolf** for appellant.

Mr. **Alonzo L. Miles**, for appellees:

In the discharge of their duties as police officers and detectives, defendants have an absolute right to photograph and measure any person who may have been arrested for a felony, if there are reasonable grounds to believe that he was guilty of the charge upon which he was arrested.

State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541; Shaffer v. United States, 24 App. D. C. 417; Tiedeman, Pol. Power, § 103, p. 102; Freund, Pol. Power, pp. 157, 158.

Mr. **Luther Eugene Mackall** also for appellees.

Schmucker, J., delivered the opinion of the court:

The appeal in this case was taken from an order of the circuit court of Baltimore city dissolving a preliminary injunction theretofore issued by it. The injunction had been issued upon the filing of a bill of complaint, to restrain the police authorities of Baltimore city from photographing and measuring the appellant, who had been arrested and was detained by them upon a charge of embezzlement of public funds of the city. The defendant, having answered

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cided since the preparation of the earlier note.

In People ex rel. Gow v. Bingham, 57 Misc. 66, 107 N. Y. Supp. 1011, it was held that the acts of police officers in requiring a man to submit to having his photograph taken and measurements and impressions of his body made, for the purpose of preserving them in the criminal records of the department, simply because such person had been indicted charged with a criminal offense, were unlawful, being violative of the natural rights of the person, and not authorized by the provisions of the city charter, which made it the duty of the police to "especially preserve the public peace, prevent crime, and detect and arrest offenders," and which required the police commissioner to "make such rules, orders, and regulations" as may be reasonably necessary to effect the prompt and efficient exercise of all powers conferred upon him by law; nor were they authorized by a provision of the penal Code which required that, upon the determination of a criminal action in favor of the defendant, the police authorities should turn over to him all photographs, proofs, plates, etc., taken by the authorities while the action or proceedings were pending.

It was held, however, that the plaintiff had mistaken his remedy in instituting an action for mandamus to compel the authorities to turn over to him such photographs, records, etc., to be destroyed, as in the absence of special statutory authority a writ of mandamus lies only to compel one to do what ought to be done in the discharge of a public duty, and not to undo what is improperly done, even though it may have been done under the color of performance of public duty.

But in Mabry v. Kettering, 89 Ark. 551, 117 S. W. 746, it was held that public officers charged with the enforcement of criminal laws and having in their custody individuals charged with crime may use photographs for the purpose of identifying the individual accused; and the court ordered dissolved a temporary injunction restraining the defendant police officers from developing certain photographs of the plaintiff, taken while under arrest. The court said that no question of the "right of privacy" was involved, nor was the question presented whether or not the officers in charge of the prisoner should be restrained from compelling him to submit to having his photograph taken. A demurrer to the complaint having been sustained, the plaintiff appealed again to the supreme court ([Ark.] 122 S. W. 115), and the court reasserted its former views, and said that the plaintiff was not entitled to an injunction without showing specifically that the photographs were to be used in an improper way. As to the allegation that the photographs were to be placed in the "rogues' gallery," the court said: "It is true that it is alleged in the complaint that the photographs were taken by the defendants 'for the avowed purpose of developing said plates into photographs, as these plaintiffs believe and allege, for the purpose of having said photographs placed in what is known as the "rogues' gallery;"' but they fail to state what the rogues' gallery consists of, and we cannot take judicial cognizance thereof. For aught we know to the contrary, it may be some legitimate method of identification of criminals or those charged with crime; and we have held that the photographs of accused persons may be used for such purpose." This judicial ignorance as to the meaning of the term "rogues' gallery" is somewhat surprising.

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the bill, made a motion to dissolve the injunction. The motion was heard upon bill and answer, and the order dissolving the injunction was passed, and the appeal taken therefrom.

The substantial allegations of the bill are as follows: On March 30, 1909, the plaintiff, William F. Downs, who had for some years theretofore been a clerk in the office of the city register, was arrested by a city detective upon complaint of the register, and locked up at the Central Police Station on the charge of embezzling $1,000 of the money of the city. The police authorities were about to put Downs through the Bertillon system, consisting in part of having his photograph taken, the measurement of his head, height, age, color, and pedigree, together with his finger prints, in order that the record thereof might be preserved for the use of the police department, and it was their intention to take his photograph immediately after his preliminary hearing before the magistrate, and before his trial upon the charge of embezzlement. It is also alleged that there is a rogues' gallery in connection with the police department of the city, where are kept the pictures and photographs of criminals and notoriously bad men who have been tried and convicted of various offenses in different jurisdictions, and that it was the custom of the police authorities to take the photographs of persons arrested for any violations of law; but it does not allege the existence of a custom to put the photographs of unconvicted persons in the rogues' gallery, or charge the defendants with a purpose to put Downs's picture there, but only with an intention to preserve it for the use of the department. It is further alleged that Downs, up until his arrest, enjoyed the confidence and esteem of his employer and associates, and that he will be irreparably injured if the police authorities are permitted to carry out their contemplated acts, which it is charged would constitute a violation of his personal liberty and constitutional rights, and that he is without adequate remedy at law. The appellees, as defendants below, answered the bill, admitting the facts of the arrest and detention of Downs upon the charge of embezzling the public moneys, and that, prior to the issue of the injunction, it had been their purpose to take his photograph, in order to enable them to identify him if it became necessary in any criminal proceeding then pending against him, or that might thereafter be instituted against him. They also admit the conducting by them of a bureau of identification under the superintendence of a lieutenant of police on the Bertillon system, in connection with which they photograph persons arrested for felony or other crimes of the character charged against the plaintiff. And they further say that the practice of photographing and measuring persons so charged prevails in every large city of the country where proper police regulations are well established and enforced; and that, when a prisoner is arrested, charged with a crime of the character charged against the plaintiff, who may be released upon bail, it is necessary, to the proper enforcement of police regulations and the securing of the prisoner for trial, that a full description of him should be had in order that, if he should undertake to become a fugitive from justice, the police and detective department may be in possession of such information as will enable them to have him identified, wherever he may be found; that the defendants are required, in the proper discharge of their duties, to run down and arrest offenders who may escape after having been released on bail; and that, if they are not permitted to provide efficient means of identification of persons charged with offenses, their efforts in that direction will become ineffectual and unavailing. Further answering, they say that it is not their practice to publish the photograph of a prisoner who has been arrested upon the first offense, or to place it among the photographs of well-known and established criminals, until and unless the prisoner whose photograph has been taken has either been convicted, or has undertaken to escape and avoid the payment of his bail; and that such was not their purpose with reference to the plaintiff. It is also averred in the answer that, since the filing of the bill, Downs had been admitted to bail in the sum of $10,000, but that subsequently, upon investigation, it was discovered that his alleged embezzlements were of such larger proportions than were disclosed by the testimony taken at the hearing on the first charge, and his crime was of such greater magnitude, that he was rearrested, and was, at the time of the filing of the answer, confined in a cell at the Central Police Station.

The issue presented for our consideration is the propriety of the dissolution of the injunction upon the case made by the bill and answer. Without stopping to consider whether the appellant had an adequate remedy at law for any invasion, if such there should be, of his personal rights, we will devote our attention to the substantial issue presented by the record. The precise question there presented for our determination is whether the police authorities of Baltimore city may lawfully provide themselves, for the use of their department of the city government, with the means of identification of a person arrested by them upon a charge of felony, but not yet tried or convicted, by photographing and measuring him

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under the Bertillon system. It is not directly charged in the bill that the police intend to put his photograph in their rogues' gallery, or distribute copies of it to the police authorities of other cities, unless he is convicted or becomes a fugitive from justice, or that they propose to apply his Bertillon record to any other uses than those of their own department of Baltimore city. Furthermore, the answer denies the existence of any purpose to apply the photograph or record of the appellant to any other purpose than that of his identification, if it becomes necessary, in criminal proceedings now pending or hereafter to be instituted against him, unless he is convicted or becomes a fugitive from justice. In our opinion the photographing and measuring of the appellant in the manner and for the purposes mentioned, and the use of his photograph and the record of his measurement to the extent set forth in the answer by the police authorities of Baltimore city, would not constitute a violation of the personal liberty secured to him by the Constitution of the United States or of this state. As was said by the United States Supreme Court in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint, under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." In Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, the same high court, in discussing the extent of the police power of the state, declared that it "has more than once recognized it as a fundamental principle, that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state,'" and many cases are cited in support of the statement. Similar views upon the limits of the police power have been expressed by this court in a line of cases from Ford v. State, 85 Md. 465, 41 L.R.A. 551, 60 Am. St. Rep. 337, 37 Atl. 172, down to Watson v. State, 105 Md. 655, 66 Atl. 635. It has also been settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld. Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Singer v. State, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 209, 43 Atl. 771; State v. Knowles, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; Scholle v. State, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; Watson v. State, 105 Md. 650, 66 Atl. 635.

A person suspected of the commission of a crime may lawfully be arrested by the sheriff or police, and held in custody until a preliminary hearing of the charge against him can be had before a magistrate, and he may then be committed to jail or held to bail, for the action of the grand jury. Brish v. Carter, 98 Md. 445, 57 Atl. 210; Edger v. Burke, 96 Md. 722, 54 Atl. 986. He may be exhibited for identification to the person injured by the commission of the crime, if it be one of violence, and we see no good reason why the police authorities may not be furnished with the further and more efficient means of his identification, provided by the Bertillon process. The populous communities which now exist, and the modern facilities for swift and frequent communication and rapid transit, afford hitherto unknown facilities for evading arrest or fleeing from justice, which should be offset in the public interest by providing the agencies charged with the duty of preserving the public peace and arresting persons reasonably suspected of the commission of crimes, with the most efficient means of detecting and identifying them consistent with the protection of the accused persons in the enjoyment of that "liberty regulated by law" to which they are entitled. Section 744 of the Baltimore city charter (Laws 1898, chap. 123, p. 522) confers upon the police many of the duties which at common law were incident to the office of sheriff. It makes it the duty of the police commissioners of the city, among other things, "to preserve the public peace, prevent crime, arrest offenders, and protect the rights of persons and property," also to cause to be followed any person who the board have reason to believe intends leaving the city for the purpose of violating any laws of the state. The burden of those duties brings the board clearly within the category of the public agencies, which should be furnished with the most approved means of identification of probable wrongdoers; and it may be assumed that the legislature, in the imposition of the duties, intended also to confer the incidental powers necessary to their discharge. The right of the police authorities to employ the Bertillon process for the identification of convicted criminals has been recognized in most, if not all, of the jurisdictions in which the subject has re

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ceived consideration, although several courts and text writers have either questioned or denied the right to subject to that process persons accused of crimes, before their trial or conviction. Molineux v. Collins, 177 N. Y. 395, 65 L.R.A. 104, 69 N. E. 727; Schulman v. Whitaker, 117 La. 704, 7 L.R.A.(N.S.) 274, 42 So. 227, 8 A. & E. Ann. Cas. 1174; Itzkovitch v. Whitaker, 115 La. 479, 1 L.R.A.(N.S.) 1147, 112 Am. St. Rep. 272, 39 So. 499; People ex rel. Gow v. Bingham, 57 Misc. 66, 107 N. Y. Supp. 1011; People ex rel. Joyce v. York, 27 Misc. 658, 59 N. Y. Supp. 418; Owen v. Partridge, 40 Misc. 415, 82 N. Y. Supp. 248; 1 Tiedeman, State & Federal Control of Persons & Property, p. 57. The question in the form in which it is now presented to us formed the subject of recent review in the case of State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541, where it was held that a sheriff may lawfully take the photograph, measurement, weight, name, residence, place of birth, occupation, and personal characteristics of an accused person committed to his custody for safe-keeping, if in his discretion it is necessary to prevent the escape of the accused, or to facilitate his recapture, if he should do so.

In Shaffer v. United States, 24 App. D. C. 417, the court of appeals of the District of Columbia, speaking through Chief Judge Alvey, made a clear and forcible statement of the principles and considerations which led them to the same conclusion at which we have arrived in the present case, in reference to the constitutional privilege alleged to be involved in it. In that case Shaffer had been arrested by the police of the district upon a charge of murder, and upon his trial the prosecution offered in evidence his photograph, taken for purposes of identification by the police officer who had him in custody after his arrest. The evidence was objected to on behalf of the prisoner, and, in passing upon the objection on appeal, the court in their opinion say: "We understand the main point of this objection to be that . . . the government had no right to photograph the accused while holding him in custody, for the purpose of using that photograph to have him identified at the trial. This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this objection. In taking and using the photographic picture there was no violation of any constitutional right. . . . We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that without such means many criminals would escape detection or identification. . . . It is one of the usual means employed in the police service of the country, and it would be a matter of regret to have its use unduly restricted upon any fanciful theory of constitutional privilege." "It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen while in prison by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mask in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer in whose custody he remained to set an instrument and take his likeness for the purposes of proof and identification."

For the reasons mentioned in this opinion we will affirm the order appealed from, but we must not be understood by so doing to countenance the placing in the rogues' gallery of the photograph of any person not an habitual criminal, who has been arrested, but not convicted, on a criminal charge, or the publication under those circumstances of his Bertillon record. Police officers have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable to the injured person, in the same manner and to the same extent that private individuals would be.

Order affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

F. W. WOOLWORTH & COMPANY, Plff. in Err.,
v.
LILLIAN CONBOY.

(— C. C. A. —, 170 Fed. 934.)

Negligence — unsafe property — stairway.

1. The maintenance by the proprietor of a store of a well-lighted stairway leading downward from the floor to which customers are invited, guarded on all sides except where the steps meet the floor, is not negligence which will render him liable for injury to a customer who falls down the stairs.

Note. — See case note to McDermott v. Sallaway, 21 L.R.A.(N.S.) 456, as to duty of store or shopkeeper to customer as to condition of premises.

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Same — bargain sale — violence of customers.

2. A merchant is not liable for injury to a customer who is pushed down a stairway by the violence of a crowd which is attracted to the store by a bargain sale.

(June 3, 1909.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

Statement by **Amidon, District Judge:**

This is an action for personal injury. The plaintiff in error, the defendant below, is the owner of the Five and Ten Cent Store at Minneapolis. The store room is 44 feet wide and 127 feet deep, and extends east and west, fronting on Nicollet avenue. It advertised a special sale of granite ware, which attracted a large crowd, and among them the plaintiff. The counter at which this ware was sold was a long wall counter on the north side of the store, and situated a little to the west of the center. In front of it was a broad aisle extending the entire length of the store. To the west, and separated from this counter 2 or 3 feet, was a small counter, immediately back of which was an open stairway leading to the basement. The counter served to protect the stairway on the south side. On the east side it was protected by a railing, and on the north side by the wall of the building. A short distance back of this counter and the stairway was the partition of a private toilet room for the employees. Between this partition and the end of the counter was an aisle leading to the stairway. The entrance to the stairway was guarded by a gate, which was open at the time of the accident. The store was well lighted by windows, and also by arc lights, one of which was situated about 11 feet from the stairway. The basement was used only for storing goods, and not for their sale. The aisle leading to the head of the stairs was for the use of employees, and patrons had no occasion to enter it. At the time of the accident a clerk was standing on the long counter above referred to, handing out goods to purchasers, who were required to approach him with the correct change for their purchases in their hands. The crowd became violent. Some of the women fainted, and others clambered on the counter. So great was the crush that the plaintiff was pushed past the man on the counter. She claims that she was crowded along down the aisle past the small counter, and then into the side aisle between it and the partition. Plaintiff, all the time that she was moving along, claims to have had her eyes on the clerk, and was hoping to attract his notice. But she says that she was pushed sidewise or backwards, head foremost, down the stairs. The negligence charged in the complaint is the unguarded stairway, and the permitting of a large and violent crowd to assemble on the store premises. A motion for a directed verdict was made by the defendant at the conclusion of the evidence, and denied. The case was then submitted to the jury, and resulted in a verdict and judgment in favor of plaintiff for $500. The denial of the motion for a directed verdict is the chief error assigned in this court.

Argued before Hook, Circuit Judge, and River and Amidon, District Judges.

Messrs. **Arthur M. Keith, Charles T. Thompson, and Edwin K. Fairchild,** for plaintiff in error:

The duty to exercise reasonable care with respect to the condition of the premises to which people are invited is confined to those parts and places of an establishment to which the invitation extends.

Macartney v. Colwell (R. I.) 68 Atl. 719; DeBlois v. Great Northern R. Co. 71 Minn. 45, 73 N. W. 637; Flanagan v. Sanders, 138 Mich. 253, 101 N. W. 581; Schmidt v. Bauer, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256; Missel v. Lennox, 84 C. C. A. 243, 156 Fed. 347; Dunn v. Kemp, 36 Wash. 183, 78 Pac. 782; Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320; Accousi v. G. A. Stowers Furniture Co. (Tex. Civ. App.) 87 S. W. 861.

The absence of a guard at the top of the stairway was not the proximate cause of the injuries received by the defendant in error.

Teis v. Smuggler Min. Co. 15 L.R.A. (N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Dolan v. Callender, McA. & T. Co. 26 R. I. 198, 58 Atl. 655; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Pardington v. Abraham, 183 N. Y. 553, 76 N. E. 1102.

Messrs. **W. H. McDonald and F. H. Ayers** for defendant in error.

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Amidon, District Judge, delivered the opinion of the court:

The motion should have been granted. It was not negligent to maintain the open stairway. It was separated from the part of the store to which patrons were invited or accustomed to resort. Indeed, if it had been situated in a portion of the room used by the public, that would not have constituted negligence. Important retail establishments are now accustomed to occupy several stories of the building in which their business is carried on. Open stairways leading from one story to another are a part of the ordinary equipment of such premises. Even when elevators are provided, there is usually a stairway adjacent to the shaft, and there are frequently other stairways in such rooms. Such stairways are closed on three sides, as was the one in this case; but the entrance is left open. Any other arrangement would be manifestly impracticable, and defeat the very object which the stairways are designed to accomplish. Such open stairways being an ordinary feature of store premises, the public, when resorting there, assume the risk arising therefrom, and are bound to protect themselves by the use of their eyes against such dangers. Mr. Justice Holmes, then speaking as chief justice of the supreme court of Massachusetts, states the rule applicable to such a situation as follows, in Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320: "There is no duty on the part of a shopkeeper to give warning of the presence of an ordinary flight of stairs in broad daylight, or to guard the necessary access to it, even if there is a crowd in his shop. The sides of the opening were guarded. Everyone who is on an upper story knows that there probably are stairs from it somewhere, and must look out for them. . . . The case is different from that of a hole in the floor which commonly is covered, and which is of a kind not to be expected."

See also Dunn v. Kemp, 36 Wash. 183, 78 Pac. 782.

The crowd on the present occasion seems to have been somewhat more violent than usual. Still such crowds are often found in large stores at the time of special sales, and during holiday seasons. They are an unavoidable feature of mercantile life in large cities. The defendant, on the occasion in question, had no reason to believe that such a sale as it was conducting would lead to any uncontrolled or violent conduct on the part of customers visiting the store, and was not therefore required to maintain its store in an unusual condition of safety to meet such an emergency. It had no reasonable cause to anticipate such violence, but, on the contrary, had a right to believe that patrons would demean themselves with a proper regard to others using the store. It was not, therefore, guilty of any negligence by reason of anything done by the crowd. In the excitement plaintiff seems to have lost her head and become wholly oblivious of her own safety or environment. She has met with an accident which is quite frequent, and there is nothing in this record justifying the shifting of her misfortune upon the defendant.

The judgment must be reversed, and a new trial granted.

MINNESOTA SUPREME COURT.

CHARLES D. HARRINGTON, Appt.,
v.
WABASH RAILROAD COMPANY, Respt.

(— Minn. —, 122 N. W. 14.)

Carrier — agent of shipper — package — contents — notice — nondelivery — damages.

Plaintiff gave to a local express company at a point in Missouri a crated sewing machine and a box for delivery to defendant carrier, to be by it transported to a point in Minnesota, and there delivered to a named consignee. The box was delivered to, accepted by, and receipted for by, defendant as books. Instead of containing books only, it actually contained a few books, and mis-

Headnote by JAGGARD, J.

Case Note. — Effect of misrepresentation as to character, quantity, or value of goods by shipper on his right to recover for loss.

This note is confined to cases in which the shipper intentionally or otherwise concealed either by silence or by direct misrepresentation, the true character, quantity, or value of the goods shipped, and, after loss, attempted to recover the real value of the goods. Cases are excluded where the decision turns merely upon the validity of a stipulation in the contract of carriage by which the carrier limits or attempts to limit its liability to a fixed or agreed valuation, regardless of the particular kind, quantity, or value of the goods. In many of the cases falling strictly within the scope of this note there is such a stipulation, but such cases only are taken as involve the effect of the acts of the shipper in not truly stating the character or value of the goods; cases involving the effect of the carrier's acts in putting such a stipulation into the contract of carriage have not been taken.

Cases dealing with the liability of the carrier for the loss of merchandise which is de-

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cellaneous articles of household goods and of personal effects. The value of the crated sewing machine was $50. The value of the books was $5. The tariff rate per hundredweight fixed by defendant for books was 63 cents; for household goods and personal effects, 94½ cents. The articles shipped were lost through defendant's negligence. It is held:

(1) The local express company was plaintiff's agent for delivering the box for shipment, and for whatever usually and naturally belongs to the doing of it, and therefore for the giving of the information necessary to the shipment.

(2) In the absence of more definite information, the carrier had the right to accept the shipper's marks as to the contents of a package offered for transportation, and was not bound to inquire particularly about them in order to take advantage of a false classification.

(3) A neglect on the part of the shipper to disclose the true nature of the contents of a receptacle offered for transportation is conduct amounting to a fraud on the carrier, if there be anything in its form, dimensions, or outward appearance which is likely to throw the carrier off its guard, whether so designed or not. Intention to impose upon the carrier is not essential.

(4) Plaintiff's damages were properly limited to $55.

(June 25, 1909.)

APPEAL by plaintiff from an order of the Municipal Court of Minneapolis denying a new trial after verdict in his favor

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livered to it by a passenger as baggage have not been included, as such cases present a different question, although the liability of the carrier in such cases is frequently referred to the general rule that is discussed herein. The fact, however, that carriers are not, according to the general rule, required, under any circumstances, to carry merchandise as baggage, distinguishes this class of cases from those considered here.

The general rule is that, if a shipper is guilty of any fraud or imposition in respect to the carrier, as by concealing or misstating the value or nature of the article, or deludes the carrier by his own carelessness in treating the parcel as a thing of no value, he cannot hold the carrier liable for the loss of the goods beyond their apparent value, or the value as stated by him, as he has deprived the carrier of the compensation to which he was justly entitled, and caused him to relax his vigilance in carrying the goods. 5 Am. & Eng. Enc. Law, p. 345; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Hellman v. Holladay, 1 Woolw. 365, Fed. Cas. No. 6,340; Earnest v. Southern Exp. Co. 1 Woods, 573, Fed. Cas. No. 4,248; St. John v. Southern Exp. Co. 1 Woods, 612, Fed. Cas. No. 12,228; Muser v. American Exp. Co. 1 Fed. 382; The Denmark, 27 Fed. 141; The Bermuda, 23 Blatchf. 554, 29 Fed. 399, affirming 27 Fed. 476; The St. Cuthbert, 97 Fed. 340; Galt v. Adams Exp. Co. McArth. & M. 124, 48 Am. Rep. 742; Everett v. Southern Exp. Co. 46 Ga. 303; Georgia Southern & F. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; Chicago, B. & Q. R. Co. v. Miller, 79 Ill. App. 473; Southern Exp. Co. v. Fox & Logan (Ky.) 115 S. W. 184; Little v. Boston & M. R. Co. 66 Me. 239; Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 50 Am. Rep. 282; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Rowan v. Wells, F. & Co. 80 App. Div. 31, 80 N. Y. Supp. 226; Warner v. Western Transp. Co. 5 Robt. 490; Coxe v. Heisley, 19 Pa. 243; Caldwell v. United States Exp. Co. 36 Pa. Super. Ct. 465; Missouri P. R. Co. v. York, 2 Tex. App. Civ. Cas. (Willson) 557; Texas Exp. Co. v. Dupree, 2 Tex. App. Civ. Cas. (Willson) 274; G. C. & S. F. R. Co. v. Clark, 2 Tex. App. Civ. Cas. (Willson) 459; Texas Exp. Co. v. Scott, 2 Tex. App. Civ. Cas. (Willson) 59; Tyly v. Morrice, Carth. 485.

The reason for the rule is thus stated in Hart v. Pennsylvania R. Co. supra: "If the shipper is guilty of fraud or imposition, by representing the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed."

And in Earnest v. Southern Exp. Co. supra, it was held that where the shipper, to avoid paying the regular charges, had concealed the value of the package, and thereby thrown the carrier off his guard, and induced him to treat the package as of small value, it would be gross injustice to allow him to recover beyond what he had stated the value of the package to be. In this case he was allowed to recover the value which he had placed on the package, although it appeared that, had it not been for his misstatements, no loss at all would have ensued.

The same general rule was applied in The St. Cuthbert, supra, where valuable memorandum books were concealed in clothing and sent as "worn clothing;" in Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416, and in Chicago & A. R. Co. v. Shea, 66 Ill. 471, where clothing was inclosed in a bundle of bedding and sent as bedding; in Charleston & S. R. Co. v. Moore, 80 Ga. 522, 5 S. E. 769, where jewelry was inclosed in a package and sent as household goods; in Bottum v. Charleston & W. C. R. Co. 72 S. C. 376, 2 L.R.A. (N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118, where a similar package of pictures was shipped as containing glass, and the liability of the carrier for the loss was held to be limited to

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for a less sum than was demanded in an action brought to recover damages for loss of certain goods while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Mr. **Paul J. Thompson**, for appellant:

As the mistake was innocently made, the shipper did not fraudulently misrepresent the contents of the box.

Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27; Atchison, T. & S. F. R. Co. v. Goetz & B. Mfg. Co. 51 Ill. App. 151; Mobile & O. R. Co. v. Dismukes, 94 Ala. 131, 17 L.R.A. 113, 4 Inters. Com. Rep. 200, 10 So. 289.

Mr. **F. W. Root**, for respondent:

The shipper having constituted the local express company his agent to make the shipment, he is bound by its every act that was necessary to be done in order to make the shipment.

Mechem, Agency, § 284; Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, 54 N. W. 1059; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Christenson v. American Exp. Co. 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

In the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them in order to take advantage of a false classification.

Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St.

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the value of a package of glass; in Shackt v. Illinois C. R. Co. 94 Tenn. 658, 28 L.R.A. 176, 30 S. W. 742, where a quantity of silks, satins, laces, silver spoons, etc., was sent as household goods; in Relf v. Rapp, 3 Watts & S. 21, 37 Am. Dec. 528, where jewelry was sent in a package labeled "glass."

The same rule was applied in St. John v. Southern Exp. Co. supra, where the defendant was in ignorance of the value of the package, and in consequence failed to place it in the hands of a messenger known to be honest and trustworthy, who was uniformly employed to deliver valuable packages.

Where a shipper delivered a sealed package worth $234,000 to a carrier, and represented that its value was $1,000, and paid the charges for that value, it was held in United States Exp. Co. v. Koerner, 65 Minn. 540, 33 L.R.A. 600, 68 N. W. 181, that the liability of the express company was limited to carrying $1,000 worth of property; and consequently it was not entitled, in an action for further compensation, to recover on the theory that, in case of loss, the limit of its liability would be for failure to deliver the whole $234,000 worth.

One who ships his horse as an ordinary horse, knowing that a regulation of the carrier limits its liability in case of the loss of such animals to a certain sum, and requires extra compensation for transporting animals of greater value, thereby elects to treat his horse, for the purpose of transportation, as of no greater value than that fixed by the regulation, and he cannot, in case of loss, insist on a higher valuation. Duntley v. Boston & M. R. Co. 66 N. H. 263, 9 L.R.A. 449, 49 Am. St. Rep. 610, 20 Atl. 327.

The ground for holding that a carrier is not liable for goods shipped under a wrongful classification was said, in Savannah, F. & W. R. Co. v. Collins, supra, to be that there is no contract existing between the carrier and the shipper to carry other than those described in the bill of lading.

A carrier may accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them, in order to take

advantage of a false classification. Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118.

In a number of cases the act of the shipper in concealing or misrepresenting the character or value of the goods has been held to be such a fraud as to invalidate the whole contract of carriage, and to release the carrier from any liability at all thereon, especially if the loss was directly traceable to the fact that the carrier was in ignorance of the true character or value of the goods. The decision in some of these cases may be influenced by the fact that the package lost, although containing valuable goods, was of no apparent value, but the language used by the court is apparently broad enough to sustain the rule as stated, and some of the cases so hold expressly.

Thus, in The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059, it was held that where the shipper informed the captain of a vessel that he had nothing but clothing in his trunk, when in fact he had money, the carrier was not liable for the loss even of the clothing which the trunk contained; for, if the truth had been stated, the captain would have protected his vessel from responsibility for the loss by putting the trunk in a place of safety.

A constructive if not an actual fraud to obtain cheap rates of freight, which relieves the carrier from liability for loss of the goods, is shown where a man of intelligence ships in a basket with a rope around it, without making known its contents, a quantity of silks, satins, laces, curtains, silver spoons, and other valuable articles, most of which were for sale by his wife, in her business as a dressmaker and milliner, and remains silent when he hears the carrier's agent designating them as "household goods," the rate on which is very much less than that on merchandise. Shackt v. Illinois C. R. Co. supra. In this case no recovery at all was allowed the shipper, although it does not appear that the constructive fraud of the shipper in any way caused or tended to cause the loss.

So, in Hayes v. Wells, F. & Co. 23 Cal.

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Rep. 610, 57 S. E. 985, 5 A. & E. Ann. Cas. 118; Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416.

If a fraud is practised by the shipper upon a carrier by misleading the carrier as to the nature of the shipment, the contract of carriage is thereby made void, and the carrier will not be liable for the loss of the shipment; and neglect or failure to disclose the real value of a package and the nature of its contents is conduct amounting to a fraud upon the carrier.

Bottum v. Charleston & W. C. R. Co. and Savannah, F. & W. R. Co. v. Collins, supra; Hutchinson, Carr. 3d ed. § 330; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Charleston & S. R. Co. v. Moore, 80 Ga. 522, 5 S. E. 769; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

Jaggard, J., delivered the opinion of the court:

Plaintiff and appellant gave to the St. Louis Express Company, at St. Louis, Missouri, one sewing machine, crated, and one box, for delivery to the defendant at said St. Louis, to be by it transported over its lines and the lines of its connecting carrier or carriers to Minneapolis, Minnesota, and there delivered to a named consignee. The

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185, 83 Am. Dec. 89, the court said that if any fraud or unfair concealment of value is used, the carrier will not be responsible for any loss, and it will make the contract between them null and void; and this rule applies to all cases of concealment or suppression of facts, and to all false statements made by the shipper for the purpose of misleading the carrier.

And in Southern Exp. Co. v. Everett, 37 Ga. 688, it was held that if the shipper so conducted himself as to induce the carrier to regard a box as of but little value, or if he intentionally concealed from the carrier the true value of the contents of the box, for the purpose of depriving him of his lawful freight therefor, such concealment by the shipper is, in law, a fraud upon the carrier, and releases him from liability.

And the Everett Case was cited with approval and followed in Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436, where it was held that conduct upon the part of the shipper which amounted to a concealment of the true character of the contents of the package constituted such a legal fraud upon the carrier as would in law discharge it from all liability as a carrier. And to the same general effect was the decision in Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809.

So, in Chicago & A. R. Co. v. Thompson, 19 Ill. 578, it was held that by suppressing and concealing the fact that a box contained bank bills in such a way as to deceive the carrier as to the true contents of the box, the shipper committed a fraud upon the defendant and made the contract void, for there could be no action where the plaintiff practised fraud and deceit. And this case was cited and followed in American Exp. Co. v. Perkins, 42 Ill. 458, where it was held that a carrier was not liable for injury to a wreath consisting partially of glass, where the carrier was not informed of the true contents of the package. To the same general effect was the decision in Pennsylvania Co. v. Kenwood Bridge Co. 170 Ill. 645, 49 N. E. 215, where the carrier accepted certain bridge iron which was of greater height than it was represented to be by the bridge company, and consequently was broken while passing through a river bridge.

And in Houston & T. C. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, it was held that where the shipper of valuable articles practises a fraud on the carrier, either by his acts or omissions fraudulently concealing the value of the article shipped, the carrier is discharged. And to the same effect was the decision in Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312.

Where the carrier gave notice that he would not be liable beyond a specified value unless the package was received at its true value and paid for accordingly, it was held in Izett v. Mountain, 4 East, 370, that he was not liable for any loss where a package above the stated value had been shipped without notice of its true value being given. And to the same effect were the decisions in Marsh v. Horne, 5 Barn. & C. 322, and Clay v. Willan, 1 H. Bl. 298.

The same rule was followed in Bradley v. Waterhouse, 3 Car. & P. 318, where money was sent done up in a package of tea; in Gibbon v. Paynton, 4 Burr. 2298, where money was concealed in a bag of nails; in Batson v. Donovan, 4 Barn. & Ald. 21, where bank notes were sent done up in an ordinary parcel.

In Sewall v. Allen, 6 Wend. 335, it was held that a steamboat company which was not a common carrier of packages of bank bills was not liable for the loss of such a package, intrusted to the master of one of their boats, where it appeared that he had been forbidden by his employers to carry money, and that the usage was for persons sending money to compensate the masters.

In the following cases it was held that, under the particular facts presented, the carrier would be liable for the actual value of the goods, although the general rule was not expressly denied:

That goods of more value than designated are packed in a box will not release the carrier if the more valuable things are not lost. Hyde v. New York & N. O. S. S. Co. 17 La. Ann. 29.

A wrongful classification of goods by a

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box was delivered to the defendant, and accepted by it for such shipment, as containing books, was receipted for as books, and was billed and given the rate fixed by the published tariff of the defendant for transportation of books. That box, instead of containing books, only actually contained a few books and many miscellaneous articles of household goods and of personal effects. The aggregate value of said shipment, including said sewing machine and attachments, at the point of shipment, was $175. The value of the sewing machine and attachments was $50, and the value of the books in the box was $5. In said tariff, the articles in the box bore the classification of household goods and personal effects, and carried a rate of 94½ cents per hundredweight, instead of 63 cents per hundredweight, for books. The articles shipped were lost through what is, for present purposes, the admitted neglect of defendant. Neither the defendant nor any person or persons employed by or connected with it had, at any time before the same became lost and written claim was made by the plaintiff therefor, any knowledge, information, or belief that the said box contained anything more than books. The marking of said box as containing books was done by the said St. Louis Express Company, and without the knowledge of the said plaintiff, and without direction from him. The trial court found as a matter of fact "that plaintiff, through his agent, fraudulently misrepresented the contents of the package

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shipper, with a view to escape double rates, was held in Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27, not to disable plaintiffs to maintain an action for the conversion of the goods. But it was held that the defendant was entitled to receive such double rates, and to be credited therefor.

Where a contract containing a stipulation limiting the liability of the carrier was void under a statute, it was held in Lucas v. Burlington, C. R. & N. R. Co. 112 Iowa, 594, 84 N. W. 673, that, if fraud was practised by the plaintiff in order to secure a cheaper rate of freight, the defendant would not be bound by the rate given, but a void contract procured thereby could by no means lessen the carrier's liability.

No fraud or imposition can be predicated of the acts of a shipper in failing to disclose the contents of a package containing silver coin, where the very appearance of the package indicated that it was not merchandise, and it was addressed to well-known manufacturers of silver, and the carrier did not ask about the contents or value of the package. Gorham Mfg. Co. v. Fargo, 3 Jones & S. 434.

Where there is no agreement or contract as to any limitation on account of loss or damage by reason of any reduction of freight, it was held in Louisville & N. R. Co. v. Levi, 18 Ohio C. C. 873, that a mere statement that the value is less than the actual value will not relieve the carrier for any loss or injury due to its own negligence.

If the defendants knew that parties emigrating like the plaintiff were in the habit of packing up valuable articles and money among their household wares, and from such knowledge might infer that this box of the plaintiff's might contain money, it was held in Kuter v. Michigan C. R. Co. 1 Biss. 35, Fed. Cas. No. 7,955, that it was their duty to make inquiry in order to relieve themselves from liability.

Where there was no intention to impose upon the carrier, and it was not claimed that greater diligence would have been used or a larger rate charged if the true character of the goods had been known, it was held in Fassett v. Ruark, 3 La. Ann. 694, that the shipper might recover for the actual value of the goods lost.

Where the carrier did not inquire as to the value of the package and there was no fraud on the part of the shipper, the carrier is liable for the full amount of the loss. Levois v. Gale, 17 La. Ann. 302.

Where the plaintiff shipped certain negatives as "photo goods," and no inquiry or representation was made as to the value of the shipment, it was held in Southern P. R. Co. v. d'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813, that evidence that, if the true value of the goods had been known, the shipper would have been obliged to pay a higher rate of freight than he did, did not fairly raise an issue of fraud or concealment as to the character and value of the goods.

In Sleat v. Fagg, 5 Barn. & Ald. 342, it was held that the noncommunication of the contents of a package to the carrier, and the directing of it in such a way as to conceal its value, was not such a fraud as to relieve the carrier from liability for its loss, where the carrier sent it by another and more dangerous route than that by which it had contracted to send it. The court distinguished Batson v. Donovan, supra, upon the ground that, in the latter case, the loss was expressly due to the noncommunication of the value; for, had the actual value been made known, the carrier would have exercised greater care.

The question has arisen in a number of cases whether it is the duty of the shipper to reveal the value or the character of the goods; but the general rule is that, in the absence of any other acts on the part of the shipper, intended to deceive the carrier, mere silence as to character and value of the goods does not amount to fraud.

Thus, in New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531, it was held that, in the absence of inquiry on the part of the carrier, and in the absence of conduct on the part of the shipper misleading the carrier, the court could not, as a matter of law, declare that the mere failure of the shipper, unasked, to disclose the value of his goods, was a fraud upon the

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containing all the household goods, except the sewing machine stating that they were books." Plaintiff was allowed $55 as damages.

1. The local express company was plaintiff's agent for delivery of the box for shipment and for whatever usually and naturally belonged to the doing of it. Mechem, Agency, § 284. This included the giving of the information necessary to such shipment. The plaintiff was therefore bound by the act of its agent in marking the box as containing books. Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, collecting cases at page 190, 54 N. W. 1059.

2. Plaintiff contends that the marking of the box, which was partially true, was a mistake only, and that the trial court was not justified in finding that the plaintiff, through his agent, misrepresented the contents of the box, and was guilty of fraud. It is, however, a settled rule of law that, in the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them in order to take advantage of a false classification. See Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118, and Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416. Fraud was made out, although intention to impose on the carrier was not shown. "Fraud may be as

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carrier which defeated all rights of recovery. And to the same effect was the decision in Muser v. American Exp. Co. 1 Fed. 382.

And in Titchburne v. White, 1 Strange, 145, it was held that a carrier was liable for the loss of a package containing money, where it had made no inquiry as to the contents of the package.

The carrier is bound to make the inquiry as to the value of the box or the articles delivered to him, and the owner must answer at his peril; and if such inquiries are not made, and the article is received for such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value. Gorham Mfg. Co. v. Fargo, supra.

And in Phillips v. Earle, 8 Pick. 182, it was held that the shipper was under no obligations to state the value of the goods if he was not questioned concerning it, but if questions had been asked, any false answer would have been fraudulent and excused the carrier, and if there had been any concealment or deception, the same consequences would have followed. To the same effect was the decision in Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473.

The mere failure to disclose the value of the goods is not fraud. G. C. & S. F. R. Co. v. Clark, 2 Tex. App. Civ. Cas. (Willson) 459; Texas Exp. Co. v. Scott, 2 Tex. App. Civ. Cas. (Willson) 59.

But in Hayes v. Wells, F. & Co. 23 Cal. 185, 83 Am. Dec. 89, it was held that it was the duty of all persons employing a carrier to deliver letters containing matters of great value to inform the carrier of that fact, and it was not the duty of the carrier to make inquiries concerning the value of the letters delivered to them for carriage. And the Hayes Case was cited with approval and followed in White v. Postal Teleg. & Cable Co. 25 App. D. C. 364, 4 A. & E. Ann. Cas. 767, and in Gilman v. Postal Teleg. Co. 48 Misc. 372, 95 N. Y. Supp. 564, where bank bills were done up in a newspaper, and sent by a messenger boy without any notice to the company of the value of the package.

And in Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442, second appeal in 70 N. Y. 410, 26 Am. Rep. 608, the shipper sought to recover the value of a package of valuable watches and watchkeys, but failed to state the value to the carrier at the time of shipment, and the court accordingly held that the carrier's liability was controlled by the regulation of the company that, where the value was not stated, the liability would be limited to $50. The court said that, although there was no inquiry by the defendant as to the value of the goods, and no artifice to conceal the value or to deceive, the silence of the shipper was a fraud which discharged the carrier from liability beyond $50.

So, in Galt v. Adams Exp. Co. McArth. & M. 124, 48 Am. Rep. 742, it was held that the omission of the shipper to advise the carrier that the actual was greater than the apparent value of the articles shipped does not affect the shipper's rights unless it justifies the carrier in adopting the course of conduct by which the loss occurred.

In a few cases the liability of the carrier has been determined by statute.

Thus, under a statute which held that a common carrier of gold, silver, etc., is not liable for more than $50 for loss or injury of a package of any such articles unless he has notice of the nature of the freight, it was held in Scammon v. Wells, F. & Co. 84 Cal. 311, 24 Pac. 284, that the carrier was not liable beyond the value given by the shipper, although in fact the package was of much greater value.

And in Ocean S. S. Co. v. Way, 90 Ga. 747, 20 L.R.A. 123, 17 S. E. 57, it was held that fans and parasols made of delicate and expensive materials, and fragile in construction, and intended more for ornament than for use, were not clothing, and, under the Federal statute, the carrier was not liable for the loss of the same, unless notice of the value and character of the goods had been given.

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effectually practised upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package, and the nature of its contents, if there be any thing in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper; as, if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled; for by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it, had he known its actual value." Hutchinson, Carr. 3d. ed. § 330. This rule was approved in Bottum v. Charleston & W. C. R. Co. 2 L.R.A.(N.S.) 773 (72 S. C. 375, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118). It was there held that "a misdescription, without fraudulent intent, of a package of pictures as containing glass, in a shipment of household goods, will relieve the carrier from liability for their loss above the value of a package of glass, where the freight rate is much higher on pictures than on glass." And see cases collected at page 776. So, in Savanah, F. & W. R. Co. v. Collins, supra, it was held that, "in an action against a railroad company for the loss of goods shipped by it, defendant's agent testified that, at the time of the shipment, plaintiff's husband, with whom the agreement for shipment was made, stated that, if the goods, were lost, the company would have to pay him $25. The court charged, in substance, that unless it appeared that both the husband and the agent had authority to make such valuation, and actually agreed upon it, it would not be binding upon plaintiff. Held, that the jury, in ascertaining the value of the goods, might properly consider such testimony, and that the charge withdrew it from their consideration and was erroneous." And see J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

That in some of these cases there was knowledge on the part of the shipper that his goods were given a rate less than they should have been charged is not material, in view of absence of any necessity to show actual intention to defraud. As opposed, plaintiff refers us to Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27 (in which an instruction favorable to this position, given at the request of the railroad company, was affirmed on an appeal by the railroad company), and to Atchison, T. & S. F. R. Co. v. Goetz & B. Mfg. Co. 51 Ill. App. 151. It is certain that the authorities rule this case for defendant. Plaintiff was properly limited in damages to the value of the crated machine and to the value of the books shipped.

Affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LUCIA NAJARIAN, Admrx., etc., of Deckran Najarian, Deceased,
v.
JERSEY CITY, HOBOKEN, & PATERSON STREET RAILWAY COMPANY, Plff. in Err.

(— N. J. —, 73 Atl. 527.)

Street railway — accident to pedestrian — negligence — evidence — burden of proof.

1. In a suit brought against a street railroad company to recover for the death of a pedestrian in a street, caused by his being hit by the rear end of a car which left the track because of the "splitting" of a switch, proof of the happening of the acci-

Headnotes by TRENCHARD, J.

Case Note. — Liability for injury to person other than passenger or employee by derailment of street car.

The only case directly in point upon this question which a search has disclosed is Kelly v. United Traction Co. 88 App. Div. 234, 85 N. Y. Supp. 433. It there appeared that deceased, while engaged in laying brick upon a sidewalk, was killed by an electric car which ran off the track and against him; and it was held erroneous to charge the jury that "it was the duty of the defendant to have their car and its apparatus and the roadbed and the rails so constructed and applied that the car would stay on the tracks," since it wholly eliminated from the consideration of the jury the question of the degree of care which the railway company was required to exercise under the circumstances, and practically made it an insurer against injury caused by derailment, regardless of whether such derailment was caused by its negligence or otherwise.

Upon the question of the liability of a street railway company for defects in its tracks or in the street, see the note to Groves v. Louisville R. Co. 52 L.R.A. 448.

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dent is sufficient to charge the company with negligence, and to place upon it the burden of showing that the injuries resulting in death were not received through any fault on its part.

Trial — negligence — jury.

2. Where the happening of an accident is sufficient to charge a defendant with negligence, and where fair-minded men might honestly differ as to whether the defendant has sustained its burden of showing that the decedent's injuries were not received through any fault on its part, the question of defendant's negligence should be submitted to the jury.

Street railway — accident to pedestrian — contributory negligence.

3. A pedestrian, struck by a street car which left the track, is not guilty of contributory negligence because he was standing in the roadway, when it appears that he was sufficiently distant from the track for the car to have passed him in safety if it had remained upon the track.

(June 14, 1909.)

ERROR to the Circuit Court for Hudson County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her intestate. Affirmed.

The facts are stated in the opinion.

Messrs. **William D. Edwards** and **Edwin F. Smith**, for plaintiff in error:

The doctrine of *res ipsa loquitur* does not apply.

Widmer v. West End Street R. Co. 158 Mass. 49, 32 N. E. 899.

The court should have directed a verdict for defendant upon request.

Alcott v. Public Service Corp. (N. J. L.) 71 Atl. 45.

Messrs. **Hartshorne, Insley, & Leake**, for defendant in error:

Plaintiff's intestate had a right to stand in the roadway of the street while waiting for the car to pass down the street before him.

Kathmeyer v. Mehl (N. J. L.) 60 Atl. 40.

The fact that the wheels of the car "split" the switch was sufficient, prima facie, to raise a presumption of negligence against the defendant, and the burden rested upon defendant to satisfy the jury that the accident did not happen by negligence of the defendant or its servants.

Bergen County Traction Co. v. Demarest, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; Mumma v. Easton & A. R. Co. 73 N. J. L. 653, 65 Atl. 208.

Trenchard, J., delivered the opinion of the court:

On January 23, 1907, the plaintiff's intestate, Deckran Najarian, was struck and killed by a trolley car of the defendant company. The accident occurred about 6 or 7 o'clock in the evening, and while it was dark. The decedent was walking westward on Angelica street (being on the north side of that street), and stopped, when he came to the corner of that street and Spring street, to allow the trolley car in question to pass before him. The car was going southward on Spring street. A switch was in the track on Spring street north of Angelica street, for the purpose at times of switching cars off eastward into the car barn on Angelica street. The tongue of this switch was usually kept "closed for Angelica street;" that is, it was ordinarily so set that cars traveling south on Spring street would pass over it, and continue southward through that street. The decedent stood in the roadway between the curb of Spring street and the trolley track. The front wheels of the car in question passed over the switch in safety, but the hind wheels took the switch into Angelica street, thereby throwing the rear of the car toward the curb on the east side of Spring street, and against the decedent, injuring him so that he died shortly after. This action was brought in the Hudson county circuit court by the administratrix of the decedent, to recover damages for his death. The trial resulted in a verdict for the plaintiff, and this writ of error brings up for review the judgment entered upon the verdict.

The defendant below assigns error upon the refusal of the trial judge to nonsuit the plaintiff and to direct a verdict for the defendant. We think the motions were properly refused. Both motions were grounded upon (1) want of evidence of negligence of the defendant company; and (2) the contributory negligence of the plaintiff's intestate. With respect to the negligence of the defendant company, we think there was evidence requiring the submission of that question to the jury. It was not necessary for the plaintiff, in order to make out a prima facie case, to prove the cause of the accident. All that she was required to do was to show the existence of negligence on the part of the defendant, which occasioned the injury resulting in death. This she did by proving that the rear of the car left the straight track upon which the front part of it was proceeding, so as to kill the plaintiff's intestate, who was standing in what was normally a place of safety. Ordinarily, proof of the occurrence of an accident will not, of itself, support a conclusion of the defendant's carelessness; but this principle is not of universal application. Where the accident is one which, in the ordinary course of events, would not have happened

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if proper care had been used by the defendant, *res ipsa loquitur*. Bergen County Traction Co. v. Demarest, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Sheridan v. Foley, 58 N. J. L. 230, 33 Atl. 484.

In Bergen County Traction Co. v. Demarest, supra, Chief Justice Gummere, speaking for this court, said: "In the ordinary operation of the defendant's railroad its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built, and the cars so constructed, that when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently, proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation." In the present case it may likewise be said that common experience teaches that switches are so built, and cars so constructed, that when there is no defect in either, and the switches are prudently operated, and the cars are run with due care, the latter will pass over closed switches in safety. Therefore, proof of the "splitting" of the switch, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation of the car or switch, or both. If there were any facts inconsistent with negligence, it was for the defendant to prove them. The motion to nonsuit upon the ground of want of proof of the defendant's negligence was therefore properly denied. We think there was no conclusive rebuttal of such presumption of negligence established by the defendant.

We have pointed out that the switch, the "splitting" of which caused the accident, was supposed to be kept set so that cars would pass over it down Spring street. The front wheels passed safely, but the rear wheels took the switch into Angelica street. Immediately after the accident, and before the car was moved, the tongue of the switch was found "open for Angelica street;" that is, so placed that a car going southward on Spring street would be turned by the tongue of the switch into Angelica street. This movable tongue of the switch (which, according as it is "closed" or "opened," keeps the wheels of the car upon the main track, or shunts them off upon the switch) is 6 feet 9 inches long. It rests in a pocket, and is pivoted at the large end with a pin. The other end or point of the tongue is the part which is moved from right to left for the purpose of opening or closing the switch. The defendant attempted to overcome the presumption of negligence by showing that the switch was of standard type and in good working order. But the testimony shows that the tongue was considerably worn at the point. Moreover, the accident may well have happened from the failure of the defendant's servant to completely close the switch; that is, from his failure to move the point of the tongue until it was in actual contact with the rail of the main track. If it was not so completely closed, the forward wheels might well have passed over, and the rear wheels have taken, the switch, on account of the natural swing of the car from side to side from time to time. The testimony shows that, had the switch been properly closed, it could not have been forced open by the motion of the car wheels in running over it, unless the tongue was defectively loose at the pivot. The motorman says that as he went over the switch, he noticed that it was "set straight to go right on to Spring street." Whether his conclusion was correct, or his inspection imperfect, was, in view of the fact that the switch was found open immediately after the accident, a matter about which fair-minded men might honestly differ. The negligence of the defendant being a jury question, motion for a direction of a verdict upon the ground of want of proof of the defendant's negligence was properly refused.

With respect to the alleged contributory negligence of plaintiff's intestate, counsel has not pointed out, nor do we perceive, in what respect he was negligent. He was about to cross Spring street, when he saw the car approaching, and stopped, evidently to allow it to pass. He had the right to stand in the roadway of the street where he was standing, while waiting for the car to pass down the street before him. He had no reason to suppose that the forward end of the car would keep on the track and the rear end take the switch, and so make the spot where he stood a place of danger. Kathmeyer v. Mehl (N. J. L.) 60 Atl. 40. The alleged contributory negligence of the deceased was therefore at least a jury question, and the motions to nonsuit and direct a verdict upon that ground were properly refused.

The result is that the judgment of the court below is affirmed.

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NEW YORK COURT OF APPEALS.

C. ADELBERT BECKER et al. Appts.,
v.
MAGGIE McCREA, Appt.,
And
ANNIE BREVOORT EDDY et al., Impleaded, etc., Respts.

(193 N. Y. 423, 86 N. E. 463.)

Limitation of action — redemption from mortgage — possession.

A mortgagee who, with the consent of the mortgagor, takes possession of the property after a judgment of foreclosure, without sale, does not, while merely holding and enjoying the property as his own, hold adversely, within the meaning of a statute giving a right to redeem unless the mortgagee has maintained an adverse possession for twenty years.

(November 17, 1908.)

APPEAL by plaintiffs and defendant McCrea from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Westchester County in favor of defendants Eddy et al., in an action brought to partition certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Charles Francis Stone** and **Brainard Tolles**, with Mr. **Harlan F. Stone**, for appellants:

The right of redemption was not cut off by the statute of limitations.

Winslow v. Clark, 47 N. Y. 261; Warder v. Enslen, 73 Cal. 291, 14 Pac. 874; Miner v. Beekman, 50 N. Y. 344; Kip v. Hirsh, 21 Jones & S. 13; Maurhoffer v. Mittnacht, 12 Misc. 585, 34 N. Y. Supp. 439; Hubbell v. Sibley, 50 N. Y. 468; Green v. Turner, 38 Iowa, 118; Hunter v. Coffman, 74 Kan. 308, 86 Pac. 451; Catlin v. Murray, 37

Case Note. — ***Is possession of a mortgagee who enters under incomplete or defective foreclosure adverse to mortgagor.***

Whether a mortgage is regarded as merely a lien upon the mortgaged land covered thereby, or as a conveyance of the legal title, an equity of redemption exists in favor of the mortgagor, and although the mortgagee enters into possession of the mortgaged premises, the right of redemption still exists, and the mortgagee is merely a resultant or constructive trustee for the mortgagor, and is within the doctrine that a trustee will not be permitted to claim his possession is adverse so long as the trust relation exists. Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545; Webb v. Winter, 135 Cal. 455, 65 Pac. 1028, 67 Pac. 691; Chickering v. Failes, 26 Ill. 507; Hinkley v. Greene, 52 Ill. 223; Mason v. Ayers, 73 Ill. 121; Gebhard v. Sattler, 40 Iowa, 152; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Mears v. Somers Land Co. (N. D.) 121 N. W. 916; Robinson v. Fife, 3 Ohio St. 551; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; Swann v. Young, 36 W. Va. 57, 14 S. E. 426.

A mortgagee, to bring himself within the operation of the limitation statute based upon adverse hostile possession under color of title, must, by direct notice to the mortgagor, or some other mode, terminate the trust relation theretofore existing by reason of the relation of mortgagor and mortgagee. Generally the foreclosure of the mortgage and sale of the land thereunder are sufficient to terminate this relation, and will raise the presumption that possession thereafter is adverse and hostile to the mortgagor. Under such circumstances, in the absence of fraud or bad faith, the validity of the foreclosure proceedings is immaterial, so far as affecting the right to rely thereon to show a termination of the trust relation, and a consequent hostile adverse possession under color of title. Gebhard v. Sattler; Chickering v. Failes; Hinkley v. Greene; and Mason v. Ayers,—supra; Brenner v. Quick, 88 Ind. 546; Goodell v. Starr, 127 Ind. 198, 26 N. E. 793; Sedwick v. Ritter, 128 Ind. 209, 27 N. E. 610; Webb v. Winter; Nash v. Northwest Land Co.; and Mears v. Somers Land Co.,—supra; Brynjolfson v. Dagner, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; Swann v. Thayer and Swann v. Young, supra; and see, to the same effect, Creighton v. Proctor, 12 Cush. 433; Melvin v. Locks & Canals, 5 Met. 15, 38 Am. Dec. 384.

And where there is a continuous, visible, and exclusive possession and occupation of the mortgaged premises under a claim of title based on foreclosure proceedings, it is immaterial whether the foreclosure is valid or otherwise. Clark v. Clough, 65 N. H. 43, 23 Atl. 526; Grant v. Fowler, 39 N. H. 101; Forest v. Jackson, 56 N. H. 357; Green v. Cross, 45 N. H. 484.

In Chickering v. Failes, supra, one of the leading cases on this subject, in referring to the question of adverse possession while the relation of mortgagor and mortgagee exists as to the land in question, the court said: "Whilst these several relations exist, the possession and payment of taxes cannot be held to be for the benefit of the occupant, and cannot in good faith be relied upon for hostile purposes against the mortgagor or landlord. To bring themselves within the good faith of this statute, they must first surrender the possession, if it has been obtained, or, as against the mortgagor, notice must be given that payment of taxes is claimed to be in the right of the mortgagee, independent of the mortgage, or the relation must be apparently terminated in some other mode. After a foreclosure or an effort to foreclose the mortgage, by decree or deed which purports to have that effect, the presumption then arises that all acts done in reference to the property are done under a claim of ownership by the mortgagee, and referred to his color of title. If they are

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Wash. 164, 79 Pac. 605; McPherson v. Hayward, 81 Me. 336, 17 Atl. 164; Dunton v. McCook, 93 Iowa, 258, 61 N. W. 977; McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27; Kohlheim v. Harrison, 34 Miss. 457; Knowlton v. Walker, 13 Wis. 265; 2 Jones, Mortg. § 1152; Zeller v. Eckert, 4 How. 296, 11 L. ed. 982; Root v. Woolworth, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 136; Graydon v. Hurd, 5 C. C. A. 258, 6 U. S. App. 610, 55 Fed. 724; Coleman v. Pickett, 82 Hun, 287, 31 N. Y. Supp. 480; Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739; Bannon v. Brandon, 34 Pa. 263, 75 Am. Dec. 655; Hudson v. Putney, 14 W. Va. 561; Hall v. Stevens, 9 Met. 418; Clarke v. McClure, 10 Gratt. 305; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Calkins v. Isbell, 20 N. Y. 147; Chapin v. Wright, 41 N. J. Eq. 438, 5 Atl. 574; McCarren v. Coogan, 50 N. J. Eq. 268, 24 Atl. 1033; Robinson v. Fife, 3 Ohio St. 551; Hindley v. Metropolitan Elev. R. Co. 42 Misc. 56, 85 N. Y. Supp. 561; Neel v. McElhenny, 69 Pa. 300; Perrin v. Garfield, 37 Vt. 304; Jones v. Williams, 108 Ala. 282, 19 So. 317; Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Williams v. Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

Messrs. **Davies, Stone, & Auerbach** for appellant Maggie McCrea.

Mr. **J. Addison Young, with Mr. C. H. Young,** for respondents.

Cullen, Ch. J., delivered the opinion of the court:

This action was brought for the partition of certain lands in Westchester county, claimed to be owned by the plaintiffs and certain of the defendants as tenants in common. The premises were not in the actual possession of these parties, but were held and occupied by the respondents, the defendants Annie B. Eddy and others. It

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such as is required by the statute, and for the period of time designated by the statute, they would form a bar to a redemption."

On the same subject, in Nash v. Northwest Land Co. supra, the court said: "A mortgagee in possession may or may not be holding adversely. The only necessary essentials to give rise to that relation are the existence of a mortgage, and the consent by the mortgagor that the mortgagee take or hold possession of the property by reason of the mortgage and as security for the debt. The acknowledgment or recognition of the mortgagor's right, on the part of the mortgagee, when the possession is taken or while it is held, is not essential. So long as the relation continues, the rights and liabilities arising out of it are the same, whether the mortgagee acknowledges the relation or not . . . so long as the mortgagee acknowledges or recognizes the mortgagor's right to the land, the statute of limitations does not run against the latter's remedies . . . and conversely, when the mortgagee in possession denies the mortgagor's rights, the statute is put in motion. Of course, where the mortgagee is permitted to take possession under an agreement on his part to hold in subjection to the mortgagor's rights, such possession is not deemed adverse, so as to set the statute of limitations in motion against the mortgagor, until the mortgagee distinctly disavows his obligations as such, and notice thereof is brought home to the mortgagor. This is so because, until the mortgagor has notice of the repudiation of the agreement, he has the right to presume that the original arrangement continues. Where, however, the mortgagee's possession is adverse from the beginning, and he has never acknowledged any obligation to the mortgagor, there is no ground for the presumption above mentioned, and the act of taking possession not only gives rise to a cause of action in favor of the mortgagor, but also starts the statute of limitations running against such cause of action."

In Stout v. Rigney, supra, holding that a purchaser at an invalid trust sale does not necessarily enter into possession of the property as mortgagee, irrespective of his actual intention, so that he cannot rely on his possession to invoke the statute of limitations in favor of his title, the court said: "The character of the possession . . . whether adverse or otherwise, must be determined from all the facts and circumstances of the case, and particularly with reference to the dominion exercised over the property by the purchaser and by his grantees subsequent to the sale. If the acts done and performed by those in possession were of such a nature as would naturally advise the world that the occupants claimed to be the owners of the fee, and such was their claim in fact, then their possession was adverse . . . nor do we believe it to have been essential, to render their possession adverse, that they should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem." To the same effect are H. B. Claflin Co. v. Middlesex Bkg. Co. 113 Fed. 958, and Gottlieb v. Thatcher, 2 C. C. A. 278, 4 U. S. App. 616, 51 Fed. 373 (possession of vacant land under foreclosure sale).

Entry into possession under title based upon foreclosure sale ineffective as to one of the owners of the land sold thereunder, because not made a party to the foreclosure proceeding, is nevertheless sufficiently adverse to start in operation the statute of limitations in favor of the mortgagee as against such party. Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005. To same effect as to constructive possession of vacant land is Goetter v. Moore (Wash.) 101 Pac. 365.

This doctrine also finds support in Mc-

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appears that on May 1, 1877, Jane B. Eddy conveyed to Bernard Spaulding the premises in question. From him the appellants deduce their title. It further appears that, contemporaneous with the conveyance to Spaulding, he executed a mortgage of the same premises to said Jane B. Eddy to secure a portion of the purchase money. On July 25, 1878, default having been made in the payment of that mortgage, said Eddy instituted an action in the supreme court for the foreclosure of the same, in which action a judgment of foreclosure and sale was entered on April 22, 1879. No sale was ever had under this judgment, but, some time in the year 1879, said Jane B. Eddy entered into possession of the mortgaged premises and held the same until her death (subsequent to the commencement of this action) in February, 1905, when her title devolved upon the respondents, the executors and trustees of her will. Mrs. Eddy was made a party to the action. The complaint set forth the mortgage, the ignorance of the plaintiffs as to its validity, and charged that the same had been paid or was barred by the statute of limitations. Judgment was demanded that the rights and claims of all the parties to the action be ascertained and determined, that partition of the premises be made, or that a sale of the same be had. The respondents, Mrs. Eddy's executors and trustees (she having, in the meantime, died), answered, claiming to own the premises in fee, and setting up adverse possession in themselves and in their testatrix for more than twenty years. The special term rendered judgment in favor of these last-named defendants, holding that the rights of the plaintiffs and the other defendants were barred by lapse of time. That judgment has been affirmed by the appellate division.

The whole controversy depends upon the character of the possession taken and held by Mrs. Eddy, and on the interpretation to be given to § 379 of the Code of Civil Procedure. The learned trial court found that no part of the mortgage had been paid; and as to the entry and possession of Mrs. Eddy, its findings are as follows: "In the year 1879, the said Jane B. Eddy, with the knowledge and consent of the said Bernard Spaulding and the defendant Maggie McCrea, entered into the open, actual, and visible possession and use of the said premises described in the complaint in this action, and became a mortgagee in possession of said premises." That the said Jane B. Eddy continued in such possession and

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Caughn v. Young, 85 Miss. 277, 37 So. 839. It appeared in this case, however, that the purchaser of mortgaged land at a trustee's sale notified the grantor in such trust deed that he had purchased, and was holding possession of the land as owner.

In Sutton v. Jenkins, 147 N. C. 11, 60 S. E. 643, the court said that possession of mortgaged premises for the statutory period of time by a purchaser under void foreclosure proceedings tended strongly to prove an indefeasible title.

The same result was reached in Minnesota, although on a different theory. Thus, in Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765, it was held that a mortgagee entering into possession of the mortgaged premises under a defective foreclosure proceeding, but claiming title thereunder, which claim was acquiesced in by the mortgagor, who surrendered possession of the premises on demand, was nevertheless a mortgagee in possession. It was, however, held that the right to foreclose and the right to redeem were reciprocal and commensurable, and the right to foreclose having expired, the right to redeem had also expired, and, as a logical result, the mortgagee in possession was vested with an absolute legal title to the mortgaged premises. To the same effect are Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332, and Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; but this doctrine was disapproved in Backus v. Burke, 63 Minn. 272, 65 N. W. 459, to the extent that it was limited to possession with the consent of the mortgagor. On this point the court said: "How can the statute of limitations run against the mortgagor if it is by his consent or license that the purchaser is in possession? It is a well-settled principle of law that the statute of limitations does not run in favor of an occupant of land in possession by the license or consent of the owner . . . of course, there are cases where the licensee in possession may, by his acts, repudiate his license, and thereafter hold adversely to the licensor. . . . But if such a purchaser at a foreclosure sale cannot be a mortgagee in possession unless he is in with the consent of the mortgagor, he will cease to be a mortgagee in possession, and becomes a mere trespasser, liable to an action of ejectment, as soon as he repudiates his license, and commences to hold adversely. We cannot hold that such is the law. Such a purchaser, entering under color of the foreclosure proceedings, enters adversely, not by the consent of the mortgagor, and continues to hold adversely from the time he enters."

Corby v. Moran, 58 Kan. 278, 49 Pac. 82, illustrates the doctrine that possession by a mortgagee or other purchaser under a foreclosure proceeding must be in good faith and free from fraud, in order to come within the doctrine that possession under a foreclosure-of-mortgage proceeding is adverse to the mortgagor. In this case it was held that possession under a sheriff's deed given in a foreclosure proceeding based upon a judgment which had been previously paid, of which fact the purchaser had notice, did not start in operation the statute of limitations limiting the time within which deeds execut-

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use of said premises up to the time of the commencement of that action, a period of twenty-five years and upwards, and until the time of her death, as hereinafter found, and continuously cultivated and improved the same, ploughing and planting and raising crops thereon, cutting the meadow, using the timber, building roads and walls thereon, and also built a barn upon the same, and received the fruits and benefits of said premises, and possessed and improved the same as owners are accustomed to possess and improve their estates, and that such possession and use and said acts of ownership by the said Jane B. Eddy were continued, during all said period, with the knowledge and acquiescence of the defendant McCrea, and no claim adverse to such use and occupancy was ever made by said defendant McCrea until the spring of 1904, nor did she at any time, from 1879 to 1904, pay any taxes or assessment on said property, or use or occupy the same."

On these findings it determined as conclusions of law: "(1) That the said Jane B. Eddy, in the year 1879, became and was a mortgagee in possession of said premises. (2) That the possession of said premises by said Jane B. Eddy was, for more than twenty years prior to the commencement of this action, exclusive, hostile, and adverse to the defendant McCrea. (3) That, by reason of such adverse possession by said Jane B. Eddy, the right of plaintiffs and said defendant McCrea to redeem from said mortgage is barred." The findings of fact are conclusive in this court, the affirmance of the appellate division having been unanimous, but the question remains whether those findings support the legal conclusions and the judgment founded thereon. That the possession of Mrs. Eddy was not adverse in the ordinary sense of the term is quite apparent, for she entered with the consent of the owner of the equity, and, as found, became a mortgagee in possession of the premises. Under our statutes, contrary to the common law, a mortgage creates no estate in the land, but is merely a lien on the mortgaged premises. Since his right to recover the premises in ejectment upon default has been abrogated by the statute, one cannot become a mortgagee in possession unless his entry is with the consent of the owner of the equity of redemption, express or implied. Howell v. Leavitt, 95 N. Y. 617; Barson v. Mulligan, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75. Therefore, when a mortgagee enters into possession with such consent, it is in

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It is to be noted that in all of the foregoing cases the mortgagee, or the purchaser at the foreclosure sale, entered into possession under a paper title, based upon a decree or deed purporting to convey the mortgaged premises. In this respect they are distinguishable from BECKER v. McCREA, wherein the foreclosure proceeding was not prosecuted to a sale of the mortgaged premises, and the mortgagee thereafter entered into possession with the consent of the mortgagor, and became a mortgagee in possession. He therefore was within the doctrine already stated, that, to render his possession adverse, so as to start the operation of the limitation statute in his favor, he must, by some act, clearly disavow and repudiate the relation of mortgagor and mortgagee, and claim to hold as owner in fee. This distinction is also made in Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221, wherein it was held a purchaser at a foreclosure of a trust deed, who took possession under a certificate of purchase, without, however, having issued to him a court deed of the premises, to which he was entitled upon surrender of the certificate, did not hold adversely to the mortgagor, so as to set in operation the limitation statute based on adverse possession. The court said, in order to obtain the benefit of this statute, it was essential that the purchaser prove a paper title which, on its face, purported to convey title.

This distinction reconciles BECKER v. McCREA with Shriver v. Shriver, 86 N. Y. 575, wherein the purchaser of land at judicial sale was relieved from carrying out his purchase because a marketable title was not shown by the vendors. The title offered was based on possession, for the statutory period, by a purchaser under a defective foreclosure of mortgage sale. The vendors failed to show adverse possession for the statutory period, because it appeared that the mortgagor had deceased within the period, and it did not appear that his heirs were not under some disability that would toll the statute. It was, however, recognized that such a possession, where no disability existed as to the mortgagor or his representatives or heirs, would be sufficient to establish title by adverse possession. On this point the court said: "The facts of the case make out a continuous, uninterrupted, actual possession, beginning with an entry under claim of exclusive title founded on a written instrument, and so kept up for over twenty years . . . a clear adverse possession for that time makes a title which a purchaser at a judicial sale may not refuse."

In H. B. Claflin Co. v. Middlesex Bkg. Co. supra, wherein the court said that, had the mortgagees taken possession of the premises as mortgagees, without the foreclosure proceeding, their possession would not have been adverse; but where there was a foreclosure, although voidable, and possession was taken under a deed issued under such proceeding, "this was notice to everybody that the possession was under claim of absolute ownership, and not as a mortgagee, and such a repudiation of the trust as sets the statute of limitations in operation."

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appears that on May 1, 1877, Jane B. Eddy conveyed to Bernard Spaulding the premises in question. From him the appellants deduce their title. It further appears that, contemporaneous with the conveyance to Spaulding, he executed a mortgage of the same premises to said Jane B. Eddy to secure a portion of the purchase money. On July 25, 1878, default having been made in the payment of that mortgage, said Eddy instituted an action in the supreme court for the foreclosure of the same, in which action a judgment of foreclosure and sale was entered on April 22, 1879. No sale was ever had under this judgment, but, some time in the year 1879, said Jane B. Eddy entered into possession of the mortgaged premises and held the same until her death (subsequent to the commencement of this action) in February, 1905, when her title devolved upon the respondents, the executors and trustees of her will. Mrs. Eddy was made a party to the action. The complaint set forth the mortgage, the ignorance of the plaintiffs as to its validity, and charged that the same had been paid or was barred by the statute of limitations. Judgment was demanded that the rights and claims of all the parties to the action be ascertained and determined, that partition of the premises be made, or that a sale of the same be had. The respondents, Mrs. Eddy's executors and trustees (she having, in the meantime, died), answered, claiming to own the premises in fee, and setting up adverse possession in themselves and in their testatrix for more than twenty years. The special term rendered judgment in favor of these last-named defendants, holding that the rights of the plaintiffs and the other defendants were barred by lapse of time. That judgment has been affirmed by the appellate division.

The whole controversy depends upon the character of the possession taken and held by Mrs. Eddy, and on the interpretation to be given to § 379 of the Code of Civil Procedure. The learned trial court found that no part of the mortgage had been paid; and as to the entry and possession of Mrs. Eddy, its findings are as follows: "In the year 1879, the said Jane B. Eddy, with the knowledge and consent of the said Bernard Spaulding and the defendant Maggie McCrea, entered into the open, actual, and visible possession and use of the said premises described in the complaint in this action, and became a mortgagee in possession of said premises." That the said Jane B. Eddy continued in such possession and

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no sense in hostility to the title of the mortgagor. In Packer v. Rochester & S. R. Co. 17 N. Y. 283, it is said by Judge Pratt: "The mortgagee holds simply a chose in action, secured by a lien upon the land. Since the Revised Statutes, there is not an attribute left in the mortgagee before foreclosure, upon which he can make any pretense for a claim of title; for the mere right, where he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title." In Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623, it was held that the legal title to the mortgaged premises remains in the mortgagor, and that title is not affected by default in payment, or by surrender of possession to, or the taking of possession by, the mortgagee. In that case Judge Earl said: "How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession, the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession, he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title, subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives, to be administered as personal estate, and the mortgagor's title would go to his heirs." In the same case Judge Reynolds said: "In such case the creditor, instead of leaving his debtor in possession, and relying upon his intangible legal lien for his security, takes the thing pledged in his own possession, and enjoys its use until his debt is paid. He must account for profits and waste to his debtor, and when his debt is paid by the receipt of rents and profits, or in any other manner, his lien is extinguished and his possession is no longer justified by law."

Though, as we have seen, the surrender of possession by the mortgagor to the mortgagee confers no title upon the latter, still it is settled law that in such case ejectment cannot be maintained by the mortgagor against the mortgagee, but he must resort to an action in equity to redeem (Phyfe v. Riley, 15 Wend. 248, 30 Am. Dec. 55; Chase v. Peck, 21 N. Y. 581); and the only question remaining is whether the plaintiffs and their co-owners have lost their right to that relief by the lapse of time. Before the enactment of the present Code there was no provision of law specially prescribing the time in which such actions must be instituted, but it was held that they fell within § 97 of the old Code, which prescribed that actions for relief not otherwise specially provided for must be brought within ten years. Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, 50 N. Y. 468. In the former case it was held that the cause of action did not accrue at least until the mortgagee entered into possession. That was all that was necessary to decide in that case. The learned judge who wrote for the court, however, said further: "The statute, I think, would not then commence running had the defendants or their grantor entered and continued in possession avowedly as mortgagees, and would not run while they so held, for the reason that it is a continuing right of the owner to pay off and discharge a mortgage, and, by so doing, regain the possession of the land." This was the state of judicial authority when the present Code, prepared by Mr. Throop, was enacted. The section before us, as already said, is new. In his note to the section [379] Mr. Throop says: "One of the questions which has given rise to much conflict of opinion is that relating to the application of the statute of limitations to such a case [to redeem]." He refers to the Miner and Hubbell Cases, and suggests that, in analogy to other actions for the recovery of real estate, the period prescribed should be twenty years instead of ten. In the section as drawn by him and enacted by the legislature, we find the words, "unless he or they [mortgagee in possession and those claiming under him] have continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage." The use of the word "adverse," in the light of the previous intimation by this court in the Miner Case, seems to indicate very clearly that it was the intention of the legislature to incorporate that intimation or *dictum* into the statute law. It is admitted by the learned judge who wrote for the appellate division that the possession of the respondents was not adverse, but he thought that the word "adverse" was not to be construed in the same sense as that in which it is used in the sections of the Code relative to the time for the bringing of other actions in regard to real property. He was led to this conclusion by the consideration that, if the term "adverse" were to be given its ordinary meaning, there would be practically no limitation of time on the institution of actions to redeem, for, as he argues, if the mortgagee enters without the consent of the mortgagor, he is a mere trespasser, his possession is unlawful, and

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he can be ousted in ejectment, and the action to redeem is unnecessary; or, if he enters with the consent of the mortgagor, he becomes a mortgagee in possession, and the statute never commences to run. I think the learned judge is somewhat in error in thinking that under the ordinary definition of the word "adverse" there can be no case to which the section applies. The mortgagee might enter with the consent of the mortgagor and thus become a mortgagee in possession. He might thereafter assume to convey the land as the absolute owner thereof. In that situation, the possession of the grantee of the mortgagee would be plainly adverse, or there might be such a repudiation by the mortgagee of his relation as such to the mortgagor as would set the statute running. The section would also apply to the cases of all lienors and encumbrancers. But whatever force there may be in the argument of the learned court, it cannot justify the unqualified elimination of the word "adverse" from the statute, yet this is precisely what the decision below has done. No suggestion of a possible interpretation of the word "adverse" is attempted. It is simply ignored. If the legislature intended that twenty years' possession as mortgagee merely should bar an action to redeem, it is difficult, if not impossible, to see why it required that such possession should be adverse. It may be unfortunate that so long a period should be permitted during which the title to land can be unsettled, but the remedy is with the legislature. The courts are not justified in disregarding its express enactment.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the final award of costs.

Gray, Edward T. Bartlett, Werner, Haight, Willard Bartlett, and Hiscock, JJ., concur.

Petition for rehearing denied.

TEXAS SUPREME COURT.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plff. in Err.,

v.

LILLIE M. WIMBERLY.

(— Tex. —, 112 S. W. 1038.)

Insurance — grace — computation — Sunday.

In computing the days of grace allowed in an insurance policy for payments after the date specified in the policy, in case such date falls on Sunday, so that, by law, payment can be made the following day, the time begins to run on Sunday, and not on the day following.

(October 28, 1908.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Milan County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Mr. **W. J. Moroney** for plaintiff in error.

Messrs. **J. M. Ralston** and **Moore & Moore** for defendant in error.

Brown, J., delivered the opinion of the court:

On the 1st day of October, 1904, the plaintiff in error issued to Garee A. Wimberly a life insurance policy in the sum

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Case Note. — Computation of days of grace allowed for payment of insurance premium or assessment, where date of payment or expiration of such period falls on Sunday or a holiday.

A search has disclosed no case in addition to ÆTNA L. INS. CO. v. WIMBERLY in which a question as to the computation of days of grace, where the date specified in the policy for the payment of the premium has fallen on Sunday or a holiday, has arisen, but in the following cases it has been held that where the last day of grace falls on Sunday, payment can be made on the Monday following.

Thus, in Campbell v. International Life Assur. Soc. 4 Bosw. 299, where the thirtieth and last day of grace on which a premium on a life insurance policy could be paid fell on Sunday, it was held that the insured was justified in deferring payment until the Monday following, and that such delay did not impair any right under, or work a forfeiture of, the policy.

And in Hammond v. American Mut. L. Ins. Co. 10 Gray, 306, where the life insurance policy sued upon provided that it was to terminate in case the premium should not be paid in advance, on or before the day at noon upon which it should become due, in holding that the payment could properly be postponed till Monday, without a forfeiture of the policy, where such payment fell due on Sunday, the court said: "The defendants had no office open on that day [Sunday], and were under no obligation to receive the payment of the premium on that day if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act,

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of $1,000 payable at his death to his wife, Lillie M. Wimberly. The policy provided that the premiums should be paid annually in advance on the 1st day of October, at or before 5 o'clock, and the first premium was paid upon the issuance of the policy. The policy contained this provision: "Policies cease in accordance with their terms if the premiums are not paid on or before the day stipulated therein for such payment, except that a grace of thirty days is allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken." The 1st day of October, 1905, was Sunday, and the premium which fell due on that day was never paid by the deceased, who died on November 1st of that year. The plaintiff in error contends that the thirty days of grace expired with the 31st day of October, while counsel for defendant in error contends that the thirty days of grace began at the expiration of the 2d day of October and embraced all of the 1st day of November. If there had been no provision for days of grace in the policy, the assured would have had the right to pay the premium on the 2d day of October,—Monday. This proposition of law is not disputed by the plaintiff in error. It is claimed by counsel for the defendant in error that because the day of payment fell upon Sunday, and the assured had the right to pay the premium on Monday, that made Monday the day of maturity, just as if it had been named in the policy, and that the thirty days of grace ran from that day. If the plaintiff in error's contention is correct, it determines this case, and it will be unnecessary for us to pursue the investigation of the other questions presented.

The 1st day of October in the year 1905 being Sunday, if the days of grace had not been allowed by the contract, the assured would have had the right to pay the premium on the following Monday, because the law does not require payment to be made on Sunday. It is contended by the defendant in error, and so held by the honorable court of civil appeals, that this constituted Monday the day for the payment of the premium, and that the thirty days which the contract allowed for the payment of that premium commenced to run at the close of Monday, instead of at the close of Sunday, and therefore the 1st day of November was within the thirty-day limit for the payment of the premium. We are of opinion that the fact that the law granted to the assured the right to pay on Monday did not have the effect to add a day to the thirty days allowed by the contract. The contract prescribes that the premium shall be due on October 1st, but the policy would not be forfeited if paid within thirty days thereafter. The construction placed upon the contract by the court of civil appeals

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but also one which the other party was not bound to recognize."

In Holbrook Bros. v. Mill Owners' Mut. Ins. Co. 86 Iowa, 255, 53 N. W. 229, under a statute providing that, in computing time where the last day on which an act is to be performed falls on Sunday, the time prescribed shall be extended so as to include the whole of the following Monday, it was held that a payment on Monday satisfied the articles of incorporation of the insurance company, which required the payment of assessments within thirty days from the time the notices of assessments were mailed, the thirtieth day having fallen upon Sunday.

But in National Mut. Ben. Asso. v. Miller, 85 Ky. 88, 2 S. W. 900, where the thirty days of grace after notice of assessment, during which the charter of the association allowed assessments to be paid, fell on Thanksgiving day, it was held that a failure to make the payment on such day forfeited the policy, as insured was not entitled to an additional day. This decision, however, is under a statute in regard to holidays which "makes all days appointed by the President of the United States, or by the governor of the commonwealth, as days of fasting or thanksgiving, holidays, on which all the public offices of this commonwealth may be closed, and shall be treated and considered as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, placed by law upon the footing of bills of exchange," and which provided that, if any of such days named "as holidays shall occur on Sunday, the next day thereafter shall be observed as holiday, but bills of exchange or other paper may be presented for payment or acceptance on the Saturday preceding such holiday, and proceeded on accordingly;" and therefore is in full accord with the foregoing cases, as the court expressly placed the decision upon the ground that there was nothing in the statute prohibiting business transactions on Thanksgiving day or treating that day as a Christian Sabbath, except as to commercial paper, thus impliedly holding that a different result would attend had the day upon which the period for payment of the assessment expired fallen on a Sunday.

As to the rule as to the first and last days in computation of time in general, see subject note to Halbert v. San Saba Springs Land & Live Stock Asso. 49 L.R.A. 193, and case note to State v. Elson, 15 L.R.A.(N.S.) 686.

As to extension of time in general when last day falls on Sunday, see note to Brown v. Vailes, 14 L.R.A. 120.

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would give to the assured thirty-one days from the 1st day of October, instead of thirty, as expressed in the contract. Wooley v. Clements, 11 Ala. 220. In the case cited suit was upon a note to which the law gave three days of grace. The note fell due on Sunday, and was protested on Wednesday. It was contended, as in this case, that the days of grace began to run at midnight of Monday, and that the note was not protestable until Thursday; but the court held that the days of grace were not enlarged by the fact that the note matured on Sunday.

The rule for computation of time under a state of facts like those set out in this case is well settled to be that the day on which an act is to be performed is to be excluded in determining the time when some other thing is to be done thereafter, and that the last day of the time given for the performance of the latter act is to be included in the computation. Hill v. Kerr, 78 Tex. 217, 14 S. W. 566; Lubbock v. Cook, 49 Tex. 100. Applying this rule to the facts of this case, the thirty' days grace allowed by the policy of insurance began to run at midnight of Sunday, October 1st, and terminated at midnight of the 31st day of that month, which gave thirty full days from the day on which the payment was expressed to be made, and fulfilled every provision of the contract between the parties. It follows that since Wimberly did not pay the premium at all, and died after the expiration of the time allowed within which to make the payment, the policy was forfeited before his death, and there was no right of recovery as against the insurance company.

It is unnecessary to discuss the other questions which are raised, and it is hereby ordered that the judgments of the Court of Civil Appeals and District Court be reversed, and that judgment be here rendered that the defendant in error take nothing by the suit, and that the insurance company go hence without day, and recover of the defendant in error all costs of this proceeding.

TEXAS COURT OF CRIMINAL APPEALS.

EUGENE HARTNETT, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. App. —, 119 S. W. 855.)

Officer — embezzlement — duty.

1. A police officer assigned to the position of jailer cannot be convicted under a statute providing that if an officer shall convert to his own use money belonging to the county that may come into his custody by virtue of his office, he shall be punished, where he appropriates to his own use money collected from prisoners as fines, if the statute imposes the duty of collecting such fines upon another officer.

Same — estoppel.

2. That one in collecting fines assumes to do so by color of his office does not estop him from denying his authority to do so, in defense of a prosecution against him under a statute providing for punishment of an officer who appropriates to his own use money belonging to the county that has come into his possession by virtue of his office.

Appeal — criminal cause — dismissal.

3. A prosecution under an indictment charging an offense cannot be dismissed by the appellate court because the facts do not support the conviction.

(May 26, 1909.)

Case Note. — May estoppel to deny authority to receive money alleged to have been embezzled be invoked against public officer charged with embezzlement.

As to embezzlement by persons other than bailees or public officers, as affected by want of authority to receive the money or property in the first instance, see note to Smith v. State, 17 L.R.A.(N.S.) 531.

Where officer exceeds his authority in receiving money.

There is a difference of opinion as to whether an officer who, without having actual authority to collect money, nevertheless, assuming to have such power, collects money and then converts it, can be punished for embezzlement as a public officer. Some cases hold that by his conduct he is estopped to deny that he has such power.

Thus, the treasurer of an association who received in its name and in its behalf, from the governor of the state, certain money which had been voted by Congress to the association, and sent to the governor, is estopped, in a prosecution for embezzling the money, to assert that the association was not entitled to the money, or that he was not authorized to receive it as treasurer, because it should have been transmitted to the state treasurer and thence by him directly to the defendant, the treasurer of the association. People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

So, it was held in People v. Robertson, 6 Cal. App. 514, 92 Pac. 498, that, admitting that a deputy assessor acted irregularly in receiving from a mining company a part only of the taxes due from it, he was estopped, in a prosecution for embezzling the money, from denying his authority to receive it, or that he acted as agent of the county in the transaction.

And in State v. Spaulding, 24 Kan. 1,—a

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APPEAL by defendant from a judgment of the District Court for Jefferson County convicting him of embezzlement. Reversed.

The facts are stated in the opinion.

Messrs. **F. J. Duff** and **Robert A. John** for appellant.

Mr. **F. J. McCord** for the State.

Ramsey, J., delivered the opinion of the court:

The charging part of the indictment against appellant is in these words: "That Eugene Hartnett, on or about the 3d day of March, one thousand nine hundred and eight (1908), and anterior to the presentment of this indictment, in the county of Jefferson and state of Texas, Eugene Hartnett was then and there a police officer of the incorporated city of Beaumont, which said city was then and there duly and legally incorporated under the laws of Texas, and was then and there acting and serving as such police officer, and as such police officer and by virtue of his said office there had come into his hands and was in his charge, custody, and possession the sum of two hundred and eighty-one dollars and fifty cents, lawful and current money of the United States of America, and of the value of two hundred and eighty-one dollars and fifty cents, a better description of which said money is to the grand jurors unknown, which said money was then and there the property of said incorporated city of Beaumont, and

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leading case on the question of estoppel,—a conviction of a city clerk for embezzling money received by him for a license was sustained on the ground of estoppel, notwithstanding that under the ordinances it was his duty to issue the license upon production by the licensee of the receipt of the city treasurer showing that the license money had been paid; it appearing that for years it had been the custom, known to the mayor, council, and other city officers, for the licensee to pay the money directly to the clerk, who would thereafter hand it to the treasurer, it not appearing that the city had ever disavowed such assumed authority, or made any effort to recollect license moneys. Brewer, J., remarked that "one who is agent enough to receive money is agent enough to be punished for embezzling it."

So, under a statute providing that if a clerk to any body corporate shall fraudulently embezzle any money delivered to or received or taken into possession by him for and in the name or on account of his master or employment, he shall be deemed to have feloniously stolen it, it is not necessary to show that he had received the money "by virtue of his employment," nor that he had authority to receive it; but it is sufficient if it was received in the name or on account of the master or employer. Denton v. State, 77 Md. 527, 26 Atl. 1022.

But the contrary doctrine is held in many, perhaps most, of the cases, which are set out below.

Thus United States v. Smith, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595, holds that a clerk of a collector of customs is not by statute charged with the safe-keeping of the public moneys, and therefore cannot be guilty of embezzling the same.

So, a sheriff forbidden by law to collect taxes on unlisted property cannot be convicted of embezzling money so collected, as property belonging to or for the use of the state or any county, since, under the statute, to warrant a conviction of embezzlement the officer must have been rightfully and legally in possession of the money, and must then have misappropriated it, whereas the sheriff in this case must be considered as holding the money in trust for the use of the persons from whom he received it. Com. v. Alexander, 33 Ky. L. Rep. 971, 112 S. W. 586.

A justice of the peace, having no legal right to the possession of public-school money, cannot be convicted of embezzling it, under a statute making punishable embezzlement, by any public officer, agent, or servant, of public money received by virtue of his office, agency, or service, or under color or pretense thereof. State v. Bolin, 110 Mo. 209, 19 S. W. 650.

So, an auditor of public accounts who receives fees in violation of the state Constitution, which forbids him to receive the same, and requires that they be paid in advance to the state treasurer, cannot be convicted of embezzling the same, under a statute providing: "If any officer or other person charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money, or any part thereof, belonging to the state, . . . shall convert to his own use . . . any portion of the public money . . . received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose . . . every such act shall be deemed and held in law to be an embezzlement." Moore v. State, 53 Neb. 831 74 N. W. 319.

So, a county auditor not being charged by law with possession and custody of money belonging to the state, an indictment charging him with converting money of the state which came into his possession by virtue of his office and in discharge thereof is bad, under a statute providing for the punishment of any officer or other person charged with collection, receipt, etc., of public money, who converts the same to his own use State v. Newton, 26 Ohio St. 265.

A similar decision with respect to a deputy county treasurer was rendered in State v Meyers, 56 Ohio St. 340, 47 N. E. 138.

The legal possession of money in the mint being in the Treasury Department, a clerk to the Treasurer of the mint cannot be convicted of embezzling the same, under a Federal statute applicable to "all officers and

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the said Eugene Hartnett did then and there unlawfully and fraudulently take, misapply, and convert to his own use the said money, against the peace and dignity of the state."

The indictment so returned against him and the prosecution which ensued, were based on article 103 of our Penal Code of 1895. This article is as follows: "If any officer of any county, city, or town in this state, or any clerk or other person employed by such officer, shall fraudulently take, misapply, or convert to his own use any money, property, or other thing of value, belonging to such county, city, or town, that may have come into his custody or possession by virtue of his office or employment, or shall secrete the same with intent to take, misapply, or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years."

Many questions were raised in the court below, which have also been urged in this court, as grounds for reversal of the judgment of conviction. We think the case must be reversed because under the uncontradicted evidence the conviction cannot stand for the reason the moneys appropriated must be public funds owned by the city, and must come into the possession of the officer by virtue of his office, and his duties must be defined by law, and cannot

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other persons charged by this act or any other act with safe-keeping, transfer, and disbursement of public moneys." The court said that the statute had "obvious reference to persons intrusted by some act of Congress with the legal possession of public moneys, not to those subordinates who, not having been intrusted with such possession, could be punished for a fraudulent conversion, as felons without any congressional legislation." United States v. Hutchinson, 4 Clark (Pa.) 211.

R. v. Orman, 36 Eng. L. & Eq. 611, held that a servant who had exceeded his written instructions in receiving money might nevertheless be convicted for embezzling the moneys, if he was employed *de facto* to receive the money; but when a storekeeper of a county jail, whose duties are defined by statute, wrongfully converts money which he is not allowed by law to receive, a conviction for embezzlement will be quashed.

Where officer is one *de facto* only.

Most of the cases hold that an officer accused of embezzlement cannot defend on the ground that he had no right to receive the money as officer for the reason that his appointment or election was invalid.

Thus, State v. Stone, 40 Iowa, 547, holds that if one holds himself out to be an officer, or acts as an officer *de facto*, he cannot be heard to object that he is not an officer *de jure*, because his acting in that office estops him to deny his right to it, even when indicted for embezzlement.

And People v. Sanders, 139 Mich. 442, 102 N. W. 959, held that a deputy of a township treasurer might be convicted for embezzling township funds, even though the treasurer had not lawfully appointed him, for the reason that he had not obtained the consent of his bondsmen, as required by law.

Bartley v. State, 53 Neb. 310, 73 N. W. 744, holds that a state treasurer who has served out his term cannot, when charged with embezzlement, defend on the ground that he never rightfully held the office; since it is immaterial whether he was an officer *de jure* or *de facto*.

Fortenberry v. State, 56 Miss. 286, held that one who had been duly elected to an office and had assumed its functions could be convicted of embezzlement, though he had not taken the oath of office.

State v. Heath, 8 Mo. App. 99, held that the relation of agent or servant, within the meaning of a statute making punishable any embezzlement of public moneys by any public officers, agents, and servants, "does not depend on the legal right of the appointing power to receive the money converted, or upon the legal right of the agent to collect it. The relation of trust and confidence between the alleged principal and agent, and a colorable right to appoint or employ the agent or servant, with the acceptance by the latter of the relation, are the essential elements." This case was reversed in 70 Mo. 565, but for a reason not affecting the above principle.

State v. Findley, 101 Mo. 217, 14 S. W. 185, held that it was not a defense to a county collector accused of embezzlement, that he failed to take the oath of office or give bond for the performance of his duties. The court said: "Being an officer *de facto* he cannot object that he is not an officer *de jure*."

State v. Mims, 26 Minn. 183, 2 N. W. 494, 683, held that the fact that a county treasurer did not give bonds as required by statute did not prevent his prosecution for embezzling public moneys collected by him as treasurer. The court said: "If he [defendant] assumed the right of making the collections as county treasurer, it does not lie with him, when called upon to account therefor to the state, to object that he had no legal right to do so.

R. v. Borrett, 6 Car. & P. 124, holds that on an indictment for embezzlement against a letter carrier charged as a person employed in the public service of his Majesty, it is not necessary to prove his appointment as a letter carrier, but evidence of his having acted as such is sufficient.

On the trial of a person for embezzling a letter containing a bill of exchange, he being at the time employed under the postoffice, it was held in R. v. Rees, 6 Car. & P. 606, suf-

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be created by custom or usage. The evidence, in brief, showed that appellant was a policeman in the city of Beaumont, and that he was assigned to the position of jailer, and that the moneys the embezzlement of which is charged herein came into his possession in payment of fines assessed (quite irregularly) against various defendants in the corporation court of Beaumont. There was absolutely no evidence in the record that by law he was authorized to receive such moneys. This authority by law was vested in the city marshal, and he was required to make payments monthly to the city treasurer. While it is possible that appellant might have been indicted and convicted as an employee of the marshal, it is certain that as here charged, where the conviction is sought by reason of misappropriation of funds received by him as an officer and by virtue of his office, under the authorities, a conviction cannot be sustained. This question is, we think, definitely settled beyond serious doubt by the decision of this court in the case of Warswick v. State, 36 Tex. Crim. Rep. 63, 35 S. W. 386. It was there held in substance that an indictment based upon article 103, Penal Code 1895, will not lie against a county judge for a misapplication or conversion of county school funds, because such funds cannot come into his hands by virtue of his office, and the law does not authorize a county judge, as such officer, to receive county school moneys. The suggestion is made, however, by Judge Henderson, that the court should not be understood as holding that the commissioners' court might not empower the county judge, or any other person, to receive money coming to the county for and on behalf of the county; but in such contingency the money or property would come to such person, not by virtue of his official capacity, but on account of his employment or agency.

A quite similar question came before the supreme court of Missouri and was decided in the case of State v. Bolin, 110 Mo. 209, 19 S. W. 650. Their statute is somewhat similar though rather broader than ours. It is as follows: "If any officer appointed or elected by virtue of the Constitution of this state, or any law thereof, including as well all officers, agents, and servants of incorporated cities and towns, or municipal townships or school districts, as of the state and counties thereof, shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall make way with or secrete any portion of the public moneys, or any valuable security by him received for safe-keeping, disbursement, transfer, or for any other purpose, or which may be in his possession, or over which he may have the supervision, care, or control by virtue of his office, agency, or service or under color or pretense thereof, every such officer, agent, or servant shall, upon conviction, be punished by imprisonment in the penitentiary not less than five years." Passing on this statute the supreme court of Missouri say: "No provision of the statute is pointed out or found, which directs or authorizes the public school money of the state or county to be placed in the possession or

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ficient to prove that such person acted in the service of the postoffice, and that it was not necessary to go into proof of his appointment.

But the contrary is held in a few cases.

Thus, in Wood v. State, 47 Ark. 488, 1 S. W. 709, a statute provided for punishing every officer, etc., "who has taken an oath of office, as required by law," etc., who should embezzle public funds. It was held that an indictment which failed to allege that defendant had taken an oath of office was fatally defective, though it alleged that he was the duly elected county treasurer, and received the money as such treasurer.

And State v. Flint, 62 Mo. 393, held that an indictment for embezzlement, which merely stated that defendant was the agent of the state and county, was properly quashed when it did not further allege when and how he was appointed and the authority for his appointment.

Estoppel of officer to deny right of public to money embezzled.

State v. Patterson, 66 Kan. 447, 71 Pac. 23 L.R.A.(N.S.) 860, was an action of embezzlement against a city treasurer for fraudulent conversion of moneys which came into his hands by virtue of his office. It was held to be no defense that he collected the money embezzled from persons engaged in unlawful traffic in intoxicating liquors in the city, under an arrangement between such persons and the city whereby immunity from prosecution was secured to them.

Estoppel of officer to deny right of individual to money embezzled.

State v. Williamson, 118 Mo. 146, 21 L.R.A. 827, 40 Am. St. Rep. 358, 23 S. W. 1054, held that an assignment of unearned salary by a public officer was contrary to public policy, and void, and hence he could not be convicted of embezzling it, although at the time of the assignment he had taken an appointment as agent of the assignee to collect it for the latter, and did collect it by virtue of such assignment, since he was not in fact an agent in collecting the money, the assignment being void.

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under the supervision, care, or control of a justice of the peace for safe-keeping, disbursement, transfer, or other purpose; and we are unable to see how he, as a public officer, can be guilty of embezzling funds which never came into his possession, under any authority of law, by virtue of his office. If he had no right to the possession or control of this public money as an officer, he would have no greater right when acting merely under color or pretense of office. We do not think the language of the statute, 'under color or pretense' of an office, can be construed to apply to an officer who, having in fact no right to the custody of public money, obtains the possession of it by falsely representing that he is entitled to its custody by virtue of his office. The statute was only intended to make one acting officially, under color of office only, equally liable for the misappropriation of the public money coming into his possession by virtue of his supposed official right to receive it, as he would have been had the title to his office been perfect."

The doctrine laid down in the Warswick Case, supra, was affirmed by the supreme court of Nebraska in the case of Moore v. State, 53 Neb. 831, 74 N. W. 319, where the matter is exhaustively considered. See also San Luis Obispo County v. Farnum, 108 Cal. 562, 41 Pac. 445. In the Moore Case the court say: "That where an officer receives money which he is not by law authorized to receive, such money is not received by him in his official capacity, and that any duty which he may owe of paying the money is only that which rests upon any debtor or bailee, is established by many cases."

It is suggested in the brief of our learned assistant attorney general that by the circumstances of this case appellant cannot defend on the ground that his acts were not within the limits of his legal authority, and the suggestion is made that appellant is estopped from denying the fact that his act was authorized. This position is not, we believe, sound. In the case of Moore v. State, supra, on this question the supreme court of Nebraska say: "Nor do we think that there is any principle of estoppel whereby the defendant is forbidden to deny that he is within the class against which the penalties of the statute are denounced. For the purposes of this case we need not inquire whether the same rules apply as to estoppel in civil and in criminal cases, or whether a man may ever be estopped to plead the law. The cases cited as applying estoppels are, for the most part, cases where an officer charged by law with the duty of collecting taxes has actually collected them, and then refused to turn them over because illegally levied. There the general duty of collecting the money was imposed by law on the officer. The money was paid. The legality of the tax was a question solely between the public and the taxpayer, and, the latter having voluntarily paid the tax, it was no affair of the collector whether he might have resisted the payment or not. The matter was not one of an estoppel. The issue was merely immaterial. No one could defend a charge of embezzlement as the agent of an individual, on the ground that a third person had paid money which he did not owe and could not have been compelled to pay; but there is a multitude of cases holding that he may defend if he had no authority to receive payment at all. Akin to these cases are those where a foreign corporation is prohibited from doing business except on compliance with certain requirements, and an agent embezzles its funds, and alleges in defense that the principal had no right to make the contracts leading to the collection of the money. This is really a case of an immaterial issue, or, if it be one of estoppel, it is an estoppel to deny the facts giving the principal a right to do business. Where a criminal statute applies only to persons of a certain class, the doing of the acts which the statute forbids does not estop the defendant from denying that he belongs to the class which is alone subjected to the penalties. Yet that is at the last analysis the argument of the state on this branch."

This case is, as we believe, readily distinguishable from the ruling of our supreme court in the case of State v. Brooks, 42 Tex. 62, upon which our assistant attorney general so much relies. It was there held, and correctly, that a deputy sheriff is an officer authorized to collect taxes, and as such is liable to indictment for embezzling money collected by him as taxes. The statute at the time of the prosecution of the case against Brooks was as follows: "If any officer of the government who is by law a receiver or depositary of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take or misapply or convert to his own use any part of such public money, or secrete the same with intent to take, misapply, or convert to his own use, or shall pay or deliver the same to any person, knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years." The indictment charged Brooks in the language of the statute. Exceptions were

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presented to the indictment, alleging its insufficiency because, among other reasons, Brooks was not shown to be such an officer of the government as was included in the terms of the statute defining and punishing embezzlement. This motion prevailed in the court below, and an appeal was prosecuted, as was then allowed, by the state to test the sufficiency of the indictment. The argument was made that the deputy sheriff is appointed by the sheriff, and gives bond to him, and not to the state; that the sheriff, on the other hand, is designated by the Constitution and the law as the person to collect taxes; and that the deputy sheriff did not bear such relation to the matter as constituted him under the law an officer charged with this duty. It was held, as stated above, that he was such an officer; and the court called attention to the fact that by law the sheriff was authorized to make appointments of deputies, and that the statute authorizing such appointments provided that every deputy shall have the like authority in regard to collecting taxes, within that portion of the county which may have been alloted to him, which the sheriff would have. Pasch. Dig. art. 7615. It was also pointed out that the statute requires the deputy to take the same oath as required by the sheriff faithfully to discharge the duties required of him (Pasch. Dig. arts. 7608, 7615), and that in case of disability, death, or removal of the sheriff the deputies are required to proceed in the collection of taxes until the vacancy is filled Pasch. Dig. 7616). It was said: "In various other sections of the law the deputy is recognized as authorized to collect taxes. Pasch. Dig. arts. 7619–7621." It was held that "it is clear that the deputy sheriff has both the actual and legal possession of the taxes which he collects, and is not subject to indictment for theft." In that case it will be observed that the duties of the deputy sheriff were defined and fixed by law. He was authorized to collect taxes, and, in the absence or during the disability of the sheriff, was charged with the duty of so doing. In a sense he took the place of and acted instead of his principal, clothed with his duties and charged with his responsibilities, and this as a matter of statute. These elements are conspicuously wanting in this case, where no ordinance clothed appellant with the authority or placed upon him the responsibility of receiving and collecting fines.

The indictment charges an offense. It follows the language of the statute. As we believe, however, under the law, the facts do not support a conviction. In this attitude of the record, and in view of the fact that the indictment does charge an offense against the law, it results that the prosecution cannot be dismissed; but the judgment of conviction is reversed, and the cause remanded for proceedings in accordance with this opinion.

Brooks, J., absent.

VERMONT SUPREME COURT.

STATE BOARD OF HEALTH
v.
VILLAGE OF ST. JOHNSBURY et al., Appts.

(— Vt. —, 73 Atl. 581.)

Action — parties — municipal clerk.

1. The clerk of a municipal corporation is not a proper party to a bill by the state board of health to enforce an order prohibiting the furnishing and use of the municipal water supply for domestic purposes, where he is a mere recording, and not an administrative, officer.

Costs — against state board.

2. Costs should not be awarded against a state board of health upon dismissal of the bill against one improperly made a party to a suit to enforce its order.

Action — parties — municipal trustees.

3. Trustees of a municipality, who have the management and control of its affairs, are proper parties to a bill by the state board of health to enforce its order against

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Case Note. — Power of state or health authorities to forbid the use of a polluted water supply.

The few cases disclosed by an extended search, in which the question involved is discussed, are, like STATE BD. OF HEALTH v. ST. JOHNSBURY, based on the fundamental principle of government that the state may require the individual to use his property so that the public health and safety shall be best conserved, and that interference with personal liberty is excusable when reasonably necessary for the protection of the public health, provided the means used and the extent of the interference are reasonably necessary to accomplish that purpose.

Thus, in Com. ex rel. McCormick v. Russell, 172 Pa. 506, 33 Atl. 709, in which a bill was filed by the state, on the relation of a water company, to restrain defendants from polluting a stream above the point where the water company took its supply, the trial court, after finding that the water was wholly unfit for domestic uses or for steam, ordered the company to furnish pure water and granted an injunction against the collection of water rates until pure water should be furnished, but held that relief against the pollution could not be had. In reversing that decree, on the ground that

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the furnishing and use of the municipal water supply for domestic purposes.

Same — water supply.

4. A village which owns a system of water supply is a proper party to a bill by the state board of health to enforce its order forbidding the furnishing of the supply for domestic purposes.

Water supply — forbidden use — personal liberty.

5. The constitutional right of a citizen to personal liberty is not infringed by an order of the state board of health forbidding him to make use, for drinking purposes, of a polluted water supply.

Action — enforcement of administrative order — hearing.

6. Statutory permission to the court to enforce an order of the state board of health forbidding use of a polluted water supply does not make the order conclusive so as to deprive persons affected thereby of a right to a hearing before the court.

Administrative order — contempt — enforcement.

7. That no method is provided for enforcing an order of a state board of health will not prevent its enforcement by the court, if its order might be of such a character that enforcement of it would result in the enforcement of that of the state board.

Process — service — municipality — trustees.

8. Notice of an order to be obeyed by a municipality served upon its trustees is sufficient notice to it.

(July 2, 1909.)

APPEAL by defendants from a judgment of the Chancery Court for Caledonia County enforcing an order of the State Board of Health forbidding the use of a certain polluted water supply. Reversed.

The facts are stated in the opinion.

Messrs. **Harry Blodgett** and **Elisha May**, for appellants:

If notice and hearing are essential, they must be required by law.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Taunton v. Taylor, 116 Mass. 254; Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783; Weil v. Ricord, 24 N. J. Eq. 169; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Mulligan v. Smith, 59 Cal. 206; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Health Depart. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; McGehee, Due Process of Law, p. 82.

Notice must be given to the parties interested and an opportunity afforded for a full and impartial hearing.

Brown v. Denver, 7 Colo. 305, 3 Pac.

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the water company was entitled to have its source of water supply protected, the supreme court, in discussing the status of the public as regards the right of the state to regulate a public use such as the furnishing of water to the public, said that the state, in the exercise of its police power, through the exercise of which it asserts its right to inquire into the sufficiency and good faith with which a public use is served, and to correct, through the courts, any defects or abuse in the conduct of the business of gathering or distributing the supply or of securing a quality of the commodity furnished that is suitable for use, could investigate the sufficiency and quality of the water supply, and require the company to meet fairly the public use it had undertaken to serve, or cease to collect charges therefor, and that it could require the company to be diligent in its efforts to procure a sufficient supply of pure water, if it could be had from sources reasonably accessible to its plant, since the existence of civilized society requires that other interests than those of the individual should be reckoned with, and that each person must be held to have surrendered such of his natural rights to civil liberty as could not be asserted consistently with due respect to the rights of others and the public; but that the state could not require the company to relocate its plant or seek a new supply, to reach which would involve an expense greater than its entire capital stock. 23 L.R.A. (N.S.)

In the somewhat analogous case of State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307, it was held that a city ordinance having for its object the prevention of the use of unwholesome well water in the making of bread for public distribution and consumption could validly require, as a means to that end, the filling up of all wells on premises where such bread was made, as an exercise of the extensive police power which had been delegated by the legislature.

And in Peffer v. Pennsylvania Water Co. 221 Pa. 578, 70 Atl. 870, where a bill was filed by certain consumers on behalf of themselves and others, against a water company, alleging that the water furnished was polluted and unfit for domestic use, a decree directing the company to provide a sufficient supply of reasonably pure and wholesome water, and allowing a reasonable time for compliance, was upheld.

The foregoing cases, while not involving the power of health authorities, fully support the result reached in the ST. JOHNSBURY CASE, wherein the board of health was acting under expressly delegated authority. It would seem, however, that the use of a polluted water supply could not, in the absence of such an express delegation of authority, be forbidden or regulated by a board of health or other local authorities, but would, because of constitutional objections, have to be regulated by the state directly.

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455; McGehee, Due Process of Law, p. 26; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697.

The limit put by the order of the orator on the use of the water for "domestic purposes" is in a legal sense a taking of the water.

Randolph, Em. Dom. § 116; Helfrich v. Catonsville Water Co. 74 Md. 269, 13 L.R.A. 117, 28 Am. St. Rep. 245, 22 Atl. 72.

The order is confiscatory in its result and should not be enforced.

Winthrop v. Farrar, 11 Allen, 398.

Mr. Robert W. Simonds, for appellee:

The act provides for notice by necessary implication.

Paulson v. Portland, 16 Or. 450, 1 L.R.A. 673, 19 Pac. 450, affirmed in 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; State Railroad Tax Cases, 92 U. S. 610, 23 L. ed. 672; Kentucky Railroad Tax Cases, 115 U. S. 332, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

The authority granted to the state board of health to forbid the furnishing and use for domestic purposes of all water so contaminated, unwholesome, and impure that its use for such domestic purposes is a menace and danger to the public health, is a legitimate exercise of the police power of the state, and is not subject to restraint by constitutional provisions for the general protection of the rights of individual life and property.

State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; Kennedy v. Board of Health, 2 Pa. St. 366.

Rowell, Ch. J., delivered the opinion of the court:

This is a bill in chancery brought by, and in the names and official capacity of, the persons composing the state board of health, against the village of St. Johnsbury and divers takers of water resident therein, for the enforcement of an order made by the board prohibiting the furnishing and the use of the village water for domestic purposes till such a time. The order was made and issued in July, 1906, and recited that the board found and was of the opinion that the water taken from the Passumpsic river at the point where the village was then taking it, and as supplied by it to the inhabitants thereof by its water system, was so contaminated, unwholesome, and impure that the use of it for domestic purposes endangered the public health; and it prohibited the drawing and the use thereof for said purposes until, in the opinion of the board, the danger ceased. But it expressly permitted the drawing and use for laundry purposes, flushing water-closets, sprinkling lawns, and streets, watering gardens, and for stable purposes. The order was served on the trustees of the village, but not on the village itself, on the school directors and 134 takers, a large number of whom obeyed it, but many did not, and they are defendants. After the bill was brought, the village itself, its newly elected trustees, and its clerk were made defendants. The statute under which the order was made gave the board the general oversight and care of all waters, streams, and ponds used by any cities, towns, villages, or public institutions, or by any water or ice companies in this state as sources of water supply, and of all springs, streams, and water courses tributary thereto; and authorized the board to prohibit any town, city, village, public institution, individual, or water or ice company from using water or ice from any given source whenever, in its opinion, the same was so contaminated, unwholesome, or impure that the use thereof endangered the public health. The statute as it was when the bill was brought, and as it now is, provides that the court of chancery "may" on application therefor by the board enforce any order, rule, or regulation that the board may make under and by virtue thereof. P. S. 5496.

The defendant Elisha May demurs to the bill for that under its allegations the board has no authority to maintain the bill in its own name; that the statute does not provide for notice of a hearing by the board, nor for notice of any action by it to condemn the water; and that it does not allege that any notice was given in these respects. The village, its three trustees who were made defendants after the bill was brought, and Preston E. May, its clerk, jointly demur for want of equity, and because the bill does not charge them nor any of them with any shortcomings nor wrongdoings, nor contain any prayer for relief against them, and because said May is not a proper party. They further demur for substantially the same causes assigned in the demurrer of the defendant Elisha May. The bill discloses no reason for making Preston E. May a party defendant, except that he is clerk. But that is no reason, for he is a mere recording officer, and not an administrative officer. The bill should be dismissed as to him, but without costs, for the orators are acting in their official capacity as state officers, and to make them pay costs would be making the

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state pay costs, which it does not do in cases distinctively of public concern certainly. But the trustees are proper parties, though not charged with anything amiss, for the bill alleges that they have the management and control of the affairs of the village, including the water system, subject to the ultimate control of the village, and therefore they can be decreed against in their official capacity if need be. North Troy Graded School Dist. v. Troy, 80 Vt. 24, 66 Atl. 1033. And the village is, of course, a proper, if not a necessary, party, for it owns the water system in question. It is objected that the bill should have been brought by the state, and not by the board. But we construe the statute to mean that it may be brought by the board.

It is further objected that the prohibition authorized by the statute must be absolute, and not limited; that no order could lawfully be made by the board in restraint of the personal liberty of the citizen, for, if water was furnished by the village in its mains and taken into the houses, the board had no authority to punish those who used it for domestic purposes; that the owners of the houses had the right to drink it, and their tenants had the same right, even though forbidden by them; that the order cannot be enforced against either, nor can either be dealt with by the court for contempt; that the board could, at most, only stop the village from pumping water into its mains, but that the court cannot effectually enforce the order, even if binding, without notice or opportunity to be heard, nor make the order prayed for until it has heard all the matters in issue; and that the bill does not present any issue that the defendants can answer, and demand a trial *de novo* as to the fitness of the water for domestic purposes. As to personal liberty, our Bill of Rights declares that government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community. Closely allied to this fundamental proposition is the further declaration that the people of the state, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the state. This right the state did not surrender when it became a member of the Union, but retains it still; and that right, to say the least, embraces such reasonable rules and regulations, established directly by legislative enactment, as will protect the public health and the public safety. And the state may invest local or state boards created for administrative purposes with authority in some proper way to safeguard the public health and the public safety. The way in which these results are to be accomplished is within the discretion of the state, provided the powers and functions of the general government are not thereby infringed, nor any constitutional provision of the state nor the United States.

We come now to consider more especially what personal liberty is, as secured by constitutional provision; and on this question we refer to Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, which affirms the legality of compulsory vaccination for the prevention of smallpox. There the plaintiff in error insisted that his liberty was invaded when the commonwealth subjected him to fine and imprisonment for refusing to submit to vaccination; that the compulsory vaccination law was unreasonable, arbitrary, and oppressive, and therefore hostile to the inherent right of every free man to care for his own body and health in such way as to him seemed best; and that the execution of such a law was nothing short of an assault upon his person. But the court said that the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances wholly free from restraint; that there are manifold restraints to which every person is necessarily subject for the common good; that on any other basis organized society could not exist with safety to its members; that society based on the principle that every man is a law unto himself would soon be confronted with disorder and anarchy; that real liberty could not exist under the operation of a principle that recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that might be done to others; that that court had more than once recognized it as a fundamental principle, that persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the legislature to do which no question was ever raised, nor on general principles ever can be raised, as far as natural persons are concerned. It is said in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, that the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing author-

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ity essential to the safety, health, peace, good order, and morals of the community; that even liberty itself, the greatest of all rights, is not unrestrained license to act according to one's own will; that it is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others, and is, therefore, liberty regulated by law. And this court said in Lawrence v. Rutland R. Co. 80 Vt. 370, 383, 15 L.R.A.(N.S.) 350, 67 Atl. 1091, 13 A. & E. Ann. Cas. 475, concerning the right to contract, that it is not an absolute right, but subject, on general principles, to such reasonable restraint as the public good requires; that it is the general right to acquire property and, by necessary implication, the general right to contract concerning it, that the Constitution protects; but that the protection does not make those rights absolute in all respects, for if it does, what becomes, the court asks, of the police power, which inheres in every free government, and is based on the maxim that you shall so use your own property as not to injure the rights of others, which is a universal and pervading obligation, and a condition on which all property is held, the application of which to particular conditions must necessarily be within the reasonable discretion of the legislature; and that, when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection.

It is to be noted that the demurrer admits the truth of the allegation of the bill that many analyses of the water showed it to be contaminated, unwholesome, and impure, and of such a character and quality that its use for domestic purposes was a menace and a danger to the public health. If the mode adopted by the state for the protection of the public health and safety of its local communities proves to be objectionable, inconvenient, or even distressing, to some, if nothing more can reasonably be affirmed against the statute, the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare and safety of the many, and not to permit their interests to be subordinated to the wishes nor the convenience of the few. But there is, of course, as said in the Jacobson Case, a sphere within which the individual may assert the supremacy of his own will, and rightfully deny the authority of the government to interfere with its exercise. It is equally true, however, that, in every case where the constituted authorities are charged with the duty of conserving the welfare and safety of the general public, the rights of the individual in respect of his liberty may at times, under the pressure of great danger, be subjected to such restraint; to be enforced by reasonable rules and regulation, as the safety of the general public may demand. And it is not for the courts to determine as to the mode likely to be most effective to protect the public against disease, unless that which the legislature has done comes within the rule that, if a statute purporting to have been enacted for the protection of the public health, the public safety, or the public morals, has no just relation to those objects, or is unquestionably a plain, palpable invasion of constitutional rights, it is the duty of courts so to adjudge, and thereby give effect to the Constitution. But the statute under consideration cannot be said to be palpably in conflict with the Constitution, state or Federal; nor can it be confidently asserted that the means prescribed by it have no just relation to the protection of the public health and the public safety. It must be held, therefore, as the case is presented, that the board has authority, if properly exercised, to restrain the defendants as it did.

But it is said that it did not properly exercise its authority in this behalf, for that its proceedings lack due process of law, in that no notice of its proposed action was given nor opportunity to be heard afforded. The defendants do not claim, as we understand their brief, and could not well claim, that notice and an opportunity to be heard before the board were essential to due process of law, unless the order is final; but they claim that it is the intention of the statute to make it final and conclusive, and to give the court no authority to inquire into its correctness, but only to enforce it. But the statute does not mean that. It says that the court "may" enforce the order. This evidently means, not that it must enforce it as a duty, but only that it may enforce it or not in its discretion, to the proper exercise of which it must proceed on inquiry, and render judgment only after trial. So the order is not final and conclusive, and the bill presents an issue that the defendants can answer and they may answer, and have a trial on the merits, as agreed by counsel.

The objection that the order cannot be enforced if valid is not sustainable, for, if the court thinks it ought to be enforced, an order of its own will supervene upon it, and be of such a character that its enforcement will enforce the order of the board.

It is further objected in a supplemental brief that the order of the board is not against the village, that notice of it

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was never served upon the village, and that consequently it cannot be enforced against the village. But notice of it was served upon the trustees of the village, and that was notice to the village, as they were its chief executive officers. Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132. So notice to the president of a bank concerning matters within the sphere of his official authority is notice to the bank. Porter v. Bark of Rutland, 19 Vt. 410, 425. And the language of the order clearly embraces the village. It is: "You are hereby prohibited from furnishing, or permitting to be furnished, any water taken from the above-described water source for domestic purposes in any way, until," etc.,—and the village was the only furnisher of water from that source for any purpose.

Decree reversed as to Preston E. May, and bill dismissed as to him without costs. Decree reversed *pro forma* as to the other defendants. Cause remanded.

VIRGINIA SUPREME COURT OF APPEALS.

R. W. SHREVE, Plff. in Err.,
v.
NORFOLK & WESTERN RAILWAY COMPANY et al.

(109 Va. 706, 64 S. E. 972.)

Deed — condition subsequent — railroad depot.

A condition subsequent is not created by a recital in a deed to a railroad company that it is made in consideration of the company's agreement to erect and maintain a depot on the land conveyed, a breach of which will entitle the grantor to maintain ejectment, but merely an agreement or covenant on the part of the grantee.

(June 10, 1909.)

ERROR to the Circuit Court for Tazewell County to review a judgment in defendants' favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. **Greever & Gillespie**, for plaintiff in error:

In the construction of every instrument where the courts are asked to say whether the language used creates a covenant or a condition, the intention of the parties governs, regardless of justice or injustice, the language used being of minor importance.

Minard v. Delaware, L. & W. R. Co. 139 Fed. 60; Union Stockyards Co. v. Nashville Packing Co. 72 C. C. A. 195, 140 Fed. 701.

The recital in the deed created a condition subsequent.

Close v. Burlington, C. R. & N. R. Co. 64 Iowa, 149, 19 N. W. 886; Ecroyd v. Coggeshall, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260.

Messrs. **S. D. May** and **Henry & Graham**, for defendants in error:

The grant did not contain the condition subsequent that the grantee should erect and maintain a depot on the land conveyed.

King v. Norfolk & W. R. Co. 99 Va. 625, 39 S. E. 701; 4 Kent, Com. 129, 130; Lowman v. Crawford, 99 Va. 688, 40 S. E. 17; Alexandria & W. R. Co. v. Chew, 27 Gratt. 547; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; Carroll County

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Case Note. — When provision in conveyance for erection of building or other structure regarded as a condition subsequent.

The earlier cases on this specific subject are collected in a case note to Hawley v. Kafitz, 3 L.R.A.(N.S.) 741. A few decisions in point have been rendered since the preparation of that note.

The decision in Minard v. Delaware, L. & W. R. Co. 139 Fed. 60, cited in the earlier note, was affirmed by the circuit court of appeals (82 C. C. A. 586, 153 Fed. 578).

In Louisville, H. & St. L. R. Co. v. Baskett, 31 Ky. L. Rep. 1035, 104 S. W. 695, under the rule that a deed will not be construed to create an estate on condition subsequent unless language is used clearly indicating such a purpose, it was held that such a condition was not created by a deed to a railroad company which recited as a consideration the agreement of the railroad company to establish and maintain a station on the land in question.

But a condition subsequent was held in Hamel v. Minneapolis, St. P. & S. Ste. M. R. Co. 97 Minn. 334, 107 N. W. 139, to be created by a deed of a strip to a railroad company, the sole consideration for which was the condition incorporated therein, that, if the property "shall not be used for station purposes for the period of one year at any one time, the same and said first strip shall revert to and revert [*sic*] in the party of the first part."

And in McCue v. Barrett, 99 Minn. 352, 109 N. W. 594, a condition subsequent was held to be created by an agreement under seal in which the grantee, in consideration of the release and conveyance of the land for purposes of a private cartway, agreed for himself, his heirs, and assigns, to keep and maintain at his own expense forever a good and lawful fence on one line of the strip so conveyed, and to rebuild and repair the same when necessary.

Cases involving the question whether or not provisions with respect to the continued use of property for a particular purpose create a condition subsequent are not within the scope of these notes.

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of $1,000 payable at his death to his wife, Lillie M. Wimberly. The policy provided that the premiums should be paid annually in advance on the 1st day of October, at or before 5 o'clock, and the first premium was paid upon the issuance of the policy. The policy contained this provision: "Policies cease in accordance with their terms if the premiums are not paid on or before the day stipulated therein for such payment, except that a grace of thirty days is allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken." The 1st day of October, 1905, was Sunday, and the premium which fell due on that day was never paid by the deceased, who died on November 1st of that year. The plaintiff in error contends that the thirty days of grace expired with the 31st day of October, while counsel for defendant in error contends that the thirty days of grace began at the expiration of the 2d day of October and embraced all of the 1st day of November. If there had been no provision for days of grace in the policy, the assured would have had the right to pay the premium on the 2d day of October,—Monday. This proposition of law is not disputed by the plaintiff in error. It is claimed by counsel for the defendant in error that because the day of payment fell upon Sunday, and the assured had the right to pay the premium on Monday, that made Monday the day of maturity, just as if it had been named in the policy, and that the thirty days of grace ran from that day. If the plaintiff in error's contention is correct, it determines this case, and it will be unnecessary for us to pursue the investigation of the other questions presented.

The 1st day of October in the year 1905 being Sunday, if the days of grace had not been allowed by the contract, the assured would have had the right to pay the premium on the following Monday, because the law does not require payment to be made on Sunday. It is contended by the defendant in error, and so held by the honorable court of civil appeals, that this constituted Monday the day for the payment of the premium, and that the thirty days which the contract allowed for the payment of that premium commenced to run at the close of Monday, instead of at the close of Sunday, and therefore the 1st day of November was within the thirty-day limit for the payment of the premium. We are of opinion that the fact that the law granted to the assured the right to pay on Monday did not have the effect to add a day to the thirty days allowed by the contract. The contract prescribes that the premium shall be due on October 1st, but the policy would not be forfeited if paid within thirty days thereafter. The construction placed upon the contract by the court of civil appeals

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but also one which the other party was not bound to recognize."

In Holbrook Bros. v. Mill Owners' Mut. Ins. Co. 86 Iowa, 255, 53 N. W. 229, under a statute providing that, in computing time where the last day on which an act is to be performed falls on Sunday, the time prescribed shall be extended so as to include the whole of the following Monday, it was held that a payment on Monday satisfied the articles of incorporation of the insurance company, which required the payment of assessments within thirty days from the time the notices of assessments were mailed, the thirtieth day having fallen upon Sunday.

But in National Mut. Ben. Asso. v. Miller, 85 Ky. 88, 2 S. W. 900, where the thirty days of grace after notice of assessment, during which the charter of the association allowed assessments to be paid, fell on Thanksgiving day, it was held that a failure to make the payment on such day forfeited the policy, as insured was not entitled to an additional day. This decision, however, is under a statute in regard to holidays which "makes all days appointed by the President of the United States, or by the governor of the commonwealth, as days of fasting or thanksgiving, holidays, on which all the public offices of this commonwealth may be closed, and shall be treated and considered as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, placed by law upon the footing of bills of exchange," and which provided that, if any of such days named "as holidays shall occur on Sunday, the next day thereafter shall be observed as holiday, but bills of exchange or other paper may be presented for payment or acceptance on the Saturday preceding such holiday, and proceeded on accordingly;" and therefore is in full accord with the foregoing cases, as the court expressly placed the decision upon the ground that there was nothing in the statute prohibiting business transactions on Thanksgiving day or treating that day as a Christian Sabbath, except as to commercial paper, thus impliedly holding that a different result would attend had the day upon which the period for payment of the assessment expired fallen on a Sunday.

As to the rule as to the first and last days in computation of time in general, see subject note to Halbert v. San Saba Springs Land & Live Stock Asso. 49 L.R.A. 193, and case note to State v. Elson, 15 L.R.A. (N.S.) 686.

As to extension of time in general when last day falls on Sunday, see note to Brown v. Vailes, 14 L.R.A. 120.

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would give to the assured thirty-one days from the 1st day of October, instead of thirty, as expressed in the contract. Wooley v. Clements, 11 Ala. 220. In the case cited suit was upon a note to which the law gave three days of grace. The note fell due on Sunday, and was protested on Wednesday. It was contended, as in this case, that the days of grace began to run at midnight of Monday, and that the note was not protestable until Thursday; but the court held that the days of grace were not enlarged by the fact that the note matured on Sunday.

The rule for computation of time under a state of facts like those set out in this case is well settled to be that the day on which an act is to be performed is to be excluded in determining the time when some other thing is to be done thereafter, and that the last day of the time given for the performance of the latter act is to be included in the computation. Hill v. Kerr, 78 Tex. 217, 14 S. W. 566; Lubbock v. Cook, 49 Tex. 100. Applying this rule to the facts of this case, the thirty' days grace allowed by the policy of insurance began to run at midnight of Sunday, October 1st, and terminated at midnight of the 31st day of that month, which gave thirty full days from the day on which the payment was expressed to be made, and fulfilled every provision of the contract between the parties. It follows that since Wimberly did not pay the premium at all, and died after the expiration of the time allowed within which to make the payment, the policy was forfeited before his death, and there was no right of recovery as against the insurance company.

It is unnecessary to discuss the other questions which are raised, and it is hereby ordered that the judgments of the Court of Civil Appeals and District Court be reversed, and that judgment be here rendered that the defendant in error take nothing by the suit, and that the insurance company go hence without day, and recover of the defendant in error all costs of this proceeding.

TEXAS COURT OF CRIMINAL APPEALS.

EUGENE HARTNETT, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. App. —, 119 S. W. 855.)

Officer — embezzlement — duty.

1. A police officer assigned to the position of jailer cannot be convicted under a statute providing that if an officer shall convert to his own use money belonging to the county that may come into his custody by virtue of his office, he shall be punished, where he appropriates to his own use money collected from prisoners as fines, if the statute imposes the duty of collecting such fines upon another officer.

Same — estoppel.

2. That one in collecting fines assumes to do so by color of his office does not estop him from denying his authority to do so, in defense of a prosecution against him under a statute providing for punishment of an officer who appropriates to his own use money belonging to the county that has come into his possession by virtue of his office.

Appeal — criminal cause — dismissal.

3. A prosecution under an indictment charging an offense cannot be dismissed by the appellate court because the facts do not support the conviction.

(May 26, 1909.)

Case Note. — May estoppel to deny authority to receive money alleged to have been embezzled be invoked against public officer charged with embezzlement.

As to embezzlement by persons other than bailees or public officers, as affected by want of authority to receive the money or property in the first instance, see note to Smith v. State, 17 L.R.A.(N.S.) 531.

Where officer exceeds his authority in receiving money.

There is a difference of opinion as to whether an officer who, without having actual authority to collect money, nevertheless, assuming to have such power, collects money and then converts it, can be punished for embezzlement as a public officer. Some cases hold that by his conduct he is estopped to deny that he has such power.

Thus, the treasurer of an association who received in its name and in its behalf, from the governor of the state, certain money which had been voted by Congress to the association, and sent to the governor, is estopped, in a prosecution for embezzling the money, to assert that the association was not entitled to the money, or that he was not authorized to receive it as treasurer, because it should have been transmitted to the state treasurer and thence by him directly to the defendant, the treasurer of the association. People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

So, it was held in People v. Robertson, 6 Cal. App. 514, 92 Pac. 498, that, admitting that a deputy assessor acted irregularly in receiving from a mining company a part only of the taxes due from it, he was estopped, in a prosecution for embezzling the money, from denying his authority to receive it, or that he acted as agent of the county in the transaction.

And in State v. Spaulding, 24 Kan. 1,—a

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Rep. 610, 57 S. E. 985, 5 A. & E. Ann. Cas. 118; Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416.

If a fraud is practised by the shipper upon a carrier by misleading the carrier as to the nature of the shipment, the contract of carriage is thereby made void, and the carrier will not be liable for the loss of the shipment; and neglect or failure to disclose the real value of a package and the nature of its contents is conduct amounting to a fraud upon the carrier.

Bottum v. Charleston & W. C. R. Co. and Savannah, F. & W. R. Co. v. Collins, supra; Hutchinson, Carr. 3d ed. § 330; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Charleston & S. R. Co. v. Moore, 80 Ga. 522, 5 S. E. 769; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

Jaggard, J., delivered the opinion of the court:

Plaintiff and appellant gave to the St. Louis Express Company, at St. Louis, Missouri, one sewing machine, crated, and one box, for delivery to the defendant at said St. Louis, to be by it transported over its lines and the lines of its connecting carrier or carriers to Minneapolis, Minnesota, and there delivered to a named consignee. The

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185, 83 Am. Dec. 89, the court said that if any fraud or unfair concealment of value is used, the carrier will not be responsible for any loss, and it will make the contract between them null and void; and this rule applies to all cases of concealment or suppression of facts, and to all false statements made by the shipper for the purpose of misleading the carrier.

And in Southern Exp. Co. v. Everett, 37 Ga. 688, it was held that if the shipper so conducted himself as to induce the carrier to regard a box as of but little value, or if he intentionally concealed from the carrier the true value of the contents of the box, for the purpose of depriving him of his lawful freight therefor, such concealment by the shipper is, in law, a fraud upon the carrier, and releases him from liability.

And the Everett Case was cited with approval and followed in Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436, where it was held that conduct upon the part of the shipper which amounted to a concealment of the true character of the contents of the package constituted such a legal fraud upon the carrier as would in law discharge it from all liability as a carrier. And to the same general effect was the decision in Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809.

So, in Chicago & A. R. Co. v. Thompson, 19 Ill. 578, it was held that by suppressing and concealing the fact that a box contained bank bills in such a way as to deceive the carrier as to the true contents of the box, the shipper committed a fraud upon the defendant and made the contract void, for there could be no action where the plaintiff practised fraud and deceit. And this case was cited and followed in American Exp. Co. v. Perkins, 42 Ill. 458, where it was held that a carrier was not liable for injury to a wreath consisting partially of glass, where the carrier was not informed of the true contents of the package. To the same general effect was the decision in Pennsylvania Co. v. Kenwood Bridge Co. 170 Ill. 645, 49 N. E. 215, where the carrier accepted certain bridge iron which was of greater height than it was represented to be by the bridge company, and consequently was broken while passing through a river bridge.

And in Houston & T. C. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, it was held that where the shipper of valuable articles practises a fraud on the carrier, either by his acts or omissions fraudulently concealing the value of the article shipped, the carrier is discharged. And to the same effect was the decision in Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312.

Where the carrier gave notice that he would not be liable beyond a specified value unless the package was received at its true value and paid for accordingly, it was held in Izett v. Mountain, 4 East, 370, that he was not liable for any loss where a package above the stated value had been shipped without notice of its true value being given. And to the same effect were the decisions in Marsh v. Horne, 5 Barn. & C. 322, and Clay v. Willan, 1 H. Bl. 298.

The same rule was followed in Bradley v. Waterhouse, 3 Car. & P. 318, where money was sent done up in a package of tea; in Gibbon v. Paynton, 4 Burr. 2298, where money was concealed in a bag of nails; in Batson v. Donovan, 4 Barn. & Ald. 21, where bank notes were sent done up in an ordinary parcel.

In Sewall v. Allen, 6 Wend. 335, it was held that a steamboat company which was not a common carrier of packages of bank bills was not liable for the loss of such a package, intrusted to the master of one of their boats, where it appeared that he had been forbidden by his employers to carry money, and that the usage was for persons sending money to compensate the masters.

In the following cases it was held that, under the particular facts presented, the carrier would be liable for the actual value of the goods, although the general rule was not expressly denied:

That goods of more value than designated are packed in a box will not release the carrier if the more valuable things are not lost. Hyde v. New York & N. O. S. S. Co. 17 La. Ann. 29.

A wrongful classification of goods by a

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box was delivered to the defendant, and accepted by it for such shipment, as containing books, was receipted for as books, and was billed and given the rate fixed by the published tariff of the defendant for transportation of books. That box, instead of containing books, only actually contained a few books and many miscellaneous articles of household goods and of personal effects. The aggregate value of said shipment, including said sewing machine and attachments, at the point of shipment, was $175. The value of the sewing machine and attachments was $50, and the value of the books in the box was $5. In said tariff, the articles in the box bore the classification of household goods and personal effects, and carried a rate of 94½ cents per hundredweight, instead of 63 cents per hundredweight, for books. The articles shipped were lost through what is, for present purposes, the admitted neglect of defendant. Neither the defendant nor any person or persons employed by or connected with it had, at any time before the same became lost and written claim was made by the plaintiff therefor, any knowledge, information, or belief that the said box contained anything more than books. The marking of said box as containing books was done by the said St. Louis Express Company, and without the knowledge of the said plaintiff, and without direction from him. The trial court found as a matter of fact "that plaintiff, through his agent, fraudulently misrepresented the contents of the package

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shipper, with a view to escape double rates, was held in Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27, not to disable plaintiffs to maintain an action for the conversion of the goods. But it was held that the defendant was entitled to receive such double rates, and to be credited therefor.

Where a contract containing a stipulation limiting the liability of the carrier was void under a statute, it was held in Lucas v. Burlington, C. R. & N. R. Co. 112 Iowa, 594, 84 N. W. 673, that, if fraud was practised by the plaintiff in order to secure a cheaper rate of freight, the defendant would not be bound by the rate given, but a void contract procured thereby could by no means lessen the carrier's liability.

No fraud or imposition can be predicated of the acts of a shipper in failing to disclose the contents of a package containing silver coin, where the very appearance of the package indicated that it was not merchandise, and it was addressed to well-known manufacturers of silver, and the carrier did not ask about the contents or value of the package. Gorham Mfg. Co. v. Fargo, 3 Jones & S. 434.

Where there is no agreement or contract as to any limitation on account of loss or damage by reason of any reduction of freight, it was held in Louisville & N. R. Co. v. Levi, 18 Ohio C. C. 873, that a mere statement that the value is less than the actual value will not relieve the carrier for any loss or injury due to its own negligence.

If the defendants knew that parties emigrating like the plaintiff were in the habit of packing up valuable articles and money among their household wares, and from such knowledge might infer that this box of the plaintiff's might contain money, it was held in Kuter v. Michigan C. R. Co. 1 Biss. 35, Fed. Cas. No. 7,955, that it was their duty to make inquiry in order to relieve themselves from liability.

Where there was no intention to impose upon the carrier, and it was not claimed that greater diligence would have been used or a larger rate charged if the true character of the goods had been known, it was held in Fassett v. Ruark, 3 La. Ann. 694, that the shipper might recover for the actual value of the goods lost.

Where the carrier did not inquire as to the value of the package and there was no fraud on the part of the shipper, the carrier is liable for the full amount of the loss. Levois v. Gale, 17 La. Ann. 302.

Where the plaintiff shipped certain negatives as "photo goods," and no inquiry or representation was made as to the value of the shipment, it was held in Southern P. R. Co. v. d'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813, that evidence that, if the true value of the goods had been known, the shipper would have been obliged to pay a higher rate of freight than he did, did not fairly raise an issue of fraud or concealment as to the character and value of the goods.

In Sleat v. Fagg, 5 Barn. & Ald. 342, it was held that the noncommunication of the contents of a package to the carrier, and the directing of it in such a way as to conceal its value, was not such a fraud as to relieve the carrier from liability for its loss, where the carrier sent it by another and more dangerous route than that by which it had contracted to send it. The court distinguished Batson v. Donovan, supra, upon the ground that, in the latter case, the loss was expressly due to the noncommunication of the value; for, had the actual value been made known, the carrier would have exercised greater care.

The question has arisen in a number of cases whether it is the duty of the shipper to reveal the value or the character of the goods; but the general rule is that, in the absence of any other acts on the part of the shipper, intended to deceive the carrier, mere silence as to character and value of the goods does not amount to fraud.

Thus, in New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531, it was held that, in the absence of inquiry on the part of the carrier, and in the absence of conduct on the part of the shipper misleading the carrier, the court could not, as a matter of law, declare that the mere failure of the shipper, unasked, to disclose the value of his goods, was a fraud upon the

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vantage of the president of the board, his relative and partners."

The gravamen of the charge is official favoritism, and misconduct to the prejudice of the university.

In the first place, the evidence does not show that a more favorable disposition of the property could have been made at that particular time. There is nothing to show that Dr. Kells, if given an option, would have purchased the property for $150,000, or that such a sum was preferable to an assured revenue of $10,000 per annum. A large majority of the members of the board testified on the trial of this case that the Nicholson offer was the best the board had ever received, and that they all rejoiced at the consummation of this lease. The testimony of a number of independent witnesses acquainted with the facts tends to show that, at that time, the Nicholson lease was considered a good bargain for the board and a poor investment for the lessees. The real estate agents of the board had endeavored in vain to lease on the same terms, and the board had never been offered more than $125,000 for the property. At the time there was no proposition pending save the application of Dr. Kells for an option, and there was no assurance that he would have exercised the option if it had been granted to him. The most that can be said on the undisputed facts of the case is that the board committed an error of judgment in not holding on to the property. The governor, who approved the lease, certainly considered the price and terms as fair to the university.

The record shows that Judge Fenner informed the board that his relative and partner, Mr. Henderson, had an interest in the lease. On the trial of the case the secretary and Judge Fenner testified that the latter also said that his son would have or probably have an interest in the lease. There was nothing in the statements of Judge Fenner to indicate to the board that their fellow member and presiding officer had any personal interest whatever in the transaction. A charge of favoritism to a particular individual necessarily implies actual knowledge of his interest in the subject-matter. Now, the evidence in the case is to the effect that Judge Fenner had no personal interest in the lease to Nicholson. That Judge Fenner and his wife subsequently acquired an interest in the subject-matter in no manner affects the bona fides of the members of the board who voted to accept the proposition made by Thomas Nicholson. The most that can be said on the evidence is that Judge Fenner, being the part owner of an office building across the street, had an interest in preventing the erection of a similar building on the Tulane property. There is no evidence that such collateral interest, if known to, influenced, any of the members of the board.

On the whole case, we are clearly of opinion that the plea of justification tendered by the defendants has not been sustained by the evidence.

The charge that the board has been guilty of maladministration in not seeking to annul said lease and to recover the property assumes the invalidity of the lease,—a question which cannot be determined in this suit for want of proper parties, if for no other reason. We express no opinion as to the validity of the lease. The question in this case relates to the motives of the members of the board, and not to the legality of the corporate action. The evidence fails to show that the members of the board acted from improper motives, as charged in the libel.

The Boston Herald retracted the offensive article and apologized. The defendants published the retraction, but have continued to affirm the truth of the charges made in said article.

Malice on the part of a publisher of statements selected from other journals that are injurious to the reputation or character of private individuals or public officials is conclusively inferred, if the communications are false in fact. Fitzpatrick v. Daily States Pub. Co. 48 La. Ann. 1135, 20 So. 173. The animus of the publisher affects only the question of damages; and, where no special damages are proven, plaintiff is entitled to such damages on account of injured feeling as must unavoidably be inferred from such a libel. Id.

The freedom of the press consists in the right to print without any previous license, but subject to responsibility therefor to the same extent that anyone else could be responsible for the publication. 25 Cyc. Law & Proc. p. 406.

The privilege of fair and reasonable criticism of public men does not embrace the right to publish false statements of fact, or to falsely impute to them malfeasance or misconduct in office. 25 Cyc. Law & Proc. pp. 402, 403.

That the plaintiff was not named, and that the defendants did not even know that he was a member of the board, is no legal excuse, but may be considered as a mitigating circumstance. The libel not only assailed the corporate action of the board, but impeached the integrity of every individual member who participated in the proceedings.

The wholesale charge of official favoritism and misconduct pointed to all the members of the board who participated in the proceedings. These gentlemen were citizens of more or less prominence in the community.

And their official connection with the Tu-

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lane University was well known. It is manifest that the plaintiff, although not named in the libelous publication, was necessarily one of its objects, and it must have been so understood by those who knew that he was a member of the board. 25 Cyc. Law & Proc. pp. 352, 362, 363.

The evidence shows no actual malice on the part of the defendant, and no special damages sustained by the plaintiff, but the latter is entitled, at least, to nominal damages.

Assuming that the plaintiff is seeking the vindication of his good name rather than to enrich himself at the expense of the defendants, we fix the damages in the sum of $50.

It is therefore ordered that the verdict and judgment below be reversed, and it is now ordered that the plaintiff, John B. Levert, do have and recover of the Daily States Publishing Company, Limited, W. C. Chevis, and Robert Ewing, *in solido*, the full sum of $50, with legal interest from this date, and costs of suit in both courts.

Breaux, Ch. J. I concur in the decree.

Monroe, J., recused.

MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE
v.
PANIEL KAPICSKI.

(— Me. —, 73 Atl. 830.)

Indictment — continuing offense — proof.

1. To secure a conviction under an indictment for maintaining a common nuisance in a place of resort where intoxicating liquors are dispensed between certain dates, it is not necessary for the state to show that the place was used for such purposes during the entire period named in the indictment.

Intoxicating liquor — social club — nuisance.

2. An unlicensed social club which distributes among its members, to be consumed upon the premises, intoxicating liquors from a stock which had been bought in common by them, is a common nuisance under a statute providing that all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided by law are common nuisances.

(February 10, 1909.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Androscoggin County, made during the trial of an indictment charging him with maintaining a common nuisance. Overruled.

The facts are stated in the opinion.

Mr. George S. McCarty, for defendant:

In order to find the defendant guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment had been habitually, commonly used for the purpose.

State v. O'Conner, 49 Me. 594; 2 Bishop, Crim. Law, § 59; Com. v. M'Culloch, 15 Mass. 227; Com. v. Tubbs, 1 Cush. 3; Com. v. Davis, 11 Pick. 432; State v. Stanley, 84 Me. 561, 24 Atl. 983; State v. McIntosh, 98 Me. 401, 57 Atl. 83.

Mr. Frank A. Morey for the State.

Whitehouse, J., delivered the opinion of the court:

This is an indictment against the defendant under § 1 of chapter 22 of the Revised Statutes, for maintaining a common nuisance from the 1st day of May, 1908, to the day of the finding of the indictment at the September term, 1908, of court in Androscoggin county. It is alleged that "the defendant kept and maintained a certain tenement as a place of resort where intoxicating liquors were unlawfully kept, sold, given away, drunk, and dispensed in a manner not provided for by law."

The defendant was one of 204 members of the St. Bartholomew Society, occupying the premises mentioned in the indictment. The society had occupied the premises from April, 1908, to the time of the trial of the case, in September. The premises consisted of one large lodge room, a billiard room, and a small "barroom," so called, in connection with the latter. The society itself was regularly organized, having a constitution and by-laws, and from the dues assessed to the members sick and death benefits were paid. The billiard room was open practically all of the time for the recreation of the members. The defendant claimed that the barroom was open three times each week, and that at these times cigars and nonintoxicating drinks were sold to the members; the profits of the sales being devoted to the payment of rent, lights, heat, and other expenses incident to the running of the rooms. A member of the society acted as janitor and keeper of the barroom, each in turn for two weeks, and without compensation.

Note. — The above case, with others, was cited in the case note to Manning v. Canon City, ante, 192, where a reference will be found to notes covering the prior cases upon the question of the applicability of liquor laws to social clubs dispensing intoxicating liquors to their members.

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The state introduced evidence tending to prove that, on two separate occasions during the time mentioned in the indictment, intoxicating liquors were sold upon the premises by the respondent. The first occasion was on the evening of August 29th, when the officers, looking through a window, saw the defendant making numerous sales of what they claimed to have been ale. The other occasion, that of September 5th, when the officers, looking through a hole in the curtain overhanging this same window, saw the respondent making sales of beer alleged to be intoxicating, and, later in the evening, searched the premises and found the beer, which proved upon analysis to contain sufficient alcohol to be in fact intoxicating. The defendant claimed that the beer seized was bought in common by the members of the society in anticipation of Labor Day, September 7th; each contributing a certain amount, for which he was to receive his proportionate part of the beer. It was in evidence that some of the members began to drink their allowance during the afternoon of September 5th, and that the drinking continued and was in progress from that time to the time of the seizure, late in the afternoon.

The jury returned a verdict of guilty, and the case comes to this court on exceptions to certain instructions to the jury, given in the charge of the presiding justice.

It is provided by § 1 of chapter 22 of the Revised Statutes that "all places used . . . for the illegal sale or keeping of intoxicating liquors . . . [and] all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, are common nuisances."

It was obviously the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should, commonly and habitually, be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drunk, or dispensed in any manner not provided for by law." State v. McIntosh, 98 Me. 397, 57 Atl. 83; State v. Stanley, 84 Me. 555, 24 Atl. 983.

But it is not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment will warrant a conviction. Com. v. Mitchell, 115 Mass. 141, and cases cited. In Com. v. Gallagher, 1 Allen, 592, the defendants erected a temporary tent or booth, constructed of boards, and covered with cloth, and on the following day had there several kinds of intoxicating liquors, and, between the hours of 9 and 11 o'clock in the forenoon, made four or more sales of such liquors. The land on which the booth was erected was hired for three days; but the booth was torn down by the officers at 11 o'clock of the first day. The defendants were found guilty of maintaining a common nuisance. In the opinion the court says: "The evidence was sufficient to warrant the jury in convicting the defendants. A disturbance of the public peace by the assembly of noisy and dissolute persons, the illegal sale of intoxicating liquors, and other similar acts which tend to make disorder and injure public morals, and thus to create a common nuisance in a house or tenement, may be proved to have occurred in the course of a few hours, as well as during a number of days, a week, or a month. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense."

In the case at bar the presiding justice correctly defined the word "resort," and sufficiently explained the meaning of the phrase "place of resort," as employed in the statute. The following instruction was then given to the jury:

"All places of resort where liquors are 'given away,' and again, all places of resort where liquors are 'drunk,' even if they are not 'sold' or 'given away,' if it is a place of resort under the definition I have given you, and, when there, those men drank the liquor which is intoxicating, that makes it a nuisance under the laws of this state."

In further defining what constitutes a "nuisance" under the law, the presiding justice used the following quotation in instructing the jury, *viz.*:

"'Among other things, the legislature has said, and it applies to this case, that any place of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, is a nuisance; any place that is resorted to—that is, a place of resort—for the mere purpose of drinking intoxicating liquors is a nuisance; any place of resort where liquors are illegally kept is a nuisance; any place of resort where liquors are given away is a nuisance. It must be a place of resort, and then the statute goes on to say that any person keeping or maintaining such a place shall be found guilty and be punished therefor.

"'In this case the state says that between the 1st day of May last, and the day of the finding of this indictment, at some time be-

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tween those dates, this place described here, the tenement, and soforth, was a place contrary to the form of this statute,—a place of resort; and that at that place of resort, at some time during this space of time, liquors were kept, sold, given away, drunk, or dispensed in some manner not provided by law. The state need not prove that this place was so kept and used during the whole of that time. The case is made out, the offense is committed, if for a single day between those dates that place was so used. Nay, if for a single hour in the day it was so used; for that hour it was a common nuisance, and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.'

"It makes no difference, you see, under this statute, whether the men were joined as a club, and chipped in in advance, contributed their 16 cents and bought this liquor and paid for it and had it come, if when it came there it was drunk there on the premises resorted to, that would be no defense whatever."

To these instructions the defendant has exceptions; but it will be observed upon examination of the language used that it is, for the most part, essentially a restatement of the terms of the statute, and that the comments of the presiding justice, as well as the paragraphs quoted by him, are in entire harmony with the previous rulings and decisions of this court, as well as the authorities cited from Massachusetts, and are obviously a correct interpretation of the true meaning and purpose of the statute.

In support of the last paragraph of the instructions to which exceptions were taken, that "it makes no difference under this statute whether the men were joined as a club, and chipped in in advance and bought the liquor, if when it came there it was drunk on the premises resorted to," the case of Com. v. Baker, 152 Mass. 337, 25 N. E. 718, may be cited as an authority. That was an indictment for maintaining a nuisance under the Massachusetts statute of 1887 (chap. 206, § 1, which provided that "all buildings or places used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquors to their members or others shall be deemed common nuisances." In the opinion the court says: "A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members, intoxicating liquor owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member, upon his order, the liquor belonging to and kept for him, and kept the place for that purpose, the place was a common nuisance under the statute."

Finally, the defendant's counsel requested the following instructions: "In order to find the respondent guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment must have been habitually, commonly used for the purpose."

The presiding justice gave this instruction in the following language: "This is the law of the state; but there is no limit as to the time, as I have stated to you. A nuisance may be maintained and kept in two hours or two weeks or two days if you find the facts are sufficient.

It has already been seen that this instruction respecting the length of time during which it must appear that the nuisance was maintained in order to warrant a conviction is directly and fully supported by Com. v. Gallagher, 1 Allen, 592, above cited.

It is, accordingly, the opinion of the court that, when all of the instructions to which exceptions were taken are considered in their proper relation to the entire charge, and applied to the facts in evidence in this case, no exceptionable error is disclosed.

The certificate must therefore be: Exceptions overruled.

Judgment for the state.

MARYLAND COURT OF APPEALS.

WILLIAM F. DOWNS, Appt.,
v.
SHERLOCK SWANN et al.

(— Md. —, 73 Atl. 653.)

Criminal law — photographing and measuring prisoner — validity.

1. The photographing and measuring before trial for purposes of identification by the Bertillon system of one arrested on a criminal charge does not violate any of his constitutional rights if the photograph is not to be placed in the rogues' gallery, or the means of identification distributed prior to his conviction, unless he becomes a fugitive from justice.

Same — power of commissioners.

2. Police commissioners, who are required by statute to preserve the public peace, prevent crime, arrest offenders, and protect

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Case Note. — Right to take or retain in rogues' gallery picture of one accused of crime before conviction.

The earlier cases upon this subject are collected and discussed in a case note to Schulman v. Whitaker, 7 L.R.A.(N.S.) 274. The question has arisen in a few cases de-

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rights of persons and property within a city, and cause to be followed any person whom they have reason to believe intends leaving the city for the purpose of violating the laws of the state, have a right to adopt the most approved means of identifying probable wrongdoers, including that of photographing and measuring persons arrested for crime.

(June 30, 1909.)

APPEAL by plaintiff from an order of the Circuit Court of Baltimore City dissolving a preliminary injunction theretofore issued by it in a suit to restrain the police authorities of Baltimore City from photographing and measuring plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. **Harry B. Wolf** for appellant.

Mr. **Alonzo L. Miles**, for appellees:

In the discharge of their duties as police officers and detectives, defendants have an absolute right to photograph and measure any person who may have been arrested for a felony, if there are reasonable grounds to believe that he was guilty of the charge upon which he was arrested.

State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541; Shaffer v. United States, 24 App. D. C. 417; Tiedeman, Pol. Power, § 103, p. 102; Freund, Pol. Power, pp. 157, 158.

Mr. **Luther Eugene Mackall** also for appellees.

Schmucker, J., delivered the opinion of the court:

The appeal in this case was taken from an order of the circuit court of Baltimore city dissolving a preliminary injunction theretofore issued by it. The injunction had been issued upon the filing of a bill of complaint, to restrain the police authorities of Baltimore city from photographing and measuring the appellant, who had been arrested and was detained by them upon a charge of embezzlement of public funds of the city. The defendant, having answered

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cided since the preparation of the earlier note.

In People ex rel. Gow v. Bingham, 57 Misc. 66, 107 N. Y. Supp. 1011, it was held that the acts of police officers in requiring a man to submit to having his photograph taken and measurements and impressions of his body made, for the purpose of preserving them in the criminal records of the department, simply because such person had been indicted charged with a criminal offense, were unlawful, being violative of the natural rights of the person, and not authorized by the provisions of the city charter, which made it the duty of the police to "especially preserve the public peace, prevent crime, and detect and arrest offenders," and which required the police commissioner to "make such rules, orders, and regulations" as may be reasonably necessary to effect the prompt and efficient exercise of all powers conferred upon him by law; nor were they authorized by a provision of the penal Code which required that, upon the determination of a criminal action in favor of the defendant, the police authorities should turn over to him all photographs, proofs, plates, etc., taken by the authorities while the action or proceedings were pending.

It was held, however, that the plaintiff had mistaken his remedy in instituting an action for mandamus to compel the authorities to turn over to him such photographs, records, etc., to be destroyed, as in the absence of special statutory authority a writ of mandamus lies only to compel one to do what ought to be done in the discharge of a public duty, and not to undo what is improperly done, even though it may have been done under the color of performance of public duty.

But in Mabry v. Kettering, 89 Ark. 551, 117 S. W. 746, it was held that public officers charged with the enforcement of criminal laws and having in their custody individuals charged with crime may use photographs for the purpose of identifying the individual accused; and the court ordered dissolved a temporary injunction restraining the defendant police officers from developing certain photographs of the plaintiff, taken while under arrest. The court said that no question of the "right of privacy" was involved, nor was the question presented whether or not the officers in charge of the prisoner should be restrained from compelling him to submit to having his photograph taken. A demurrer to the complaint having been sustained, the plaintiff appealed again to the supreme court ([Ark.] 122 S. W. 115), and the court reasserted its former views, and said that the plaintiff was not entitled to an injunction without showing specifically that the photographs were to be used in an improper way. As to the allegation that the photographs were to be placed in the "rogues' gallery," the court said: "It is true that it is alleged in the complaint that the photographs were taken by the defendants 'for the avowed purpose of developing said plates into photographs, as these plaintiffs believe and allege, for the purpose of having said photographs placed in what is known as the "rogues' gallery;"' but they fail to state what the rogues' gallery consists of, and we cannot take judicial cognizance thereof. For aught we know to the contrary, it may be some legitimate method of identification of criminals or those charged with crime; and we have held that the photographs of accused persons may be used for such purpose." This judicial ignorance as to the meaning of the term "rogues' gallery" is somewhat surprising.

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the bill, made a motion to dissolve the injunction. The motion was heard upon bill and answer, and the order dissolving the injunction was passed, and the appeal taken therefrom.

The substantial allegations of the bill are as follows: On March 30, 1909, the plaintiff, William F. Downs, who had for some years theretofore been a clerk in the office of the city register, was arrested by a city detective upon complaint of the register, and locked up at the Central Police Station on the charge of embezzling $1,000 of the money of the city. The police authorities were about to put Downs through the Bertillon system, consisting in part of having his photograph taken, the measurement of his head, height, age, color, and pedigree, together with his finger prints, in order that the record thereof might be preserved for the use of the police department, and it was their intention to take his photograph immediately after his preliminary hearing before the magistrate, and before his trial upon the charge of embezzlement. It is also alleged that there is a rogues' gallery in connection with the police department of the city, where are kept the pictures and photographs of criminals and notoriously bad men who have been tried and convicted of various offenses in different jurisdictions, and that it was the custom of the police authorities to take the photographs of persons arrested for any violations of law; but it does not allege the existence of a custom to put the photographs of unconvicted persons in the rogues' gallery, or charge the defendants with a purpose to put Downs's picture there, but only with an intention to preserve it for the use of the department. It is further alleged that Downs, up until his arrest, enjoyed the confidence and esteem of his employer and associates, and that he will be irreparably injured if the police authorities are permitted to carry out their contemplated acts, which it is charged would constitute a violation of his personal liberty and constitutional rights, and that he is without adequate remedy at law. The appellees, as defendants below, answered the bill, admitting the facts of the arrest and detention of Downs upon the charge of embezzling the public moneys, and that, prior to the issue of the injunction, it had been their purpose to take his photograph, in order to enable them to identify him if it became necessary in any criminal proceeding then pending against him, or that might thereafter be instituted against him. They also admit the conducting by them of a bureau of identification under the superintendence of a lieutenant of police on the Bertillon system, in connection with which they photograph persons arrested for felony or other crimes of the character charged against the plaintiff. And they further say that the practice of photographing and measuring persons so charged prevails in every large city of the country where proper police regulations are well established and enforced; and that, when a prisoner is arrested, charged with a crime of the character charged against the plaintiff, who may be released upon bail, it is necessary, to the proper enforcement of police regulations and the securing of the prisoner for trial, that a full description of him should be had in order that, if he should undertake to become a fugitive from justice, the police and detective department may be in possession of such information as will enable them to have him identified, wherever he may be found; that the defendants are required, in the proper discharge of their duties, to run down and arrest offenders who may escape after having been released on bail; and that, if they are not permitted to provide efficient means of identification of persons charged with offenses, their efforts in that direction will become ineffectual and unavailing. Further answering, they say that it is not their practice to publish the photograph of a prisoner who has been arrested upon the first offense, or to place it among the photographs of well-known and established criminals, until and unless the prisoner whose photograph has been taken has either been convicted, or has undertaken to escape and avoid the payment of his bail; and that such was not their purpose with reference to the plaintiff. It is also averred in the answer that, since the filing of the bill, Downs had been admitted to bail in the sum of $10,000, but that subsequently, upon investigation, it was discovered that his alleged embezzlements were of such larger proportions than were disclosed by the testimony taken at the hearing on the first charge, and his crime was of such greater magnitude, that he was rearrested, and was, at the time of the filing of the answer, confined in a cell at the Central Police Station.

The issue presented for our consideration is the propriety of the dissolution of the injunction upon the case made by the bill and answer. Without stopping to consider whether the appellant had an adequate remedy at law for any invasion, if such there should be, of his personal rights, we will devote our attention to the substantial issue presented by the record. The precise question there presented for our determination is whether the police authorities of Baltimore city may lawfully provide themselves, for the use of their department of the city government, with the means of identification of a person arrested by them upon a charge of felony, but not yet tried or convicted, by photographing and measuring him

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under the Bertillon system. It is not directly charged in the bill that the police intend to put his photograph in their rogues' gallery, or distribute copies of it to the police authorities of other cities, unless he is convicted or becomes a fugitive from justice, or that they propose to apply his Bertillon record to any other uses than those of their own department of Baltimore city. Furthermore, the answer denies the existence of any purpose to apply the photograph or record of the appellant to any other purpose than that of his identification, if it becomes necessary, in criminal proceedings now pending or hereafter to be instituted against him, unless he is convicted or becomes a fugitive from justice. In our opinion the photographing and measuring of the appellant in the manner and for the purposes mentioned, and the use of his photograph and the record of his measurement to the extent set forth in the answer by the police authorities of Baltimore city, would not constitute a violation of the personal liberty secured to him by the Constitution of the United States or of this state. As was said by the United States Supreme Court in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint, under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." In Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, the same high court, in discussing the extent of the police power of the state, declared that it "has more than once recognized it as a fundamental principle, that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state.'" and many cases are cited in support of the statement. Similar views upon the limits of the police power have been expressed by this court in a line of cases from Ford v. State, 85 Md. 465, 41 L.R.A. 551, 60 Am. St. Rep. 337, 37 Atl. 172, down to Watson v. State, 105 Md. 655, 66 Atl. 635. It has also been settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld. Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Singer v. State, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 209, 43 Atl. 771; State v. Knowles, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; Scholle v. State, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; Watson v. State, 105 Md. 650, 66 Atl. 635.

A person suspected of the commission of a crime may lawfully be arrested by the sheriff or police, and held in custody until a preliminary hearing of the charge against him can be had before a magistrate, and he may then be committed to jail or held to bail, for the action of the grand jury. Brish v. Carter, 98 Md. 445, 57 Atl. 210; Edger v. Burke, 96 Md. 722, 54 Atl. 986. He may be exhibited for identification to the person injured by the commission of the crime, if it be one of violence, and we see no good reason why the police authorities may not be furnished with the further and more efficient means of his identification, provided by the Bertillon process. The populous communities which now exist, and the modern facilities for swift and frequent communication and rapid transit, afford hitherto unknown facilities for evading arrest or fleeing from justice, which should be offset in the public interest by providing the agencies charged with the duty of preserving the public peace and arresting persons reasonably suspected of the commission of crimes, with the most efficient means of detecting and identifying them consistent with the protection of the accused persons in the enjoyment of that "liberty regulated by law" to which they are entitled. Section 744 of the Baltimore city charter (Laws 1898, chap. 123, p. 522) confers upon the police many of the duties which at common law were incident to the office of sheriff. It makes it the duty of the police commissioners of the city, among other things, "to preserve the public peace, prevent crime, arrest offenders, and protect the rights of persons and property," also to cause to be followed any person who the board have reason to believe intends leaving the city for the purpose of violating any laws of the state. The burden of those duties brings the board clearly within the category of the public agencies, which should be furnished with the most approved means of identification of probable wrongdoers; and it may be assumed that the legislature, in the imposition of the duties, intended also to confer the incidental powers necessary to their discharge. The right of the police authorities to employ the Bertillon process for the identification of convicted criminals has been recognized in most, if not all, of the jurisdictions in which the subject has re

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In Shaffer v. United States, 24 App. D. C. 417, the court of appeals of the District of Columbia, speaking through Chief Judge Alvey, made a clear and forcible statement of the principles and considerations which led them to the same conclusion at which we have arrived in the present case, in reference to the constitutional privilege alleged to be involved in it. In that case Shaffer had been arrested by the police of the district upon a charge of murder, and upon his trial the prosecution offered in evidence his photograph, taken for purposes of identification by the police officer who had him in custody after his arrest. The evidence was objected to on behalf of the prisoner, and, in passing upon the objection on appeal, the court in their opinion say: "We understand the main point of this objection to be that . . . the government had no right to photograph the accused while holding him in custody, for the purpose of using that photograph to have him identified at the trial. This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this objection. In taking and using the photographic picture there was no violation of any constitutional right. . . . We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that without such means many criminals would escape detection or identification. . . . It is one of the usual means employed in the police service of the country, and it would be a matter of regret to have its use unduly restricted upon any fanciful theory of constitutional privilege." "It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen while in prison by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mask in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer in whose custody he remained to set an instrument and take his likeness for the purposes of proof and identification."

For the reasons mentioned in this opinion we will affirm the order appealed from, but we must not be understood by so doing to countenance the placing in the rogues' gallery of the photograph of any person not an habitual criminal, who has been arrested, but not convicted, on a criminal charge, or the publication under those circumstances of his Bertillon record. Police officers have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable to the injured person, in the same manner and to the same extent that private individuals would be.

Order affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

F. W. WOOLWORTH & COMPANY, Plff. in Err.,
v.
LILLIAN CONBOY.

(— C. C. A. —, 170 Fed. 934.)

Negligence — unsafe property — stairway.

1. The maintenance by the proprietor of a store of a well-lighted stairway leading downward from the floor to which customers are invited, guarded on all sides except where the steps meet the floor, is not negligence which will render him liable for injury to a customer who falls down the stairs.

Note. — See case note to McDermott v. Sallaway, 21 L.R.A.(N.S.) 456, as to duty of store or shopkeeper to customer as to condition of premises.

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Order affirmed, with costs.

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v.
LILLIAN CONBOY.

(— C. C. A. —, 170 Fed. 934.)

Negligence — unsafe property — stairway.

1. The maintenance by the proprietor of a store of a well-lighted stairway leading downward from the floor to which customers are invited, guarded on all sides except where the steps meet the floor, is not negligence which will render him liable for injury to a customer who falls down the stairs.

Note. — See case note to McDermott v. Sallaway, 21 L.R.A.(N.S.) 456, as to duty of store or shopkeeper to customer as to condition of premises.

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Same — bargain sale — violence of customers.

2. A merchant is not liable for injury to a customer who is pushed down a stairway by the violence of a crowd which is attracted to the store by a bargain sale.

(June 3, 1909.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

Statement by **Amidon**, District Judge:

This is an action for personal injury. The plaintiff in error, the defendant below, is the owner of the Five and Ten Cent Store at Minneapolis. The store room is 44 feet wide and 127 feet deep, and extends east and west, fronting on Nicollet avenue. It advertised a special sale of granite ware, which attracted a large crowd, and among them the plaintiff. The counter at which this ware was sold was a long wall counter on the north side of the store, and situated a little to the west of the center. In front of it was a broad aisle extending the entire length of the store. To the west, and separated from this counter 2 or 3 feet, was a small counter, immediately back of which was an open stairway leading to the basement. The counter served to protect the stairway on the south side. On the east side it was protected by a railing, and on the north side by the wall of the building. A short distance back of this counter and the stairway was the partition of a private toilet room for the employees. Between this partition and the end of the counter was an aisle leading to the stairway. The entrance to the stairway was guarded by a gate, which was open at the time of the accident. The store was well lighted by windows, and also by arc lights, one of which was situated about 11 feet from the stairway. The basement was used only for storing goods, and not for their sale. The aisle leading to the head of the stairs was for the use of employees, and patrons had no occasion to enter it. At the time of the accident a clerk was standing on the long counter above referred to, handing out goods to purchasers, who were required to approach him with the correct change for their purchases in their hands. The crowd became violent. Some of the women fainted, and others clambered on the counter. So great was the crush that the plaintiff was pushed past the man on the counter. She claims that she was crowded along down the aisle past the small counter, and then into the side aisle between it and the partition. Plaintiff, all the time that she was moving along, claims to have had her eyes on the clerk, and was hoping to attract his notice. But she says that she was pushed sidewise or backwards, head foremost, down the stairs. The negligence charged in the complaint is the unguarded stairway, and the permitting of a large and violent crowd to assemble on the store premises. A motion for a directed verdict was made by the defendant at the conclusion of the evidence, and denied. The case was then submitted to the jury, and resulted in a verdict and judgment in favor of plaintiff for $500. The denial of the motion for a directed verdict is the chief error assigned in this court.

Argued before Hook, Circuit Judge, and River and Amidon, District Judges.

Messrs. **Arthur M. Keith, Charles T. Thompson, and Edwin K. Fairchild**, for plaintiff in error:

The duty to exercise reasonable care with respect to the condition of the premises to which people are invited is confined to those parts and places of an establishment to which the invitation extends.

Macartney v. Colwell (R. I.) 68 Atl. 719; DeBlois v. Great Northern R. Co. 71 Minn. 45, 73 N. W. 637; Flanagan v. Sanders, 138 Mich. 253, 101 N. W. 581; Schmidt v. Bauer, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256; Missel v. Lennox, 84 C. C. A. 243, 156 Fed. 347; Dunn v. Kemp, 36 Wash. 183, 78 Pac. 782; Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320; Accousi v. G. A. Stowers Furniture Co. (Tex. Civ. App.) 87 S. W. 861.

The absence of a guard at the top of the stairway was not the proximate cause of the injuries received by the defendant in error.

Teis v. Smuggler Min. Co. 15 L.R.A. (N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Dolan v. Callender, McA. & T. Co. 26 R. I. 198, 58 Atl. 655; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Pardington v. Abraham, 183 N. Y. 553, 76 N. E. 1102.

Messrs. **W. H. McDonald and F. H. Ayers** for defendant in error.

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Amidon, District Judge, delivered the opinion of the court:

The motion should have been granted. It was not negligent to maintain the open stairway. It was separated from the part of the store to which patrons were invited or accustomed to resort. Indeed, if it had been situated in a portion of the room used by the public, that would not have constituted negligence. Important retail establishments are now accustomed to occupy several stories of the building in which their business is carried on. Open stairways leading from one story to another are a part of the ordinary equipment of such premises. Even when elevators are provided, there is usually a stairway adjacent to the shaft, and there are frequently other stairways in such rooms. Such stairways are closed on three sides, as was the one in this case; but the entrance is left open. Any other arrangement would be manifestly impracticable, and defeat the very object which the stairways are designed to accomplish. Such open stairways being an ordinary feature of store premises, the public, when resorting there, assume the risk arising therefrom, and are bound to protect themselves by the use of their eyes against such dangers. Mr. Justice Holmes, then speaking as chief justice of the supreme court of Massachusetts, states the rule applicable to such a situation as follows, in Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320: "There is no duty on the part of a shopkeeper to give warning of the presence of an ordinary flight of stairs in broad daylight, or to guard the necessary access to it, even if there is a crowd in his shop. The sides of the opening were guarded. Everyone who is on an upper story knows that there probably are stairs from it somewhere, and must look out for them. . . . The case is different from that of a hole in the floor which commonly is covered, and which is of a kind not to be expected."

See also Dunn v. Kemp, 36 Wash. 183, 78 Pac. 782.

The crowd on the present occasion seems to have been somewhat more violent than usual. Still such crowds are often found in large stores at the time of special sales, and during holiday seasons. They are an unavoidable feature of mercantile life in large cities. The defendant, on the occasion in question, had no reason to believe that such a sale as it was conducting would lead to any uncontrolled or violent conduct on the part of customers visiting the store, and was not therefore required to maintain its store in an unusual condition of safety to meet such an emergency. It had no reasonable cause to anticipate such violence, but, on the contrary, had a right to believe that patrons would demean themselves with a proper regard to others using the store. It was not, therefore, guilty of any negligence by reason of anything done by the crowd. In the excitement plaintiff seems to have lost her head and become wholly oblivious of her own safety or environment. She has met with an accident which is quite frequent, and there is nothing in this record justifying the shifting of her misfortune upon the defendant.

The judgment must be reversed, and a new trial granted.

MINNESOTA SUPREME COURT.

CHARLES D. HARRINGTON, Appt.,
v.
WABASH RAILROAD COMPANY, Respt.

(— Minn. —, 122 N. W. 14.)

Carrier — agent of shipper — package — contents — notice — nondelivery — damages.

Plaintiff gave to a local express company at a point in Missouri a crated sewing machine and a box for delivery to defendant carrier, to be by it transported to a point in Minnesota, and there delivered to a named consignee. The box was delivered to, accepted by, and receipted for by, defendant as books. Instead of containing books only, it actually contained a few books, and mis-

Headnote by JAGGARD, J.

Case Note. — Effect of misrepresentation as to character, quantity, or value of goods by shipper on his right to recover for loss.

This note is confined to cases in which the shipper intentionally or otherwise concealed either by silence or by direct misrepresentation, the true character, quantity, or value of the goods shipped, and, after loss, attempted to recover the real value of the goods. Cases are excluded where the decision turns merely upon the validity of a stipulation in the contract of carriage by which the carrier limits or attempts to limit its liability to a fixed or agreed valuation, regardless of the particular kind, quantity, or value of the goods. In many of the cases falling strictly within the scope of this note there is such a stipulation, but such cases only are taken as involve the effect of the acts of the shipper in not truly stating the character or value of the goods; cases involving the effect of the carrier's acts in putting such a stipulation into the contract of carriage have not been taken.

Cases dealing with the liability of the carrier for the loss of merchandise which is de-

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cellaneous articles of household goods and of personal effects. The value of the crated sewing machine was $50. The value of the books was $5. The tariff rate per hundredweight fixed by defendant for books was 63 cents; for household goods and personal effects, 94½ cents. The articles shipped were lost through defendant's negligence. It is held:

(1) The local express company was plaintiff's agent for delivering the box for shipment, and for whatever usually and naturally belongs to the doing of it, and therefore for the giving of the information necessary to the shipment.

(2) In the absence of more definite information, the carrier had the right to accept the shipper's marks as to the contents of a package offered for transportation, and was not bound to inquire particularly about them in order to take advantage of a false classification.

(3) A neglect on the part of the shipper to disclose the true nature of the contents of a receptacle offered for transportation is conduct amounting to a fraud on the carrier, if there be anything in its form, dimensions, or outward appearance which is likely to throw the carrier off its guard, whether so designed or not. Intention to impose upon the carrier is not essential.

(4) Plaintiff's damages were properly limited to $55.

(June 25, 1909.)

APPEAL by plaintiff from an order of the Municipal Court of Minneapolis denying a new trial after verdict in his favor

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livered to it by a passenger as baggage have not been included, as such cases present a different question, although the liability of the carrier in such cases is frequently referred to the general rule that is discussed herein. The fact, however, that carriers are not, according to the general rule, required, under any circumstances, to carry merchandise as baggage, distinguishes this class of cases from those considered here.

The general rule is that, if a shipper is guilty of any fraud or imposition in respect to the carrier, as by concealing or misstating the value or nature of the article, or deludes the carrier by his own carelessness in treating the parcel as a thing of no value, he cannot hold the carrier liable for the loss of the goods beyond their apparent value, or the value as stated by him, as he has deprived the carrier of the compensation to which he was justly entitled, and caused him to relax his vigilance in carrying the goods. 5 Am. & Eng. Enc. Law, p. 345; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Hellman v. Holladay, 1 Woolw. 365, Fed. Cas. No. 6,340; Earnest v. Southern Exp. Co. 1 Woods, 573, Fed. Cas. No. 4,248; St. John v. Southern Exp. Co. 1 Woods, 612, Fed. Cas. No. 12,228; Muser v. American Exp. Co. 1 Fed. 382; The Denmark, 27 Fed. 141; The Bermuda, 23 Blatchf. 554, 29 Fed. 399, affirming 27 Fed. 476; The St. Cuthbert, 97 Fed. 340; Galt v. Adams Exp. Co. McArth. & M. 124, 48 Am. Rep. 742; Everett v. Southern Exp. Co. 46 Ga. 303; Georgia Southern & F. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; Chicago, B. & Q. R. Co. v. Miller, 79 Ill. App. 473; Southern Exp. Co. v. Fox & Logan (Ky.) 115 S. W. 184; Little v. Boston & M. R. Co. 66 Me. 239; Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 50 Am. Rep. 282; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Rowan v. Wells, F. & Co. 80 App. Div. 31, 80 N. Y. Supp. 226; Warner v. Western Transp. Co. 5 Robt. 490; Coxe v. Heisley, 19 Pa. 243; Caldwell v. United States Exp. Co. 36 Pa. Super. Ct. 465; Missouri P. R. Co. v. York, 2 Tex. App. Civ. Cas. (Willson) 557; Texas Exp. Co. v. Dupree, 2 Tex. App. Civ. Cas. (Willson) 274; G. C. & S. F. R. Co. v. Clark, 2 Tex. App. Civ. Cas. (Willson) 459; Texas Exp. Co. v. Scott, 2 Tex. App. Civ. Cas. (Willson) 59; Tyly v. Morrice, Carth. 485.

The reason for the rule is thus stated in Hart v. Pennsylvania R. Co. supra: "If the shipper is guilty of fraud or imposition, by representing the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed."

And in Earnest v. Southern Exp. Co. supra, it was held that where the shipper, to avoid paying the regular charges, had concealed the value of the package, and thereby thrown the carrier off his guard, and induced him to treat the package as of small value, it would be gross injustice to allow him to recover beyond what he had stated the value of the package to be. In this case he was allowed to recover the value which he had placed on the package, although it appeared that, had it not been for his misstatements, no loss at all would have ensued.

The same general rule was applied in The St. Cuthbert, supra, where valuable memorandum books were concealed in clothing and sent as "worn clothing;" in Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416, and in Chicago & A. R. Co. v. Shea, 66 Ill. 471, where clothing was inclosed in a bundle of bedding and sent as bedding; in Charleston & S. R. Co. v. Moore, 80 Ga. 522, 5 S. E. 769, where jewelry was inclosed in a package and sent as household goods; in Bottum v. Charleston & W. C. R. Co. 72 S. C. 376, 2 L.R.A. (N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118, where a similar package of pictures was shipped as containing glass, and the liability of the carrier for the loss was held to be limited to

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for a less sum than was demanded in an action brought to recover damages for loss of certain goods while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Mr. Paul J. Thompson, for appellant:

As the mistake was innocently made, the shipper did not fraudulently misrepresent the contents of the box.

Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27; Atchison, T. & S. F. R. Co. v. Goetz & B. Mfg. Co. 51 Ill. App. 151; Mobile & O. R. Co. v. Dismukes, 94 Ala. 131, 17 L.R.A. 113, 4 Inters. Com. Rep. 200, 10 So. 289.

Mr. F. W. Root, for respondent:

The shipper having constituted the local express company his agent to make the shipment, he is bound by its every act that was necessary to be done in order to make the shipment.

Mechem, Agency, § 284; Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, 54 N. W. 1059; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Christenson v. American Exp. Co. 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

In the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them in order to take advantage of a false classification.

Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St.

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the value of a package of glass; in Shackt v. Illinois C. R. Co. 94 Tenn. 658, 28 L.R.A. 176, 30 S. W. 742, where a quantity of silks, satins, laces, silver spoons, etc., was sent as household goods; in Relf v. Rapp, 3 Watts & S. 21, 37 Am. Dec. 528, where jewelry was sent in a package labeled "glass."

The same rule was applied in St. John v. Southern Exp. Co. supra, where the defendant was in ignorance of the value of the package, and in consequence failed to place it in the hands of a messenger known to be honest and trustworthy, who was uniformly employed to deliver valuable packages.

Where a shipper delivered a sealed package worth $234,000 to a carrier, and represented that its value was $1,000, and paid the charges for that value, it was held in United States Exp. Co. v. Koerner, 65 Minn. 540, 33 L.R.A. 600, 68 N. W. 181, that the liability of the express company was limited to carrying $1,000 worth of property; and consequently it was not entitled, in an action for further compensation, to recover on the theory that, in case of loss, the limit of its liability would be for failure to deliver the whole $234.000 worth.

One who ships his horse as an ordinary horse, knowing that a regulation of the carrier limits its liability in case of the loss of such animals to a certain sum, and requires extra compensation for transporting animals of greater value, thereby elects to treat his horse, for the purpose of transportation, as of no greater value than that fixed by the regulation, and he cannot, in case of loss, insist on a higher valuation. Duntley v. Boston & M. R. Co. 66 N. H. 263, 9 L.R.A. 449, 49 Am. St. Rep. 610, 20 Atl. 327.

The ground for holding that a carrier is not liable for goods shipped under a wrongful classification was said, in Savannah, F. & W. R. Co. v. Collins, supra, to be that there is no contract existing between the carrier and the shipper to carry other than those described in the bill of lading.

A carrier may accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them, in order to take advantage of a false classification. Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118.

In a number of cases the act of the shipper in concealing or misrepresenting the character or value of the goods has been held to be such a fraud as to invalidate the whole contract of carriage, and to release the carrier from any liability at all thereon, especially if the loss was directly traceable to the fact that the carrier was in ignorance of the true character or value of the goods. The decision in some of these cases may be influenced by the fact that the package lost, although containing valuable goods, was of no apparent value, but the language used by the court is apparently broad enough to sustain the rule as stated, and some of the cases so hold expressly.

Thus, in The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059, it was held that where the shipper informed the captain of a vessel that he had nothing but clothing in his trunk, when in fact he had money, the carrier was not liable for the loss even of the clothing which the trunk contained; for, if the truth had been stated, the captain would have protected his vessel from responsibility for the loss by putting the trunk in a place of safety.

A constructive if not an actual fraud to obtain cheap rates of freight, which relieves the carrier from liability for loss of the goods, is shown where a man of intelligence ships in a basket with a rope around it, without making known its contents, a quantity of silks, satins, laces, curtains, silver spoons, and other valuable articles, most of which were for sale by his wife, in her business as a dressmaker and milliner, and remains silent when he hears the carrier's agent designating them as "household goods," the rate on which is very much less than that on merchandise. Shackt v. Illinois C. R. Co. supra. In this case no recovery at all was allowed the shipper, although it does not appear that the constructive fraud of the shipper in any way caused or tended to cause the loss.

So, in Hayes v. Wells, F. & Co. 23 Cal.

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Rep. 610, 57 S. E. 985, 5 A. & E. Ann. Cas. 118; Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416.

If a fraud is practised by the shipper upon a carrier by misleading the carrier as to the nature of the shipment, the contract of carriage is thereby made void, and the carrier will not be liable for the loss of the shipment; and neglect or failure to disclose the real value of a package and the nature of its contents is conduct amounting to a fraud upon the carrier.

Bottum v. Charleston & W. C. R. Co. and Savannah, F. & W. R. Co. v. Collins, supra; Hutchinson, Carr. 3d ed. § 330; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Charleston & S. R. Co. v. Moore, 80 Ga. 522, 5 S. E. 769; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

Jaggard, J., delivered the opinion of the court:

Plaintiff and appellant gave to the St. Louis Express Company, at St. Louis, Missouri, one sewing machine, crated, and one box, for delivery to the defendant at said St. Louis, to be by it transported over its lines and the lines of its connecting carrier or carriers to Minneapolis, Minnesota, and there delivered to a named consignee. The

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185, 83 Am. Dec. 89, the court said that if any fraud or unfair concealment of value is used, the carrier will not be responsible for any loss, and it will make the contract between them null and void; and this rule applies to all cases of concealment or suppression of facts, and to all false statements made by the shipper for the purpose of misleading the carrier.

And in Southern Exp. Co. v. Everett, 37 Ga. 688, it was held that if the shipper so conducted himself as to induce the carrier to regard a box as of but little value, or if he intentionally concealed from the carrier the true value of the contents of the box, for the purpose of depriving him of his lawful freight therefor, such concealment by the shipper is, in law, a fraud upon the carrier, and releases him from liability.

And the Everett Case was cited with approval and followed in Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436, where it was held that conduct upon the part of the shipper which amounted to a concealment of the true character of the contents of the package constituted such a legal fraud upon the carrier as would in law discharge it from all liability as a carrier. And to the same general effect was the decision in Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809.

So, in Chicago & A. R. Co. v. Thompson, 19 Ill. 578, it was held that by suppressing and concealing the fact that a box contained bank bills in such a way as to deceive the carrier as to the true contents of the box, the shipper committed a fraud upon the defendant and made the contract void, for there could be no action where the plaintiff practised fraud and deceit. And this case was cited and followed in American Exp. Co. v. Perkins, 42 Ill. 458, where it was held that a carrier was not liable for injury to a wreath consisting partially of glass, where the carrier was not informed of the true contents of the package. To the same general effect was the decision in Pennsylvania Co. v. Kenwood Bridge Co. 170 Ill. 645, 49 N. E. 215, where the carrier accepted certain bridge iron which was of greater height than it was represented to be by the bridge company, and consequently was broken while passing through a river bridge.

And in Houston & T. C. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, it was held that where the shipper of valuable articles practises a fraud on the carrier, either by his acts or omissions fraudulently concealing the value of the article shipped, the carrier is discharged. And to the same effect was the decision in Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312.

Where the carrier gave notice that he would not be liable beyond a specified value unless the package was received at its true value and paid for accordingly, it was held in Izett v. Mountain, 4 East, 370, that he was not liable for any loss where a package above the stated value had been shipped without notice of its true value being given. And to the same effect were the decisions in Marsh v. Horne, 5 Barn. & C. 322, and Clay v. Willan, 1 H. Bl. 298.

The same rule was followed in Bradley v. Waterhouse, 3 Car. & P. 318, where money was sent done up in a package of tea; in Gibbon v. Paynton, 4 Burr. 2298, where money was concealed in a bag of nails; in Batson v. Donovan, 4 Barn. & Ald. 21, where bank notes were sent done up in an ordinary parcel.

In Sewall v. Allen, 6 Wend. 335, it was held that a steamboat company which was not a common carrier of packages of bank bills was not liable for the loss of such a package, intrusted to the master of one of their boats, where it appeared that he had been forbidden by his employers to carry money, and that the usage was for persons sending money to compensate the masters.

In the following cases it was held that, under the particular facts presented, the carrier would be liable for the actual value of the goods, although the general rule was not expressly denied:

That goods of more value than designated are packed in a box will not release the carrier if the more valuable things are not lost. Hyde v. New York & N. O. S. S. Co. 17 La. Ann. 29.

A wrongful classification of goods by a

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box was delivered to the defendant, and accepted by it for such shipment, as containing books, was receipted for as books, and was billed and given the rate fixed by the published tariff of the defendant for transportation of books. That box, instead of containing books, only actually contained a few books and many miscellaneous articles of household goods and of personal effects. The aggregate value of said shipment, including said sewing machine and attachments, at the point of shipment, was $175. The value of the sewing machine and attachments was $50, and the value of the books in the box was $5. In said tariff, the articles in the box bore the classification of household goods and personal effects, and carried a rate of 94½ cents per hundredweight, instead of 63 cents per hundredweight, for books. The articles shipped were lost through what is, for present purposes, the admitted neglect of defendant. Neither the defendant nor any person or persons employed by or connected with it had, at any time before the same became lost and written claim was made by the plaintiff therefor, any knowledge, information, or belief that the said box contained anything more than books. The marking of said box as containing books was done by the said St. Louis Express Company, and without the knowledge of the said plaintiff, and without direction from him. The trial court found as a matter of fact "that plaintiff, through his agent, fraudulently misrepresented the contents of the package

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shipper, with a view to escape double rates, was held in Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27, not to disable plaintiffs to maintain an action for the conversion of the goods. But it was held that the defendant was entitled to receive such double rates, and to be credited therefor.

Where a contract containing a stipulation limiting the liability of the carrier was void under a statute, it was held in Lucas v. Burlington, C. R. & N. R. Co. 112 Iowa, 594, 84 N. W. 673, that, if fraud was practised by the plaintiff in order to secure a cheaper rate of freight, the defendant would not be bound by the rate given, but a void contract procured thereby could by no means lessen the carrier's liability.

No fraud or imposition can be predicated of the acts of a shipper in failing to disclose the contents of a package containing silver coin, where the very appearance of the package indicated that it was not merchandise, and it was addressed to well-known manufacturers of silver, and the carrier did not ask about the contents or value of the package. Gorham Mfg. Co. v. Fargo, 3 Jones & S. 434.

Where there is no agreement or contract as to any limitation on account of loss or damage by reason of any reduction of freight, it was held in Louisville & N. R. Co. v. Levi, 18 Ohio C. C. 873, that a mere statement that the value is less than the actual value will not relieve the carrier for any loss or injury due to its own negligence.

If the defendants knew that parties emigrating like the plaintiff were in the habit of packing up valuable articles and money among their household wares, and from such knowledge might infer that this box of the plaintiff's might contain money, it was held in Kuter v. Michigan C. R. Co. 1 Biss. 35, Fed. Cas. No. 7,955, that it was their duty to make inquiry in order to relieve themselves from liability.

Where there was no intention to impose upon the carrier, and it was not claimed that greater diligence would have been used or a larger rate charged if the true character of the goods had been known, it was held in Fassett v. Ruark, 3 La. Ann. 694, that the shipper might recover for the actual value of the goods lost.

Where the carrier did not inquire as to the value of the package and there was no fraud on the part of the shipper, the carrier is liable for the full amount of the loss. Levois v. Gale, 17 La. Ann. 302.

Where the plaintiff shipped certain negatives as "photo goods," and no inquiry or representation was made as to the value of the shipment, it was held in Southern P. R. Co. v. d'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813, that evidence that, if the true value of the goods had been known, the shipper would have been obliged to pay a higher rate of freight than he did, did not fairly raise an issue of fraud or concealment as to the character and value of the goods.

In Sleat v. Fagg, 5 Barn. & Ald. 342, it was held that the noncommunication of the contents of a package to the carrier, and the directing of it in such a way as to conceal its value, was not such a fraud as to relieve the carrier from liability for its loss, where the carrier sent it by another and more dangerous route than that by which it had contracted to send it. The court distinguished Batson v. Donovan, supra, upon the ground that, in the latter case, the loss was expressly due to the noncommunication of the value; for, had the actual value been made known, the carrier would have exercised greater care.

The question has arisen in a number of cases whether it is the duty of the shipper to reveal the value or the character of the goods; but the general rule is that, in the absence of any other acts on the part of the shipper, intended to deceive the carrier, mere silence as to character and value of the goods does not amount to fraud.

Thus, in New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531, it was held that, in the absence of inquiry on the part of the carrier, and in the absence of conduct on the part of the shipper misleading the carrier, the court could not, as a matter of law, declare that the mere failure of the shipper, unasked, to disclose the value of his goods, was a fraud upon the

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containing all the household goods, except the sewing machine stating that they were books." Plaintiff was allowed $55 as damages.

1. The local express company was plaintiff's agent for delivery of the box for shipment and for whatever usually and naturally belonged to the doing of it. Mechem, Agency, § 284. This included the giving of the information necessary to such shipment. The plaintiff was therefore bound by the act of its agent in marking the box as containing books. Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, collecting cases at page 190, 54 N. W. 1059.

2. Plaintiff contends that the marking of the box, which was partially true, was a mistake only, and that the trial court was not justified in finding that the plaintiff, through his agent, misrepresented the contents of the box, and was guilty of fraud. It is, however, a settled rule of law that, in the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them in order to take advantage of a false classification. See Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118, and Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416. Fraud was made out, although intention to impose on the carrier was not shown. "Fraud may be as

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carrier which defeated all rights of recovery. And to the same effect was the decision in Muser v. American Exp. Co. 1 Fed. 382.

And in Titchburne v. White, 1 Strange, 145, it was held that a carrier was liable for the loss of a package containing money, where it had made no inquiry as to the contents of the package.

The carrier is bound to make the inquiry as to the value of the box or the articles delivered to him, and the owner must answer at his peril; and if such inquiries are not made, and the article is received for such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value. Gorham Mfg. Co. v. Fargo, supra.

And in Phillips v. Earle, 8 Pick. 182, it was held that the shipper was under no obligations to state the value of the goods if he was not questioned concerning it, but if questions had been asked, any false answer would have been fraudulent and excused the carrier, and if there had been any concealment or deception, the same consequences would have followed. To the same effect was the decision in Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473.

The mere failure to disclose the value of the goods is not fraud. G. C. & S. F. R. Co. v. Clark, 2 Tex. App. Civ. Cas. (Willson) 459; Texas Exp. Co. v. Scott, 2 Tex. App. Civ. Cas. (Willson) 59.

But in Hayes v. Wells, F. & Co. 23 Cal. 185, 83 Am. Dec. 89, it was held that it was the duty of all persons employing a carrier to deliver letters containing matters of great value to inform the carrier of that fact, and it was not the duty of the carrier to make inquiries concerning the value of the letters delivered to them for carriage. And the Hayes Case was cited with approval and followed in White v. Postal Teleg. & Cable Co. 25 App. D. C. 364, 4 A. & E. Ann. Cas. 767, and in Gilman v. Postal Teleg. Co. 48 Misc. 372, 95 N. Y. Supp. 564, where bank bills were done up in a newspaper, and sent by a messenger boy without any notice to the company of the value of the package.

And in Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442, second appeal in 70 N. Y. 410, 26 Am. Rep. 608, the shipper sought to recover the value of a package of valuable watches and watchkeys, but failed to state the value to the carrier at the time of shipment, and the court accordingly held that the carrier's liability was controlled by the regulation of the company that, where the value was not stated, the liability would be limited to $50. The court said that, although there was no inquiry by the defendant as to the value of the goods, and no artifice to conceal the value or to deceive, the silence of the shipper was a fraud which discharged the carrier from liability beyond $50.

So, in Galt v. Adams Exp. Co. McArth. & M. 124, 48 Am. Rep. 742, it was held that the omission of the shipper to advise the carrier that the actual was greater than the apparent value of the articles shipped does not affect the shipper's rights unless it justifies the carrier in adopting the course of conduct by which the loss occurred.

In a few cases the liability of the carrier has been determined by statute.

Thus, under a statute which held that a common carrier of gold, silver, etc., is not liable for more than $50 for loss or injury of a package of any such articles unless he has notice of the nature of the freight, it was held in Scammon v. Wells, F. & Co. 84 Cal. 311, 24 Pac. 284, that the carrier was not liable beyond the value given by the shipper, although in fact the package was of much greater value.

And in Ocean S. S. Co. v. Way, 90 Ga. 747, 20 L.R.A. 123, 17 S. E. 57, it was held that fans and parasols made of delicate and expensive materials, and fragile in construction, and intended more for ornament than for use, were not clothing, and, under the Federal statute, the carrier was not liable for the loss of the same, unless notice of the value and character of the goods had been given.

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effectually practised upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package, and the nature of its contents, if there be any thing in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper; as, if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled; for by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it, had he known its actual value." Hutchinson, Carr. 3d. ed. § 330. This rule was approved in Bottum v. Charleston & W. C. R. Co. 2 L.R.A.(N.S.) 773 (72 S. C. 375, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118). It was there held that "a misdescription, without fraudulent intent, of a package of pictures as containing glass, in a shipment of household goods, will relieve the carrier from liability for their loss above the value of a package of glass, where the freight rate is much higher on pictures than on glass." And see cases collected at page 776. So, in Savanah, F. & W. R. Co. v. Collins, supra, it was held that, "in an action against a railroad company for the loss of goods shipped by it, defendant's agent testified that, at the time of the shipment, plaintiff's husband, with whom the agreement for shipment was made, stated that, if the goods, were lost, the company would have to pay him $25. The court charged, in substance, that unless it appeared that both the husband and the agent had authority to make such valuation, and actually agreed upon it, it would not be binding upon plaintiff. Held, that the jury, in ascertaining the value of the goods, might properly consider such testimony, and that the charge withdrew it from their consideration and was erroneous." And see J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

That in some of these cases there was knowledge on the part of the shipper that his goods were given a rate less than they should have been charged is not material, in view of absence of any necessity to show actual intention to defraud. As opposed, plaintiff refers us to Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27 (in which an instruction favorable to this position, given at the request of the railroad company, was affirmed on an appeal by the railroad company), and to Atchison, T. & S. F. R. Co. v. Goetz & B. Mfg. Co. 51 Ill. App. 151. It is certain that the authorities rule this case for defendant. Plaintiff was properly limited in damages to the value of the crated machine and to the value of the books shipped.

Affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LUCIA NAJARIAN, Admrx., etc., of Deckran Najarian, Deceased,
v.
JERSEY CITY, HOBOKEN, & PATERSON STREET RAILWAY COMPANY, Plff. in Err.

(— N. J. —, 73 Atl. 527.)

Street railway — accident to pedestrian — negligence — evidence — burden of proof.

1. In a suit brought against a street railroad company to recover for the death of a pedestrian in a street, caused by his being hit by the rear end of a car which left the track because of the "splitting" of a switch, proof of the happening of the acci-

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containing all the household goods, except the sewing machine stating that they were books." Plaintiff was allowed $55 as damages.

1. The local express company was plaintiff's agent for delivery of the box for shipment and for whatever usually and naturally belonged to the doing of it. Mechem, Agency, § 284. This included the giving of the information necessary to such shipment. The plaintiff was therefore bound by the act of its agent in marking the box as containing books. Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, collecting cases at page 190, 54 N. W. 1059.

2. Plaintiff contends that the marking of the box, which was partially true, was a mistake only, and that the trial court was not justified in finding that the plaintiff, through his agent, misrepresented the contents of the box, and was guilty of fraud. It is, however, a settled rule of law that, in the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them in order to take advantage of a false classification. See Bottum v. Charleston & W. C. R. Co. 72 S. C. 375, 2 L.R.A.(N.S.) 773, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118, and Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416. Fraud was made out, although intention to impose on the carrier was not shown. "Fraud may be as

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And in Titchburne v. White, 1 Strange, 145, it was held that a carrier was liable for the loss of a package containing money, where it had made no inquiry as to the contents of the package.

The carrier is bound to make the inquiry as to the value of the box or the articles delivered to him, and the owner must answer at his peril; and if such inquiries are not made, and the article is received for such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value. Gorham Mfg. Co. v. Fargo, supra.

And in Phillips v. Earle, 8 Pick. 182, it was held that the shipper was under no obligations to state the value of the goods if he was not questioned concerning it, but if questions had been asked, any false answer would have been fraudulent and excused the carrier, and if there had been any concealment or deception, the same consequences would have followed. To the same effect was the decision in Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473.

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Rep. 610, 57 S. E. 985, 5 A. & E. Ann. Cas. 118; Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416.

If a fraud is practised by the shipper upon a carrier by misleading the carrier as to the nature of the shipment, the contract of carriage is thereby made void, and the carrier will not be liable for the loss of the shipment; and neglect or failure to disclose the real value of a package and the nature of its contents is conduct amounting to a fraud upon the carrier.

Bottum v. Charleston & W. C. R. Co. and Savannah, F. & W. R. Co. v. Collins, supra; Hutchinson, Carr. 3d ed. § 330; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Charleston & S. R. Co. v. Moore, 80 Ga. 522, 5 S. E. 769; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

Jaggard, J., delivered the opinion of the court:

Plaintiff and appellant gave to the St. Louis Express Company, at St. Louis, Missouri, one sewing machine, crated, and one box, for delivery to the defendant at said St. Louis, to be by it transported over its lines and the lines of its connecting carrier or carriers to Minneapolis, Minnesota, and there delivered to a named consignee. The

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185, 83 Am. Dec. 89, the court said that if any fraud or unfair concealment of value is used, the carrier will not be responsible for any loss, and it will make the contract between them null and void; and this rule applies to all cases of concealment or suppression of facts, and to all false statements made by the shipper for the purpose of misleading the carrier.

And in Southern Exp. Co. v. Everett, 37 Ga. 688, it was held that if the shipper so conducted himself as to induce the carrier to regard a box as of but little value, or if he intentionally concealed from the carrier the true value of the contents of the box, for the purpose of depriving him of his lawful freight therefor, such concealment by the shipper is, in law, a fraud upon the carrier, and releases him from liability.

And the Everett Case was cited with approval and followed in Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436, where it was held that conduct upon the part of the shipper which amounted to a concealment of the true character of the contents of the package constituted such a legal fraud upon the carrier as would in law discharge it from all liability as a carrier. And to the same general effect was the decision in Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809.

So, in Chicago & A. R. Co. v. Thompson, 19 Ill. 578, it was held that by suppressing and concealing the fact that a box contained bank bills in such a way as to deceive the carrier as to the true contents of the box, the shipper committed a fraud upon the defendant and made the contract void, for there could be no action where the plaintiff practised fraud and deceit. And this case was cited and followed in American Exp. Co. v. Perkins, 42 Ill. 458, where it was held that a carrier was not liable for injury to a wreath consisting partially of glass, where the carrier was not informed of the true contents of the package. To the same general effect was the decision in Pennsylvania Co. v. Kenwood Bridge Co. 170 Ill. 645, 49 N. E. 215, where the carrier accepted certain bridge iron which was of greater height than it was represented to be by the bridge company, and consequently was broken while passing through a river bridge.

And in Houston & T. C. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, it was held that where the shipper of valuable articles practises a fraud on the carrier, either by his acts or omissions fraudulently concealing the value of the article shipped, the carrier is discharged. And to the same effect was the decision in Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312.

Where the carrier gave notice that he would not be liable beyond a specified value unless the package was received at its true value and paid for accordingly, it was held in Izett v. Mountain, 4 East, 370, that he was not liable for any loss where a package above the stated value had been shipped without notice of its true value being given. And to the same effect were the decisions in Marsh v. Horne, 5 Barn. & C. 322, and Clay v. Willan, 1 H. Bl. 298.

The same rule was followed in Bradley v. Waterhouse, 3 Car. & P. 318, where money was sent done up in a package of tea; in Gibbon v. Paynton, 4 Burr. 2298, where money was concealed in a bag of nails: in Batson v. Donovan, 4 Barn. & Ald. 21, where bank notes were sent done up in an ordinary parcel.

In Sewall v. Allen, 6 Wend. 335, it was held that a steamboat company which was not a common carrier of packages of bank bills was not liable for the loss of such a package, intrusted to the master of one of their boats, where it appeared that he had been forbidden by his employers to carry money, and that the usage was for persons sending money to compensate the masters.

In the following cases it was held that, under the particular facts presented, the carrier would be liable for the actual value of the goods, although the general rule was not expressly denied:

That goods of more value than designated are packed in a box will not release the carrier if the more valuable things are not lost. Hyde v. New York & N. O. S. S. Co. 17 La. Ann. 29.

A wrongful classification of goods by a

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box was delivered to the defendant, and accepted by it for such shipment, as containing books, was receipted for as books, and was billed and given the rate fixed by the published tariff of the defendant for transportation of books. That box, instead of containing books, only actually contained a few books and many miscellaneous articles of household goods and of personal effects. The aggregate value of said shipment, including said sewing machine and attachments, at the point of shipment, was $175. The value of the sewing machine and attachments was $50, and the value of the books in the box was $5. In said tariff, the articles in the box bore the classification of household goods and personal effects, and carried a rate of 94½ cents per hundredweight, instead of 63 cents per hundredweight, for books. The articles shipped were lost through what is, for present purposes, the admitted neglect of defendant. Neither the defendant nor any person or persons employed by or connected with it had, at any time before the same became lost and written claim was made by the plaintiff therefor, any knowledge, information, or belief that the said box contained anything more than books. The marking of said box as containing books was done by the said St. Louis Express Company, and without the knowledge of the said plaintiff, and without direction from him. The trial court found as a matter of fact "that plaintiff, through his agent, fraudulently misrepresented the contents of the package

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shipper, with a view to escape double rates, was held in Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27, not to disable plaintiffs to maintain an action for the conversion of the goods. But it was held that the defendant was entitled to receive such double rates, and to be credited therefor.

Where a contract containing a stipulation limiting the liability of the carrier was void under a statute, it was held in Lucas v. Burlington, C. R. & N. R. Co. 112 Iowa, 594, 84 N. W. 673, that, if fraud was practised by the plaintiff in order to secure a cheaper rate of freight, the defendant would not be bound by the rate given, but a void contract procured thereby could by no means lessen the carrier's liability.

No fraud or imposition can be predicated of the acts of a shipper in failing to disclose the contents of a package containing silver coin, where the very appearance of the package indicated that it was not merchandise, and it was addressed to well-known manufacturers of silver, and the carrier did not ask about the contents or value of the package. Gorham Mfg. Co. v. Fargo, 3 Jones & S. 434.

Where there is no agreement or contract as to any limitation on account of loss or damage by reason of any reduction of freight, it was held in Louisville & N. R. Co. v. Levi, 18 Ohio C. C. 873, that a mere statement that the value is less than the actual value will not relieve the carrier for any loss or injury due to its own negligence.

If the defendants knew that parties emigrating like the plaintiff were in the habit of packing up valuable articles and money among their household wares, and from such knowledge might infer that this box of the plaintiff's might contain money, it was held in Kuter v. Michigan C. R. Co. 1 Biss. 35, Fed. Cas. No. 7,955, that it was their duty to make inquiry in order to relieve themselves from liability.

Where there was no intention to impose upon the carrier, and it was not claimed that greater diligence would have been used or a larger rate charged if the true character of the goods had been known, it was held in Fassett v. Ruark, 3 La. Ann. 694, that the shipper might recover for the actual value of the goods lost.

Where the carrier did not inquire as to the value of the package and there was no fraud on the part of the shipper, the carrier is liable for the full amount of the loss. Levois v. Gale, 17 La. Ann. 302.

Where the plaintiff shipped certain negatives as "photo goods," and no inquiry or representation was made as to the value of the shipment, it was held in Southern P. R. Co. v. d'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813, that evidence that, if the true value of the goods had been known, the shipper would have been obliged to pay a higher rate of freight than he did, did not fairly raise an issue of fraud or concealment as to the character and value of the goods.

In Sleat v. Fagg, 5 Barn. & Ald. 342, it was held that the noncommunication of the contents of a package to the carrier, and the directing of it in such a way as to conceal its value, was not such a fraud as to relieve the carrier from liability for its loss, where the carrier sent it by another and more dangerous route than that by which it had contracted to send it. The court distinguished Batson v. Donovan, supra, upon the ground that, in the latter case, the loss was expressly due to the noncommunication of the value; for, had the actual value been made known, the carrier would have exercised greater care.

The question has arisen in a number of cases whether it is the duty of the shipper to reveal the value or the character of the goods; but the general rule is that, in the absence of any other acts on the part of the shipper, intended to deceive the carrier, mere silence as to character and value of the goods does not amount to fraud.

Thus, in New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531, it was held that, in the absence of inquiry on the part of the carrier, and in the absence of conduct on the part of the shipper misleading the carrier, the court could not, as a matter of law, declare that the mere failure of the shipper, unasked, to disclose the value of his goods, was a fraud upon the

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containing all the household goods, except the sewing machine stating that they were books." Plaintiff was allowed $55 as damages.

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And in Ocean S. S. Co. v. Way, 90 Ga. 747, 20 L.R.A. 123, 17 S. E. 57, it was held that fans and parasols made of delicate and expensive materials, and fragile in construction, and intended more for ornament than for use, were not clothing, and, under the Federal statute, the carrier was not liable for the loss of the same, unless notice of the value and character of the goods had been given.

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effectually practised upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package, and the nature of its contents, if there be any thing in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper; as, if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled; for by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it, had he known its actual value." Hutchinson, Carr. 3d. ed. § 330. This rule was approved in Bottum v. Charleston & W. C. R. Co. 2 L.R.A.(N.S.) 773 (72 S. C. 375, 110 Am. St. Rep. 610, 51 S. E. 985, 5 A. & E. Ann. Cas. 118). It was there held that "a misdescription, without fraudulent intent, of a package of pictures as containing glass, in a shipment of household goods, will relieve the carrier from liability for their loss above the value of a package of glass, where the freight rate is much higher on pictures than on glass." And see cases collected at page 776. So, in Savanah, F. & W. R. Co. v. Collins, supra, it was held that, "in an action against a railroad company for the loss of goods shipped by it, defendant's agent testified that, at the time of the shipment, plaintiff's husband, with whom the agreement for shipment was made, stated that, if the goods, were lost, the company would have to pay him $25. The court charged, in substance, that unless it appeared that both the husband and the agent had authority to make such valuation, and actually agreed upon it, it would not be binding upon plaintiff. Held, that the jury, in ascertaining the value of the goods, might properly consider such testimony, and that the charge withdrew it from their consideration and was erroneous." And see J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Warner v. Western Transp. Co. 5 Robt. 490.

That in some of these cases there was knowledge on the part of the shipper that his goods were given a rate less than they should have been charged is not material, in view of absence of any necessity to show actual intention to defraud. As opposed, plaintiff refers us to Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27 (in which an instruction favorable to this position, given at the request of the railroad company, was affirmed on an appeal by the railroad company), and to Atchison, T. & S. F. R. Co. v. Goetz & B. Mfg. Co. 51 Ill. App. 151. It is certain that the authorities rule this case for defendant. Plaintiff was properly limited in damages to the value of the crated machine and to the value of the books shipped.

Affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LUCIA NAJARIAN, Admrx., etc., of Deckran Najarian, Deceased,
v.
JERSEY CITY, HOBOKEN, & PATERSON STREET RAILWAY COMPANY, Plff. in Err.

(— N. J. —, 73 Atl. 527.)

Street railway — accident to pedestrian — negligence — evidence — burden of proof.

1. In a suit brought against a street railroad company to recover for the death of a pedestrian in a street, caused by his being hit by the rear end of a car which left the track because of the "splitting" of a switch, proof of the happening of the acci-

Headnotes by TRENCHARD, J.

Case Note. — Liability for injury to person other than passenger or employee by derailment of street car.

The only case directly in point upon this question which a search has disclosed is Kelly v. United Traction Co. 88 App. Div. 234, 85 N. Y. Supp. 433. It there appeared that deceased, while engaged in laying brick upon a sidewalk, was killed by an electric car which ran off the track and against him; and it was held erroneous to charge the jury that "it was the duty of the defendant to have their car and its apparatus and the roadbed and the rails so constructed and applied that the car would stay on the tracks," since it wholly eliminated from the consideration of the jury the question of the degree of care which the railway company was required to exercise under the circumstances, and practically made it an insurer against injury caused by derailment, regardless of whether such derailment was caused by its negligence or otherwise.

Upon the question of the liability of a street railway company for defects in its tracks or in the street, see the note to Groves v. Louisville R. Co. 52 L.R.A. 448.

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dent is sufficient to charge the company with negligence, and to place upon it the burden of showing that the injuries resulting in death were not received through any fault on its part.

Trial — negligence — jury.

2. Where the happening of an accident is sufficient to charge a defendant with negligence, and where fair-minded men might honestly differ as to whether the defendant has sustained its burden of showing that the decedent's injuries were not received through any fault on its part, the question of defendant's negligence should be submitted to the jury.

Street railway — accident to pedestrian — contributory negligence.

3. A pedestrian, struck by a street car which left the track, is not guilty of contributory negligence because he was standing in the roadway, when it appears that he was sufficiently distant from the track for the car to have passed him in safety if it had remained upon the track.

(June 14, 1909.)

ERROR to the Circuit Court for Hudson County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her intestate. Affirmed.

The facts are stated in the opinion.

Messrs. **William D. Edwards** and **Edwin F. Smith**, for plaintiff in error:

The doctrine of *res ipsa loquitur* does not apply.

Widmer v. West End Street R. Co. 158 Mass. 49, 32 N. E. 899.

The court should have directed a verdict for defendant upon request.

Alcott v. Public Service Corp. (N. J. L.) 71 Atl. 45.

Messrs. **Hartshorne, Insley, & Leake**, for defendant in error:

Plaintiff's intestate had a right to stand in the roadway of the street while waiting for the car to pass down the street before him.

Kathmeyer v. Mehl (N. J. L.) 60 Atl. 40.

The fact that the wheels of the car "split" the switch was sufficient, prima facie, to raise a presumption of negligence against the defendant, and the burden rested upon defendant to satisfy the jury that the accident did not happen by negligence of the defendant or its servants.

Bergen County Traction Co. v. Demarest, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; Mumma v. Easton & A. R. Co. 73 N. J. L. 653, 65 Atl. 208.

Trenchard, J., delivered the opinion of the court:

On January 23, 1907, the plaintiff's intestate, Deckran Najarian, was struck and killed by a trolley car of the defendant company. The accident occurred about 6 or 7 o'clock in the evening, and while it was dark. The decedent was walking westward on Angelica street (being on the north side of that street), and stopped, when he came to the corner of that street and Spring street, to allow the trolley car in question to pass before him. The car was going southward on Spring street. A switch was in the track on Spring street north of Angelica street, for the purpose at times of switching cars off eastward into the car barn on Angelica street. The tongue of this switch was usually kept "closed for Angelica street;" that is, it was ordinarily so set that cars traveling south on Spring street would pass over it, and continue southward through that street. The decedent stood in the roadway between the curb of Spring street and the trolley track. The front wheels of the car in question passed over the switch in safety, but the hind wheels took the switch into Angelica street, thereby throwing the rear of the car toward the curb on the east side of Spring street, and against the decedent, injuring him so that he died shortly after. This action was brought in the Hudson county circuit court by the administratrix of the decedent, to recover damages for his death. The trial resulted in a verdict for the plaintiff, and this writ of error brings up for review the judgment entered upon the verdict.

The defendant below assigns error upon the refusal of the trial judge to nonsuit the plaintiff and to direct a verdict for the defendant. We think the motions were properly refused. Both motions were grounded upon (1) want of evidence of negligence of the defendant company; and (2) the contributory negligence of the plaintiff's intestate. With respect to the negligence of the defendant company, we think there was evidence requiring the submission of that question to the jury. It was not necessary for the plaintiff, in order to make out a prima facie case, to prove the cause of the accident. All that she was required to do was to show the existence of negligence on the part of the defendant, which occasioned the injury resulting in death. This she did by proving that the rear of the car left the straight track upon which the front part of it was proceeding, so as to kill the plaintiff's intestate, who was standing in what was normally a place of safety. Ordinarily, proof of the occurrence of an accident will not, of itself, support a conclusion of the defendant's carelessness; but this principle is not of universal application. Where the accident is one which, in the ordinary course of events, would not have happened

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if proper care had been used by the defendant, *res ipsa loquitur*. Bergen County Traction Co. v. Demarest, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Sheridan v. Foley, 58 N. J. L. 230, 33 Atl. 484.

In Bergen County Traction Co. v. Demarest, supra, Chief Justice Gummere, speaking for this court, said: "In the ordinary operation of the defendant's railroad its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built, and the cars so constructed, that when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently, proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation." In the present case it may likewise be said that common experience teaches that switches are so built, and cars so constructed, that when there is no defect in either, and the switches are prudently operated, and the cars are run with due care, the latter will pass over closed switches in safety. Therefore, proof of the "splitting" of the switch, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation of the car or switch, or both. If there were any facts inconsistent with negligence, it was for the defendant to prove them. The motion to nonsuit upon the ground of want of proof of the defendant's negligence was therefore properly denied. We think there was no conclusive rebuttal of such presumption of negligence established by the defendant.

We have pointed out that the switch, the "splitting" of which caused the accident, was supposed to be kept set so that cars would pass over it down Spring street. The front wheels passed safely, but the rear wheels took the switch into Angelica street. Immediately after the accident, and before the car was moved, the tongue of the switch was found "open for Angelica street;" that is, so placed that a car going southward on Spring street would be turned by the tongue of the switch into Angelica street. This movable tongue of the switch (which, according as it is "closed" or "opened," keeps the wheels of the car upon the main track, or shunts them off upon the switch) is 6 feet 9 inches long. It rests in a pocket, and is pivoted at the large end with a pin. The other end or point of the tongue is the part which is moved from right to left for the purpose of opening or closing the switch. The defendant attempted to overcome the presumption of negligence by showing that the switch was of standard type and in good working order. But the testimony shows that the tongue was considerably worn at the point. Moreover, the accident may well have happened from the failure of the defendant's servant to completely close the switch; that is, from his failure to move the point of the tongue until it was in actual contact with the rail of the main track. If it was not so completely closed, the forward wheels might well have passed over, and the rear wheels have taken, the switch, on account of the natural swing of the car from side to side from time to time. The testimony shows that, had the switch been properly closed, it could not have been forced open by the motion of the car wheels in running over it, unless the tongue was defectively loose at the pivot. The motorman says that as he went over the switch, he noticed that it was "set straight to go right on to Spring street." Whether his conclusion was correct, or his inspection imperfect, was, in view of the fact that the switch was found open immediately after the accident, a matter about which fair-minded men might honestly differ. The negligence of the defendant being a jury question, motion for a direction of a verdict upon the ground of want of proof of the defendant's negligence was properly refused.

With respect to the alleged contributory negligence of plaintiff's intestate, counsel has not pointed out, nor do we perceive, in what respect he was negligent. He was about to cross Spring street, when he saw the car approaching, and stopped, evidently to allow it to pass. He had the right to stand in the roadway of the street where he was standing, while waiting for the car to pass down the street before him. He had no reason to suppose that the forward end of the car would keep on the track and the rear end take the switch, and so make the spot where he stood a place of danger. Kathmeyer v. Mehl (N. J. L.) 60 Atl. 40. The alleged contributory negligence of the deceased was therefore at least a jury question, and the motions to nonsuit and direct a verdict upon that ground were properly refused.

The result is that the judgment of the court below is affirmed.

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NEW YORK COURT OF APPEALS.

C. ADELBERT BECKER et al. Appts.,
v.
MAGGIE McCREA, Appt.,
And
ANNIE BREVOORT EDDY et al., Impleaded, etc., Respts.

(193 N. Y. 423, 86 N. E. 463.)

Limitation of action — redemption from mortgage — possession.

A mortgagee who, with the consent of the mortgagor, takes possession of the property after a judgment of foreclosure, without sale, does not, while merely holding and enjoying the property as his own, hold adversely, within the meaning of a statute giving a right to redeem unless the mortgagee has maintained an adverse possession for twenty years.

(November 17, 1908.)

APPEAL by plaintiffs and defendant McCrea from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Westchester County in favor of defendants Eddy et al., in an action brought to partition certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Charles Francis Stone** and **Brainard Tolles**, with Mr. **Harlan F. Stone**, for appellants:

The right of redemption was not cut off by the statute of limitations.

Winslow v. Clark, 47 N. Y. 261; Warder v. Enslen, 73 Cal. 291, 14 Pac. 874; Miner v. Beekman, 50 N. Y. 344; Kip v. Hirsh, 21 Jones & S. 13; Maurhoffer v. Mittnacht, 12 Misc. 585, 34 N. Y. Supp. 439; Hubbell v. Sibley, 50 N. Y. 468; Green v. Turner, 38 Iowa, 118; Hunter v. Coffman, 74 Kan. 308, 86 Pac. 451; Catlin v. Murray, 37

Case Note. — Is possession of a mortgagee who enters under incomplete or defective foreclosure adverse to mortgagor.

Whether a mortgage is regarded as merely a lien upon the mortgaged land covered thereby, or as a conveyance of the legal title, an equity of redemption exists in favor of the mortgagor, and although the mortgagee enters into possession of the mortgaged premises, the right of redemption still exists, and the mortgagee is merely a resultant or constructive trustee for the mortgagor, and is within the doctrine that a trustee will not be permitted to claim his possession is adverse so long as the trust relation exists. Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545; Webb v. Winter, 135 Cal. 455, 65 Pac. 1028, 67 Pac. 691; Chickering v. Failes, 26 Ill. 507; Hinkley v. Greene, 52 Ill. 223; Mason v. Ayers, 73 Ill. 121; Gebhard v. Sattler, 40 Iowa, 152; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Mears v. Somers Land Co. (N. D.) 121 N. W. 916; Robinson v. Fife, 3 Ohio St. 551; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; Swann v. Young, 36 W. Va. 57, 14 S. E. 426.

A mortgagee, to bring himself within the operation of the limitation statute based upon adverse hostile possession under color of title, must, by direct notice to the mortgagor, or some other mode, terminate the trust relation theretofore existing by reason of the relation of mortgagor and mortgagee. Generally the foreclosure of the mortgage and sale of the land thereunder are sufficient to terminate this relation, and will raise the presumption that possession thereafter is adverse and hostile to the mortgagor. Under such circumstances, in the absence of fraud or bad faith, the validity of the foreclosure proceedings is immaterial, so far as affecting the right to rely thereon to show a termination of the trust relation, and a consequent hostile adverse possession under color of title. Gebhard v. Sattler; Chickering v. Failes; Hinkley v. Greene; and Mason v. Ayers,—supra; Brenner v. Quick, 88 Ind. 546; Goodell v. Starr, 127 Ind. 198, 26 N. E. 793; Sedwick v. Ritter, 128 Ind. 209, 27 N. E. 610; Webb v. Winter; Nash v. Northwest Land Co.; and Mears v. Somers Land Co.,—supra; Brynjolfson v. Dagner, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; Swann v. Thayer and Swann v. Young, supra; and see, to the same effect, Creighton v. Proctor, 12 Cush. 433; Melvin v. Locks & Canals, 5 Met. 15, 38 Am. Dec. 384.

And where there is a continuous, visible, and exclusive possession and occupation of the mortgaged premises under a claim of title based on foreclosure proceedings, it is immaterial whether the foreclosure is valid or otherwise. Clark v. Clough, 65 N. H. 43, 23 Atl. 526; Grant v. Fowler, 39 N. H. 101; Forest v. Jackson, 56 N. H. 357; Green v. Cross, 45 N. H. 484.

In Chickering v. Failes, supra, one of the leading cases on this subject, in referring to the question of adverse possession while the relation of mortgagor and mortgagee exists as to the land in question, the court said: "Whilst these several relations exist, the possession and payment of taxes cannot be held to be for the benefit of the occupant, and cannot in good faith be relied upon for hostile purposes against the mortgagor or landlord. To bring themselves within the good faith of this statute, they must first surrender the possession, if it has been obtained, or, as against the mortgagor, notice must be given that payment of taxes is claimed to be in the right of the mortgagee, independent of the mortgage, or the relation must be apparently terminated in some other mode. After a foreclosure or an effort to foreclose the mortgage, by decree or deed which purports to have that effect, the presumption then arises that all acts done in reference to the property are done under a claim of ownership by the mortgagee, and are referred to his color of title. If they

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Wash. 164, 79 Pac. 605; McPherson v. Hayward, 81 Me. 336, 17 Atl. 164; Dunton v. McCook, 93 Iowa, 258, 61 N. W. 977; McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27; Kohlheim v. Harrison, 34 Miss. 457; Knowlton v. Walker, 13 Wis. 265; 2 Jones, Mortg. § 1152; Zeller v. Eckert, 4 How. 296, 11 L. ed. 982; Root v. Woolworth, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 136; Graydon v. Hurd, 5 C. C. A. 258, 6 U. S. App. 610, 55 Fed. 724; Coleman v. Pickett, 82 Hun, 287, 31 N. Y. Supp. 480; Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739; Bannon v. Brandon, 34 Pa. 263, 75 Am. Dec. 655; Hudson v. Putney, 14 W. Va. 561; Hall v. Stevens, 9 Met. 418; Clarke v. McClure, 10 Gratt. 305; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Calkins v. Isbell, 20 N. Y. 147; Chapin v. Wright, 41 N. J. Eq. 438, 5 Atl. 574; McCarren v. Coogan, 50 N. J. Eq. 268, 24 Atl. 1033; Robinson v. Fife, 3 Ohio St. 551; Hindley v. Metropolitan Elev. R. Co. 42 Misc. 56, 85 N. Y. Supp. 561; Neel v. McElhenny, 69 Pa. 300; Perrin v. Garfield, 37 Vt. 304; Jones v. Williams, 108 Ala. 282, 19 So. 317; Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Williams v. Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

Messrs. **Davies, Stone, & Auerbach** for appellant Maggie McCrea.

Mr. **J. Addison Young, with Mr. C. H. Young,** for respondents.

Cullen, Ch. J., delivered the opinion of the court:

This action was brought for the partition of certain lands in Westchester county, claimed to be owned by the plaintiffs and certain of the defendants as tenants in common. The premises were not in the actual possession of these parties, but were held and occupied by the respondents, the defendants Annie B. Eddy and others. It

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such as is required by the statute, and for the period of time designated by the statute, they would form a bar to a redemption."

On the same subject, in Nash v. Northwest Land Co. supra, the court said: "A mortgagee in possession may or may not be holding adversely. The only necessary essentials to give rise to that relation are the existence of a mortgage, and the consent by the mortgagor that the mortgagee take or hold possession of the property by reason of the mortgage and as security for the debt. The acknowledgment or recognition of the mortgagor's right, on the part of the mortgagee, when the possession is taken or while it is held, is not essential. So long as the relation continues, the rights and liabilities arising out of it are the same, whether the mortgagee acknowledges the relation or not . . . so long as the mortgagee acknowledges or recognizes the mortgagor's right to the land, the statute of limitations does not run against the latter's remedies . . . and conversely, when the mortgagee in possession denies the mortgagor's rights, the statute is put in motion. Of course, where the mortgagee is permitted to take possession under an agreement on his part to hold in subjection to the mortgagor's rights, such possession is not deemed adverse, so as to set the statute of limitations in motion against the mortgagor, until the mortgagee distinctly disavows his obligations as such, and notice thereof is brought home to the mortgagor. This is so because, until the mortgagor has notice of the repudiation of the agreement, he has the right to presume that the original arrangement continues. Where, however, the mortgagee's possession is adverse from the beginning, and he has never acknowledged any obligation to the mortgagor, there is no ground for the presumption above mentioned, and the act of taking possession not only gives rise to a cause of action in favor of the mortgagor, but also starts the statute of limitations running against such cause of action."

In Stout v. Rigney, supra, holding that a purchaser at an invalid trust sale does not necessarily enter into possession of the property as mortgagee, irrespective of his actual intention, so that he cannot rely on his possession to invoke the statute of limitations in favor of his title, the court said: "The character of the possession . . . whether adverse or otherwise, must be determined from all the facts and circumstances of the case, and particularly with reference to the dominion exercised over the property by the purchaser and by his grantees subsequent to the sale. If the acts done and performed by those in possession were of such a nature as would naturally advise the world that the occupants claimed to be the owners of the fee, and such was their claim in fact, then their possession was adverse . . . nor do we believe it to have been essential, to render their possession adverse, that they should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem." To the same effect are H. B. Claflin Co. v. Middlesex Bkg. Co. 113 Fed. 958, and Gottlieb v. Thatcher, 2 C. C. A. 278, 4 U. S. App. 616, 51 Fed. 373 (possession of vacant land under foreclosure sale).

Entry into possession under title based upon foreclosure sale ineffective as to one of the owners of the land sold thereunder, because not made a party to the foreclosure proceeding, is nevertheless sufficiently adverse to start in operation the statute of limitations in favor of the mortgagee as against such party. Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005. To same effect as to constructive possession of vacant land is Goetter v. Moore (Wash.) 101 Pac. 365.

This doctrine also finds support in Mc-

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appears that on May 1, 1877, Jane B. Eddy conveyed to Bernard Spaulding the premises in question. From him the appellants deduce their title. It further appears that, contemporaneous with the conveyance to Spaulding, he executed a mortgage of the same premises to said Jane B. Eddy to secure a portion of the purchase money. On July 25, 1878, default having been made in the payment of that mortgage, said Eddy instituted an action in the supreme court for the foreclosure of the same, in which action a judgment of foreclosure and sale was entered on April 22, 1879. No sale was ever had under this judgment, but, some time in the year 1879, said Jane B. Eddy entered into possession of the mortgaged premises and held the same until her death (subsequent to the commencement of this action) in February, 1905, when her title devolved upon the respondents, the executors and trustees of her will. Mrs. Eddy was made a party to the action. The complaint set forth the mortgage, the ignorance of the plaintiffs as to its validity, and charged that the same had been paid or was barred by the statute of limitations. Judgment was demanded that the rights and claims of all the parties to the action be ascertained and determined, that partition of the premises be made, or that a sale of the same be had. The respondents, Mrs. Eddy's executors and trustees (she having, in the meantime, died), answered, claiming to own the premises in fee, and setting up adverse possession in themselves and in their testatrix for more than twenty years. The special term rendered judgment in favor of these last-named defendants, holding that the rights of the plaintiffs and the other defendants were barred by lapse of time. That judgment has been affirmed by the appellate division.

The whole controversy depends upon the character of the possession taken and held by Mrs. Eddy, and on the interpretation to be given to § 379 of the Code of Civil Procedure. The learned trial court found that no part of the mortgage had been paid; and as to the entry and possession of Mrs. Eddy, its findings are as follows: "In the year 1879, the said Jane B. Eddy, with the knowledge and consent of the said Bernard Spaulding and the defendant Maggie McCrea, entered into the open, actual, and visible possession and use of the said premises described in the complaint in this action, and became a mortgagee in possession of said premises." That the said Jane B. Eddy continued in such possession and

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Caughn v. Young, 85 Miss. 277, 37 So. 839. It appeared in this case, however, that the purchaser of mortgaged land at a trustee's sale notified the grantor in such trust deed that he had purchased, and was holding possession of the land as owner.

In Sutton v. Jenkins, 147 N. C. 11, 60 S. E. 643, the court said that possession of mortgaged premises for the statutory period of time by a purchaser under void foreclosure proceedings tended strongly to prove an indefeasible title.

The same result was reached in Minnesota, although on a different theory. Thus, in Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765, it was held that a mortgagee entering into possession of the mortgaged premises under a defective foreclosure proceeding, but claiming title thereunder, which claim was acquiesced in by the mortgagor, who surrendered possession of the premises on demand, was nevertheless a mortgagee in possession. It was, however, held that the right to foreclose and the right to redeem were reciprocal and commensurable, and the right to foreclose having expired, the right to redeem had also expired, and, as a logical result, the mortgagee in possession was vested with an absolute legal title to the mortgaged premises. To the same effect are Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332, and Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; but this doctrine was disapproved in Backus v. Burke, 63 Minn. 272, 65 N. W. 459, to the extent that it was limited to possession with the consent of the mortgagor. On this point the court said: "How can the statute of limitations run against the mortgagor if it is by his consent or license that the purchaser is in possession? It is a well-settled principle of law that the statute of limitations does not run in favor of an occupant of land in possession by the license or consent of the owner . . . of course, there are cases where the licensee in possession may, by his acts, repudiate his license, and thereafter hold adversely to the licensor. . . . But if such a purchaser at a foreclosure sale cannot be a mortgagee in possession unless he is in with the consent of the mortgagor, he will cease to be a mortgagee in possession, and becomes a mere trespasser, liable to an action of ejectment, as soon as he repudiates his license, and commences to hold adversely. We cannot hold that such is the law. Such a purchaser, entering under color of the foreclosure proceedings, enters adversely, not by the consent of the mortgagor, and continues to hold adversely from the time he enters."

Corby v. Moran, 58 Kan. 278, 49 Pac. 82, illustrates the doctrine that possession by a mortgagee or other purchaser under a foreclosure proceeding must be in good faith and free from fraud, in order to come within the doctrine that possession under a foreclosure-of-mortgage proceeding is adverse to the mortgagor. In this case it was held that possession under a sheriff's deed given in a foreclosure proceeding based upon a judgment which had been previously paid, of which fact the purchaser had notice, did not start in operation the statute of limitations limiting the time within which deeds execut-

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use of said premises up to the time of the commencement of that action, a period of twenty-five years and upwards, and until the time of her death, as hereinafter found, and continuously cultivated and improved the same, ploughing and planting and raising crops thereon, cutting the meadow, using the timber, building roads and walls thereon, and also built a barn upon the same, and received the fruits and benefits of said premises, and possessed and improved the same as owners are accustomed to possess and improve their estates, and that such possession and use and said acts of ownership by the said Jane B. Eddy were continued, during all said period, with the knowledge and acquiescence of the defendant McCrea, and no claim adverse to such use and occupancy was ever made by said defendant McCrea until the spring of 1904, nor did she at any time, from 1879 to 1904, pay any taxes or assessment on said property, or use or occupy the same."

On these findings it determined as conclusions of law: "(1) That the said Jane B. Eddy, in the year 1879, became and was a mortgagee in possession of said premises. (2) That the possession of said premises by said Jane B. Eddy was, for more than twenty years prior to the commencement of this action, exclusive, hostile, and adverse to the defendant McCrea. (3) That, by reason of such adverse possession by said Jane B. Eddy, the right of plaintiffs and said defendant McCrea to redeem from said mortgage is barred." The findings of fact are conclusive in this court, the affirmance of the appellate division having been unanimous, but the question remains whether those findings support the legal conclusions and the judgment founded thereon. That the possession of Mrs. Eddy was not adverse in the ordinary sense of the term is quite apparent, for she entered with the consent of the owner of the equity, and, as found, became a mortgagee in possession of the premises. Under our statutes, contrary to the common law, a mortgage creates no estate in the land, but is merely a lien on the mortgaged premises. Since his right to recover the premises in ejectment upon default has been abrogated by the statute, one cannot become a mortgagee in possession unless his entry is with the consent of the owner of the equity of redemption, express or implied. Howell v. Leavitt, 95 N. Y. 617; Barson v. Mulligan, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75. Therefore, when a mortgagee enters into possession with such consent, it is in

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ed in judicial proceedings may be attacked for irregularities.

It is to be noted that in all of the foregoing cases the mortgagee, or the purchaser at the foreclosure sale, entered into possession under a paper title, based upon a decree or deed purporting to convey the mortgaged premises. In this respect they are distinguishable from BECKER v. McCREA, wherein the foreclosure proceeding was not prosecuted to a sale of the mortgaged premises, and the mortgagee thereafter entered into possession with the consent of the mortgagor, and became a mortgagee in possession. He therefore was within the doctrine already stated, that, to render his possession adverse, so as to start the operation of the limitation statute in his favor, he must, by some act, clearly disavow and repudiate the relation of mortgagor and mortgagee, and claim to hold as owner in fee. This distinction is also made in Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221, wherein it was held a purchaser at a foreclosure of a trust deed, who took possession under a certificate of purchase, without, however, having issued to him a court deed of the premises, to which he was entitled upon surrender of the certificate, did not hold adversely to the mortgagor, so as to set in operation the limitation statute based on adverse possession. The court said, in order to obtain the benefit of this statute, it was essential that the purchaser prove a paper title which, on its face, purported to convey title.

This distinction reconciles BECKER v. McCREA with Shriver v. Shriver, 86 N. Y. 575, wherein the purchaser of land at judicial sale was relieved from carrying out his purchase because a marketable title was not shown by the vendors. The title offered was based on possession, for the statutory period, by a purchaser under a defective foreclosure of mortgage sale. The vendors failed to show adverse possession for the statutory period, because it appeared that the mortgagor had deceased within the period, and it did not appear that his heirs were not under some disability that would toll the statute. It was, however, recognized that such a possession, where no disability existed as to the mortgagor or his representatives or heirs, would be sufficient to establish title by adverse possession. On this point the court said: "The facts of the case make out a continuous, uninterrupted, actual possession, beginning with an entry under claim of exclusive title founded on a written instrument, and so kept up for over twenty years . . . a clear adverse possession for that time makes a title which a purchaser at a judicial sale may not refuse."

In H. B. Claflin Co. v. Middlesex Bkg. Co. supra, wherein the court said that, had the mortgagees taken possession of the premises as mortgagees, without the foreclosure proceeding, their possession would not have been adverse; but where there was a foreclosure, although voidable, and possession was taken under a deed issued under such proceeding, "this was notice to everybody that the possession was under claim of absolute ownership, and not as a mortgagee, and such a repudiation of the trust as sets the statute of limitations in operation."

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no sense in hostility to the title of the mortgagor. In Packer v. Rochester & S. R. Co. 17 N. Y. 283, it is said by Judge Pratt: "The mortgagee holds simply a chose in action, secured by a lien upon the land. Since the Revised Statutes, there is not an attribute left in the mortgagee before foreclosure, upon which he can make any pretense for a claim of title; for the mere right, where he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title." In Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623, it was held that the legal title to the mortgaged premises remains in the mortgagor, and that title is not affected by default in payment, or by surrender of possession to, or the taking of possession by, the mortgagee. In that case Judge Earl said: "How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession, the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession, he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title, subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives, to be administered as personal estate, and the mortgagor's title would go to his heirs." In the same case Judge Reynolds said: "In such case the creditor, instead of leaving his debtor in possession, and relying upon his intangible legal lien for his security, takes the thing pledged in his own possession, and enjoys its use until his debt is paid. He must account for profits and waste to his debtor, and when his debt is paid by the receipt of rents and profits, or in any other manner, his lien is extinguished and his possession is no longer justified by law."

Though, as we have seen, the surrender of possession by the mortgagor to the mortgagee confers no title upon the latter, still it is settled law that in such case ejectment cannot be maintained by the mortgagor against the mortgagee, but he must resort to an action in equity to redeem (Phyfe v. Riley, 15 Wend. 248, 30 Am. Dec. 55; Chase v. Peck, 21 N. Y. 581); and the only question remaining is whether the plaintiffs and their co-owners have lost their right to that relief by the lapse of time. Before the enactment of the present Code there was no provision of law specially proscribing the time in which such actions must be instituted, but it was held that they fell within § 97 of the old Code, which prescribed that actions for relief not otherwise specially provided for must be brought within ten years. Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, 50 N. Y. 468. In the former case it was held that the cause of action did not accrue at least until the mortgagee entered into possession. That was all that was necessary to decide in that case. The learned judge who wrote for the court, however, said further: "The statute, I think, would not then commence running had the defendants or their grantor entered and continued in possession avowedly as mortgagees, and would not run while they so held, for the reason that it is a continuing right of the owner to pay off and discharge a mortgage, and, by so doing, regain the possession of the land." This was the state of judicial authority when the present Code, prepared by Mr. Throop, was enacted. The section before us, as already said, is new. In his note to the section [379] Mr. Throop says: "One of the questions which has given rise to much conflict of opinion is that relating to the application of the statute of limitations to such a case [to redeem]." He refers to the Miner and Hubbell Cases, and suggests that, in analogy to other actions for the recovery of real estate, the period prescribed should be twenty years instead of ten. In the section as drawn by him and enacted by the legislature, we find the words, "unless he or they [mortgagee in possession and those claiming under him] have continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage." The use of the word "adverse," in the light of the previous intimation by this court in the Miner Case, seems to indicate very clearly that it was the intention of the legislature to incorporate that intimation or *dictum* into the statute law. It is admitted by the learned judge who wrote for the appellate division that the possession of the respondents was not adverse, but he thought that the word "adverse" was not to be construed in the same sense as that in which it is used in the sections of the Code relative to the time for the bringing of other actions in regard to real property. He was led to this conclusion by the consideration that, if the term "adverse" were to be given its ordinary meaning, there would be practically no limitation of time on the institution of actions to redeem, for, as he argues, if the mortgagee enters without the consent of the mortgagor, he is a mere trespasser, his possession is unlawful, and

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he can be ousted in ejectment, and the action to redeem is unnecessary; or, if he enters with the consent of the mortgagor, he becomes a mortgagee in possession, and the statute never commences to run. I think the learned judge is somewhat in error in thinking that under the ordinary definition of the word "adverse" there can be no case to which the section applies. The mortgagee might enter with the consent of the mortgagor and thus become a mortgagee in possession. He might thereafter assume to convey the land as the absolute owner thereof. In that situation, the possession of the grantee of the mortgagee would be plainly adverse, or there might be such a repudiation by the mortgagee of his relation as such to the mortgagor as would set the statute running. The section would also apply to the cases of all lienors and encumbrancers. But whatever force there may be in the argument of the learned court, it cannot justify the unqualified elimination of the word "adverse" from the statute, yet this is precisely what the decision below has done. No suggestion of a possible interpretation of the word "adverse" is attempted. It is simply ignored. If the legislature intended that twenty years' possession as mortgagee merely should bar an action to redeem, it is difficult, if not impossible, to see why it required that such possession should be adverse. It may be unfortunate that so long a period should be permitted during which the title to land can be unsettled, but the remedy is with the legislature. The courts are not justified in disregarding its express enactment.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the final award of costs.

Gray, Edward T. Bartlett, Werner, Haight, Willard Bartlett, and Hiscock, JJ., concur.

Petition for rehearing denied.

TEXAS SUPREME COURT.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plff. in Err.,

v.

LILLIE M. WIMBERLY.

(— Tex. —, 112 S. W. 1038.)

Insurance — grace — computation — Sunday.

In computing the days of grace allowed in an insurance policy for payments after the date specified in the policy, in case such date falls on Sunday, so that, by law, payment can be made the following day, the time begins to run on Sunday, and not on the day following.

(October 28, 1908.)

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The facts are stated in the opinion.

Mr. **W. J. Moroney** for plaintiff in error.

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On the 1st day of October, 1904, the plaintiff in error issued to Garee A. Wimberly a life insurance policy in the sum

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Thus, in Campbell v. International Life Assur. Soc. 4 Bosw. 299, where the thirtieth and last day of grace on which a premium on a life insurance policy could be paid fell on Sunday, it was held that the insured was justified in deferring payment until the Monday following, and that such delay did not impair any right under, or work a forfeiture of, the policy.

And in Hammond v. American Mut. L. Ins. Co. 10 Gray, 306, where the life insurance policy sued upon provided that it was to terminate in case the premium should not be paid in advance, on or before the day at noon upon which it should become due, in holding that the payment could properly be postponed till Monday, without a forfeiture of the policy, where such payment fell due on Sunday, the court said: "The defendants had no office open on that day [Sunday], and were under no obligation to receive the payment of the premium on that day if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act,

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The judgment appealed from should be reversed and a new trial granted, with costs to abide the final award of costs.

Gray, Edward T. Bartlett, Werner, Haight, Willard Bartlett, and Hiscock, JJ., concur.

Petition for rehearing denied.

TEXAS SUPREME COURT.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plff. in Err.,

v.

LILLIE M. WIMBERLY.

(— Tex. —, 112 S. W. 1038.)

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Thus, in Campbell v. International Life Assur. Soc. 4 Bosw. 299, where the thirtieth and last day of grace on which a premium on a life insurance policy could be paid fell on Sunday, it was held that the insured was justified in deferring payment until the Monday following, and that such delay did not impair any right under, or work a forfeiture of, the policy.

And in Hammond v. American Mut. L. Ins. Co. 10 Gray, 306, where the life insurance policy sued upon provided that it was to terminate in case the premium should not be paid in advance, on or before the day at noon upon which it should become due, in holding that the payment could properly be postponed till Monday, without a forfeiture of the policy, where such payment fell due on Sunday, the court said: "The defendants had no office open on that day [Sunday], and were under no obligation to receive the payment of the premium on that day if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act,

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of $1,000 payable at his death to his wife, Lillie M. Wimberly. The policy provided that the premiums should be paid annually in advance on the 1st day of October, at or before 5 o'clock, and the first premium was paid upon the issuance of the policy. The policy contained this provision: "Policies cease in accordance with their terms if the premiums are not paid on or before the day stipulated therein for such payment, except that a grace of thirty days is allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken." The 1st day of October, 1905, was Sunday, and the premium which fell due on that day was never paid by the deceased, who died on November 1st of that year. The plaintiff in error contends that the thirty days of grace expired with the 31st day of October, while counsel for defendant in error contends that the thirty days of grace began at the expiration of the 2d day of October and embraced all of the 1st day of November. If there had been no provision for days of grace in the policy, the assured would have had the right to pay the premium on the 2d day of October,—Monday. This proposition of law is not disputed by the plaintiff in error. It is claimed by counsel for the defendant in error that because the day of payment fell upon Sunday, and the assured had the right to pay the premium on Monday, that made Monday the day of maturity, just as if it had been named in the policy, and that the thirty days of grace ran from that day. If the plaintiff in error's contention is correct, it determines this case, and it will be unnecessary for us to pursue the investigation of the other questions presented.

The 1st day of October in the year 1905 being Sunday, if the days of grace had not been allowed by the contract, the assured would have had the right to pay the premium on the following Monday, because the law does not require payment to be made on Sunday. It is contended by the defendant in error, and so held by the honorable court of civil appeals, that this constituted Monday the day for the payment of the premium, and that the thirty days which the contract allowed for the payment of that premium commenced to run at the close of Monday, instead of at the close of Sunday, and therefore the 1st day of November was within the thirty-day limit for the payment of the premium. We are of opinion that the fact that the law granted to the assured the right to pay on Monday did not have the effect to add a day to the thirty days allowed by the contract. The contract prescribes that the premium shall be due on October 1st, but the policy would not be forfeited if paid within thirty days thereafter. The construction placed upon the contract by the court of civil appeals

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but also one which the other party was not bound to recognize."

In Holbrook Bros. v. Mill Owners' Mut. Ins. Co. 86 Iowa, 255, 53 N. W. 229, under a statute providing that, in computing time where the last day on which an act is to be performed falls on Sunday, the time prescribed shall be extended so as to include the whole of the following Monday, it was held that a payment on Monday satisfied the articles of incorporation of the insurance company, which required the payment of assessments within thirty days from the time the notices of assessments were mailed, the thirtieth day having fallen upon Sunday.

But in National Mut. Ben. Asso. v. Miller, 85 Ky. 88, 2 S. W. 900, where the thirty days of grace after notice of assessment, during which the charter of the association allowed assessments to be paid, fell on Thanksgiving day, it was held that a failure to make the payment on such day forfeited the policy, as insured was not entitled to an additional day. This decision, however, is under a statute in regard to holidays which "makes all days appointed by the President of the United States, or by the governor of the commonwealth, as days of fasting or thanksgiving, holidays, on which all the public offices of this commonwealth may be closed, and shall be treated and considered as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, placed by law upon the footing of bills of exchange," and which provided that, if any of such days named "as holidays shall occur on Sunday, the next day thereafter shall be observed as holiday, but bills of exchange or other paper may be presented for payment or acceptance on the Saturday preceding such holiday, and proceeded on accordingly;" and therefore is in full accord with the foregoing cases, as the court expressly placed the decision upon the ground that there was nothing in the statute prohibiting business transactions on Thanksgiving day or treating that day as a Christian Sabbath, except as to commercial paper, thus impliedly holding that a different result would attend had the day upon which the period for payment of the assessment expired fallen on a Sunday.

As to the rule as to the first and last days in computation of time in general, see subject note to Halbert v. San Saba Springs Land & Live Stock Asso. 49 L.R.A. 193, and case note to State v. Elson, 15 L.R.A. (N.S.) 686.

As to extension of time in general when last day falls on Sunday, see note to Brown v. Vailes, 14 L.R.A. 120.

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would give to the assured thirty-one days from the 1st day of October, instead of thirty, as expressed in the contract. Wooley v. Clements, 11 Ala. 220. In the case cited suit was upon a note to which the law gave three days of grace. The note fell due on Sunday, and was protested on Wednesday. It was contended, as in this case, that the days of grace began to run at midnight of Monday, and that the note was not protestable until Thursday; but the court held that the days of grace were not enlarged by the fact that the note matured on Sunday.

The rule for computation of time under a state of facts like those set out in this case is well settled to be that the day on which an act is to be performed is to be excluded in determining the time when some other thing is to be done thereafter, and that the last day of the time given for the performance of the latter act is to be included in the computation. Hill v. Kerr, 78 Tex. 217, 14 S. W. 566; Lubbock v. Cook, 49 Tex. 100. Applying this rule to the facts of this case, the thirty' days grace allowed by the policy of insurance began to run at midnight of Sunday, October 1st, and terminated at midnight of the 31st day of that month, which gave thirty full days from the day on which the payment was expressed to be made, and fulfilled every provision of the contract between the parties. It follows that since Wimberly did not pay the premium at all, and died after the expiration of the time allowed within which to make the payment, the policy was forfeited before his death, and there was no right of recovery as against the insurance company.

It is unnecessary to discuss the other questions which are raised, and it is hereby ordered that the judgments of the Court of Civil Appeals and District Court be reversed, and that judgment be here rendered that the defendant in error take nothing by the suit, and that the insurance company go hence without day, and recover of the defendant in error all costs of this proceeding.

TEXAS COURT OF CRIMINAL APPEALS.

EUGENE HARTNETT, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. App. —, 119 S. W. 855.)

Officer — embezzlement — duty.

1. A police officer assigned to the position of jailer cannot be convicted under a statute providing that if an officer shall convert to his own use money belonging to the county that may come into his custody by virtue of his office, he shall be punished, where he appropriates to his own use money collected from prisoners as fines, if the statute imposes the duty of collecting such fines upon another officer.

Same — estoppel.

2. That one in collecting fines assumes to do so by color of his office does not estop him from denying his authority to do so, in defense of a prosecution against him under a statute providing for punishment of an officer who appropriates to his own use money belonging to the county that has come into his possession by virtue of his office.

Appeal — criminal cause — dismissal.

3. A prosecution under an indictment charging an offense cannot be dismissed by the appellate court because the facts do not support the conviction.

(May 26, 1909.)

Case Note. — May estoppel to deny authority to receive money alleged to have been embezzled be invoked against public officer charged with embezzlement.

As to embezzlement by persons other than bailees or public officers, as affected by want of authority to receive the money or property in the first instance, see note to Smith v. State, 17 L.R.A.(N.S.) 531.

Where officer exceeds his authority in receiving money.

There is a difference of opinion as to whether an officer who, without having actual authority to collect money, nevertheless, assuming to have such power, collects money and then converts it, can be punished for embezzlement as a public officer. Some cases hold that by his conduct he is estopped to deny that he has such power.

Thus, the treasurer of an association who received in its name and in its behalf, from the governor of the state, certain money which had been voted by Congress to the association, and sent to the governor, is estopped, in a prosecution for embezzling the money, to assert that the association was not entitled to the money, or that he was not authorized to receive it as treasurer, because it should have been transmitted to the state treasurer and thence by him directly to the defendant, the treasurer of the association. People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

So, it was held in People v. Robertson, 6 Cal. App. 514, 92 Pac. 498, that, admitting that a deputy assessor acted irregularly in receiving from a mining company a part only of the taxes due from it, he was estopped, in a prosecution for embezzling the money, from denying his authority to receive it, or that he acted as agent of the county in the transaction.

And in State v. Spaulding, 24 Kan. 1,—a

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APPEAL by defendant from a judgment of the District Court for Jefferson County convicting him of embezzlement. Reversed.

The facts are stated in the opinion.

Messrs. **F. J. Duff** and **Robert A. John** for appellant.

Mr. **F. J. McCord** for the State.

Ramsey, J., delivered the opinion of the court:

The charging part of the indictment against appellant is in these words: "That Eugene Hartnett, on or about the 3d day of March, one thousand nine hundred and eight (1908), and anterior to the presentment of this indictment, in the county of Jefferson and state of Texas, Eugene Hartnett was then and there a police officer of the incorporated city of Beaumont, which said city was then and there duly and legally incorporated under the laws of Texas, and was then and there acting and serving as such police officer, and as such police officer and by virtue of his said office there had come into his hands and was in his charge, custody, and possession the sum of two hundred and eighty-one dollars and fifty cents, lawful and current money of the United States of America, and of the value of two hundred and eighty-one dollars and fifty cents, a better description of which said money is to the grand jurors unknown, which said money was then and there the property of said incorporated city of Beaumont, and

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leading case on the question of estoppel.—a conviction of a city clerk for embezzling money received by him for a license was sustained on the ground of estoppel, notwithstanding that under the ordinances it was his duty to issue the license upon production by the licensee of the receipt of the city treasurer showing that the license money had been paid; it appearing that for years it had been the custom, known to the mayor, council, and other city officers, for the licensee to pay the money directly to the clerk, who would thereafter hand it to the treasurer, it not appearing that the city had ever disavowed such assumed authority, or made any effort to recollect license moneys. Brewer, J., remarked that "one who is agent enough to receive money is agent enough to be punished for embezzling it."

So, under a statute providing that if a clerk to any body corporate shall fraudulently embezzle any money delivered to or received or taken into possession by him for and in the name or on account of his master or employment, he shall be deemed to have feloniously stolen it, it is not necessary to show that he had received the money "by virtue of his employment," nor that he had authority to receive it; but it is sufficient if it was received in the name or on account of the master or employer. Denton v. State, 77 Md. 527, 26 Atl. 1022.

But the contrary doctrine is held in many, perhaps most, of the cases, which are set out below.

Thus United States v. Smith, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595, holds that a clerk of a collector of customs is not by statute charged with the safe-keeping of the public moneys, and therefore cannot be guilty of embezzling the same.

So, a sheriff forbidden by law to collect taxes on unlisted property cannot be convicted of embezzling money so collected, as property belonging to or for the use of the state or any county, since, under the statute, to warrant a conviction of embezzlement the officer must have been rightfully and legally in possession of the money, and must then have misappropriated it, whereas the sheriff in this case must be considered as holding the money in trust for the use of the persons from whom he received it. Com. v. Alexander, 33 Ky. L. Rep. 971, 112 S. W. 586.

A justice of the peace, having no legal right to the possession of public-school money, cannot be convicted of embezzling it, under a statute making punishable embezzlement, by any public officer, agent, or servant, of public money received by virtue of his office, agency, or service, or under color or pretense thereof. State v. Bolin, 110 Mo. 209, 19 S. W. 650.

So, an auditor of public accounts who receives fees in violation of the state Constitution, which forbids him to receive the same, and requires that they be paid in advance to the state treasurer, cannot be convicted of embezzling the same, under a statute providing: "If any officer or other person charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money, or any part thereof, belonging to the state, . . . shall convert to his own use . . . any portion of the public money . . . received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose . . . every such act shall be deemed and held in law to be an embezzlement." Moore v. State, 53 Neb. 831, 74 N. W. 319.

So, a county auditor not being charged by law with possession and custody of money belonging to the state, an indictment charging him with converting money of the state which came into his possession by virtue of his office and in discharge thereof is bad, under a statute providing for the punishment of any officer or other person charged with collection, receipt, etc., of public money, who converts the same to his own use State v. Newton, 26 Ohio St. 265.

A similar decision with respect to a deputy county treasurer was rendered in State v. Meyers, 56 Ohio St. 340, 47 N. E. 138.

The legal possession of money in the mint being in the Treasury Department, a clerk to the Treasurer of the mint cannot be convicted of embezzling the same, under a Federal statute applicable to "all officers and

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the said Eugene Hartnett did then and there unlawfully and fraudulently take, misapply, and convert to his own use the said money, against the peace and dignity of the state."

The indictment so returned against him and the prosecution which ensued, were based on article 103 of our Penal Code of 1895. This article is as follows: "If any officer of any county, city, or town in this state, or any clerk or other person employed by such officer, shall fraudulently take, misapply, or convert to his own use any money, property, or other thing of value, belonging to such county, city, or town, that may have come into his custody or possession by virtue of his office or employment, or shall secrete the same with intent to take, misapply, or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years."

Many questions were raised in the court below, which have also been urged in this court, as grounds for reversal of the judgment of conviction. We think the case must be reversed because under the uncontradicted evidence the conviction cannot stand for the reason the moneys appropriated must be public funds owned by the city, and must come into the possession of the officer by virtue of his office, and his duties must be defined by law, and cannot

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other persons charged by this act or any other act with safe-keeping, transfer, and disbursement of public moneys." The court said that the statute had "obvious reference to persons intrusted by some act of Congress with the legal possession of public moneys, not to those subordinates who, not having been intrusted with such possession, could be punished for a fraudulent conversion, as felons without any congressional legislation." United States v. Hutchinson, 4 Clark (Pa.) 211.

R. v. Orman, 36 Eng. L. & Eq. 611, held that a servant who had exceeded his written instructions in receiving money might nevertheless be convicted for embezzling the moneys, if he was employed *de facto* to receive the money; but when a storekeeper of a county jail, whose duties are defined by statute, wrongfully converts money which he is not allowed by law to receive, a conviction for embezzlement will be quashed.

Where officer is one *de facto* only.

Most of the cases hold that an officer accused of embezzlement cannot defend on the ground that he had no right to receive the money as officer for the reason that his appointment or election was invalid.

Thus, State v. Stone, 40 Iowa, 547, holds that if one holds himself out to be an officer, or acts as an officer *de facto*, he cannot be heard to object that he is not an officer *de jure*, because his acting in that office estops him to deny his right to it, even when indicted for embezzlement.

And People v. Sanders, 139 Mich. 442, 102 N. W. 959, held that a deputy of a township treasurer might be convicted for embezzling township funds, even though the treasurer had not lawfully appointed him, for the reason that he had not obtained the consent of his bondsmen, as required by law.

Bartley v. State, 53 Neb. 310, 73 N. W. 744, holds that a state treasurer who has served out his term cannot, when charged with embezzlement, defend on the ground that he never rightfully held the office; since it is immaterial whether he was an officer *de jure* or *de facto*.

Fortenberry v. State, 56 Miss. 286, held that one who had been duly elected to an office and had assumed its functions could be convicted of embezzlement, though he had not taken the oath of office.

State v. Heath, 8 Mo. App. 99, held that the relation of agent or servant, within the meaning of a statute making punishable any embezzlement of public moneys by any public officers, agents, and servants, "does not depend on the legal right of the appointing power to receive the money converted, or upon the legal right of the agent to collect it. The relation of trust and confidence between the alleged principal and agent, and a colorable right to appoint or employ the agent or servant, with the acceptance by the latter of the relation, are the essential elements." This case was reversed in 70 Mo. 565, but for a reason not affecting the above principle.

State v. Findley, 101 Mo. 217, 14 S. W. 185, held that it was not a defense to a county collector accused of embezzlement, that he failed to take the oath of office or give bond for the performance of his duties. The court said: "Being an officer *de facto* he cannot object that he is not an officer *de jure*."

State v. Mims, 26 Minn. 183, 2 N. W. 494, 683, held that the fact that a county treasurer did not give bonds as required by statute did not prevent his prosecution for embezzling public moneys collected by him as treasurer. The court said: "If he [defendant] assumed the right of making the collections as county treasurer, it does not lie with him, when called upon to account therefor to the state, to object that he had no legal right to do so.

R. v. Borrett, 6 Car. & P. 124, holds that on an indictment for embezzlement against a letter carrier charged as a person employed in the public service of his Majesty, it is not necessary to prove his appointment as a letter carrier, but evidence of his having acted as such is sufficient.

On the trial of a person for embezzling a letter containing a bill of exchange, he being at the time employed under the postoffice, it was held in R. v. Rees, 6 Car. & P. 606, suf-

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be created by custom or usage. The evidence, in brief, showed that appellant was a policeman in the city of Beaumont, and that he was assigned to the position of jailer, and that the moneys the embezzlement of which is charged herein came into his possession in payment of fines assessed (quite irregularly) against various defendants in the corporation court of Beaumont. There was absolutely no evidence in the record that by law he was authorized to receive such moneys. This authority by law was vested in the city marshal, and he was required to make payments monthly to the city treasurer. While it is possible that appellant might have been indicted and convicted as an employee of the marshal, it is certain that as here charged, where the conviction is sought by reason of misappropriation of funds received by him as an officer and by virtue of his office, under the authorities, a conviction cannot be sustained. This question is, we think, definitely settled beyond serious doubt by the decision of this court in the case of Warswick v. State, 36 Tex. Crim. Rep. 63, 35 S. W. 386. It was there held in substance that an indictment based upon article 103, Penal Code 1895, will not lie against a county judge for a misapplication or conversion of county school funds, because such funds cannot come into his hands by virtue of his office, and the law does not authorize a county judge, as such officer, to receive county school moneys. The suggestion is made, however, by Judge Henderson, that the court should not be understood as holding that the commissioners' court might not empower the county judge, or any other person, to receive money coming to the county for and on behalf of the county; but in such contingency the money or property would come to such person, not by virtue of his official capacity, but on account of his employment or agency.

A quite similar question came before the supreme court of Missouri and was decided in the case of State v. Bolin, 110 Mo. 209, 19 S. W. 650. Their statute is somewhat similar though rather broader than ours. It is as follows: "If any officer appointed or elected by virtue of the Constitution of this state, or any law thereof, including as well all officers, agents, and servants of incorporated cities and towns, or municipal townships or school districts, as of the state and counties thereof, shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall make way with or secrete any portion of the public moneys, or any valuable security by him received for safe-keeping, disbursement, transfer, or for any other purpose, or which may be in his possession, or over which he may have the supervision, care, or control by virtue of his office, agency, or service or under color or pretense thereof, every such officer, agent, or servant shall, upon conviction, be punished by imprisonment in the penitentiary not less than five years." Passing on this statute the supreme court of Missouri say: "No provision of the statute is pointed out or found, which directs or authorizes the public school money of the state or county to be placed in the possession or

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ficient to prove that such person acted in the service of the postoffice, and that it was not necessary to go into proof of his appointment.

But the contrary is held in a few cases.

Thus, in Wood v. State, 47 Ark. 488, 1 S. W. 709, a statute provided for punishing every officer, etc., "who has taken an oath of office, as required by law," etc., who should embezzle public funds. It was held that an indictment which failed to allege that defendant had taken an oath of office was fatally defective, though it alleged that he was the duly elected county treasurer, and received the money as such treasurer.

And State v. Flint, 62 Mo. 393, held that an indictment for embezzlement, which merely stated that defendant was the agent of the state and county, was properly quashed when it did not further allege when and how he was appointed and the authority for his appointment.

Estoppel of officer to deny right of public to money embezzled.

State v. Patterson, 66 Kan. 447, 71 Pac. 860, was an action of embezzlement against a city treasurer for fraudulent conversion of moneys which came into his hands by virtue of his office. It was held to be no defense that he collected the money embezzled from persons engaged in unlawful traffic in intoxicating liquors in the city, under an arrangement between such persons and the city whereby immunity from prosecution was secured to them.

Estoppel of officer to deny right of individual to money embezzled.

State v. Williamson, 118 Mo. 146, 21 L.R.A. 827, 40 Am. St. Rep. 358, 23 S. W. 1054, held that an assignment of unearned salary by a public officer was contrary to public policy, and void, and hence he could not be convicted of embezzling it, although at the time of the assignment he had taken an appointment as agent of the assignee to collect it for the latter, and did collect it by virtue of such assignment, since he was not in fact an agent in collecting the money, the assignment being void.

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under the supervision, care, or control of a justice of the peace for safe-keeping, disbursement, transfer, or other purpose; and we are unable to see how he, as a public officer, can be guilty of embezzling funds which never came into his possession, under any authority of law, by virtue of his office. If he had no right to the possession or control of this public money as an officer, he would have no greater right when acting merely under color or pretense of office. We do not think the language of the statute, 'under color or pretense' of an office, can be construed to apply to an officer who, having in fact no right to the custody of public money, obtains the possession of it by falsely representing that he is entitled to its custody by virtue of his office. The statute was only intended to make one acting officially, under color of office only, equally liable for the misappropriation of the public money coming into his possession by virtue of his supposed official right to receive it, as he would have been had the title to his office been perfect."

The doctrine laid down in the Warswick Case, supra, was affirmed by the supreme court of Nebraska in the case of Moore v. State, 53 Neb. 831, 74 N. W. 319, where the matter is exhaustively considered. See also San Luis Obispo County v. Farnum, 108 Cal. 562, 41 Pac. 445. In the Moore Case the court say: "That where an officer receives money which he is not by law authorized to receive, such money is not received by him in his official capacity, and that any duty which he may owe of paying the money is only that which rests upon any debtor or bailee, is established by many cases."

It is suggested in the brief of our learned assistant attorney general that by the circumstances of this case appellant cannot defend on the ground that his acts were not within the limits of his legal authority, and the suggestion is made that appellant is estopped from denying the fact that his act was authorized. This position is not, we believe, sound. In the case of Moore v. State, supra, on this question the supreme court of Nebraska say: "Nor do we think that there is any principle of estoppel whereby the defendant is forbidden to deny that he is within the class against which the penalties of the statute are denounced. For the purposes of this case we need not inquire whether the same rules apply as to estoppel in civil and in criminal cases, or whether a man may ever be estopped to plead the law. The cases cited as applying estoppels are, for the most part, cases where an officer charged by law with the duty of collecting taxes has actually collected them, and then refused to turn them over because illegally levied. There the general duty of collecting the money was imposed by law on the officer. The money was paid. The legality of the tax was a question solely between the public and the taxpayer, and, the latter having voluntarily paid the tax, it was no affair of the collector whether he might have resisted the payment or not. The matter was not one of an estoppel. The issue was merely immaterial. No one could defend a charge of embezzlement as the agent of an individual, on the ground that a third person had paid money which he did not owe and could not have been compelled to pay; but there is a multitude of cases holding that he may defend if he had no authority to receive payment at all. Akin to these cases are those where a foreign corporation is prohibited from doing business except on compliance with certain requirements, and an agent embezzles its funds, and alleges in defense that the principal had no right to make the contracts leading to the collection of the money. This is really a case of an immaterial issue, or, if it be one of estoppel, it is an estoppel to deny the facts giving the principal a right to do business. Where a criminal statute applies only to persons of a certain class, the doing of the acts which the statute forbids does not estop the defendant from denying that he belongs to the class which is alone subjected to the penalties. Yet that is at the last analysis the argument of the state on this branch."

This case is, as we believe, readily distinguishable from the ruling of our supreme court in the case of State v. Brooks, 42 Tex. 62, upon which our assistant attorney general so much relies. It was there held, and correctly, that a deputy sheriff is an officer authorized to collect taxes, and as such is liable to indictment for embezzling money collected by him as taxes. The statute at the time of the prosecution of the case against Brooks was as follows: "If any officer of the government who is by law a receiver or depositary of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take or misapply or convert to his own use any part of such public money, or secrete the same with intent to take, misapply, or convert to his own use, or shall pay or deliver the same to any person, knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years." The indictment charged Brooks in the language of the statute. Exceptions were

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presented to the indictment, alleging its insufficiency because, among other reasons, Brooks was not shown to be such an officer of the government as was included in the terms of the statute defining and punishing embezzlement. This motion prevailed in the court below, and an appeal was prosecuted, as was then allowed, by the state to test the sufficiency of the indictment. The argument was made that the deputy sheriff is appointed by the sheriff, and gives bond to him, and not to the state; that the sheriff, on the other hand, is designated by the Constitution and the law as the person to collect taxes; and that the deputy sheriff did not bear such relation to the matter as constituted him under the law an officer charged with this duty. It was held, as stated above, that he was such an officer; and the court called attention to the fact that by law the sheriff was authorized to make appointments of deputies, and that the statute authorizing such appointments provided that every deputy shall have the like authority in regard to collecting taxes, within that portion of the county which may have been alloted to him, which the sheriff would have. Pasch. Dig. art. 7615. It was also pointed out that the statute requires the deputy to take the same oath as required by the sheriff faithfully to discharge the duties required of him (Pasch. Dig. arts. 7608, 7615), and that in case of disability, death, or removal of the sheriff the deputies are required to proceed in the collection of taxes until the vacancy is filled Pasch. Dig. 7616). It was said: "In various other sections of the law the deputy is recognized as authorized to collect taxes. Pasch. Dig. arts. 7619–7621." It was held that "it is clear that the deputy sheriff has both the actual and legal possession of the taxes which he collects, and is not subject to indictment for theft." In that case it will be observed that the duties of the deputy sheriff were defined and fixed by law. He was authorized to collect taxes, and, in the absence or during the disability of the sheriff, was charged with the duty of so doing. In a sense he took the place of and acted instead of his principal, clothed with his duties and charged with his responsibilities, and this as a matter of statute. These elements are conspicuously wanting in this case, where no ordinance clothed appellant with the authority or placed upon him the responsibility of receiving and collecting fines.

The indictment charges an offense. It follows the language of the statute. As we believe, however, under the law, the facts do not support a conviction. In this attitude of the record, and in view of the fact that the indictment does charge an offense against the law, it results that the prosecution cannot be dismissed; but the judgment of conviction is reversed, and the cause remanded for proceedings in accordance with this opinion.

Brooks, J., absent.

VERMONT SUPREME COURT.

STATE BOARD OF HEALTH
v.
VILLAGE OF ST. JOHNSBURY et al., Appts.

(— Vt. —, 73 Atl. 581.)

Action — parties — municipal clerk.

1. The clerk of a municipal corporation is not a proper party to a bill by the state board of health to enforce an order prohibiting the furnishing and use of the municipal water supply for domestic purposes, where he is a mere recording, and not an administrative, officer.

Costs — against state board.

2. Costs should not be awarded against a state board of health upon dismissal of the bill against one improperly made a party to a suit to enforce its order.

Action — parties — municipal trustees.

3. Trustees of a municipality, who have the management and control of its affairs, are proper parties to a bill by the state board of health to enforce its order against

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Case Note. — Power of state or health authorities to forbid the use of a polluted water supply.

The few cases disclosed by an extended search, in which the question involved is discussed, are, like STATE BD. OF HEALTH v. ST. JOHNSBURY, based on the fundamental principle of government that the state may require the individual to use his property so that the public health and safety shall be best conserved, and that interference with personal liberty is excusable when reasonably necessary for the protection of the public health, provided the means used and the extent of the interference are reasonably necessary to accomplish that purpose.

Thus, in Com. ex rel. McCormick v. Russell 172 Pa. 506, 33 Atl. 709, in which a bill was filed by the state, on the relation of a water company, to restrain defendants from polluting a stream above the point where the water company took its supply, the trial court, after finding that the water was wholly unfit for domestic uses or for steam, ordered the company to furnish pure water and granted an injunction against the collection of water rates until pure water should be furnished, but held that relief against the pollution could not be had. In reversing that decree, on the ground that

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the furnishing and use of the municipal water supply for domestic purposes.

Same — water supply.

4. A village which owns a system of water supply is a proper party to a bill by the state board of health to enforce its order forbidding the furnishing of the supply for domestic purposes.

Water supply — forbidden use — personal liberty.

5. The constitutional right of a citizen to personal liberty is not infringed by an order of the state board of health forbidding him to make use, for drinking purposes, of a polluted water supply.

Action — enforcement of administrative order — hearing.

6. Statutory permission to the court to enforce an order of the state board of health forbidding use of a polluted water supply does not make the order conclusive so as to deprive persons affected thereby of a right to a hearing before the court.

Administrative order — contempt — enforcement.

7. That no method is provided for enforcing an order of a state board of health will not prevent its enforcement by the court, if its order might be of such a character that enforcement of it would result in the enforcement of that of the state board.

Process — service — municipality — trustees.

8. Notice of an order to be obeyed by a municipality served upon its trustees is sufficient notice to it.

(July 2, 1909.)

APPEAL by defendants from a judgment of the Chancery Court for Caledonia County enforcing an order of the State Board of Health forbidding the use of a certain polluted water supply. Reversed.

The facts are stated in the opinion.

Messrs. **Harry Blodgett** and **Elisha May**, for appellants:

If notice and hearing are essential, they must be required by law.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Taunton v. Taylor, 116 Mass. 254; Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783; Weil v. Ricord, 24 N. J. Eq. 169; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Mulligan v. Smith, 59 Cal. 206; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Health Depart. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; McGehee, Due Process of Law, p. 82.

Notice must be given to the parties interested and an opportunity afforded for a full and impartial hearing.

Brown v. Denver, 7 Colo. 305, 3 Pac.

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the water company was entitled to have its source of water supply protected, the supreme court, in discussing the status of the public as regards the right of the state to regulate a public use such as the furnishing of water to the public, said that the state, in the exercise of its police power, through the exercise of which it asserts its right to inquire into the sufficiency and good faith with which a public use is served, and to correct, through the courts, any defects or abuse in the conduct of the business of gathering or distributing the supply or of securing a quality of the commodity furnished that is suitable for use, could investigate the sufficiency and quality of the water supply, and require the company to meet fairly the public use it had undertaken to serve, or cease to collect charges therefor, and that it could require the company to be diligent in its efforts to procure a sufficient supply of pure water, if it could be had from sources reasonably accessible to its plant, since the existence of civilized society requires that other interests than those of the individual should be reckoned with, and that each person must be held to have surrendered such of his natural rights to civil liberty as could not be asserted consistently with due respect to the rights of others and the public; but that the state could not require the company to relocate its plant or seek a new supply, to reach which would involve an expense greater than its entire capital stock.

23 L.R.A. (N.S.)

In the somewhat analogous case of State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307, it was held that a city ordinance having for its object the prevention of the use of unwholesome well water in the making of bread for public distribution and consumption could validly require, as a means to that end, the filling up of all wells on premises where such bread was made, as an exercise of the extensive police power which had been delegated by the legislature.

And in Peffer v. Pennsylvania Water Co. 221 Pa. 578, 70 Atl. 870, where a bill was filed by certain consumers on behalf of themselves and others, against a water company, alleging that the water furnished was polluted and unfit for domestic use, a decree directing the company to provide a sufficient supply of reasonably pure and wholesome water, and allowing a reasonable time for compliance, was upheld.

The foregoing cases, while not involving the power of health authorities, fully support the result reached in the ST. JOHNSBURY CASE, wherein the board of health was acting under expressly delegated authority. It would seem, however, that the use of a polluted water supply could not, in the absence of such an express delegation of authority, be forbidden or regulated by a board of health or other local authorities, but would, because of constitutional objections, have to be regulated by the state directly.

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455; McGehee, Due Process of Law, p. 26; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697.

The limit put by the order of the orator on the use of the water for "domestic purposes" is in a legal sense a taking of the water.

Randolph, Em. Dom. § 116; Helfrich v. Catonsville Water Co. 74 Md. 269, 13 L.R.A. 117, 28 Am. St. Rep. 245, 22 Atl. 72.

The order is confiscatory in its result and should not be enforced.

Winthrop v. Farrar, 11 Allen, 398.

Mr. **Robert W. Simonds**, for appellee:

The act provides for notice by necessary implication.

Paulson v. Portland, 16 Or. 450, 1 L.R.A. 673, 19 Pac. 450, affirmed in 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; State Railroad Tax Cases, 92 U. S. 610, 23 L. ed. 672; Kentucky Railroad Tax Cases, 115 U. S. 332, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

The authority granted to the state board of health to forbid the furnishing and use for domestic purposes of all water so contaminated, unwholesome, and impure that its use for such domestic purposes is a menace and danger to the public health, is a legitimate exercise of the police power of the state, and is not subject to restraint by constitutional provisions for the general protection of the rights of individual life and property.

State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; Kennedy v. Board of Health, 2 Pa. St. 366.

Rowell, Ch. J., delivered the opinion of the court:

This is a bill in chancery brought by, and in the names and official capacity of, the persons composing the state board of health, against the village of St. Johnsbury and divers takers of water resident therein, for the enforcement of an order made by the board prohibiting the furnishing and the use of the village water for domestic purposes till such a time. The order was made and issued in July, 1906, and recited that the board found and was of the opinion that the water taken from the Passumpsic river at the point where the village was then taking it, and as supplied by it to the inhabitants thereof by its water system, was so contaminated, unwholesome, and impure that the use of it for domestic purposes endangered the public health; and it prohibited the drawing and the use thereof for said purposes until, in the opinion of the board, the danger ceased. But it expressly permitted the drawing and use for laundry purposes, flushing water-closets, sprinkling lawns, and streets, watering gardens, and for stable purposes. The order was served on the trustees of the village, but not on the village itself, on the school directors and 134 takers, a large number of whom obeyed it, but many did not, and they are defendants. After the bill was brought, the village itself, its newly elected trustees, and its clerk were made defendants. The statute under which the order was made gave the board the general oversight and care of all waters, streams, and ponds used by any cities, towns, villages, or public institutions, or by any water or ice companies in this state as sources of water supply, and of all springs, streams, and water courses tributary thereto; and authorized the board to prohibit any town, city, village, public institution, individual, or water or ice company from using water or ice from any given source whenever, in its opinion, the same was so contaminated, unwholesome, or impure that the use thereof endangered the public health. The statute as it was when the bill was brought, and as it now is, provides that the court of chancery "may" on application therefor by the board enforce any order, rule, or regulation that the board may make under and by virtue thereof. P. S. 5496.

The defendant Elisha May demurs to the bill for that under its allegations the board has no authority to maintain the bill in its own name; that the statute does not provide for notice of a hearing by the board, nor for notice of any action by it to condemn the water; and that it does not allege that any notice was given in these respects. The village, its three trustees who were made defendants after the bill was brought, and Preston E. May, its clerk, jointly demur for want of equity, and because the bill does not charge them nor any of them with any shortcomings nor wrongdoings, nor contain any prayer for relief against them, and because said May is not a proper party. They further demur for substantially the same causes assigned in the demurrer of the defendant Elisha May. The bill discloses no reason for making Preston E. May a party defendant, except that he is clerk. But that is no reason, for he is a mere recording officer, and not an administrative officer. The bill should be dismissed as to him, but without costs, for the orators are acting in their official capacity as state officers, and to make them pay costs would be making the

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state pay costs, which it does not do in cases distinctively of public concern certainly. But the trustees are proper parties, though not charged with anything amiss, for the bill alleges that they have the management and control of the affairs of the village, including the water system, subject to the ultimate control of the village, and therefore they can be decreed against in their official capacity if need be. North Troy Graded School Dist. v. Troy, 80 Vt. 24, 66 Atl. 1033. And the village is, of course, a proper, if not a necessary, party, for it owns the water system in question. It is objected that the bill should have been brought by the state, and not by the board. But we construe the statute to mean that it may be brought by the board.

It is further objected that the prohibition authorized by the statute must be absolute, and not limited; that no order could lawfully be made by the board in restraint of the personal liberty of the citizen, for, if water was furnished by the village in its mains and taken into the houses, the board had no authority to punish those who used it for domestic purposes; that the owners of the houses had the right to drink it, and their tenants had the same right, even though forbidden by them; that the order cannot be enforced against either, nor can either be dealt with by the court for contempt; that the board could, at most, only stop the village from pumping water into its mains, but that the court cannot effectually enforce the order, even if binding, without notice or opportunity to be heard, nor make the order prayed for until it has heard all the matters in issue; and that the bill does not present any issue that the defendants can answer, and demand a trial *de novo* as to the fitness of the water for domestic purposes. As to personal liberty, our Bill of Rights declares that government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community. Closely allied to this fundamental proposition is the further declaration that the people of the state, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the state. This right the state did not surrender when it became a member of the Union, but retains it still; and that right, to say the least, embraces such reasonable rules and regulations, established directly by legislative enactment, as will protect the public health and the public safety. And the state may invest local or state boards created for administrative purposes with authority in some proper way to safeguard the public health and the public safety. The way in which these results are to be accomplished is within the discretion of the state, provided the powers and functions of the general government are not thereby infringed, nor any constitutional provision of the state nor the United States.

We come now to consider more especially what personal liberty is, as secured by constitutional provision; and on this question we refer to Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, which affirms the legality of compulsory vaccination for the prevention of smallpox. There the plaintiff in error insisted that his liberty was invaded when the commonwealth subjected him to fine and imprisonment for refusing to submit to vaccination; that the compulsory vaccination law was unreasonable, arbitrary, and oppressive, and therefore hostile to the inherent right of every free man to care for his own body and health in such way as to him seemed best; and that the execution of such a law was nothing short of an assault upon his person. But the court said that the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances wholly free from restraint; that there are manifold restraints to which every person is necessarily subject for the common good; that on any other basis organized society could not exist with safety to its members; that society based on the principle that every man is a law unto himself would soon be confronted with disorder and anarchy; that real liberty could not exist under the operation of a principle that recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that might be done to others; that that court had more than once recognized it as a fundamental principle, that persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the legislature to do which no question was ever raised, nor on general principles ever can be raised, as far as natural persons are concerned. It is said in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, that the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing author-

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ity essential to the safety, health, peace, good order, and morals of the community; that even liberty itself, the greatest of all rights, is not unrestrained license to act according to one's own will; that it is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others, and is, therefore, liberty regulated by law. And this court said in Lawrence v. Rutland R. Co. 80 Vt. 370, 383, 15 L.R.A.(N.S.) 350, 67 Atl. 1091, 13 A. & E. Ann. Cas. 475, concerning the right to contract, that it is not an absolute right, but subject, on general principles, to such reasonable restraint as the public good requires; that it is the general right to acquire property and, by necessary implication, the general right to contract concerning it, that the Constitution protects; but that the protection does not make those rights absolute in all respects, for if it does, what becomes, the court asks, of the police power, which inheres in every free government, and is based on the maxim that you shall so use your own property as not to injure the rights of others, which is a universal and pervading obligation, and a condition on which all property is held, the application of which to particular conditions must necessarily be within the reasonable discretion of the legislature; and that, when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection.

It is to be noted that the demurrer admits the truth of the allegation of the bill that many analyses of the water showed it to be contaminated, unwholesome, and impure, and of such a character and quality that its use for domestic purposes was a menace and a danger to the public health. If the mode adopted by the state for the protection of the public health and safety of its local communities proves to be objectionable, inconvenient, or even distressing, to some, if nothing more can reasonably be affirmed against the statute, the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare and safety of the many, and not to permit their interests to be subordinated to the wishes nor the convenience of the few. But there is, of course, as said in the Jacobson Case, a sphere within which the individual may assert the supremacy of his own will, and rightfully deny the authority of the government to interfere with its exercise. It is equally true, however, that, in every case where the constituted authorities are charged with the duty of conserving the welfare and safety of the general public, the rights of the individual in respect of his liberty may at times, under the pressure of great danger, be subjected to such restraint; to be enforced by reasonable rules and regulation, as the safety of the general public may demand. And it is not for the courts to determine as to the mode likely to be most effective to protect the public against disease, unless that which the legislature has done comes within the rule that, if a statute purporting to have been enacted for the protection of the public health, the public safety, or the public morals, has no just relation to those objects, or is unquestionably a plain, palpable invasion of constitutional rights, it is the duty of courts so to adjudge, and thereby give effect to the Constitution. But the statute under consideration cannot be said to be palpably in conflict with the Constitution, state or Federal; nor can it be confidently asserted that the means prescribed by it have no just relation to the protection of the public health and the public safety. It must be held, therefore, as the case is presented, that the board has authority, if properly exercised, to restrain the defendants as it did.

But it is said that it did not properly exercise its authority in this behalf, for that its proceedings lack due process of law, in that no notice of its proposed action was given nor opportunity to be heard afforded. The defendants do not claim, as we understand their brief, and could not well claim, that notice and an opportunity to be heard before the board were essential to due process of law, unless the order is final; but they claim that it is the intention of the statute to make it final and conclusive, and to give the court no authority to inquire into its correctness, but only to enforce it. But the statute does not mean that. It says that the court "may" enforce the order. This evidently means, not that it must enforce it as a duty, but only that it may enforce it or not in its discretion, to the proper exercise of which it must proceed on inquiry, and render judgment only after trial. So the order is not final and conclusive, and the bill presents an issue that the defendants can answer and they may answer, and have a trial on the merits, as agreed by counsel.

The objection that the order cannot be enforced if valid is not sustainable, for, if the court thinks it ought to be enforced, an order of its own will supervene upon it, and be of such a character that its enforcement will enforce the order of the board.

It is further objected in a supplemental brief that the order of the board is not against the village, that notice of it

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was never served upon the village, and that consequently it cannot be enforced against the village. But notice of it was served upon the trustees of the village, and that was notice to the village, as they were its chief executive officers. Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132. So notice to the president of a bank concerning matters within the sphere of his official authority is notice to the bank. Porter v. Bank of Rutland, 19 Vt. 410, 425. And the language of the order clearly embraces the village. It is: "You are hereby prohibited from furnishing, or permitting to be furnished, any water taken from the above-described water source for domestic purposes in any way, until," etc.,—and the village was the only furnisher of water from that source for any purpose.

Decree reversed as to Preston E. May, and bill dismissed as to him without costs. Decree reversed *pro forma* as to the other defendants. Cause remanded.

VIRGINIA SUPREME COURT OF APPEALS.

R. W. SHREVE, Plff. in Err.,
v.
NORFOLK & WESTERN RAILWAY COMPANY et al.

(109 Va. 706, 64 S. E. 972.)

Deed — condition subsequent — railroad depot.

A condition subsequent is not created by a recital in a deed to a railroad company that it is made in consideration of the company's agreement to erect and maintain a depot on the land conveyed, a breach of which will entitle the grantor to maintain ejectment, but merely an agreement or covenant on the part of the grantee.

(June 10, 1909.)

ERROR to the Circuit Court for Tazewell County to review a judgment in defendants' favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. **Greever & Gillespie**, for plaintiff in error:

In the construction of every instrument where the courts are asked to say whether the language used creates a covenant or a condition, the intention of the parties governs, regardless of justice or injustice, the language used being of minor importance.

Minard v. Delaware, L. & W. R. Co. 139 Fed. 60; Union Stockyards Co. v. Nashville Packing Co. 72 C. C. A. 195, 140 Fed. 701.

The recital in the deed created a condition subsequent.

Close v. Burlington, C. R. & N. R. Co. 64 Iowa, 149, 19 N. W. 886; Ecroyd v. Coggeshall, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260.

Messrs. **S. D. May and Henry & Graham**, for defendants in error:

The grant did not contain the condition subsequent that the grantee should erect and maintain a depot on the land conveyed.

King v. Norfolk & W. R. Co. 99 Va. 625, 39 S. E. 701; 4 Kent, Com. 129, 130; Lowman v. Crawford, 99 Va. 688, 40 S. E. 17; Alexandria & W. R. Co. v. Chew, 27 Gratt. 547; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; Carroll County

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Case Note. — When provision in conveyance for erection of building or other structure regarded as a condition subsequent.

The earlier cases on this specific subject are collected in a case note to Hawley v. Kafitz, 3 L.R.A.(N.S.) 741. A few decisions in point have been rendered since the preparation of that note.

The decision in Minard v. Delaware, L. & W. R. Co. 139 Fed. 60, cited in the earlier note, was affirmed by the circuit court of appeals (82 C. C. A. 586, 153 Fed. 578).

In Louisville, H. & St. L. R. Co. v. Baskett, 31 Ky. L. Rep. 1035, 104 S. W. 695, under the rule that a deed will not be construed to create an estate on condition subsequent unless language is used clearly indicating such a purpose, it was held that such a condition was not created by a deed to a railroad company which recited as a consideration the agreement of the railroad company to establish and maintain a station on the land in question.

But a condition subsequent was held in Hamel v. Minneapolis, St. P. & S. Ste. M. R. Co. 97 Minn. 334, 107 N. W. 139, to be created by a deed of a strip to a railroad company, the sole consideration for which was the condition incorporated therein, that, if the property "shall not be used for station purposes for the period of one year at any one time, the same and said first strip shall revert to and revert [*sic*] in the party of the first part."

And in McCue v. Barrett, 99 Minn. 352, 109 N. W. 594, a condition subsequent was held to be created by an agreement under seal in which the grantee, in consideration of the release and conveyance of the land for purposes of a private cartway, agreed for himself, his heirs, and assigns, to keep and maintain at his own expense forever a good and lawful fence on one line of the strip so conveyed, and to rebuild and repair the same when necessary.

Cases involving the question whether or not provisions with respect to the continued use of property for a particular purpose create a condition subsequent are not within the scope of these notes.

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Academy v. Gallatin Academy Co. 104 Ky. 621, 47 S. W. 617; Chapin v. Harris, 8 Allen, 594; Sohier v. Trinity Church, 109 Mass. 1; Episcopal City Mission v. Appleton, 117 Mass. 326; Clark v. Martin, 49 Pa. 289; Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; Ayling v. Kramer, 133 Mass. 12; Woodruff v. Woodruff, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. 4; Union Stockyards Co. v. Nashville Packing Co. 72 C. C. A. 195, 140 Fed. 701; Minard v. Delaware, L. & W. R. Co. 139 Fed. 60, affirmed in 82 C. C. A. 586, 153 Fed. 578; Louisville, H. & St. L. R. Co. v. Baskett, 31 Ky. L. Rep. 1035, 104 S. W. 695.

Cardwell, J., delivered the opinion of the court:

This litigation arises out of the following state of facts: On the 19th day of August, 1889, Geo. W. Gillespie and wife were the owners in fee simple and in the possession of about 400 acres of land in one boundary, situated in the rich lands, on Clinch river, Tazewell county, Virginia; and by deed of that date they conveyed two parcels of the 400 acres, aggregating about 3 acres, to the Norfolk & Western Railway Company, the granting clause being as follows: "Witnesseth, that, in consideration of the said the Norfolk & Western Railroad Company agreeing to erect and maintain a depot on the land conveyed by this deed, the said George W. Gillespie and Barbara E. Gillespie, his wife, do grant unto the said the Norfolk & Western Railroad Company for depot and railway purposes all those two certain tracts, pieces, or parcels of land, lying in Tazewell county, state of Virginia, situate in the rich lands."

The covenants contained in the deed are general, and in this language:

"And the said George W. Gillespie and Barbara E. Gillespie do covenant that they will warrant generally the property hereby conveyed, that they have the right to convey the said lands to the said Norfolk & Western Railroad Company, that the said Norfolk & Western Railroad Company shall have quiet possession of the said lands free from encumbrances, that they will execute such further assurances of the said lands as may be requisite, and that they have done no act to encumber the said lands."

The Norfolk & Western Railway Company claims and holds, under successive conveyances from the Norfolk & Western Railroad Company, the title vested in the Norfolk & Western Railroad Company by the deed of August 19, 1889, and, at the point of the location of the land, the railroad had been built, and the Norfolk & Western Railroad Company and its successor to the title has had possession of the land ever since the deed was made in August, 1889, up to the institution of this suit,—or, as one witness says, "ever since it was staked off."

By deed dated April 14, 1890, Gillespie and wife conveyed the remainder of their boundary of the 400 acres of land to the Tazewell Land & Improvement Company, in which conveyance the 3 acres theretofore conveyed to the Norfolk & Western Railroad Company are expressly excepted, but the conveyance, after reciting that "the land company had purchased the land conveyed, and are engaged in laying out in a town, and expect to expend large sums of money in the improvement and building up of said town, relying on the said agreement of the N. & W. Rd. Co. to comply with their said contract, to wit, to erect and maintain a depot on said two pieces of land," contains this clause:

"Now, in consideration of the premises, and for the consideration aforesaid, the parties of the first part hereto do hereby grant, assign, and transfer unto the party of the second part hereto, all their right, title, and interest in and to said contract between themselves and said Norfolk and Western Railroad Company. This assignment and transfer of said contract is without recourse on the parties of the first part."

By deed of June 24, 1904, the Tazewell Land & Improvement Company conveyed to R. W. Shreve the land acquired by it under the said deed from Gillespie and wife, which deed to Shreve contains this clause:

"There is also excepted and reserved from this conveyance any right, title, and interest in 3 acres of land in two parcels, conveyed by George W. Gillespie and wife to the Norfolk & Western Railroad Company for depot and railroad purposes, by deed dated the 19th day of August, 1889, . . . but the said party of the first part grants, conveys, assigns, and transfers to said Robert W. Shreve, any right, title, claim, or interest which the said party of the first part now holds under and by virtue of the deed from George W. Gillespie and wife to said company, dated the 14th day of April, 1890. . . ."

There has never been any depot house built on the two lots in question, but there was a section house erected on the lots, and switches and sidings placed on them, and the railway company has never refused to build a depot on the premises, but has repeatedly stated that it would do so as soon as the business at that point (the name of which is Doran) was of such magnitude as to warrant it; and this action of ejectment was brought by R. W. Shreve in 1907

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against the Norfolk & Western Railway Company to recover the possession of the said two parcels of land.

At the trial of the cause, upon the plea of the general issue, not guilty, both parties agreed to submit the matters of law and fact to the judge of the court for decision; and the court at its December term, 1907, rendered judgment in favor of the defendant, to which judgment this writ of error was awarded.

The learned and exhaustive arguments for both plaintiff in error and defendant in error have taken a very much wider range than our view of the case would require, and we shall not attempt to review the numerous authorities to which we have been cited as bearing upon the questions: First, whether the language and stipulations of the deed of August 19, 1889, from Gillespie and wife to the Norfolk & Western Railroad Company, constitute and make a condition subsequent, to be performed by defendant in error; and, second, if such is the true construction of the deed, and that condition subsequent has not been performed, but has been broken, has plaintiff in error the right to recover the land in this his action of ejectment?

In our view of the case the primary and controlling question is whether or not the language of the deed, by clear and unmistakable terms, affixes to the grant in the deed a condition subsequent, upon the breach of which the land and the right of re-entry thereon reverted to the grantors, or whether the language of the deed relating to the consideration is a naked promise, and, at most, only a covenant.

It will be observed that the deed in question does not, as is the usual form, affix to the grant a condition subsequent, but the only language used to indicate an intention to attach a condition to the absolute grant of this land to the grantee is that the grant is "in consideration of the said Norfolk & Western Railroad Company agreeing to erect and maintain a depot on the land conveyed. . . ." No time is mentioned when this promise or agreement is to be carried out, nor is there any specification as to character or quality of the depot to be erected and maintained; nor is there expressed a reservation of title to the land in the grantors by reversion upon the breach of the promise or agreement made by the grantee, nor any *intimation* of the right to re-enter upon the land upon the breach of the promise or agreement to erect or maintain a depot on the premises.

In the brief of counsel for plaintiff in error it is conceded to be too well settled to admit of citation of authority that "conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates; and the vigorous exacting of them is a species *summum jus*, and in many cases hardly reconcilable with conscience."

It is also recognized that, "in the construction of every instrument where the courts are asked to say whether the language used creates a covenant or a condition, the intention of the parties governs. If the parties to the instrument say upon its face that there is to be forfeiture if its terms are not complied with, then the forfeiture is declared regardless of results; and the converse is equally true."

So, as stated in Union Stockyards Co. v. Nashville Packing Co. 72 C. C. A. 195, 140 Fed. 701, in determining the intention of the parties, and whether the terms of the instrument create a covenant or a condition, it becomes necessary to consider "the language employed, the situation of the parties, their relation to the subject of the transaction, and the object in view."

We have already adverted to the language employed in the deed, and we will now look in that connection to "the situation of the parties, their relation to the subject of the transaction, and the object in view."

The undisputed and pertinent facts to be considered in this connection are that, shortly after the Clinch Valley Division of the Norfolk & Western Railroad Company was completed, there was some indication that a depot would be needed at Doran. The railroad company was looking out for a place to locate the depot when it became necessary to erect it, and Gillespie, under whom plaintiff in error claims, who owned, as stated, about 400 acres of land at that place, conceiving the idea, doubtless, that a town might be laid out and built up there, making a depot at Doran not only desirable, but necessary, offered to give the railroad company a lot of land necessary for the railroad's purposes, if it would erect and maintain a depot there, and the railroad company accepted the proposition, and a deed was drawn to that effect. This is, as counsel for plaintiff in error say, the plain import of the language used in the deed; and they further say "that a depot was not necessary at the time the conveyance was made, and perhaps has not been necessary since, is claimed by the company and established by the record." In other words, Gillespie voluntarily offered to give the land needed for a depot at Doran, and the railroad company accepted the offer; the only binding effect being predicated upon the promise or covenant on the part of the railroad company to build and maintain the depot when the conditions at that point, in the economical and successful operation of

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the railroad as a public service corporation, required it.

As counsel for plaintiff in error further say, "both parties to the deed knew that railroad companies could only erect depots at those places where the needs of the public required them," and the point at Doran was not an exception to that rule. But, although the loss to Gillespie of the increase in the value of the residue of his 400-acre tract of land, resulting from the public needs not requiring a depot at Doran, may be ever so great, this does not so change the rule of construction of his deed, under which plaintiff in error seeks to maintain this action of ejectment to recover the land conveyed. Neither the language of the deed in question nor the subsequent conveyance of the residue of the 400-acre tract of land indicates an intention on the part of Gillespie that the title to the 3 acres conveyed to the railroad company for a depot site should revert to him in the event that no depot was built thereon. Not only is there no language used in his deed to the railroad company to declare a forfeiture in that event, but, when read in the light of his subsequent conveyance to the land company, in which he expressly excepts therefrom the 3 acres theretofore conveyed to the railroad company, and only assigns to the land company such right, title, or interest as he had "in and to said contract between themselves and the said Norfolk & Western Railroad Company," and this "assignment and transfer" too "without recourse" to the grantors, it cannot be doubted that Gillespie regarded that he only held a covenant on the part of the railroad company to erect and maintain a depot at Doran, and did not consider that the title and possession of the land would revert to him in the event that the public needs did not warrant the erection and maintenance of the depot contemplated. If such was not the construction of the conveyance, as understood by the grantors, it is inconceivable that they would have omitted therefrom language plainly declaring that the title and possession of the land conveyed was to revert to them in the event that a depot was not erected and maintained on the land granted.

Almost the identical question presented here—*i. e.*, the comparative weight and standing to be given in a court of law to a promise or covenant and a condition subsequent—was considered by this court in King v. Norfolk & W. R. Co. 99 Va. 625, 39 S. E. 701, and there the stipulations in the conveyance which were the subject of litigation were construed as covenants, and not conditions. The court, speaking through Harrison, J., and after a statement as to the contentions of the parties and the settled rule of law governing in construing the conveyances, said: "We are of opinion that the language employed in the deeds under consideration is apt language to create a fee simple, and that the superadded words under the authorities amount to covenants rather than conditions. The deeds are not voluntary, as contended, but are based upon the benefits to accrue to the reserved property of the grantor by reason of the use of the granted premises as a railroad terminal. Hence they must be interpreted as any other deeds based upon a valuable consideration. The language is to be taken most strongly against the grantor, and most favorably to the grantee."

The features of the conveyance under consideration in that case were stronger in favor of a construction that a condition, and not a covenant, was intended by the contracting parties, than are those contained in the deed we now have under consideration. In fact, the language in the deed before us in apt words creates a fee simple in the land granted, and there are no superadded words declaring, in express terms or by clear implication, or in any terms whatever, that the nonperformance of the promise and agreement of the grantee stated to be the consideration moving the grantors to make the conveyance should operate as a forfeiture of the land, giving the grantors the right to re-enter and possess themselves of it. In such a case, as is also stated in the opinion just cited, the courts will incline to construe the language of the deed as creating only a covenant, and not a condition, thus adopting the more benignant construction upholding the instrument, and leaving the parties to pursue their appropriate remedies for a breach of covenant.

The principles of law adverted to are fully recognized in Lowman v. Crawford, 99 Va. 688, 40 S. E. 17, and in Alexandria & W. R. Co. v. Chew, 27 Gratt. 547, where they are discussed at some length; the opinion saying: "When the grantor seeks to destroy an estate which he himself has created, it must plainly appear that the act is within the very terms of the condition and breach. It is not sufficient to show mischiefs and even losses which might have been provided against, had they been foreseen. The fact that they were not and could not have been anticipated may be a sufficient reason for the failure to provide a remedy; but they cannot justify the courts in so enlarging the operation of the covenant as to make them a ground of forfeiture."

They are discussed, also, by the leading text writers and commentators of the law, and the uniform view taken is in accord with the decided cases mentioned above and to follow. 1 Sharswood & B. Am. Law of

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Real Prop. pp. 123 et seq.; 4 Kent, Com. 2d ed. pp. 122-129; 2 Minor, Inst. 4th ed. pp. 265, 266; 2 Minor, Real Prop. § 529; 2 Devlin, Deeds, § 970, and notes.

In Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692, the deed conveying land contained these words: "This conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway and for no other purpose." Held to create a covenant, and not a condition subsequent, as claimed by the plaintiff; the opinion saying: "The clause in question is merely a declaration of the purpose for which the land conveyed was to be used and improved, to wit, as a public highway. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out, nor does it reserve to the grantors and their heirs the right in that event to re-enter on the land and resume possession of it as of their former estate. Moreover, the purpose declared is in its nature general and public, and not one inuring specially to the benefit of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified."

It is very true that the court in that case quotes the statute governing such conveyances, but that fact does not detract from the force of the discussion of the general principles controlling in determining whether the language used in a conveyance of land should be construed as creating a covenant or a condition subsequent.

In Rawson v. School Dist. No. 5, 7 Allen, 125, 83 Am. Dec. 670, in the opinion by the court, Bigelow, Ch. J., after stating that a deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated, and that conditions are not to be raised readily by inference or argument, says: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.

"If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus, it is said in Norfolk's Case, 2 Dyer, 138b, that the words 'ea *intentione*' do not make a condition, but a confidence and trust. See also Parish v. Whitney, 3 Gray, 516, and Newell v. Hill, 2 Met. 180, and cases cited. But, whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant, to enforce the appropriation of land to the specific purpose for which it was conveyed, will not of itself make that a condition, which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship, or want of equity."

We are of opinion that the deed under review does not admit of the construction contended for by plaintiff in error, but that its language creates only an agreement or covenant on the part of the grantee, and that the judgment of the circuit court in favor of defendant in error in this action of ejectment is plainly right.

Having taken this view of the case, it is unnecessary to consider the remaining question, whether, upon the breach of a condition subsequent annexed to a grant of land, an assignee of the grantor's right to recover the land can maintain an action of ejectment.

The judgment of the Circuit Court is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HAL. W. DEPUE et al., Appts.,
v.
H. W. MILLER et al.

(— W. Va. —, 64 S. E. 740.)

Husband and wife — conveyances between — title.

1. If a husband convey land directly to his wife, and she, in turn, attempt to reconvey it directly to him by executing a deed to him, and after her death he convey it to a third person, and then die, the equitable title is in the heirs of the wife by descent, and the legal title in such third person or his successors in title.

Headnotes by POFFENBARGER, J.

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Appeal — demurrer — grounds — decision — presumption.

2. A general demurrer to a bill in equity challenges its sufficiency in all respects, and a decree sustaining such a demurrer is presumed, in the appellate court, to rest upon any sufficient ground disclosed by the bill, even though it was not assigned in writing as a ground of demurrer, while others not well taken were.

Same — correct decision — wrong reason — effect.

3. A sound decree sustaining a demurrer should not be reversed merely because the trial court assigned an erroneous or incorrect reason therefor.

Equity — jurisdiction — equitable title.

4. A purely equitable title cannot be maintained in a court of law, and, for that reason, all relief respecting the same must be sought in a court of equity.

Limitation of actions — equitable right.

5. The statute of limitations never runs against a right, the vindication of which belongs to the exclusive jurisdiction of the equity courts.

Equity — adverse possession — legal estates — recognition.

6. Courts of equity recognize legal estates and titles, and in such courts such titles prevail over equitable ones. A title to land acquired by adverse possession is respected in courts of equity as well as in courts of law.

Same — laches — equitable demand.

7. Laches will bar a purely equitable demand, and the period of delay allowed depends upon the peculiar circumstances of the case.

Same — circumstances barring.

8. If the right of the plaintiff is clear, and not dependent upon oral evidence, and no injury or prejudice to the defendant has resulted from the delay, as by the death of parties, change of conditions, loss of evidence, or the like, the cause of action is not barred by laches, unless the lapse of time and the circumstances are such as to raise a presumption of intent, on the part of the plaintiff, to abandon or relinquish the right.

Same — abandonment of rights.

9. Mere forbearance to compel rendition of a just debt or other right, the existence of which is clear beyond doubt, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay; but, if the length of time be long enough in itself, or with the aid of circumstances and conduct, to satisfy the chancellor that the plaintiff had abandoned his right before he brought suit to enforce it, his demand will be regarded as stale and lost by laches.

Same — period of delay.

10. Delay for a period less than twenty years in the assertion of an exclusively equitable demand, fully proven by documentary evidence, under circumstances not in any way operating to the prejudice of the defendants, and tending to negative the inference of intent on the part of the plaintiff to abandon or reliquish the right, will not bar relief.

Same — determining factors.

11. Moral as well as legal considerations, such as ignorance of law or regard for the feelings of relatives, will be considered and given weight in determining whether the plaintiff has abandoned his cause of action; but such considerations do not relieve from, or stay, the statute of limitations, nor excuse delay working prejudice by death of parties, loss of evidence, or other similar circumstances.

Curtesy — land settled on wife.

12. A husband has an estate by the curtesy, after the death of his wife, in lands which he had voluntarily settled upon her, if he did not, in express terms or by plain implication, relinquish such right in the instrument of conveyance.

Same — presumption.

13. As the husband's estate by the curtesy in his wife's real estate is given by the law for reasons of public policy, and not created by contract between the husband and wife, no presumption of intention to preclude it arises from the mere fact of a conveyance from the former to the latter, however it may have been effected.

Equity — multifariousness of bill — facts considered.

14. If, under the circumstances stated in point 1 of this syllabus, the husband, after the death of the wife, has conveyed a portion of the land to persons who have, in turn, conveyed it in separate portions to others, so that it constitutes two tracts

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Case Note. — Husband's right of curtesy in land which he settled upon or conveyed to his wife.

The general question of the effect of a conveyance by husband to wife is treated in the note to Barnum v. Le Master, 60 L.R.A. 353, in which (at page 375) will be found collected the earlier cases involving the particular phase of such general subject here offered for discussion. From the decisions therein cited there would seem to be some conflict upon the question, but the few late cases that can be found agree in holding that a conveyance to the wife by the husband for her sole and separate use will not defeat his right to curtesy upon her death. Re Kaufmann, 142 Fed. 898; Hughes v. Saffell (Ky.) 119 S. W. 804.

And the same rule of law was applied in Williams v. Coffman, 31 Ky. L. Rep. 151, 101 S. W. 919, and the right to curtesy held not to be devested by an agreement between the husband and wife in settlement of a suit for divorce and alimony brought by her, wherein it was stipulated that the wife was to have full control of certain land and to handle the same as she thought best for the interest of the family, free from the control of the husband.

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claimed by different persons, the heirs may assert their rights as to both of such tracts against all the interested parties in a single suit.

(February 3, 1909.)

APPEAL by complainants from a decree of the Circuit Court for Roane County sustaining a demurrer to the bill in a suit to cancel certain deeds alleged to constitute clouds on title, and for an accounting for timber alleged to have been wrongfully taken. Reversed.

The facts are stated in the opinion.

Messrs. **Cunningham & Harper** for appellants.

Messrs. **Pendleton & Boggess**, for appellees:

The plaintiffs had a complete remedy at law by ejectment or unlawful detainer, and equity has no jurisdiction of the matters contained in the bill.

Jones v. Fox, 20 W. Va. 370; Clayton v. Barr, 34 W. Va. 290, 12 S. E. 704; Johnson v. Sanger, 49 W. Va. 411, 38 S. E. 645; Hope v. Norfolk & W. R. Co. 79 Va. 283; Perry, Tr. § 328; Nicoll v. Walworth, 4 Denio, 385; Matthews v. McPherson, 65 N. C. 189; Lockhart v. Canfield, 48 Miss. 470; Den ex dem. Obert v. Bordine, 20 N. J. L. 394; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Hopkins v. Ward, 6 Munf. 38; Hunter v. Strider, 41 W. Va. 321, 23 S. E. 567.

The defense of laches would avail the defendants from the time of the repudiation of the trust by the trustee and those claiming under him, and notice thereof brought home to the *cestui qui trust*.

Jones v. Lemon, 26 W. Va. 629; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; Mullan v. Carper, 37 W. Va. 215, 16 S. E. 527; Thompson v. Whitaker Iron Co. 41 W. Va. 574, 23 S. E. 795; Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579; Woods v. Stephenson, 43 W. Va. 149, 27 S. E. 309; Phillips v. Piney Coal Co. 53 W. Va. 543, 97 Am. St. Rep. 1040, 44 S. E. 774; Newman v. Newman, 60 W. Va. 371, 7 L.R.A (N.S.) 370, 55 S. E. 377; Ruckman v. Cox, 63 W. Va. 74, 59 S. E. 760.

The statute of limitations or the bar of laches having commenced to run against the wife because of her right to repudiate the void deed and acquire the legal title, no subsequent event, such as the coming into existence of the curtesy estate of Henry Depue, would interrupt it.

1 Barton, Ch. Pr. & Pl. 2d ed. § 34; Angell Limitations of Actions, §§ 194, 197, 477; 1 Rob. Pr. 609; Parsons v. M'Cracken, 9 Leigh, 495; Caperton v. Gregory, 11 Gratt. 505; Cooey v. Porter, 22 W. Va. 121; Wilson v. Harper, 25 W. Va. 182; Jones v. Lemon, 26 W. Va. 629; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 56; Randolph v. Casey, 43 W. Va. 289, 27 S. E. 231; Talbott v. Woodford, 48 W. Va. 449, 37 S. E. 580.

The plaintiffs had the right to file their bill at any time after the commission of the breach of trust (the conveyance of the legal title by the husband), or at least at the death of their mother.

Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438; Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73, 6 So. 197; Lansden v. Bone, 90 Ala. 446, 8 So. 65; Robinson v. Pierce, 118 Ala. 273, 45 L.R.A. 66, 72 Am. St. Rep. 160, 24 So. 984; Lowery v. Davis (Ala.) 8 So. 79; Miller v. Foster, 76 Tex. 479, 13 S. W. 529; Doe ex dem. Corby v. Branson, 4 Nev. & M. 664, 3 Ad. & El. 63; Hanson v. Johnson, 62 Md. 25, 50 Am. Rep. 199; Young v. McNeill, 78 S. C. 143, 59 S. E. 986; Gibson v. Herriott, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589; King v. Rhew, 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174; Clayton v. Cagle, 97 N. C. 301, 2 Am. St. Rep. 293, 1 S. E. 523; Herndon v. Pratt, 59 N. C. (6 Jones Eq.) 327: Wellborn v. Finley, 52 N. C. (7 Jones, L.) 233; Swann v. Myers, 75 N. C. 585; Balkham v. Woodstock Iron Co. 11 L.R.A. 230, 43 Fed. 648; Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317.

The deed from the wife to her husband, although void, was sufficient to give color of title for the purpose of adverse possession and set in motion the statute of limitations as against the wife and her heirs, the statute having commenced to run against her the moment she executed the void deed to her husband.

Randolph v. Casey, supra; Merritt v. Hughes, 36 W. Va. 357, 15 S. E. 56; Cooey v. Porter, 22 W. Va. 120.

When the matter demanded against one defendant is separate, distinct, and unconnected with the matter demanded against another defendant, and neither is at all interested in the defense to be made by the other, the bill asserting these several demands will be held to be multifarious.

Linn v. Patton, 10 W. Va. 199; Petty v. Fogle, 16 W. Va. 497; Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241; Crickard v. Crouch, 41 W. Va. 503, 23 S. E. 727; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682; Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885; Stuart v. Coalter, 4 Rand. (Va.) 74, 15 Am. Dec. 731; Sadler v. Whitehurst, 83 Va. 48, 1 S. E. 410.

On petition for rehearing.

The conveyance of real estate by a husband direct to his wife, though void in law, is valid in equity, and vests in the wife both the legal and the equitable title to the land,

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as of her separate estate, in which the husband, the wife being dead, is not entitled to curtesy.

Sayers v. Wall, 26 Gratt. 354, 21 Am. Rep. 303; Jones v. Obenchain, 10 Gratt. 259; McChesney v. Brown, 25 Gratt. 393; Irvine v. Greever, 32 Gratt. 411; Chapman v. Price, 83 Va. 392, 11 S. E. 879; Dugger v. Dugger, 84 Va. 130, 4 S. E. 171; Jones v. Jones, 96 Va. 749, 32 S. E. 463; Ratliff v. Ratliff, 102 Va. 881, 47 S. E. 1007; Bottoms v. Corley 5 Heisk. 6; Andrews v. Jones, 10 Ala. 400; Welch v. Welch, 14 Ala. 76; Machen v. Machen, 15 Ala. 373, 38 Ala. 364; Vanderveer v. Alston, 16 Ala. 494; Randall v. Shrader, 20 Ala. 338; Cheek v. Waldrum, 25 Ala. 152; Lockhart v. Cameron, 29 Ala. 355; Stewart v. Stewart, 31 Ala. 207; Bradford v. Howell, 42 Ala. 422; Brevard v. Jones, 50 Ala. 221; Grimball v. Patton, 70 Ala. 626; Mayfield v. Clifton, 3 Stew. (Ala.) 375; Bibb v. M'Kinley, 9 Port. (Ala.) 636; Barnum v. Le Master, 110 Tenn. 638, 69 L.R.A. 353, 75 S. W. 1045; Bingham v. Weller, 113 Tenn. 70, 69 L.R.A. 370, 106 Am. St. Rep. 803, 81 S. W. 843; Rautenbusch v. Donaldson, 13 Ky. L. Rep. 752, 18 S. W. 536; Rigler v. Cloud, 14 Pa. 361; Walker v. Long, 109 N. C. 510, 14 S. E. 299; Pool v. Blakie, 53 Ill. 495; Monroe v. Van Meter, 100 Ill. 347; Burk, Separate Estates, 16.

Where the gift is from the husband, the intention to exclude himself is inferred from the circumstances of the case and the situation of the parties, without the use of the express words that would be required where a third person is the donor.

Bishop, Married Women, § 1373; Perry, Tr. 639; Templeton v. Brown, 86 Tenn. 55, 5 S. W. 441; Carpenter v. Franklin, 89 Tenn. 142, 14 S. W. 484.

Poffenbarger, J., delivered the opinion of the court:

In the circuit court of Roane county a demurrer to the bill of Hal. W. Depue and others, heirs at law of Henry Depue, was sustained and the bill dismissed. From this decree the plaintiffs have appealed.

The object of the suit is the cancelation of a number of deeds, to clear the alleged title of the plaintiffs from cloud, and obtain an accounting for timber taken from the land. They are out of possession, but the bill proceeds upon the theory of an equitable title only in the plaintiffs, which will not sustain an action at law for the recovery of possession. The facts alleged are substantially as follows: The ancestor being the owner of two tracts of land, the home place, containing 275 acres, and the Ward land, containing 433 acres, made a deed, on the 21st day of December, 1880, by which he conveyed both of said tracts directly to his wife, Anna B. C. Depue. Thereafter they resided together on the home place, until the death of the wife about July 19, 1889; but on the 25th day of May, 1889, about two months before her death, the wife attempted directly to reconvey all the land back to her husband. In neither transaction was there a conveyance from both husband and wife to a trustee and then a conveyance by the trustee back to one of them. More than two years after the death of the wife, the husband, by deed, dated October 2, 1891, conveyed 103 acres out of the 433-acre tract to Julia A. Bridwell and Walter Bridwell. On the 9th day of June, 1892, the Bridwells conveyed to John C. and Ira S. Bartlett 35¾ acres of the land so conveyed to them. On the residue thereof they executed a deed of trust to Walter Pendleton, trustee, to secure a debt due to H. W. Miller, under which it was sold, Miller purchasing it. On February 23, 1903, the Bartletts conveyed their part of the 103-acre tract and some other land to Sidney Wine, who has possession thereof, while the other is in the possession of Miller. Both tracts have been denuded of their timber by these purchasers. Henry Depue died about the 3d day of January, 1907, and this suit was commenced on the 16th day of February, 1907.

If it shall appear that the plaintiffs have only an equitable title to the land, a court of equity is the only forum in which it can be vindicated, and the bill should have been entertained, unless it is multifarious or relief is barred by laches. No other conceivable grounds of defense appear on its face. If, on the contrary, they have the legal title, giving a right of action at law, they have no standing in a court of equity to recover possession, for they do not need its aid, nor to remove a cloud from the title, because they are out of possession. In order to maintain a bill to remove cloud from title, the plaintiff must have not only the legal title, but possession of the land as well. Mackey v. Maxim, 63 W. Va. 14, 59 S. E. 742; Harr v. Shaffer, 45 W. Va. 709, 31 S. E. 905; Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682.

Indubitably, the deed from Henry Depue to his wife vested in her the equitable title to the land (McKenzie v. Ohio River R. Co. 27 W. Va. 306), and the deed from the wife back to the husband was utterly void (Smith v. Vineyard, 58 W. Va. 98, 51 S. E. 871; Austin v. Brown, 37 W. Va. 634, 17 S. E. 207; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216). Obviously at the date of the death of the wife, she held the equitable title and the husband the legal title. On her death the former went to the plaintiffs by descent. If the legal title remained in the husband until

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his death, it also passed to them on his death, and, the legal and equitable titles being so united in them, their remedy at law would be clear and adequate; but, as to the land involved here, he conveyed that title to the Bridwells, long before he died. Though he may have had no moral right to do so, he had the power, and did it. Though the conveyance was in violation of the trust, he made it, and his deed passed such title as he had. Atkinson v. Washington & J. College, 54 W. Va. 32, 43, 46 S. E. 253; Patteson v. Horsley, 29 Gratt. 263. This being true, the legal and beneficial estates remained separate after the death of Henry Depue, the former in the hands of the grantees, immediate and remote, and the latter in the hands of the heirs; and we have the situation presented in the case of Blake v. O'Neal, 63 W. Va. 483, 16 L.R.A.(N.S.) 1147, 61 S. E. 410. Not having the legal title, the plaintiffs are utterly unable to obtain standing in a court of law to test the right of possession and title, and are wholly without remedy elsewhere than in a court of equity. In all such cases there is of necessity jurisdiction in equity. Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682; Blake v. O'Neal, supra; Kinports v. Rawson, 36 W. Va. 242, 15 S. E. 66; Swick v. Rease, 62 W. Va. 557, 560, 59 S. E. 510.

Multifariousness charged against the bill would preclude an adjudication on the merits, if sustained; but we are of the opinion that the plaintiffs could properly proceed against both tracts of land in one suit. Their demand as to each is founded upon the same title, and the primary relief sought as to each is the same. The differences relate merely to the parties defendant and the subsidiary or sequential matter of accounting. Moore v. McNutt, supra, has been invoked as a precedent applying the doctrine of multifariousness under the conditions here presented; but there are material differences which comparison will reveal. All the defendants are alike interested in the vital questions presented—title, appropriateness of the remedy, and sufficiency of the bill. In Moore v. McNutt, the titles were strange and hostile. We think Gaines v. Chew, 2 How. 619, 11 L. ed. 402, in which the objection was overruled, is more in accord with this case in its facts, circumstances, and relation of parties.

More than fifteen years elapsed between the date of the deed to the Bridwells and the bringing of this suit, and on this disclosure the defense of laches is asserted here in argument, but was not brought to the attention of the court below by any written assignment thereof as a ground of demurrer. That this defense may be raised in this state by a demurrer has been long since firmly settled. Whittaker v. Southwest Virginia Improv. Co. 34 W. Va. 217, 12 S. E. 507; Hogg, Equity Principles, p. 419; Hogg, Eq. Proc. § 304. Failure to assign laches as a ground of demurrer is made the basis of a contention that it was not passed upon by the trial court. The statutory rule declared in § 29 of chapter 125 of the Code of 1899 (Code 1906, § 3849) would not apply for the reason that certain other grounds were assigned, if it were ever applicable to demurrers in equity; but it affects only demurrers at law. Hays v. Heatherly, 36 W. Va. 613, 619, 15 S. E. 223. No causes of demurrer need be assigned in equity cases. It suffices to say the bill is not sufficient in law. Cook v. Dorsey, 38 W. Va. 196, 18 S. E. 468. As such a demurrer challenges the sufficiency of the bill, it makes all the reasons available on the hearing. The trial court sustained the demurrer to this bill, because, in its opinion, there is an adequate remedy at law, as we perceive from the terms of the decree, saving to the plaintiffs their right of action at law. While this, as we have indicated, was an erroneous view of the status of the parties, it amounts only to the assignment of an erroneous reason for a correct decree, if the bar of laches exists, which does not vitiate it. If the judgment, decision, or ruling of the trial court is correct on any legal ground, it will be affirmed, although the reasons assigned by the court below are erroneous. Ballard v. Chewning, 49 W. Va. 508, 39 S. E. 170; Easley v. Craddock, 4 Rand. (Va.) 423; Newell v. Wood, 1 Munf. 555; Silsby v. Foote, 14 How. 219, 14 L. ed. 394; Corning v. Troy Iron & Nail Factory, 15 How. 451, 14 L. ed. 768. A correct ruling upon a demurrer will be sustained, though an insufficient reason for it has been stated. Tatum v. Tatum, 111 Ala. 209, 20 So. 341; Sechrist v. Rialto Irrig. Dist. 129 Cal. 640, 62 Pac. 261.

Having concluded, upon the authorities and principles above stated, that the defense of laches was raised by the demurrer, it becomes necessary to determine whether it appears upon the face of the bill. The demand is purely an equitable one. In other words, it is cognizable only in a court of equity as we have stated. The statute of limitations therefore does not apply, and in such cases courts of equity do not recognize, and are not controlled by, the period of limitation fixed by the statute. Newberger v. Wells, 51 W. Va. 624, 42 S. E. 625. Whether relief in equity is precluded by the delay is determined by the court, in such cases, according to equitable rules and principles. Cranmer v. McSwords, 24 W. Va. 594. The bill presents no element of contract between the plaintiffs and the defendants, respecting the equitable title. They derived that by inher-

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itance from their mother, who was no party to the deed executed to the Bridwells. The defendants contracted with the father alone. An allegation in the bill indicates the existence of an impression or belief, on the part of the plaintiffs, that they had no right of action or remedy at law or in equity until after the death of their father, and, under the principles declared in McNeeley v. South Penn Oil Co. 52 W. Va. 616, 63 L.R.A. 562, 44 S. E. 508, they were not bound to sue until after the death of the father, if he had an estate by the curtesy in the land. Having voluntarily settled the land upon his wife, by the deed executed to her, he had no such estate, as tested by certain Virginia decisions. Sayers v. Wall, 26 Gratt. 354, 21 Am. Rep. 303; Irvine v. Greever, 32 Gratt. 411; Dugger v. Dugger, 84 Va. 130, 4 S. E. 171; Jones v. Jones, 96 Va. 753, 32 S. E. 463; Ratliff v. Ratliff, 102 Va. 887, 47 S. E. 1007. However, none of these decisions are binding upon us, and they are against the great weight of authority throughout the country. In no other state, so far as we have observed, do the courts so hold. There are some decisions construing deeds and wills in which the terms used plainly indicate intention to exclude the husband from curtesy, and give effect to such intent. Rigler v. Cloud, 14 Pa. 361; Stokes v. McKibbin, 13 Pa. 267; McCulloch v. Valentine, 24 Neb. 215, 38 N. W. 854; Pool v. Blakie, 53 Ill. 495. But when there are no such terms in the deed from husband to wife or to a trustee for her separate use, he is not deprived of his curtesy anywhere except in Virginia. 8 Am. & Eng. Enc. Law, p. 522; Ogden v. Ogden, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796; Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665; Tremmel v. Kleiboldt, 6 Mo. App. 549, affirmed in 75 Mo. 255; Soltan v. Soltan, 93 Mo. 307, 6 S. W. 95; Meacham v. Bunting, 156 Ill. 586, 28 L.R.A. 618, 47 Am. St. Rep. 239, 41 N. E. 175; Kerr, Real Prop. p. 682, § 850; 12 Cyc. Law & Proc. pp. 1010, 1011.

Curtesy is an estate given by the law for weighty reasons of public policy, not by mere contract. It aids the father in maintaining, caring for, and controlling his children in case of the death of the mother. Such power is given for public as well as private benefit. Believing the general rule more consonant with reason and the principles of law, and better sustained by authority, than that declared by the Virginia court, we adopt it and hold that the grantor in the deed under consideration did not relinquish his curtesy. Reputable courts have held that, under such circumstances as are disclosed here, the remainderman may sue in equity to remove cloud from his title before the expiration of the life estate. Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317; Robinson v. Pierce, 118 Ala. 273, 45 L.R.A. 66, 72 Am. St. Rep. 160, 24 So. 984; Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438. There may be authority to the contrary; but, granting, for the sake of argument, that the reversioners could have sued in equity to cancel the deed to the Bridwells, as a cloud on their title, their impression that they could not do so was no misapprehension or ignorance respecting any matter of fact, and, though ignorance of law does not excuse anybody's conduct, it bears on the question of intention of the parties, so far as that may be material. They brought their suit promptly after the death of the father. He died in January, 1907, and this suit was brought in February, 1907. The relationship of parents and children existed. The plaintiffs were once infants, we know. When they became adults, the bill does not disclose. They may have been under the disability of infancy during the greater portion, or practically all, of the period of delay. We perceive also that the relation subsisting between them and their father and the defendants may, and most likely did, influence their conduct. No suit could have been instituted by them without involving him. Successful prosecution thereof might have precipitated an action against him for breach of his covenant of warranty. They might have been decidedly averse to involving him in trouble and annoyance, and so delayed action until after his death, without any intention to relinquish their right. It is apparent that all the material facts are not disclosed by the bill. It is equally obvious, considering the allegations of that paper, that no element of estoppel or loss of material evidence exists. The defendants do not appear to have improved the land or expended money on it on the faith of the silence of the plaintiffs; nor does it appear that any change has taken place which made it inequitable upon their part to refrain from assertion of their rights. The right involved is disclosed by documentary evidence. Nothing is dependent upon oral testimony. The vital question is purely legal.

Under these circumstances, many of the principles of the doctrine of laches are inapplicable. The case is one in which the only circumstance relied upon is lapse of time, and this is accompanied by other circumstances tending to negative the existence of any intention to abandon or relinquish the claim. Elements savoring of estoppel or loss of evidence, when they exist, reduce the length of time and apply the bar of laches after the lapse of a very short period. Under some circumstances, delay of only a few months, or even a few weeks,

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suffices; but these short periods are never adopted in the absence of such or similar circumstances. In the case of Cranmer v. McSwords, 24 W. Va. 594, Judge Snyder made an exhaustive examination of the authorities bearing on this question, and, after having done so, said that when none of these elements—death of parties, loss of evidence, or dependence upon oral testimony for the ascertainment of the rights of the parties—exists, and the court is satisfied that justice can be certainly attained notwithstanding the lapse of time, relief has been granted after a period longer than twenty years. In the syllabus of that case the court said: "If important facts rest upon mere parol testimony, this will be a consideration of much weight; but if upon written or documentary evidence, it will be entitled to very little weight." The same doctrine was enunciated in Pusey v. Gardner, 21 W. Va. 469. In that case the effect of mere lapse of time, without more, was ascertained and declared. In point 7 of the syllabus the court said: "Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver." That proposition was deduced by a very able author from the English decisions. Kerr, Fraud & Mistake, 305. Among the cases cited for it is that of Pickering v. Stamford, 2 Ves. Jr. 582, in which heirs were allowed to recover from trustees after a lapse of thirty years. The time and all the circumstances were considered, and, as it was found that nobody had been prejudiced by the delay, the further and vital inquiry was whether it appeared that the plaintiffs intended to relinquish or abandon their right. Like the plaintiffs in this case, they had been under an erroneous impression as to the state of the law. The master of the rolls said: "Upon full consideration I am satisfied that it is impossible, by any fair presumption, to infer that these parties, being cognizant of their rights, slept upon them, or ever intended to relinquish what I must say upon the whole complexion of the case they never knew they had a right to. That is a presumption the circumstances almost afford, for, if they had released, it is impossible not to suppose the trustees, who have kept such accurate accounts, would have had a release from them of this right as well as of their legacies and as well as they had from the heir. The law was very little known. Sir John Strange first determined it about fourteen years after the statute. If before that time parties not knowing the law had permitted the trustees to dispose of the property, I think a court of equity would not have punished them: This will was made seven years afterwards. All the circumstances show the parties did not know it. . . . No jury could, I think, infer that this demand was released. If that is so, the next question is, What inconvenience would arise, that ought to bar. The plaintiffs do not demand the interest already distributed through their default. If the accounts of the personal estate could not be now obtained, and it was impossible to know to what the plaintiffs were entitled, that is a sufficient reason for saying they should not have it, and rob the charity, because they could not tell what belonged to them and what to the charity; but that is unfortunately not the case. Then the only inconvenience will be that the charity will now cease to have the benefit of so much. That is certainly to be lamented, but it will not involve any person in difficulties to be attributed to the neglect of the plaintiffs. Therefore desiring to be understood by no means to give any countenance to these stale demands any more than I did in Hercy v. Dinwoody, 2 Ves. Jr. 87, or Lord Camden in Smith v. Clay, Ambl. 645, or Lord Thurlow in Deloraine v. Browne, 3 Bro. Ch. 633, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favor of the plaintiffs."

The whole doctrine of laches, as it is understood and applied in this country, was developed by the English decisions. The opinion just quoted from reviews and analyzes the former decisions rendered by Lords Camden and Thurlow, and clearly points out all the elements of it. It shows that, when nothing appears but lapse of time and circumstances not working prejudice or injury to the defendant in case relief should be granted, the only inquiry is whether, in view of all the facts, the plaintiffs have abandoned or relinquished their right. Substantially this doctrine was stated in Hale v. Hale, 62 W. Va. 609, 14 L.R.A.(N.S.) 221, 59 S. E. 1056. It is also asserted and applied in Southern R. Co. v. Gregg, 101 Va. 308, 43 S. E. 570, holding as follows: "Laches is only permitted to defeat an acknowledged right on the ground that it affords evidence of the abandonment of the right. The doctrine therefore can have no application to a case where a demand has been continuously asserted and as continuously acknowledged." In Bell v. Wood, 94 Va. 677, 27 S. E. 504, the court said: "Generally, if the sum sought to be recovered is certain, the transaction has not become obscure, and there has been no such loss of evidence as will be likely to produce injustice, a court of equity will not refuse relief

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merely because there has been delay in asserting the claim." For the proposition that ignorance of law, superinducing delay in the assertion of a right, may operate to preclude a finding of laches, or to excuse it, if mere lapse of time be considered laches, Cranmer v. McSwords is authority. It says: "While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity, a court of conscience. In such court moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it resulted from ignorance of law." This is reiterated in Berry v. Wiedman, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817. For the proposition that family relationship, which may have induced delay out of mere tenderness to the feelings of parties, will operate in the same way, Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861, and Roberts v. King, 10 Gratt. 184, are authorities. These decisions emphasize the importance of the element of intention when the circumstances are such that the court is able to see that justice may be done between the parties notwithstanding the lapse of time or delay in the assertion of the right. The distinction between laches and the statutes of limitation is as broad as the difference between courts of equity and courts of law. The very object and purpose of the whole system of equity jurisprudence is relief from the hardships inherent in the fixed and inflexible rules of the common law. If courts of equity should now adopt rules equally fixed and inflexible, such as the statutes of limitations, or adopt the fixed rules of the common law, the very purpose of their existence would be defeated. They must keep themselves free from such rules, and retain the power to do justice in each case according to its circumstances, subject to certain general principles, equitable in their nature and operation, and the limitations set by law.

The decisions of this court afford a number of instances of preclusion from relief by comparatively short periods of delay; but they are all cases in which parol evidence was relied upon to establish mistake or fraud or other grounds of relief from contracts by way of rescission, cancelation, or like. Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262; Whittaker v. Southwest Virginia Improv. Co. 34 W. Va. 217, 12 S. E. 507; Curlett v. Newman, 30 W. Va. 182, 3 S. E. 578; Walker v. Ruffner, 32 W. Va. 297, 9 S. E. 215; Trader v. Jarvis, 23 W. Va. 100. But these precedents are inapplicable under the circumstances of this case, and, as Judge Snyder said of cases of the class to which they belong, they have no direct bearing on the question under consideration.

What has been said here upon the subject of laches is predicated upon the facts disclosed by the bill. What may be developed by the answer and the proof, if the case should proceed to a hearing on the evidence, we are unable to foresee. As the bill only partially develops the facts and circumstances, we do not decide finally whether the defense of laches can be made in such a case as this.

In respect to the authorities invoked in support of the contention that relief is barred by the statute of limitations (Jones v. Lemon, 26 W. Va. 629; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; Mullan v. Carper, 37 W. Va. 215, 16 S. E. 527; Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579; Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309; Phillips v. Piney Coal Co. 53 W. Va. 543, 97 Am. St. Rep. 1040, 44 S. E. 774; and Ruckman v. Cox, 63 W. Va. 74, 59 S. E. 760), it may be repeated that the statute does not run against a purely equitable demand, and that the right set up in the bill is of that character. Against such a right, however, a title acquired by adverse possession under color of title may be set up. The decisions cited in the brief for appellees enunciate this proposition, but the statute does not begin to run against the equitable demand from the time of the accrual thereof. If a trust is established, whether it be an express or a constructive one, and there is a breach of it, or an equitable cause of action for any reason accrues under it, the statute of limitations has no application and does not run against the *cestui que trust*, unless his demand is of such a nature that he could sue upon it in a court of law. However, in the case of a trust in respect to real estate, there may be a disavowal and renunciation, and on this there may be commenced the process of acquiring good and complete independent title by adverse possession; but the process of acquiring such new title begins not with the mere disavowal of the trust. It requires something more. There may be, at the time of the disavowal, actual possession of the land, and often the repudiation itself consists of the giving of notice of hostile possession thereof. If the breach of the trust occurs before there is such possession, the statute does not then begin to confer new title; but if, after the disavowal of the trust, or contemporaneously therewith, and in pursuance thereof, and under the instrument of disavowal, it being a deed by the trustee to a stranger, such possession be taken and continued for the period of ten years, a new and independent title, superior to that of the equitable title, is thereby acquired and

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will prevail over it and defeat it, even in a court of equity, for courts of equity were never devised for the purpose of overriding or disregarding the law of legal estates, nor vested with power to do so. They have a wide field of operation within the law and accomplish results without in any way overturning, unsettling, or swerving common-law rules, or denying legal rights; but no such title can be made out in this case. The possession was not adverse until after the death of Henry Depue, and this suit was brought in less than two months after his death.

For the reasons stated, the decree complained of is clearly erroneous, and must be reversed, and the cause remanded for further proceedings.

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The will of James M. Dardis, of Racine county, Wisconsin, was presented for probate by John T. Lee, the executor therein named, and notice duly given. The will was made in November, 1904; devised a house and lot to one daughter, and the rest of the property, real and personal, to seven named sons and daughters in equal shares, save that one of them was to have twice as much as each of the others. This bequest omitted three sons, and by another paragraph the testator expressly declared his will that those three sons should take nothing. The will nominated an executor, the proponent, and by the sixth paragraph directed and empowered such executor to sell, and by proper instruments of conveyance to convey, the real estate, other than the house and lot devised to the daughter Susie, at such price or prices as might be reasonable in his judgment. Objections were interposed to the probate by seven of the children, including some of the beneficiaries, and one at least of the disinherited sons, asserting mental incompetency and undue influence by one Thayer, the husband of the daughter to whom the house and

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No case has been found other than RE DARDIS wherein any court passed upon the validity of a stipulation to secure the denial to probate of a will theretofore offered for probate, on the ground that the testator was mentally incompetent to make a will at the time of its execution. The decision of the court is based upon the doctrine therein enunciated, that proceedings to probate a will are proceedings *in rem*, which public interest demands should be pursued to a final adjudication, regardless of the wishes of the interested parties. In this connection and with reference to this broader question, it is of interest to note that courts of other jurisdictions, although generally recognizing that proceedings to probate a will are proceedings *in rem*, hold that the proceeding is *inter partes* to the extent that all the parties in interest may control the probate proceedings, even to the extent of doing away with the probate. As supporting this proposition, see note to Cochran v. Zachery, 16 L.R.A.(N.S.) 236, and cases therein cited.

This doctrine also finds support in Re Lasak, 131 N. Y. 624, 30 N. E. 112, wherein, in considering the right of the parties in interest to withdraw from probate a will or dismiss the probate proceedings, the court said: "After the petition was filed with the surrogate and the proper parties had been cited and were before him, he had jurisdiction of the subject-matter and of the parties. It was a proceeding *in rem*, to prove the will. All the parties could become actors therein. Any of them could contest and produce witnesses in opposition to the probate, and any of them could offer witnesses in support of the will and cross-examine the witnesses called in opposition thereto. In such a case, if all the parties cited, being of full age, should ask that the proceedings be dismissed, no one appearing in support of the will, it would be the duty of the surrogate to dismiss the proceeding. The same result could be produced if all the parties cited should formally admit that the will was not legally executed or that the testator was incompetent."

And see also Cuthbert v. Chauvet, 48 N. Y. S. R. 346, 20 N. Y. Supp. 336, which, in passing upon the same will considered in the preceding case, held that the beneficiaries might lawfully agree to ignore the provisions of the will and distribute the property as if the testator had died intes-

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And see also Cuthbert v. Chauvet, 48 N. Y. S. R. 346, 20 N. Y. Supp. 336, which, in passing upon the same will considered in the preceding case, held that the beneficiaries might lawfully agree to ignore the provisions of the will and distribute the property as if the testator had died intes-

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lot were devised. Said objections were filed February 7, 1905. On January 26, 1905, all of the children named in the will, except the son Henry Dardis, who had predeceased his father, unmarried, entered into a stipulation to the following effect: "We, the undersigned, being all of the heirs at law and next of kin of the above-named James M. Dardis, deceased, and all being of full age and under no legal disability, having learned that said Dardis having in his lifetime made a last will and testament bearing date November 21, 1904, and having further learned that said last will has been presented and filed with the county judge of Racine county, Wisconsin, for probate, the hearing for which is set for February 7th inst., do hereby consent, stipulate, and agree that, at the time of the making of the said last will and testament, the said James M. Dardis, deceased, was not mentally competent to make the same, being an old man, and, for several years prior to the making of said will, his mental faculties had become impaired, and in justice to the court and to ourselves we make this stipulation and statement. And we further stipulate and agree that in case the probate of said will is refused, either by virtue of this stipulation or otherwise, letters of administration upon the estate of the said James M. Dardis, deceased, may, by the county court for Racine county, be issued to John T. Lee, of Corliss, Racine county, Wisconsin, being the same person named as executor of the said will, hereby releasing and renouncing our and each of our rights to said administration, hereby waiving the publication of any notice therefor, or the running of any time thereon, as required by law and the rules and practice of this court, to the end that, when said administration is granted as aforesaid, it shall have the same force and effect as if done after full publication had been made therefor, and the time had run thereon, as required by law and the rules and practice of this court. It is stipulated and agreed by and between the heirs of the said James M. Dardis, deceased, as aforesaid, that, after all the debts and obligations against said estate are fully satisfied, that any advancement made to any child or children of said deceased shall be deducted and taken from their distributive share of said estate. And it is further stipulated and agreed that Susie Thayer, one of the children of the said James M. Dardis, deceased, shall have and receive from said estate, in addition to her distributive share, the sum of $50, being an advancement made to her

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tate, and that the trustee could be compelled to execute such settlement.

In Carter v. Owens, 41 Ala. 217, in sustaining the title to a chose in action of the deceased and the right to sue thereon, although received by plaintiff under a settlement of decedent's estate made to prevent the probate of his will, the court said: "All the parties interested or to be affected may as well by agreement divide property where there is a will, without employing the agency of courts, as in case of intestacy. Parties competent to act ought to do that, without the agency of courts, which the courts would ultimately accomplish. To deny them the privilege of so doing would manifest a judicial abhorrence of harmony. By the probate of the will, the claims of heirs and distributees and of the widow would have been subordinated to the directions of the will. This has been accomplished by agreement. There being no debts, the executrix would have had no other duty to perform than to divide the property according to the will. This, too, has been done by agreement of competent parties. All the ends and objects of judicial proceedings have been accomplished by agreement of the parties; and that agreement must be effective."

See also Re McNamara, 154 Mich. 671, 118 N. W. 598, which held that a party to an agreement to induce the executor to discontinue his proceedings to appeal from an order of the probate court denying probate to a will was estopped to question the validity of this agreement.

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The court in RE DARDIS cites Syme v. Broughton, 85 N. C. 367; Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85; Re Young, 123 N. C. 358, 31 S. E. 626, in support of its position. These cases however go only to the extent of holding that the proponent of a will, in order to avoid an adverse judgment and apparently for the purpose of repropounding the will, cannot submit to a nonsuit therein or discontinue the same. In addition to the foregoing cases the following cases also sustain this proposition: St. John's Lodge No. 1 v. Callender, 26 N. C. (4 Ired. L.) 335; Collins v. Collins, 125 N. C. 98, 34 S. E. 195; McMahon v. McMahon, 100 Mo. 97, 13 S. W. 208.

But see Crow v. Blakey, 31 Ala. 728; Re Leonard (N. J.) 47 Atl. 222; Heermans v. Hill, 2 Hun, 409, which hold that a surrogate or probate court has the power to permit the proponent of a will to withdraw it and discontinue the probate proceedings. In Re Leonard, the proponent was allowed to discontinue proceedings after citations had been issued, it appearing that they were void because mistakenly made returnable on a day already past.

The DARDIS CASE finds some support in an *obiter* statement of the court in Re Carpenter, 127 Cal. 582, 60 Pac. 162, to the effect that the matter of the probate of a will is a proceeding *in rem*, binding on the whole world, and a few individuals claiming to be the heirs cannot by stipulation determine the controversy.

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father during his lifetime, and also shall have and receive, in addition to her distributive share, the sum of $6 per week during the weeks she cared for her said father during his last sickness. This stipulation and agreement is made by all the heirs of the said James M. Dardis, deceased, with full power and knowledge of its contents, and with the intention and desire to settle said estate quickly and amicably, and to avoid litigation, trouble, and expense." On February 7, 1905, they followed this by another stipulation containing many of the provisions of the former, but also stipulating and agreeing that said instrument be disallowed, and the probate thereof by said county court be denied, but giving no reason therefor. This second stipulation had appended to it the following consent by Lee, the proponent: "I, John T. Lee, proponent of the instrument mentioned in the foregoing stipulation and agreement, and the person named therein as executor, do hereby consent to all and singular the terms of said stipulation, and do consent and agree that said instrument may be disallowed, and the probate thereof denied by said county court." Upon the return day of the notice, the subscribing witnesses attended and testified to the making of the will, the obvious sanity of the testator, and his apparent freedom from influence. The county court thereupon admitted the will to probate, adjudged it to be the valid will of the deceased, and appointed Lee executor. From that order, or, rather, the part thereof admitting the will to probate, the daughter Mary Esmond appealed to the circuit court. When the case was reached in circuit court Mary Esmond had died, leaving minor heirs succeeding her. The circuit court tried the subject *de novo*, no evidence to attack the validity of the will being introduced except said stipulations in circuit court, finding the testator sane and free from undue influence and the formal execution of the will to be in accordance with law, and affirmed the judgment of the county court. From said judgment of affirmance, six of the sons and daughters appeal.

Messrs. Simmons, Nelson, & Walker, for appellants:

All parties to a controversy, being *sui juris*, can bind themselves by stipulation, either as to the existence of a fact material to such controversy, or as to the judgment to be entered by the court having jurisdiction thereof.

Underhill, Ev. § 371; 20 Enc. Pl. & Pr. pp. 620-622, 625; 1 Thomp. Trials, § 361; Lewis v. Summer, 13 Met. 272; Alexander v. Rice, 52 Mich. 451, 18 N. W. 214; Hine v. New York Elev. R. Co. 149 N. Y. 154, 43 N. E. 414; Clason v. Baldwin, 152 N. Y. 204, 46 N. E. 322; Bleakley v. Sullivan, 140 N. Y. 175, 35 N. E. 433; Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774.

The parties may bind themselves by stipulations as to the form or substance of an order or judgment to be entered in the case.

5 Enc. Pl. & Pr. pp. 960, 961; Coultas v. Green, 43 Ill. 277; Clason v. Shepherd, 10 Wis. 356; Re New York, L. & W. R. Co. 98 N. Y. 447; Courtney v. McGavock, 23 Wis. 619; Dolloff v. Curran, 59 Wis. 332, 18 N. W. 266; Sullivan v. Bruhling, 70 Wis. 388, 36 N. W. 23; Horton v. Baptist Church & Soc. 34 Vt. 309.

In the matter of the probate of a will, although the proceeding is in a sense *in rem*, it is also *inter partes*, and the parties who must sign the stipulation are, at most, the proponent and those who are or may be beneficially interested in the estate, either as heirs or legatees or devisees.

Re Valentine, 93 Wis. 45, 67 N. W. 12; Re Hoppe, 102 Wis. 54, 78 N. W. 183; Anderson v. Laugen, 122 Wis. 57, 99 N. W. 437; Derse v. Derse, 103 Wis. 113, 79 N. W. 44; Fox v. Martin, 108 Wis. 101, 84 N. W. 23; Horton v. Baptist Church & Soc. supra; Re Lyon, 96 Wis. 339, 65 Am. St. Rep. 52, 71 N. W. 362.

Stipulations which represent the compromise and settlement of family differences are recognized by the courts as tending to the peace and harmony of families, and are commended and looked upon with the highest favor.

Leach v. Fobes, 11 Gray, 506, 71 Am. Dec. 732; Trigg v. Read, 5 Humph. 529, 42 Am. Dec. 447; Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761; Re Evans, 58 App. Div. 502, 69 N. Y. Supp. 482; Re Garcelon, 104 Cal. 570, 32 L.R.A. 595, 43 Am. St. Rep. 134, 38 Pac. 420; Larrabee v. Larrabee, 34 Me. 477; Phillips v. Phillips, 8 Watts, 198; Bunn v. Bartlett, 28 N. Y. S. R. 239, 8 N. Y. Supp. 160; Re Greeley, 15 Abb. Pr. N. S. 396; Lloyd's Estate, 24 Pa. Co. Ct. 567; Louisville & N. R. Co. v. Sanders, 19 Ky. L. Rep. 1941, 44 S. W. 644; Stringfellow v. Early, 15 Tex. Civ. App. 597, 40 S. W. 871; 12 Am. & Eng. Enc. Law, pp. 875-877; Ralston's Estate, 172 Pa. 104, 33 Atl. 273; Bunel v. O'Day, 125 Fed. 318; Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 801; Supreme Assembly, R. S. G. F. v. Campbell, 17 R. I. 402, 13 L.R.A. 601, 22 Atl. 307.

Messrs. H. G. Smieding, Churchill, Bennett, & Churchill, and Waller & Gittings, for respondents:

The parties can take no steps or proceeding which will in any manner set aside the effort of deceased in attempting to make a will.

Dodge v. Williams, 46 Wis. 90, 1 N. W.

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92, 50 N. W. 1103; Farmer v. Sprague, 57 Wis. 324, 15 N. W. 382; Gary, Prob. Law, 3d ed. §§ 194, 199; Allison v. Smith, 16 Mich. 405; People ex rel. Frazer v. Wayne Circuit Judge, 39 Mich. 198; Re Hathaway, 46 Mich. 326, 9 N. W. 435; Dudley v. Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; Graham v. Burch, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; Gardner v. Anderson, 79 N. C. 24; Syme v. Broughton, 85 N. C. 367; Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85; Allison v. Smith, 16 Mich. 405; Wilkins v. Hukill, 115 Mich. 594, 73 N. W. 898; Re Young, 123 N. C. 358, 31 S. E. 626.

The parties of a probate proceeding are not limited to devisees, legatees, and heirs, but include judgment creditors of heirs and of devisees.

Smith v. Bradstreet, 16 Pick. 264; Re Langevin, 45 Minn. 429, 47 N. W. 1133; Gary, Prob. Law, 3d ed. § 194.

The parties cannot compromise, because the matter is one *in rem* and binds the world.

Re Carpenter, 127 Cal. 582, 60 Pac. 162; Seip's Estate, 163 Pa. 423, 43 Am. St. Rep. 803, 30 Atl. 226; Cheever v. Circuit Judge, 45 Mich. 6, 7 N. W. 186; Van Alen v. Hewins, 5 Hun, 44.

Dodge, J., delivered the opinion of the court:

The very earnest contention of appellants that, when all parties to a litigation stipulate or consent to certain action by the court, such stipulation should be carried into effect, is undoubtedly correct as a general proposition, though obviously with some limitations. For example, a court could not be compelled to stultify itself by solemnly adjudging an absurdity or a falsehood because parties stipulated for such act. Independently, however, of whether a court must always solemnly adjudicate a fact agreed on by all parties in interest, doubtless it should give effect to a stipulation so far as it affects the individual rights of the parties thereto. It is also doubtless true that parties to any proceeding, although not all the parties, may by their stipulation or consent preclude themselves individually from setting up any rights in opposition to such stipulation. The trouble, however, with appellants' position in this case is that no stipulation was presented to the court signed by all parties in interest. The probate of a will is a proceeding *in rem*, to which all the world are in some sense parties. Of course, like any other such proceeding, it also affects specific individuals, and therefore is *inter partes* as to such individuals. But in addition to its effect upon the rights either of the heirs of the alleged testator or of the legatees, the adjudication of the question whether a given script is or is not the will of the decedent may affect many other rights and interests which cannot be ascertained in advance of such adjudication. True, for example, any will devising real estate takes effect at the death of the testator, and may, at the moment of such death, create actual vested rights or liens in judgment creditors of the devisee. Scott v. West, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; Re Langevin, 45 Minn. 429, 47 N. W. 1133. Upon probate of the will there is no opportunity to ascertain whether such rights exist, but the holders of them are parties to the proceeding in the sense that they are bound by the adjudication by virtue of the general publication of notice. Indeed, even more remote rights may exist. General creditors of legatees may have a right to question the bona fides by which such legatees surrender any portion of their property after the right to it becomes vested, and no court in which a litigation to that end might be instituted has any power to pass on the existence and validity of an alleged will; especially would it not have such right after such will had been adjudged no testament by the probate court having that jurisdiction, although proceeding upon a stipulation of certain parties in interest. It is for reasons like these that the courts have uniformly held that the proceeding to probate a will is a proceeding *in rem*, binding all the world, and in which even public welfare and policy are involved. The view that public interest requires that a valid will be established, independently of the wish of those parties specifically named therein, is evinced by various statutes in this state. By § 4505, Stat. 1898, it is made a crime to conceal or suppress a will by any person, whether with or without the consent of parties therein named. By §§ 3784, 3785, and 3786, Stat. 1898, a positive duty is imposed both upon the county judge as a public officer, upon the person named as executor in any writing purporting to be a will, and, indeed, on any person having custody of such will, to take steps to bring the question of its validity before the proper probate court; and by § 2296, Stat. 1898, the absolute requirement is made that every will of real estate admitted to probate shall, with evidence thereof, be spread upon the public records. All these steps are imposed by law wholly independent of the control of those privately interested. They evince a clear recognition and declaration of the legislature that there is a public policy involved in the establishment of every legally executed will.

Apart from the interest of the public,

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there is also recognized by the courts an interest and right of the testator to have the directions of his will carried into effect, at least upon some subjects. His right is recognized to direct, at least, the method of management and disposal of his property after his decease, which courts cannot be compelled to disregard to accommodate the wishes of some or even all parties having pecuniary interest in the property. Dodge v. Williams, 46 Wis. 70, 90, 1 N. W. 92, 50 N. W. 1103; Bussell v. Wright, 133 Wis. 445, 113 N. W. 644. Whether a will contains any directions of the sort thus protected against modifications by the beneficiaries is a question which can only arise after the probate proceeding is complete and the existence of the will has been established; but, apparently, this will commands a method of sale of the real estate which can be given effect only by its probate.

Counsel for appellants cites us to two decisions apparently holding that a probate court should regard the stipulation of the nominal parties in interest in making its decision: Stringfellow v. Early, 15 Tex. Civ. App. 597, 40 S. W. 871; Lloyd's Estate, 24 Pa. Co. Ct. 567. We cannot approve the reasoning of these cases. They are addressed both of them to the consideration whether an individual who had stipulated could be heard in court in repudiation of his stipulation, and thus were obscured the considerations which we have above suggested of the possible interest of unknown parties and of the existence of a public policy to protect them. The Texas case is based upon a remark in Phillips v. Phillips, 8 Watts, 198, to the effect that the parties in interest before probate might consent to the suppression or destruction of a will, the remark in the latter case being wholly *obiter*. Whether this might be so in Texas or in Pennsylvania, we think, as already stated, there are declared and obvious reasons of public policy in Wisconsin which preclude such a doctrine. This conclusion seems to be supported by the great weight of authority. Syme v. Broughton, 85 N. C. 367; Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85; Re Young, 123 N. C. 358, 31 S. E. 626; Allison v. Smith, 16 Mich. 405, 415; People ex rel. Frazer v. Wayne Circuit Judge, 39 Mich. 198; Re Valentine, 93 Wis. 45, 67 N. W. 12; 1 Woerner, Am. Law of Administration, § 228; Gary, Prob. Law, 3d ed. § 194.

We conclude that the stipulation in this case could not control the duty which the probate court owed to the public, and perhaps to the testator, to adjudicate as to the legal existence of the propounded document as a will,—to establish its status. Hence the judgment is proper in the absence of other grounds of attack.

Judgment affirmed.

Petition for rehearing denied May 8, 1908.

WISCONSIN SUPREME COURT.

L. V. RIPLEY, Respt.,
v.
SAGE LAND & IMPROVEMENT COMPANY, Appt.

(138 Wis. 304, 119 N. W. 108.)

Account — delay — fault of attorney.

1. One to whom an account is rendered which contains an excessive interest charge on moneys advanced by the other party thereto, together with a tender of the cash balance, cannot avoid the effect of delay in repudiating the account by placing it in the hands of an attorney for adjustment, if the latter does not proceed in due time.

Same — estoppel.

2. One who accepts and retains, for a long period without objection, an account rendered, together with the balance shown to be due thereon, irrevocably assents to the account so that he cannot subsequently take steps to falsify it.

(Barnes, Dodge, and Kirwin, JJ., dissent.)

(January 5, 1909.)

Case Note. — Conclusiveness of stated or settled account containing inaccuracy or error in method of mathematical calculation.

It will be observed that, although RIPLEY v. SAGE LAND & IMPROV. CO. involves an account stated, this note has been extended so as to include cases of settled accounts. Although it is conceded that there may be a practical difference between the two, the line of distinction cannot be determined by a perusal of the subjoined cases. Difficulty has also been experienced in keeping strictly to the line of mathematical errors. Probably there is ground for confining the note to cases in which the error or mistake was ascertainable from an inspection of the account; but some liberality has been exercised in including cases that do not fall within limitation, but are very close to the line.

There is little dissent from the proposition that the retention without objection of an account rendered constitutes an implied admission of its correctness and raises an implied promise to pay. This admission, however, is not conclusive, and the parties are not necessarily precluded from showing fraud or errors. So, too, one who expressly assents to or pays the balance of an account may, nevertheless, show, in some circumstances, that there is fraud or error. The subject of inquiry here is whether mathematical inaccuracy or error of method is such an er-

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APPEAL by defendant from a judgment of the Circuit Court for Eau Claire County in plaintiff's favor in an action brought to falsify an account. Reversed.

Statement by Siebecker, J.:

This is an appeal from the circuit court for Eau Claire county from a judgment for $1,420.25 in favor of plaintiff. Under date of September 17, 1888, H. W. Sage & Company wrote the plaintiff as follows: "Yours 12th received. We will take and pay for such portions of 6,500 acres you describe as you may select after examination, on the basis proposed by you, *i. e.*, you to examine and locate, attend to paying taxes, if required, and protect from trespass; we to pay for the land (to be located in the name of H. W. S.), and furnish money for taxes till we sell the lands, and when sold to give you one half the net profits, over and above cost, taxes, necessary expenses of handling, and annual interest at 7 per cent. We presume you will be back at Eau Claire with minutes of the lands when you receive this letter; and you can either wire us the amount of cash you will need, and we will send you bk. drafts for it, or, if equally convenient, you may draw on us at sight, and this shall be your authority to draw on us enough to pay for the land up to 6,500 acres, at 10s. per acre." This proposition was accepted by the plaintiff, who thereupon proceeded to examine lands then owned by the United States and make cash entries of such lands as he considered

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ror or mistake as will warrant the opening of the account.

Inaccurate computations.

It is the rule that ordinarily a stated or settled account may be attacked for mere inaccuracy of computations. An error of this kind, it would seem, is one purely of fact, and therefore constitutes ground of relief.

Thus, mistake in adding a column of figures in the settlement of an account will entitle one who paid the balance therein shown to be due from him to recover from the other the amount of such error. Hanson v. Jones, 20 Mo. App. 595.

So, too, errors in addition and subtraction in a dissolution settlement between partners may be readjusted on a bill to open the settlement. Mayo v. Bosson, 6 Ohio, 525.

And belief of both parties in the accuracy of the computations in an account which contained an error in addition is such a mutual mistake of fact as will support an action for the amount of the error, although payment of the balance was made and a receipt in full given. Downey v. McGinn, 1 N. Y. City Ct. Rep. 478.

The vendor of barrel headings who retains without objection for six months the vendee's account and payment of the amount thereby shown to be due, based on errors of the latter's inspector in counting and computing the number furnished, is not thereby estopped to show such errors, in his action for the amount claimed to be due, provided the discrepancy is so great as not reasonably to be accounted for by mere error in the exercise of honest judgment in sorting and matching. Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178.

And persons who held the first series of stock of a building and loan association, with whom settlement has been made, may maintain a bill for an accounting, upon the ground that the settlement was based on erroneous computations as to the date of maturity of the stock and as to the distribution of profits among the different series. Banksville Mutual Bldg. & L. Asso.'s Appeal, 1 Sadler (Pa.) 338, 2 Atl. 859.

A statement and settlement after the purchase of, and payment for, inventoried stock and fixtures, made by the agents of the vendor and purchaser in adjustment of errors in the inventory, should, where the agents' examination was obviously made in a haphazard manner, be disregarded as an account stated or settlement, so that the vendor may recover for approximately one hundred mathematical errors in extensions and footings in the inventory, of which the statement adjusted only about fifty or sixty. Mine & S. Supply Co. v. Creel (Tex. Civ. App.) 79 S. W. 67.

At the trial of the case of Grace v. Newbre, 31 Wis. 19, the lower court permitted the plaintiff to surcharge a stated account for an error in footing, and on appeal it was held that one who thus opens an account should be held to corrections of the account for errors against the defendant.

Error of method or basis.

Some errors of this kind are, it would seem, in the nature of mistakes of law, while it is possible that others may arise from mistake of fact. No cases have been found that make an express distinction on this ground, although one has been found to allude to the fact of a mistake of law. The contrary results of the various cases may, partially at least, be accounted for by differentiation of facts.

The charging by an agent of commissions for the sale of lands in addition to commissions on amounts collected is not ground for falsifying or surcharging the settled account of the agent, where the charges were made apparently in pursuance of agreement, and especially where twenty years have elapsed since the settlement of the account and the death of the principal. Philips v. Belden, 2 Edw. Ch. 1.

And one who engaged to conduct a certain department of a store for a share of the profits, and who has accepted the yearly statements of profits as well as payment of his share thereof, cannot, especially after the lapse of a considerable period of time, maintain a bill to open the annual accounts and to compel an

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it desirable to purchase. Some 2,840 acres of land were entered, but a portion of the entries were canceled by the government. Practically all of the lands were entered in October, 1888. Thereafter moneys were received from various sources by the defendant or its predecessor, during the year 1893, the business and property of H. W. Sage & Company having been merged in a corporation known as the "Sage Land & Improvement Company." The amounts of money so received did not, at any time down to May 1, 1902, equal the accrued interest on moneys advanced by the defendant and its predecessor under the contract. At that time a sale of 1,720 acres was made to the J. L. Gates Land Company for $5,020. On June 5, 1902, a sale of the remaining 520 acres was made for $1,980 net. The entries as to 520 acres were canceled. On November 12, 1902, after all the lands had been sold, the defendant forwarded from Albany, New York, to the plaintiff, a statement showing the condition of its account with plaintiff as claimed by it. Such statement showed that the plaintiff's share of the net profits at this date amounted to $114.97. A check for this amount was inclosed, and the statement showed that this check covered the balance due. The only matter between the parties then unsettled related to a claim for a refund from the government amounting to $650 for canceled entries. The plaintiff acknowledged receipt of the statement without making any objection thereto, and retained and used the

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accounting, upon the ground that his employers did not include in the accounts the time and cash discounts for goods purchased for the department, where he always had access to the firm books and never claimed the discounts, and where it is established that it is not customary in mercantile circles to regard discounts as profits. Barlow v. Platt, 133 App. Div. 364, 117 N. Y. Supp. 235.

And while an account should not be opened generally after the lapse of sixteen years, the court should, on a bill for an accounting of a partnership business of foreign trade, and after the lapse of such a time, order the restatement of the account for errors which it is satisfied should be corrected, and should direct that, instead of a statement of each adventure separately without vouchers or details, the account be stated in the form of annual accounts, where the partnership agreement provided for annual accounts, and where the violation of such agreement resulted in gross error in the interest account. Ogden v. Astor, 4 Sandf. 311.

And an electric lighting company whose accountant renders monthly statements to a consumer on an erroneous basis of the amount of electricity recorded by the meter may, although the monthly statements amount to accounts stated, recover a balance still due, upon the ground that the meter was of a type known as "Constant 3," which records only one third of the current consumed. Allegheny County Light Co. v. Thomas, 31 Pa. Super. Ct. 102.

Interest, generally.

A charge of interest computed at a rate greater than the conventional rate, in a statement of account, is conclusive on the debtor if his conduct has been such as to make the statement an account stated. Savage v. Aiken, 21 Neb. 605, 33 N. W. 241.

So, too, one giving his written assent to an account against him cannot thereafter contest it upon the ground that it contains excessive charges of interest, where the rate is not unlawful. Lalande v. Breaux, 5 La. Ann. 505.

And the fact that interest in an account stated is computed at a rate which, though not illegal, is unenforceable except under a written contract, constitutes no defense to an action on the account. Marye v. Strouse, 6 Sawy. 204, 5 Fed. 483.

And where the rate is likewise legal but unenforceable, the additional fact that the debtor did not know the rate is not, where it could have been ascertained by simple computation, a defense to notes given in settlement of the account. Porter v. Price, 26 C. C. A. 70, 49 U. S. App. 295, 80 Fed. 655.

And where an account between parties is stated and agreed upon, and, upon the basis of this settlement, real estate is transferred at a fixed value in partial discharge of the indebtedness, the account will not, in the absence of fraud, be opened because of errors in the calculation of interest. Maguire v. Filley, 9 Mo. App. 580.

On the other hand, a statement of account by the state auditor showing the amount due from the county for taxes collected becomes, where the county retains it without objection, at most, only an account stated, which the county, as respondent in mandamus to compel payment of the balance, may attack upon the ground of computation of interest on the bids for lands sold for taxes in a manner that gave the state double interest. Stevens v. Saginaw County, 62 Mich. 579, 29 N. W. 492.

And where one party to a stated account has been permitted to falsify certain charges therein, the other party will be permitted to open it to reduce an excessive charge of interest. Higginson v. Fabre, 3 Desauss. Eq. 89.

An agreement between parties as to the amount due from one to the other was held in Town v. Wood, 37 Ill. 512, not to be conclusive if it was founded on error in regard to the items or in the computation of interest.

And it was held in Tennent v. Dewees, 7 Pa. 305, that a settled account in which the amount due for advances under a trust deed was agreed upon could be corrected for errors in charging interest from a date prior to that on which the advances were made.

See also Ogden v. Astor, supra.

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accompanying $114.97. In the statement forwarded by the defendant to the plaintiff interest was compounded annually. Plaintiff made no objection to the defendant's method of computing the interest until August 8, 1905, when its attention was called to the alleged mistake in the matter of computation, and a request was made that the error be corrected. The plaintiff testified, in substance, that he did not examine the statement until some little time after it was received, and that, when he did examine it, he discovered that interest had been compounded; that he consulted an attorney (De Alton S. Thomas) concerning the right of the defendant to compound interest under this contract, and that his attorney advised him that it would be necessary for him to see the letters constituting the contract before advising upon the subject. Some time elapsed before plaintiff was able to find the letter of September 17, 1888. When he did find it, he placed it in the hands of his attorney, and advised him to take steps to notify the defendant of his claim with reference to the interest, and to adjust the same. He did not learn until some time in 1905, that his attorney had neglected to take any proceedings with reference to the matter. The circuit held that the plaintiff was not concluded by the account rendered, by his acceptance of the $114.97, and his silence with reference to the matter. The account was restated by the court, simple interest only being allowed to the defendant, and judgment was awarded in plaintiff's favor. This is an appeal from such judgment.

Messrs. **Wickham & Farr**, for appellant:

The acceptance of the check by the plaintiff without reservation was of itself a consent by the plaintiff to the terms of the settlement.

Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; Strasser v. Conklin, **54** Wis. 102, 11 N. W. 254; Singleton v. Hill, 91 Wis. 51, 51 Am. St. Rep. 868, 64 N. W. 588; 9 Cyc.

—compound interest.

This was the question raised in RIPLEY v. SAGE LAND & IMPROV. CO. While the result reached in that case is supported by the authorities, the ground of the decision is not so readily accepted. It is there held that, when the account became stated and settled, it was conclusive on the parties. The better ground would seem to be that, while the stated account was only prima facie correct, a charge of compound interest was not such an error as would warrant the opening of the account. Of course, if the court, instead of making the broad assertion of conclusiveness, had merely said that it was conclusive as to the item of compound interest, no doubt as to the propriety of the reasoning would arise.

The compounding of interest in an account, which is obvious on the face thereof, does not constitute a defense to notes given in payment of the balance shown thereby to be due. Porter v. Price, supra.

And a debtor who has acknowledged the amount of his debt, paid a part, and given his note for the remainder, cannot, in an action against him on the notes, claim a deduction upon the ground that the amount acknowledged includes compound interest. Poydras v. Turgeau, 14 La. 34.

And an account constituting the first of a series in which the balance of each was carried forward to the next cannot be corrected in equity upon the ground that the nominal principal of notes given in liquidation of the balance which it showed included interest for the period of their running and that the notes were also chargeable on their face with interest after maturity. Bullock v. Boyd, Hoffm. Ch. 294.

The rule, however, seems to be otherwise in England.

Thus, in Daniell v. Sinclair (1881) L. R. 6 App. Cas. 181, it was held that, where a mortgage account charging compound interest was settled on the erroneous belief that the mortgage provided for the compounding of interest, it could be opened on the mortgagor's bill for an accounting, the court saying that, although credits were in the nature of payments which, when made under a mistake of law, could not be recovered back, the distinctions between mistakes of fact and of law were not strictly observed in equity.

—usurious interest.

Usury has been held a good defense to an action on an account stated. Jorgensen v. Kingsley, 60 Neb. 44, 82 N. W. 104.

The early case of Bosanquett v. Dashwood (1734) Cas. t. Talb. 38, has been made to assume various aspects by different reports, of which the accuracy of one was subsequently questioned by Lord Mansfield. It may perhaps be gathered from these reports, with a fairly reasonable degree of assurance, that the testator loaned money at legal interest and thereafter procured a promise of the borrower that he would pay interest at a rate that was usurious; and that later an account apparently embracing unpaid usurious interest was rendered by the testator, the balance of which was acknowledged as due by the borrower. On a bill by the assignees in bankruptcy of the borrower, the testator's executors were directed to account for interest collected in excess of the lawful rate.

The computation of interest on the basis of 360 days in the year, in the first of a series of settled accounts in which the balance of each was carried forward to the next, renders it usurious, and constitutes a ground

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Law & Proc. p. 293; Lawrence v. Milwaukee, L. S. & W. R. Co. 84 Wis. 427, 54 N. W. 797; Saveland v. Green, 40 Wis. 431.

A mental reservation or intention by one of the parties to afterwards make a claim against the other cannot vary the binding effect of a contract of settlement.

Wheeler v. Meriden Cutlery Co. 23 Wis. 584; Sanger v. Dun, 47 Wis. 615, 32 Am. Rep. 789, 3 N. W. 388.

A settlement of accounts between parties will not be set aside without clear and positive proof of fraud or mistake.

Klauber v. Wright, 52 Wis. 303, 8 N. W. 893; Miller v. Chippewa County, 58 Wis. 630, 17 N. W. 535; Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Hawley v. Harran, 79 Wis. 379, 48 N. W. 676.

Messrs. **Bundy & Wilcox** for respondent.

Siebecker, J., delivered the opinion of the court:

The defendant contends that the court erred in opening the account and awarding plaintiff a recovery for a balance on a restatement of it, because the undisputed facts show that the parties settled the account between them, and that the plaintiff accepted payment from defendant of the amount then found due him. It is urged that it is without dispute that the defendant, on November 12, 1902, forwarded to plaintiff a statement of the account of the business affairs between them arising out of the land deals, and accompanied it with the sum of $114.97 as payment of the balance due plaintiff. Plaintiff acknowledged receipt of the statement and money, retained the money, and made no objection to the correctness of the account thus rendered. There is no controversy between the parties respecting the transaction up to this point. Without explanation and modification of this situation, the acceptance of the amount sent by defendant as payment of the balance due plaintiff made the account a stated one, and operated as a settlement and payment of the claim embraced in the account. The plaintiff, how-

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for correcting and surcharging it in equity. Bullock v. Boyd, supra.

And the charging, in the second of a series of settled accounts between lender and borrower, of a commission in addition to lawful interest on advances not made in expectation of a bona fide transmission of property to be sold on commission, warrants the striking out of the item of commission, on a bill to correct and surcharge the account. Ibid.

So, too, a borrower who objects that, in a series of settled accounts between the lender and himself, the lender, to whom he had transferred notes of another, discounted them by deducting interest and an additional commission from their face value, states a ground for the correction of the item in equity. Ibid.

And a charge, in one of a series of settled accounts for money advanced, of a commission on the balance shown in a prior account, for which an interest-bearing note was taken, is unsupportable, and will be corrected in equity. Ibid.

It was held in Lee v. Reed, 4 Dana, 109, on a bill to readjust and abate various charges in an account against a decedent, that the administrator's settlement of the account bound him, with respect to charges of usurious interest, only to the extent that legal interest was charged.

And in Barrow v. Rhinelander, 1 Johns. Ch. 550, the court set aside a series of settlements and ordered an accounting, where it appeared that the settlements were affected with usury, mistakes, omissions, fraud, and oppression by one standing in a confidential relation to the debtor. On the second appeal of this case, in 17 Johns. 538, the court remarked, in passing to the consideration of other questions, that the account was properly opened.

Remarking that a settled account could be opened upon the ground of charges of usurious interest, the court, in Fowler v. Wyatt (1857) 24 Beav. 232, held that where parties executed an instrument reciting that accounts between them were thereby stated and settled, and one of them executed a release to the other while cognizant of the usury, the account could not be opened until the release had been set aside, and that usury without fraud or undue influence was insufficient to warrant the setting aside of the release.

It was held in Bullard v. Raynor, 30 N. Y. 197, that the assignee of the maker of a note embraced in a stated account between the latter and the holder could not contest the note on the ground of usury, although the maker himself could have done so.

And it was held in Peddicord v. Connard, 85 Ill. 102, that a depositor who overdrew his account and thereafter made a settlement by having his bank book balanced, which, together with the paid checks, he received and retained for a considerable period without objection, could not afterwards open the account on the ground that the interest on the overdrafts was computed at a usurious rate.

This question has been held in some states to be governed by statutes providing that recovery back of usury must be sought in one year.

Thus, it was said in Seymour v. Marvin, 11 Barb. 80, that the right of one repaying usurious loans and advances to recover back the excess was limited by statute to one year.

And referring to such statute, the case of Smith v. Marvin, 27 N. Y. 137, held that ac-

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ever, alleges that there was no such settlement and payment of his claim, because the defendant erroneously charged an excessive amount for interest on the sums advanced by it in payment of the lands purchased, and thereby erroneously reduced the amount due him as his share of the net profits on the purchase and sale of the lands. He admits that, within a short time after receipt of the account and money as payment of the balance due him on the account, he was informed of this state of the account so rendered by the defendant. It appears that not until August 1905, a period of two years and nine months, did he give defendant any notice of this alleged overcharge in the account rendered by defendant, or make any claim for any sum as due him above the $114.97 so accepted by him. He testifies that he examined the account critically shortly after he received it and the money, and after he had acknowledged receipt thereof, that he did not offer to return the money, nor did he then inform the defendant that he repudiated the account as incorrect; but that after such examination he took legal advice regarding the right of the defendant under the contract to compute the interest as it did, and some time thereafter was informed that the defendant had illegally compounded the interest, and that he thereupon instructed his counsel to take the necessary steps to have the account corrected and to demand payment of the amount still due him. No steps were, however, taken by him or his counsel for a period of nearly three years. The duty to take the necessary steps to enforce collection of any additional sum due him rested on him, and he cannot be relieved by placing it in the control of De Alton S. Thomas, his attorney. He must be held to have sanctioned inaction by his attorney, for under the circumstances the attorney's delinquency cannot explain or justify plaintiff's silence for so long a time. Under this state of the facts the question is whether plaintiff's conduct in the matter amounts to a settlement and acceptance of the account, and precludes him from opening it at this late day.

It is urged by plaintiff that he in fact never assented to a settlement and payment of the account, and hence his conduct in the matter does not warrant the conclusion that the account became stated and paid. This contention omits consideration of the account as rendered, his acceptance of the amount tendered as payment of the whole amount due him, his long silence respecting the matter, and his failure to bring it to defendant's notice. Under the circumstances such acquiescence furnishes a good basis for the inference that he assented to the settlement defendant proposed by the account rendered. Such assent is as irrevocable as if he had expressly given it. Plaintiff was in duty bound to give defendant notice of his disapproval of the account

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quiescence for two years after paying the balance of an account containing usurious items precluded the debtor from avoiding the balance by means of a bill for an accounting.

In Louisiana a statute of this kind apparently governs several decisions, although express reference to it is not made in all of them.

The reception without objection of mercantile accounts rendered from time to time was held in Allen v. Nettles, 39 La. Ann. 788, 2 So. 602, to preclude the debtor or his representative from showing in an action for the balance in the last account, that interest was charged at an excessive rate and was computed by compounding in each successive account, the statutory period of one year having elapsed, and the settlement being equivalent to payment.

The foregoing case was regarded in Flower v. O'Bannon, 43 La. Ann. 1042, 10 So. 376, as conclusive against the right of a debtor to make similar objections in a similar action, where he had received frequent statements of account without objection, and with requests for indulgence, and promises to pay.

And it was held in Dannenmann v. Charlton, 113 La. 276, 36 So. 965, that the transferee of pledged chattels could not, as against the pledgee and after the lapse of a year, object to usurious items in a settlement entered into between the pledgee and the pledgeor who had made payment on the balance agreed upon as due.

The makers of a mortgage note were held in Carruth v. Carter, 26 La. Ann. 331, not to be entitled, in an action thereon, to set up usury, where, after several payments were made thereon, they entered into a settlement with the payee and acknowledged in writing that the sum claimed was due. In this case the court said that usury was no defense under the laws of Louisiana, and it may perhaps be properly assumed that the statutory period had elapsed.

And it was held in Flower v. Millaudon, 19 La. 185, that, where an account had been settled and the debtor had paid the balance in cash or its equivalent, he could not open the account in a suit for final settlement and to recover a balance, on the ground that the amount of the balance paid included excessive commissions and usurious interest. In this case more than one year had elapsed since the settlement.

Of course, where a settlement is effected by compromise or arbitration, its conclusiveness rests in considerations that are not a pertinent subject of inquiry herein.

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within a reasonable time. It devolved on him to exercise reasonable diligence, to give proper attention to the transaction, and repudiate the account, if he desired to avoid the effect of the settlement and payment of the account proposed by defendant. He did not act with reasonable diligence and viligance to repudiate it, and his conduct permits of but one reasonable inference, namely, that he assented to the settlement, and accepted the money tendered by defendant as payment of the balance due him. The effect of plaintiff's conduct is declared by the court in the case of Rose v. Bradley, 91 Wis. 619, 65 N. W. 509, where the force of the silence of a party, after having received a statement of the account against him from another, was considered. It is there said: "If such other keeps the account, and fails to object within a reasonable time, the facts raise a presumption or inference of acquiescence. That is all. Such presumption or inference is more or less strong according to circumstances. The neglect to return or object may be for such a length of time as to render such presumption conclusive on the question of acquiescence, so as to make an account stated." The following cases are illustrative of this principle, which we find controls this case against plaintiff's contention: Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N. W. 563; Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; Voss v. Northwestern Nat. L. Ins. Co. 137 Wis. 492, 118 N. W. 212. Since, then, the account was settled and paid, no ground is shown for opening it and allowing plaintiff to charge defendant any additional sum as due him. No fraud or mistake is claimed. Under the circumstances principle and public policy demand that, when the account was settled and adjusted, it became conclusive on the parties. Martin v. Beckwith, 4 Wis. 219; Klauber v. Wright, 52 Wis. 303, 8 N. W. 893; Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606.

We are led to the conclusion that the court erroneously opened a stated account, and that the complaint should have been dismissed.

Judgment reversed, and the cause remanded, with directions to award judgment dismissing the complaint.

Barnes, J. dissenting:

The contract between the parties was plain and unambiguous. Under it the defendant had no right whatever to compound interest. Its counsel does not claim or argue that it had such right. The defendant suffered no loss, wrong, or injury by reason of the failure of the plaintiff to object to the statement of the account as rendered. It does not claim any injury by reason of such failure. There was no controversy between the parties, before or at the time of the remittance, as to what amount was due. It was a mere matter of mathematical calculation, under a plain contract, to ascertain it. By reason of its erroneous and unlawful computation of interest, the defendant retained moneys that belonged to the plaintiff, and which, in the exercise of good faith and common honesty, it was bound to pay him. Plaintiff and defendant and its predecessor had a large number of business transactions amounting to large sums of money, and covering a period of over twenty years. They appeared to trust each other mutually. Statements were rendered from time to time; and, whenever anything was found incorrect in them, it was rectified, regardless of when the error was discovered. The plaintiff handed the statement here involved to his attorney shortly after it was received, to secure his opinion on the correctness of the computation of interest, and to collect the balance due him, if any. In view of the course the parties pursued in their dealings, it is particularly harsh and inequitable to foreclose the plaintiff from asserting his rights. The check sent plaintiff did not in itself purport to be in full of account. If it did so purport, it would make no difference. A receipt in full, when it is not in fact a payment in full, can always be contradicted. This is elementary law. Prairie Grove Cheese Mfg. Co. v. Luder, 115 Wis. 20, 27, 89 N. W. 138, 90 N. W. 1085; Weidner v. Standard Life & Acci. Ins. Co. 130 Wis. 10, 15, 110 N. W. 246. The plaintiff had a right to accept the check and to treat it as payment on account. The amount of money represented by it, and more, was due him. This $114.97, with another small payment made on account of moneys refunded on canceled entries, represented the earnings of a large amount of labor expended by plaintiff during a period of fourteen years. The payment was delayed for several months after it should have been made.

The court holds that, by accepting the check and retaining the account without telling the defendant that he was not willing to accept less than was due, the plaintiff cannot recover. The defendant should know as well as the plaintiff that it had not paid according to its contract. But, whether the plaintiff was chargeable with legal acumen superior to that of the defendant or not, I think, he should be permitted to recover.

Whether the transaction be considered from the standpoint of estoppel, of waiver, of accord and satisfaction, of an account

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stated, of acquiescence, of abandonment, or of a settlement, it still involves the question, Did plaintiff, by his failure to object to the accuracy of the account rendered, deprive himself of the right to collect what was justly his due? The rendering of an account and its retention without objection, after the lapse of time become an account stated and a strong proof of its correctness. Engler v. Roemer, 71 Wis. 11, 36 N. W. 618. A charge that, where one man makes out an itemized statement of his accounts with another, and mails or hands it to such other, and it is retained without objection, this is in law a settlement is incorrect. The act is not a settlement. Such facts "raise a presumption or inference of acquiescence. That is all. Such presumption or inference is more or less strong according to circumstances. The neglect to return or object may be for such a length of time as to render such presumption conclusive on the question of acquiescence so as to make an account stated." Rose v. Bradley, 91 Wis. 619, 623, 65 N. W. 509. The cases of Cobb v. Arundell, 26 Wis. 553, and Ryan Drug Co. v. Hvambsahl, 92 Wis. 62, 65 N. W. 873, hold that the sending of a statement of account by one party, and its retention by the other without objection thereto, make an account stated. Less than two months ago this court said: "It is quite uniformly held that, when a demand in the form of a bill or account is delivered to the debtor, his conduct, with reference thereto may be significant, and his failure to object within a reasonable time be construed prima facie as an admission that such bill or account is correct; not at all conclusive either on the fact of admission or on the fact of correctness, but prima facie subject to be overcome by other evidence." Jones v. De Muth, 137 Wis. 120, 118 N. W. 542, 543. But an account stated is only prima facie evidence that the balance struck is correct. Jefferson County v. Jones, 19 Wis. 51. While the incorrectness of a stated account may be shown, the evidence to surcharge it should be clear and satisfactory. Wilson v. Runkel, 38 Wis. 526; Marsh v. Case, 30 Wis. 531; Hoyt v. McLaughlin, 52 Wis. 280, 8 N. W. 889; Hill v. Durand, 58 Wis. 160, 15 N. W. 390. One of the late expressions of the court as to the effect of stating an account is that it is "only prima facie evidence of the correctness of the balance, and not conclusive upon it," and unless such balance is struck as the result of mutual concessions and a compromise, or the acts in reference thereto create an estoppel *in pais*, it "may be impeached for mistake or error in law or in fact with respect to the items included in it." Segelke & K. Mfg. Co. v. Vincent, 135 Wis. 237, 115 N. W. 806. In many other jurisdictions the receipt and retention of an account without comment is only prima facie evidence of assent to the correctness thereof. 1 Cyc. Law & Proc. p. 371, and cases cited. Even a settlement deliberately made may be set aside on clear proof of fraud or mistake. Klauber v. Wright, 52 Wis. 303, 8 N. W. 893; Hill v. Durand, supra. The contract here furnishes proof conclusive that a mistake of law was made in stating this account, if it was stated, or in making the settlement, if one was made, unless we assume that it was the purpose of the plaintiff to give something to the defendant that did not belong to it, and that it was the purpose of the defendant to cheat the plaintiff out of something that belonged to him.

It would seem clear from the foregoing authorities that the failure of the plaintiff to object to the account did not preclude him from showing that it was erroneous. At best it was evidence tending to show assent on his part as to its correctness. But if the transaction amounted to stating an account, still the stated account was not conclusive. The fact that any weight at all should be given such retention proceeds upon the theory of an implied assent or admission that the contents of the paper are correct because not demurred to. Many courts hold that such action is no evidence of consent; others that it is weak evidence. The doctrine seems to have originated at the trial of Horne Tooke for treason (25 How. St. Tr. 120), where treasonable letters found in his possession were offered in evidence against him, on the theory that the receipt and retention of such letters by him without protest or objection to their contents was tantamount to an approval of such contents. Defendant's objection to the letters was not wanting in logic. The accused stated that he was afraid he was guilty of blasphemy, as well as of treason, under the ruling of the court admitting the letters; that he received many curious letters that he did not answer, and that among them were some from a man named Oliver Overall, who "endeavored to prove to me that he was God, the Father, Son, and Holy Ghost. . . . He proved it from the Old Testament; in the first place that he was God the Father, because God is Overall, that is, God over all. He proved he was God the Son from the New Testament—Verily, verily, I am He; that is Veral I, Veral I, I am He. Now, if these letters written to me, which I from curiosity have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me." To which the chief justice replied: "If you can treat all

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the letters that have been found upon you with as much success as you have these letters of your correspondent, you will have no great reason for apprehension." The English court did not hold that the receipt and retention of this letter without protest would furnish proof conclusive of the crime of blasphemy.

The evolutionary progress of the law on the subject under consideration has led to the following results: (1) Receipt and retention of a statement of account without protest raise a presumption of assent to its correctness; (2) after the lapse of an indeterminate period, if the silence is continued, the statement so furnished automatically becomes an account stated; and (3) after the lapse of another indeterminate period, the account so stated automatically becomes conclusive of the rights of the parties. The last proposition is the result of the decision in this case, and it is with this that I particularly dissent.

The cases of Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246, and Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N. W. 563, rest upon an entirely different principle from that involved in this case, and I do not think they are authority for the decision here made.

Dodge and Kerwin, JJ.: We concur in the foregoing dissenting opinion of Mr. Justice Barnes.

Petition for rehearing denied.

COLORADO SUPREME COURT.

E. G. MIDDLEKAMP, Plff. in Err.,
v.
BESSEMER IRRIGATING DITCH COMPANY.

(— Colo. —, 103 Pac. 280.)

Nuisance — irrigation ditch — seepage.

1. Seepage to the injury of neighboring property from an irrigation ditch constructed under authority of law, in the ordinary and usual manner, cannot be regarded as making the ditch a nuisance, for which successive actions can be brought until it is abated.

Limitation of actions — seepage — injury.

2. The statute of limitations begins to run against a cause of action for injuries to neighboring land by seepage from an irrigation ditch constructed under statutory authority, in the usual and ordinary manner, from the date the lands are first visibly affected and injured by seepage which, together with its continuance from the same source, caused the injury for which the action was brought, and it is immaterial that the injury increases with the passage of time.

Nuisance — irrigation ditch — condition.

3. That seepage from an irrigation ditch may be prevented by fluming or cementing the portions where the seepage occurs does not render the ditch, without such protection, a nuisance to neighboring property.

(Steele, Ch. J., and Musser and White, JJ., dissent.)

(July 6, 1909.)

ERROR to the District Court for Pueblo County to review a judgment in defendant's favor in an action brought to recover damages for injuries to plaintiff's lands, alleged to have been caused by seepage from defendant's irrigation ditch. Affirmed.

The facts are stated in the opinion.

Messrs. **McCorkle & Teller** and **E. E. Hubbell** for plaintiff in error.

Messrs. **Waldron & Thompson**, for defendant in error:

Defendant is not liable for injuries to the plaintiff's property, except where the injury is the result of some fault or negligence on its part.

1 Thomp. Neg. p. 101, § 706; Cooley, Torts, 2d ed. p. 677; Pomeroy, Riparian Rights, § 72; Hoffman v. Tuolumne County Water Co. 10 Cal. 413; Kinney, Irrigation, § 325; Long, Irrigation, § 69; Gould, Waters, §§ 296, 298; 1 Addison, Torts, p. 3; Bishop, Non-Contract Law, § 110; Fleming v. Lockwood, 36 Mont. 384, 14 L.R.A.(N.S.) 628, 122 Am. St. Rep. 375, 92 Pac. 962, 13 A. & E. Ann. Cas. 263; Moore v. Berlin Mills Co. 74 N. H. 305, 11 L.R.A.(N.S.) 284, 124 Am. St. Rep. 968, 67 Atl. 578, 13 A. & E. Ann. Cas. 217; Howell v. Big Horn Basin Colonization Co. 14 Wyo. 14, 1 L.R.A. (N.S.) 596, 81 Pac. 785; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; Williams v. Gale, 3 Harr. & J. 231; Losee v. Buchanan, 51 N. Y. 477, 10 Am. Rep. 623; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Rep. 394; Swett v.

Case Note. — When does statute of limitations commence to run against action for damages caused by seepage from a ditch or canal.

The cases coming within the scope of this note are included in a case note to Turner v. Overton, 20 L.R.A.(N.S.) 894, where the question is discussed when the statute of limitations commences to run against an action for damages for the flooding of land, caused by the digging of a ditch or drain. In connection with the above note should also be considered the case note to Gulf, C.

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Cutts, 50 N. H. 439, 9 Am. Rep. 276; Garland v. Towne, 55 N. H. 57, 20 Am. Rep. 164; Livingston v. Adams, 8 Cow. 175; Shrewsbury v. Smith, 12 Cush. 177; Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 448; Everett v. Hydraulic Flume Tunnel Co. 23 Cal. 225; Campbell v. Bear River & A. Water & Min. Co. 35 Cal. 683; Hopkins v. Butte & M. Commercial Co. 13 Mont. 223, 40 Am. St. Rep. 438, 33 Pac. 817; Lisonbee v. Monroe Irrig. Co. 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009; Carson v. Western R. Co. 8 Gray, 423; Brown v. Illius, 25 Conn. 583; Gilbert v. Savannah, G. & N. A. R. Co. 69 Ga. 396; 1 Redf. Railways, 305, 306; Cosulich v. Standard Oil Co. 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; White River Log & Boom. Co. v. Nelson, 45 Mich. 578, 8 N. W. 587, 909; Walker v. Chicago, R. I. & P. R. Co. 71 Iowa, 658, 33 N. W. 224; Collins v. Alabama G. S. R. Co. 104 Ala. 390, 16 So. 140; Barnard v. Sherley, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; Bishop v. Brown, 14 Colo. App. 535, 61 Pac. 50; Bellinger v. New York C. R. Co. 23 N. Y. 42; McKee v. Delaware & H. Canal Co. 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; West Branch & S. Canal Co. v. Mulliner, 68 Pa. 360; Cumberland v. Willison, 50 Md. 139, 33 Am. Rep. 304; Moyer v. New York C. & H. R. R. Co. 88 N. Y. 351; Tinicum Fishing Co. v. Carter, 90 Pa. 85, 35 Am. Rep. 632; Rogers v. Kennebec & P. R. Co. 35 Me. 319; Green v. Swift, 47 Cal. 538; Henry v. Pittsburgh & A. Bridge Co. 8 Watts & S. 85; Monongahela Nav. Co. v. Coons, 6 Watts & S. 114; Wood, Nuisances, p. 21; 1 Sedgw. Damages, 7th ed. p. 207; Hamlin v. Chicago & N. W. R. Co. 61 Wis. 515, 21 N. W. 623; Boothby v. Androscoggin & K. R. Co. 51 Me. 318; Delaware Div. Canal Co. v. McKeen, 52 Pa. 117; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Colorado C. R. Co. v. Mollandin, 4 Colo. 157; Platte & D. Ditch Co. v. Anderson, 8 Colo. 142, 6 Pac. 515; Borchardt v. Wausau Boom Co. 54 Wis. 107, 41 Am. Rep. 12, 11 N. W. 440; Lawler v. Baring Boom Co. 56 Me. 443; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Hatch v. Vermont C. R. Co. 28 Vt. 146.

That which the law expressly authorizes to be done, when done in a reasonably prudent and careful manner, can never be deemed a nuisance, regardless of the extent of necessary, consequential damages resulting from the act.

Angell, Watercourses, § 389; Northern Transp. Co. v. Chicago, 99 U. S. 640, 25 L. ed. 337; Danville, H. & W. R. Co. v. Com. 73 Pa. 38; Davis v. New York, 14 N. Y. 507, 67 Am. Dec. 186; Atty. Gen. ex rel. Easton v. New York & L. B. R. Co. 24 N. J. Eq. 49; 1 High. Inj. § 767; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Harris v. Thompson, 9 Barb. 364; Heard v. Middlesex Canal, 5 Met. 85; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 211, 59 Am. Rep. 341, 8 N. E. 460.

The statute of limitations began to run against plaintiff from the time of the completion of defendant's ditch, and the beginning of the running of water through same for irrigation purposes.

Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 439, 13 Am. St. Rep. 234, 21 Pac. 565; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; Eberhart v. Chicago, M. & St. P. R. Co. 70 Ill. 347; Page v. Chicago, M. & St. P. R. Co. 70 Ill. 324;

& S. F. R. Co. v. Moseley, 20 L.R.A.(N.S.) 885, where the cases are gathered which deal with the applicability of the statute of limitations to actions for damages caused by the obstructing of a stream or surface water, and the note to Mast v. Sapp, 5 L.R.A.(N.S.) 379, which deals with the general question when a right of action accrues for an injury to real estate from a cause not immediately effective.

It will be observed that the holding of the court in MIDDLEKAMP v. BESSEMER IRRIGATING DITCH CO., that the injuries to neighboring land by seepage from an irrigation ditch constructed under statutory authority in the usual and ordinary manner constitute but one cause of action, against which the statute of limitations begins to run from the date the lands are first visibly affected and injured by seepage, is similar to the holding of the Iowa cases set out in the above-named notes, which also have held that, in case of a permanent structure, the consequent injuries from which are not immediately ascertainable, the statute of limitations begins to run from the first injury.

Cases similar in facts, but which would seem to be distinguishable from the MIDDLEKAMP CASE, on the ground of nuisance or negligence, are Danielly v. Cheeves, 94 Ga. 263, 21 S. E. 524, and Spilman v. Roanoke Nav. Co. 74 N. C. 675, sufficiently set out in the note to Turner v. Overton, supra. And see Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. 582, also set out in that note, and sufficiently reviewed in MIDDLEKAMP v. BESSEMER IRRIGATING DITCH CO.

Cases dealing with the application of the statute of limitations to actions for injuries caused by a milldam are found in a case note to Priebe v. Ames, 17 L.R.A.(N.S.) 206.

For cases dealing with the question when the statute of limitations commences to run against an action for injury to surface, caused by mining operations or other excavations, see case note to West Pratt Coal Co. v. Dorman, post, 805.

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Ft. Worth & R. G. R. Co. v. Garvin (Tex. Civ. App.) 29 S. W. 795; Chicago, M. & St. P. R. Co. v. Hall, 90 Ill. 43; Frankle v. Jackson, 30 Fed. 400; Denver v. Bayer, 7 Colo. 127, 2 Pac. 6; Roulston v. Chesapeake & O. R. Co. 21 Ky. L. Rep. 1507, 54 S. W. 2; Louisville & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Chicago, B. & Q. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. 329; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; Heard v. Middlesex Canal, 5 Met. 81; Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Centralia v. Wright, 156 Ill. 561, 41 N. E. 217; Omaha & R. Valley R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875; Chicago & E. I. R. Co. v. McAuley, 121 Ill. 160, 11 N. E. 67; Ipswich Mills v. Essex County, 108 Mass. 363; Union P. R. Co. v. Foley, 19 Colo. 283, 35 Pac. 542; Call v. Middlesex County, 2 Gray, 232; St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622; Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. 411; Pratt v. Des Moines & N. W. R. Co. 72 Iowa, 249, 33 N. W. 666; Illinois C. R. Co. v. Ferrell, 108 Ill. App. 659; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 515; Elgin v. Eaton, 83 Ill. 537, 25 Am. Rep. 412; Aurora v. Dale, 90 Ill. 46; Ohio & M. R. Co. v. Wachter, 123 Ill. 445, 5 Am. St. Rep. 532, 15 N. E. 279; McMahon v. St. Louis, A. & T. R. Co. 41 La. Ann. 827, 6 So. 641; Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 489; Stewart v. Ohio River R. Co. 38 W. Va. 438, 18 S. E. 608; Osgood v. Chicago, 154 Ill. 194, 41 N. E. 40.

Even if the defendant's canal was, in the first instance, negligently constructed, nevertheless, the ditch being a permanent structure, the right of action of the plaintiff would at least begin from the date that percolating waters first made their appearance upon his property, and all damages, past, present, and prospective, would be then recoverable in one suit, as the statutes of limitations would begin to run from the date that any damage first became appreciable.

Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; Troy v. Cheshire R. Co. 23 N. H. 83, 55 Am. Dec. 177; Bizer v. Ottumwa Hydraulic Power Co. 70 Iowa, 145, 30 N. W. 172; Van Orsdol v. Burlington, C. R. & N. R. Co. 56 Iowa, 470, 9 N. W. 379; Stodghill v. Chicago, B. & Q. R. Co. 53 Iowa, 341, 9 N. W. 495; Strickler v. Midland R. Co. 125 Ind. 413, 25 N. E. 455; Guinn v. Ohio River R. Co. 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 88; Fowle v. New Haven & N. Co. 112 Mass. 334, 17 Am. Rep. 106; Kansas P. R. Co. v. Mihlman, 17 Kan. 224; Chicago & E. I. R. Co. v. Loeb, supra; Gould, Waters, § 416; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; Sutherland, Damages, § 175; Fowle v. New Haven & N. Co. 107 Mass. 354; Bird v. Hannibal & St. J. R. Co. 30 Mo. App. 365; Ridley v. Seaboard & R. R. Co. 118 N. C. 996, 32 L.R.A. 708, 24 S. E. 730; Parker v. Atchison, 58 Kan. 29, 48 Pac. 635; Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 257; Haisch v. Keokuk & D. M. R. Co. 71 Iowa, 606, 33 N. W. 126; Williams v. Pomeroy Coal Co. 37 Ohio St. 583.

The right of successive actions does not exist.

Watts v. Norfolk & W. R. Co. 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 925; Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 489.

Hill, J., delivered the opinion of the court:

In this action judgment was upon the pleadings. The plaintiff in error, being plaintiff in the court below, in his complaint filed April 11, 1900, alleged, in substance, the corporate capacity of the defendant; plaintiff's ownership July 24, 1894, and ever since, of certain lands (describing them) of alleged high value; the defendant's ownership of the Bessemer irrigating ditch, by which it diverts large quantities of water from the Arkansas river, and distributes it along and under said ditch for irrigation and domestic purposes; that his lands are on the south side of the Arkansas river, about 10 miles below the headgate of said ditch; that said ditch is constructed down the south side of the Arkansas river valley, upon the high ground, to a point several miles below the lands of plaintiff; that said ditch, where it passes the lands of plaintiff, is constructed in loose, porous soil, underlaid by a bed of shale extending from the line of said ditch to the plaintiff's land; that both the surface of the land and bed of shale underneath, intervening between defendant's ditch and plaintiff's land, have a general slope from the ditch to plaintiff's land; that continuously, at all seasons of every year since August, 1894, the defendant has diverted a large volume of water from the Arkansas river through said canal, and that, by reason of the loose, gravelly soil through which said ditch is constructed, large volumes of water have escaped continuously since August, 1894, from said ditch, through the bottom and sides thereof, by seepage and percolation, and are carried along the bed of shale above referred to, which, by natural means, finds its way to the lands of plaintiff and adjacent lands, and is discharged thereon; that said seepage water is charged with alkali, and destroys

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and renders worthless the lands of plaintiff for agricultural and other purposes; that the amount of seepage water discharged on plaintiff's land, as aforesaid, independent of the alkali, is sufficient to drown and render worthless the plaintiff's land, to his damage, etc. A general and special demurrer was filed to this complaint, challenging its sufficiency as to stating any cause of action, together with sundry other points therein raised, which was overruled. Thereafter, an answer containing, first, a general denial, followed by ten separate and distinct special defenses, was filed, to which special defenses demurrers were interposed and sustained except as to the third and fourth, to which the demurrers were overruled; the plaintiff elected to stand by his demurrer. Judgment was entered in favor of the defendant, and plaintiff brings the case here upon error for review.

Able arguments, including many citations of authorities, have been presented and carefully considered upon the many vexatious and very important questions raised and discussed, and which are of general interest in this state, but most of which can be eliminated by basing our decision upon the ruling of the court below in overruling the plaintiff's demurrer to the fourth separate and special defense, which was, in substance, as follows: That this action is barred by the statute of limitations in this, to wit: That this action was not commenced until after the expiration of six years subsequent to the accruing of the right to sue, if any, for the injuries complained of, because said ditch was originally lawfully constructed and completed in 1889 for the conveyance of water for irrigating purposes; that said ditch was a lawful structure, carefully and properly built, by due warrant and authority of law, for the purpose of conveying water to be used for the irrigating of lands lying contiguous or near to the same, and belonging to individual stockholders of either the defendant company or its predecessors in interest; that said ditch was designed, intended, and has always continued, to be a permanent structure since its completion for the purposes aforesaid, and that water was conveyed into and conducted along said ditch by the predecessors in interest of defendant and by defendant since it acquired the ownership of said ditch, and that the use of said ditch, as aforesaid, began in the year 1889, and has been continuously maintained and used for the conveyance of water ever since said year; that, more than six years prior to the commencement of this suit, the lands of the plaintiff were, to a considerable extent, visibly affected and injured by percolating waters, which percolating waters came from the same sources and were produced by the same cause which caused and produced any and all percolating waters that have appeared upon said lands thereafter, and up to the time of the commencement of this suit; and, for more than six years prior to the commencement of this suit, the plaintiff, or his predecessors in interest, had actual notice and knowledge that their said lands were being continuously injured by percolating waters coming from the same source and produced from the same cause that they now assert in this suit is attributable to waters escaping by percolation from defendant's said ditch. Wherefore defendant avers that the plaintiff's cause of action herein, if it did not accrue at the time of the final completion of said ditch in the year 1889, did accrue when perceptible injury was caused to said premises by said percolating waters, which perceptible injury began and continued for more than seven years prior to the commencement of this suit, and the said plaintiff then and there had the same, if not superior, sources and means of information and knowledge touching the probable extent of the increased future damages which said lands might sustain by reason of the possible or probable augmentation of said percolating waters from year to year thereafter upon said premises, and defendant therefore says that, the injuries complained of being in part sustained and perceptible for more than six years prior to the commencement of this action, this suit is therefore barred by the statute of limitations, etc. And without passing upon the questions of the liability of canal companies in all such cases, or deciding whether, in the absence of allegations of negligence in the construction and operation of canals, a complaint states a cause of action for remote or consequential damages occasioned by waters seeping therefrom, but assuming, for the purposes of this case, as is assumed by this defense (which invokes the statute of limitations), that the complaint states a cause of action, it then presents for our determination the question as to when, if at all, a cause of action accrues and the statute begins to run upon account of damages occasioned by waters continuously seeping from an irrigation ditch which was properly built, being operated by due warrant of law, which was designed, has continued, and is intended, to be a permanent structure always, and with no direct allegation of negligence as to the manner of its operation.

In his original brief it is admitted by plaintiff in error that no negligence was alleged in the complaint, and it is claimed none need be; while in a supplemental brief filed later, counsel have taken a somewhat

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different position, wherein they contend the allegation of the construction of the canal through loose, porous soil, and its operation through such soil, resulting in continuous seepage, is a sufficient allegation of negligence itself, and they contend that under the 15th section of the Bill of Rights, which declares that private property shall not be taken or damaged for public or private use without just compensation, and under the provisions of our statutes which impose certain duties in the construction and maintenance of irrigation ditches, the allegation of seepage and the damage resulting therefrom is all that is necessary to be alleged. It is further claimed the operation of the canal, so long as it continues to seep, regardless of the degree of care exercised in its construction and want of negligence in its operation, constitutes a continuous nuisance, giving rise to a new cause of action each successive day until the seepage shall be abated, and that plaintiff would have the right to bring successive suits. It is further urged, if this position is not accepted, and we should hold only one suit can be maintained, that, regardless of the period of time the injury has continued, the seepage constitutes a continuous nuisance, and plaintiff is entitled to recover in this suit for all injury inflicted during the six years next preceding the institution of his action; and in their brief counsel state: "What, then, is the cause of action set up in the complaint? It is not that the ditch was constructed, nor, primarily, that it was improperly constructed; but that defendant has permitted it to be, during nearly six years last past, in such a condition as to allow the escape of water. . . . That is the offense,—the improper use of a lawful structure,—the neglect of defendant to discharge its duty to stop the seepage. . . . Such being the ground of complaint, there was, as in all cases of a continuing nuisance, a new cause of action each day. Every day that passed in which the defendant neglected to flume or otherwise improve that portion of the ditch at which this leakage occurred . . . witnessed a wrong for which a recovery is allowed by law. The constant wetting of the land is the nuisance, and its cause is the porous condition of the walls and bottom of the ditch, left thus by defendant's fault. This wrong has no necessary connection with the location and construction of the ditch." With this line of argument we cannot agree, and think the criticism to be offered is more applicable to the basis upon which it is assumed than to the argument itself, for we cannot conceive how the seepage has no connection with the location and construction of the ditch, including its future operation, and we think those matters the very essence of the cause of the injury. The pleadings here show this ditch was constructed in the ordinary and usual manner. The seepage is a necessary result, caused by the character of the land through which the canal was, and of necessity had to be, constructed. The seepage will therefore continue, and the same injury result from it, as long as the ditch is used without change from any cause but human labor. The cause of the injury being permanent, therefore, the injury itself is permanent. As a general rule, it is held a cause of action for a wrongful act, whether negligent or wilful, or for the breach of a contract or duty, accrues immediately upon the happening of the wrongful act or the breach, even though the actual damages resulting therefrom may not accrue until some time afterwards; and the statute, therefore, begins to run upon the occurrence of the act or the breach complained of, and not from the time of the damage resulting therefrom. 19 Am. & Eng. Enc. Law, 2d ed. p. 200; Ipswich Mills v. Essex County, 108 Mass. 363; Frankle v. Jackson (C. C.) 30 Fed. 398; Roulston v. Chesapeake & O. R. Co. 21 Ky. L. Rep. 1507, 54 S. W. 2; Louisville & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Chicago, B. & Q. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. 326; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; Heard v. Middlesex Canal, 5 Met. 81; Omaha & R. Valley R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875; Chicago & E. I. R. Co. v. McAuley, 121 Ill. 160, 11 N. E. 67; Call v. Middlesex County, 2 Gray, 232; St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622; Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. 411; Pratt v. Des Moines Northwestern R. Co. 72 Iowa, 249, 33 N. E. 666; Illinois C. R. Co. v. Ferrell, 108 Ill. App. 659; Strickler v. Midland R. Co. 125 Ind. 413, 25 N. E. 455; Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255; Van Orsdol v. Burlington, C. R. & N. R. Co. 56 Iowa, 470, 9 N. W. 379. But in cases of waters escaping by percolation and seepage from irrigation ditches, owing to the uncertainty of its course and extent, the length of time required after the construction and operation of such properties for it to develop as to its uncertain course and slow stage of career under the ground depending upon the conditions of the earth through which it must pass, the lay of the land, and all other elements tending to make uncertain its future location and extent, at least, until it commences to show its results at certain places, we do not think the rule laid down by the above cases would make a practical, equitable, or fair test as to the time when a cause of action for damages in this class of

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cases should be held to accrue, or was so intended by the framers of our statute. But we cannot agree with plaintiff that the seepage makes of the canal a nuisance, for which successive actions can be brought until it is abated, for then the statute of limitations would never commence to run in such cases. We do not think such a position is tenable, as it is well settled that a work which is authorized by law cannot be a nuisance, and that a public nuisance cannot exist in acts which are authorized by legislative sanction, even though the act complained of might, independent of statute, be a nuisance. High, Inj. 3d ed. § 767; Danville, H. & W. R. Co. v. Com. 73 Pa. 29; Davis v. New York, 14 N. Y. 507, 67 Am. Dec. 186; Atty. Gen. ex rel. Easton v. New York & L. B. R. Co. 24 N. J. Eq. 49; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Harris v. Thompson, 9 Barb. 350; Chicago & E. I. R. Co. v. Loeb, supra. It is also well settled that which the law authorizes cannot be a nuisance such as to give a common-law right of action. Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Delaware Div. Canal Co. v. McKeen, 52 Pa. 117; Boothby v. Androscoggin & K. R. Co. 51 Me. 318; Hanlin v. Chicago & N. W. R. Co. 61 Wis. 515, 21 N. W. 623; Gould, Waters, 2d ed. § 296; 1 Sedgw. Damages, 7th ed. p. 207; Wood, Nuisances, p. 21.

But assuming if, through natural causes, waters escape from a canal by seepage, to the injury of adjacent or remote lands, the owner will be entitled to compensation for the injuries thus sustained, his right of action cannot be predicated upon the theory the canal is a nuisance, for the injury which he has sustained is an injury the inflicting of which is expressly authorized by the sovereign power. Being a lawful injury, his right of action must accrue under the Constitution and statutes; and, if it were not for them, it is questionable whether any liability could be held to exist; and in some of our adjoining sister states it has been held that the owners of irrigation canals, when built with due care and so operated, are not liable for seepage therefrom upon distant proprietors, except in cases of negligence. Fleming v. Lockwood, 36 Mont. 384, 14 L.R.A.(N.S.) 628, 122 Am. St. Rep. 375, 92 Pac. 962, 13 A. & E. Ann. Cas. 263; Howell v. Big Horn Basin Colonization Co. 14 Wyo. 14, 1 L.R.A.(N.S.) 596, 81 Pac. 785. But assuming under our Constitution and legislative enactments the owners of canals are liable for damages to distant proprietors occasioned by waters seeping therefrom, although not negligent in their construction or operation, they are not insurers, and have never been so held by this court. Besides, 23 L.R.A.(N.S.)

the section of the Constitution which provides that private property shall not be taken or damaged for public or private use without just compensation is inseparably connected with the exercise of the power of eminent domain; and in suits for damages we think similar rules and tests, so far as applicable, should be applied as in condemnation proceedings, wherein this court is committed to the general rule that, in the assessment of damages, it should include all damages arising to the owner of land from any and every physical effect produced by the construction and use of the canal, if constructed according to the provisions of the statute, and with proper care and skill, whether they are damages to be clearly seen and easily estimated, or are uncertain and of doubtful result (except such as result from its negligent construction or use), and that such a judgment is final and conclusive, and the owner of the land cannot maintain a subsequent action for damages which should have been, but were not, considered or assessed by the jury. Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565, (and cases there cited). The same rule is applicable where special acts allow the construction of a specific property, and provide that actions upon account of damages for their construction and operation shall be brought within a certain period. Heard v. Middlesex Canal, supra; Davis v. New Bedford, 133 Mass. 549. Our statute in terms begins to run from the time the cause of action accrues. When the cause of action accrues is a judical question, and to determine it in any particular case is to settle a general rule of law for a class of cases, which must be founded upon reason and justice. In framing and applying such rules of law, it is the duty of the court to consider the interests which are liable to be affected; and, if those interests are of a public or quasi public character, or if they concern the welfare of the community in general, it is presumed (in the construction of such statutes) that rules would be so framed and applied as to afford them every reasonable protection. We think by adopting the rule that the statute of limitations begins to run from the date the lands were first visibly affected and injured by the seepage which, and with its continuance from the same source, caused the injury for which the suit is brought, is not only in compliance with the strict letter of our statute, but a rule which will prove the most equitable, fair, and just to all, and which, in our opinion, is the rule supported by the best-reasoned authorities in similar cases. Gould, Waters, § 416; Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; Troy v. Cheshire R. Co. 23 N. H.

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83, 55 Am. Dec. 177; Bizer v. Ottumwa Hydraulic Power Co. 70 Iowa, 145, 30 N. W. 172; Van Orsdol v. Burlington, C. R. & N. R. Co. 56 Iowa, 470, 9 N. W. 379; Stodghill v. Chicago, B. & Q. R. Co. 53 Iowa, 341, 5 N. W. 495; Guinn v. Ohio River R. Co. 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; Fowle v. New Haven & N. Co. 107 Mass. 352; Bird v. Hannibal & St. J. R. Co. 30 Mo. App. 365; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821. It will be noted by this ruling parties bringing suits for damages to lands for seepage from canals will have an advantage over the party through whose land the canal is constructed, in this: While in the condemnation proceeding it requires all such damages to be anticipated and assessed in favor of the party through whose land the canal is to be constructed, which is often done prior to the construction of the canal, in this class of cases the owners of such lands will have six years after such lands are visibly affected by the seepage within which to ascertain the result of its course and extent of such damages.

The contention—the seepage makes of the canal a nuisance which can be abated by fluming or cementing that portion where the waters escape, or by some other such means, and, until done, the company operating it being in the wrong, it creates a continuing nuisance for which a new action can be brought each day—is not supported by the pleadings or tenable under conditions existing in Colorado. It is true the complaint alleges this seepage occurs where the canal passes the lands of the plaintiff; yet it does not allege its length there or state this is the only place the canal seeps, or that it is some short space, which could, by a reasonable expenditure, be checked; and, outside of the question of common knowledge as to the condition of such ditches, when we consider four other similar cases are pending here against the same defendant, consolidated for argument with this by the same counsel, we might be justified in indulging in the presumption this seepage occurs for a long distance along the line of the canal, and that it is no exception to the general rule of large ditches, where seepage usually exists from their headgate along down their line until the ditch gradually winds its way from the river upon the level lands. All irrigation canals must, of necessity, seep more or less along this portion of their lines, and will so continue until prevented by other means than ordinary diligence in their construction; and we do not think the time has yet been reached in this state when the owners of such enterprises can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all, or be subject to successive suits for any injury which it is not practicable to remedy, and which logic would mean to prevent the construction of a large number of ditches and reservoirs, and thus retard the development of our state, as the result of such a rule would mean in most cases that the costs or means to prevent the seepage would be far in excess of the value of the property so damaged; for instance, in one case it might take $10,000 or $50,000 to flume or cement a certain portion of a canal in order to prevent it from seeping, while the total value of the land to be protected, or the damage to it, might not exceed one tenth of this amount. In such cases the property so damaged, not being touched by the right of way, could not be taken by the canal in its construction, and the owners of the canal, in order to avoid successive actions, would be compelled to expend a much greater amount than the value of the property to be protected. We do not think it was the intention of the framers of our Constitution to place such an extraordinary burden upon a class of enterprises so vital to the future development and prosperity of our state; for, by reasons of conditions existing in this arid region, the construction of irrigation canals was always deemed of paramount importance. The right of property in the waters of our public streams for irrigation purposes existed prior to any legislation on the subject. Coffin v. Left Hand Ditch Co. 6 Colo. 443. Such enterprises have been specially favored and their rights recognized prior to the act of Congress of 1866 (act July 26, 1866, chap. 262, 14 Stat. at L. 251), recognizing such rights, followed by our Constitution re-recognizing them and adding additional privileges, which, in turn, was followed by the enactment of statutes from time to time, granting special privileges to persons and companies engaged in such enterprises.

The contention, if sustained, that one suit can be brought at any time, and recovery had for all damages occasioned by waters seeping upon such lands during the six years preceding the commencement of the action, regardless of how long the injury has continued from the same source, would be to abrogate the statute of limitations, or to hold that it did not apply to this class of cases; otherwise it is only consistent with the theory that each day's injury constitutes a new cause of action, for which successive suits could be maintained, as the two contentions are inseparable, and are based upon the continuance of the seepage as a common-law nuisance, and the decisions in support of this position are no more applicable to cases of this character than those sustaining the doctrine of riparian rights, which has never been recognized in this state, or

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cases should be held to accrue, or was so intended by the framers of our statute. But we cannot agree with plaintiff that the seepage makes of the canal a nuisance, for which successive actions can be brought until it is abated, for then the statute of limitations would never commence to run in such cases. We do not think such a position is tenable, as it is well settled that a work which is authorized by law cannot be a nuisance, and that a public nuisance cannot exist in acts which are authorized by legislative sanction, even though the act complained of might, independent of statute, be a nuisance. High, Inj. 3d ed. § 767; Danville, H. & W. R. Co. v. Com. 73 Pa. 29; Davis v. New York, 14 N. Y. 507, 67 Am. Dec. 186; Atty. Gen. ex rel. Easton v. New York & L. B. R. Co. 24 N. J. Eq. 49; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Harris v. Thompson, 9 Barb. 350; Chicago & E. I. R. Co. v. Loeb, supra. It is also well settled that which the law authorizes cannot be a nuisance such as to give a common-law right of action. Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Delaware Div. Canal Co. v. McKeen, 52 Pa. 117; Boothby v. Androscoggin & K. R. Co. 51 Me. 318; Hanlin v. Chicago & N. W. R. Co. 61 Wis. 515, 21 N. W. 623; Gould, Waters, 2d ed. § 296; 1 Sedgw. Damages, 7th ed. p. 207; Wood, Nuisances, p. 21.

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the section of the Constitution which provides that private property shall not be taken or damaged for public or private use without just compensation is inseparably connected with the exercise of the power of eminent domain; and in suits for damages we think similar rules and tests, so far as applicable, should be applied as in condemnation proceedings, wherein this court is committed to the general rule that, in the assessment of damages, it should include all damages arising to the owner of land from any and every physical effect produced by the construction and use of the canal, if constructed according to the provisions of the statute, and with proper care and skill, whether they are damages to be clearly seen and easily estimated, or are uncertain and of doubtful result (except such as result from its negligent construction or use), and that such a judgment is final and conclusive, and the owner of the land cannot maintain a subsequent action for damages which should have been, but were not, considered or assessed by the jury. Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565, (and cases there cited). The same rule is applicable where special acts allow the construction of a specific property, and provide that actions upon account of damages for their construction and operation shall be brought within a certain period. Heard v. Middlesex Canal, supra; Davis v. New Bedford, 133 Mass. 549. Our statute in terms begins to run from the time the cause of action accrues. When the cause of action accrues is a judical question, and to determine it in any particular case is to settle a general rule of law for a class of cases, which must be founded upon reason and justice. In framing and applying such rules of law, it is the duty of the court to consider the interests which are liable to be affected; and, if those interests are of a public or quasi public character, or if they concern the welfare of the community in general, it is presumed (in the construction of such statutes) that rules would be so framed and applied as to afford them every reasonable protection. We think by adopting the rule that the statute of limitations begins to run from the date the lands were first visibly affected and injured by the seepage which, and with its continuance from the same source, caused the injury for which the suit is brought, is not only in compliance with the strict letter of our statute, but a rule which will prove the most equitable, fair, and just to all, and which, in our opinion, is the rule supported by the best-reasoned authorities in similar cases. Gould, Waters, § 416: Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; Troy v. Cheshire R. Co. 23 N. H.

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83, 55 Am. Dec. 177; Bizer v. Ottumwa Hydraulic Power Co. 70 Iowa, 145, 30 N. W. 172; Van Orsdol v. Burlington, C. R. & N. R. Co. 56 Iowa, 470, 9 N. W. 379; Stodghill v. Chicago, B. & Q. R. Co. 53 Iowa, 341, 5 N. W. 495; Guinn v. Ohio River R. Co. 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; Fowle v. New Haven & N. Co. 107 Mass. 352; Bird v. Hannibal & St. J. R. Co. 30 Mo. App. 365; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821. It will be noted by this ruling parties bringing suits for damages to lands for seepage from canals will have an advantage over the party through whose land the canal is constructed, in this: While in the condemnation proceeding it requires all such damages to be anticipated and assessed in favor of the party through whose land the canal is to be constructed, which is often done prior to the construction of the canal, in this class of cases the owners of such lands will have six years after such lands are visibly affected by the seepage within which to ascertain the result of its course and extent of such damages.

The contention—the seepage makes of the canal a nuisance which can be abated by fluming or cementing that portion where the waters escape, or by some other such means, and, until done, the company operating it being in the wrong, it creates a continuing nuisance for which a new action can be brought each day—is not supported by the pleadings or tenable under conditions existing in Colorado. It is true the complaint alleges this seepage occurs where the canal passes the lands of the plaintiff; yet it does not allege its length there or state this is the only place the canal seeps, or that it is some short space, which could, by a reasonable expenditure, be checked; and, outside of the question of common knowledge as to the condition of such ditches, when we consider four other similar cases are pending here against the same defendant, consolidated for argument with this by the same counsel, we might be justified in indulging in the presumption this seepage occurs for a long distance along the line of the canal, and that it is no exception to the general rule of large ditches, where seepage usually exists from their headgate along down their line until the ditch gradually winds its way from the river upon the level lands. All irrigation canals must, of necessity, seep more or less along this portion of their lines, and will so continue until prevented by other means than ordinary diligence in their construction; and we do not think the time has yet been reached in this state when the owners of such enterprises can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all, or be subject to successive suits for any injury which it is not practicable to remedy, and which logic would mean to prevent the construction of a large number of ditches and reservoirs, and thus retard the development of our state, as the result of such a rule would mean in most cases that the costs or means to prevent the seepage would be far in excess of the value of the property so damaged; for instance, in one case it might take $10,000 or $50,000 to flume or cement a certain portion of a canal in order to prevent it from seeping, while the total value of the land to be protected, or the damage to it, might not exceed one tenth of this amount. In such cases the property so damaged, not being touched by the right of way, could not be taken by the canal in its construction, and the owners of the canal, in order to avoid successive actions, would be compelled to expend a much greater amount than the value of the property to be protected. We do not think it was the intention of the framers of our Constitution to place such an extraordinary burden upon a class of enterprises so vital to the future development and prosperity of our state; for, by reasons of conditions existing in this arid region, the construction of irrigation canals was always deemed of paramount importance. The right of property in the waters of our public streams for irrigation purposes existed prior to any legislation on the subject. Coffin v. Left Hand Ditch Co. 6 Colo. 443. Such enterprises have been specially favored and their rights recognized prior to the act of Congress of 1866 (act July 26, 1866, chap. 262, 14 Stat. at L. 251), recognizing such rights, followed by our Constitution re-recognizing them and adding additional privileges, which, in turn, was followed by the enactment of statutes from time to time, granting special privileges to persons and companies engaged in such enterprises.

The contention, if sustained, that one suit can be brought at any time, and recovery had for all damages occasioned by waters seeping upon such lands during the six years preceding the commencement of the action, regardless of how long the injury has continued from the same source, would be to abrogate the statute of limitations, or to hold that it did not apply to this class of cases; otherwise it is only consistent with the theory that each day's injury constitutes a new cause of action, for which successive suits could be maintained, as the two contentions are inseparable, and are based upon the continuance of the seepage as a common-law nuisance, and the decisions in support of this position are no more applicable to cases of this character than those sustaining the doctrine of riparian rights, which has never been recognized in this state, or

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any state or territory where irrigation is necessary. The injury here complained of is a continuing one. The waters which caused the damage one year are not entirely the same as those which cause or continue the injury the following year. It is occasioned by new waters continuously seeping, and it is common knowledge that, where such seepage waters can and have been cut off and cease to continue, by the construction of drainage canals or otherwise, the lands injured will, in time, drain themselves and be restored to their natural condition and again become productive. Hence the theory that where the lands are only partially destroyed by seepage one day, month, or year, although all affected (as admitted by the pleadings in this case), the continuance of the seepage causes the damage to increase from year to year until it causes the total destruction of the land, so far as productiveness is concerned, and, for that reason a suit could be brought at any time and recovery had for that per cent or portion of the damages accruing within the six-year limit, would be to allow the plaintiff to bring an action upon the continuance of the same cause which originally started, continued to cause, and increased the same damages barred by the statute. Seepage, when it commences to affect land, usually gradually increases in quantity upon the lands affected, not necessarily because there is an increase in its escape from the canal, but from the fact that it travels slowly under the ground, is being supplied faster than it can escape through the earth underneath, and often reaches places where it cannot travel or escape nearly so fast as it is being supplied, the result of which causes it to accumulate at such places and it is then forced to the surface of the earth, in such cases causing the total destruction of the land, so far as agricultural purposes are concerned. But to say that a suit could be brought at any time for the per cent of damage caused during the six years next preceding the date of the bringing of the action can only be to hold that a new cause of action had accrued, and where no change has taken place in the manner of the operation of the ditch, by its enlargement or otherwise, and where nothing different has been done or happened to create them, and is inconsistent with any reasons supported by any line of authorities which we have been able to find, except those holding the continuance of the injury creates a new cause of action, for which successive suits can be brought from day to day. In this case, when the plaintiff's lands were first visibly affected and injured by these seepage waters, he had a cause of action against the defendant, not only for the damage then inflicted, but for all future damages which might be sustained by reason of the continuance of the seepage, including its prospective augmentation (except those caused by acts of negligence in the future maintenance of the canal other than as claimed by the pleadings in this case, relating to its location, construction, and operation through certain kinds of earth), and such an action could have been upon the assumption of the permanent maintenance of the canal in its then present condition for all time, and we think it would be in conflict with the great weight of authorities and inconsistent with sound reasoning to hold that such a cause of action is susceptible of division, and, if permissible, would be impracticable in its operation to permit of the splitting of this kind of a cause of action, which would be impossible to divide accurately, and we do not think it was intended that they should be excluded from the operation of the statute of limitations.

Another reason why a rule of this kind would not be equitable or just is it would allow the owner of the land to select any time when the value of his property was the highest to bring his suit, and such actions could be brought a great many years after the damage had first commenced, and after the land had greatly enhanced in value, often upon account of the construction and operation of the very ditch which, in years to come, it would be claimed was the cause of the damage, and after the water therefrom had made the real value to the land; and, again, such a ruling would be to open the doors of the courts of this state to hundreds of such cases, where, for many years gone by, it has been assumed and accepted as the settled law within this jurisdiction that no cause of action could, at this late date, be maintained upon account of such continuous seepage, and such a rule would leave no method or test by which the investors of capital in such enterprises could ever ascertain as to the ultimate extent of their liability upon account of such enterprise, and would thus tend to prevent the development of the state along the lines upon which its principal prosperity must depend. It is contended the decision of our court of appeals in the case of Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. 582, is conclusive here, and should be followed; and counsel say the court there lays down four propositions of law, all of which are strictly in accord with their contention here. We have given that case very careful consideration, and are unable to entirely harmonize it within itself. The action was for damages occasioned to lands by seepage from two irrigation ditches running through the land. The first opinion was delivered by Mr. Jus-

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tice Reed, who appears to have reached four conclusions as follows: "1st. That the court did not err in its application of the statute of limitations in restricting it to the six years preceding the bringing of the action. 2d. That, the injury being one that could not be foreseen nor the damage estimated, no cause of action arose from the construction of the ditch, such act being lawful, and a cause or causes of action only arose subsequently, in which damage to the time of the bringing of suit only could be recovered. 3d. That the nuisance or trespass was continuous, and, the subsequent damage continually being incurred, that the ditch company were liable until the nuisance was abated and the cause of damage removed. 4th. That successive suits might be brought and maintained for the damages sustained subsequent to the former recovery." The opinion on rehearing, delivered by Mr. Justice Thomson, expressly repudiates the last three conclusions reached by Mr. Justice Reed, in which he (Thomson) held that all damages resulting from the operation of the ditch were recoverable in one action; that the ditches in question were necessary, the country required them, and it is presumed they will be maintained for an indefinite period; that the seepage was a necessary result of the character of the land, and will therefore continue and the same injury result from it so long as the ditches are used. The causes of the injury being permanent, the injury itself is permanent, and the verdict must be assumed to include the entire damage sustained, so the plaintiff would be entitled to no further action by reason of a continuance of the nuisance. Mr. Justice Reed remaining silent upon rehearing, we presume he consented thereto and changed his mind as to most of the conclusions reached in the original opinion. His conclusions upon the statute of limitations do not appear to have received special consideration upon rehearing, unless modified by the ruling that only one action could be maintained; but in that case (not like this) the plea raising it was replied to by general denial, it was made an issue and evidence submitted, and the court instructed the only damage the jury could consider in any event are damages that accrued within the six years, and the record shows, as stated by Mr. Justice Reed, "although the seepage commenced in 1885, there was but a comparatively small amount of land injured or destroyed until 1889." Suit was brought August 17, 1892, which extended its time back to August 17, 1886, and under the evidence and instructions we cannot say that any recovery was allowed for lands affected prior to the six-year period, and think the records of that case tend to show that no damages were allowed for such lands, but only for those to which the injury commenced within that time; the trend of that case being to make the dividing line as to the lands affected, which were only two or three acres prior to the six-year limit, and we are not prepared to say (which is not necessary to determine here) that conditions might not arise where a tract of land owned by one person shows signs of injury by seepage upon one portion or subdivision only at one time, and upon another portion or subdivision at a later period, that suit might not be brought for damages occasioned to that particular tract or subdivision last affected, and that such an action could not be held to be barred by the statute of limitations on account of the injury sustained to the first portion or subdivision of the farm, for which a right of action had become barred on account of its having been so visibly affected and injured prior to the six-year period, and we will not say now that in all cases this could be termed a division of the plaintiff's case; but we have not such a case here to determine. In this case it will be noted the plaintiff elected to treat his cause of action and land as a whole, in that he makes no distinction as to the dates of the destruction of the different portions of the entire tract. The plaintiff states all his lands were so destroyed, etc., during a certain period, and the special defense accepts this condition as stated, and applies the statute to the entire tract as a whole, stating that the lands for which the damage is complained of were so visibly affected, etc., for more than six years prior to the bringing of the action. Other cases cited are not applicable to conditions existing in the construction and operation of an irrigation ditch. The case of Wright v. Ulrich, 40 Colo. 437, 91 Pac. 43, involved the construction of a slaughterhouse where one operated had been burned,—clearly an abatable common-law nuisance.

The case of Power v. Munger, 3 C. C. A. 253, 10 U. S. App. 289, 52 Fed. 705, was an action for negligence resulting in the setting out of fires by a locomotive. St. Louis, I. M. & S. R. Co. v. Biggs, 52 Ark. 240, 6 L.R.A. 804, 20 Am. St. Rep. 174, 12 S. W. 331, was the negligent construction of a railway embankment which caused the injury; the *dictum* being that its maintenance was a common-law nuisance which could be abated, which cited in support of this view Wood on Nuisances, § 865, upon the subject of continuing common-law nuisance. The case of Troy v. Cheshire R. Co. 23 N. H. 83, 55 Am. Dec. 177, does not sustain the position contended for. The case of Valley R. Co. v. Franz, 43 Ohio St. 623, 4 N. E. 88, involved the improper construction of a dam

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which caused the lands of plaintiff to be washed away, the defendant company having promised from time to time to remedy the defect, but failed, and its default in this behalf was deemed an important element in continuing the liability. The case of Sullens v. Chicago, R. I. & P. R. Co. 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545, recognizes the statute of limitations begins to run from the time the first overflow occurred, which is in line with former decisions in that state. The case of Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215, was for damages caused by the construction of an embankment without proper ditches and culverts, which afterwards were made and were successful until obstructed, and the Iowa court there held the statute did not apply for a later injury to a former one, where it was not continuous, but distinguished it from Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792, which sustains our position here. The case of Bare v. Hoffman, 79 Pa. 73, 21 Am. Rep. 42, concerned a common-law nuisance susceptible of improvement, and the gist of the reasoning there was the presumption would be that necessary steps would be taken to prevent a recurrence of the injury complained of, and, not having been done, the second action might be brought. In Danielly v. Cheeves, 94 Ga. 263, 21 S. E. 524, it was also held, as stated by the court, "the plaintiff has a right to assume it will be abated." Wabash County v. Pearson, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134, involved the maintenance of a bridge, where the court held the cause of action did not accrue until the accident happened, although the bridge had been thus constructed for thirteen years. The case of Omaha & R. Valley R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183, was where a bridge caused the overflow, which might or might not ever occur again. The same principle is announced in Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061. The case of Hill v. Empire State-Idaho Min. & Developing Co. (C. C.) 158 Fed. 881, was for damages to lands occasioned by the discharge from reduction works of large quantities of waste material containing poisonous matter into a stream, which, in time of high water, were carried down the stream, obstructed it in places, and caused the overflow of the lands complained of, as the court there states, "due to the operation of a lawful enterprise in an unlawful or careless manner," being a case, not for continuing damages, but for such as might or might not again occur, as stated in the opinion: "It was only by reason of the intervening agency of high water, the effect of which was uncertain and contingent, that the defendant's acts indirectly resulted in the injury to plaintiffs' land." The cases of Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140, and Van Hoozier v. Hannibal & St. J. R. Co. 70 Mo. 145, both admit the rule is well settled, where injury to land occasioned by the commission of a nuisance is of such a permanent character that it goes to the entire value of the estate, recovery for the whole should be had in a single suit, and no other action could be maintained; but distinguish from where, by reason of the diversion of a stream of running water, the plaintiff's land is overflowed and his crops injured, and hold, as such injury does not go to the entire value of the estate, but, being of yearly recurrence, is susceptible of periodical apportionment. This, evidently, upon the theory that there may or may not be floods, and hence may or may not be damages during the season, which would not apply to the seepage from a canal. The case of Reed v. State, 108 N. Y. 407, 15 N. E. 735, is a case of admitted negligence in the construction of a dam across the stream and valley, forming a reservoir wherein the water arose about 30 feet, and where the court held the engineers were guilty of gross negligence in its construction and in not taking proper precaution for its maintenance, and the decision in that case was not on the theory of the permanent appropriation of the land flooded. After summing up most of the above and sundry other authorities, in their reply brief counsel for plaintiff in error state: "The other cases cited all discuss improvements which are permanent, and properly hold that when the structure itself is permanent, and is the cause of injury, the injury is permanent, and all damages are to be recovered in one action, the right to which accrued with the beginning of the injury. With this law we have no controversy." We think this law clearly applicable here for the reasons hereinbefore stated, as well as those given in the cases cited sustaining this position. This structure and irrigation canal is itself permanent, and, when used for the purposes for which it was authorized and is intended, it is the cause of the injury. The injury is permanent, and, in the language of Mr. Justice Thomson in the Home Supply Co. Case, supra, the ditch in question was necessary to render the land through which it passes productive, the country required it, and it is presumed it will be maintained for an indefinite period of time. The pleading is, it was constructed in the ordinary and usual manner, and, the seepage a necessary result of the character of the land, the seepage will, therefore, continue, and the same injury result from it, as long as the ditch

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is used. The cause of the injury is permanent, and the injury itself is permanent.

The judgment of the District Court is affirmed.

Steele, Ch. J., and Musser and White, JJ., dissent.

ALABAMA SUPREME COURT.

WEST PRATT COAL COMPANY, Appt.,
v.
N. P. DORMAN et al.

(— Ala. —, 49 So. 849.)

Limitation of action — mining operation — injury.

The statute of limitations does not begin to run against a cause of action for injury to the surface by mining operations until some actual mischief has been done to it, regardless of when the mining was done.

(May 20, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Walker County in plaintiffs' favor in an action brought to recover damages for injury to the surface of plaintiffs' lands, alleged to have been caused by the removal of the subjacent support therefrom in mining operations. Affirmed.

The facts are stated in the opinion.

Messrs. **Bankhead & Bankhead** for appellant.

Mr. L. D. Gray for appellees.

Sayre, J., delivered the opinion of the court:

Appellees recovered judgment against the appellant in an action on the case for damages alleged to have been caused by the appellant (defendant) in mining coal beneath the surface of appellees' (plaintiffs') lot at Horse creek in such manner that the subjacent support of the same was impaired and the upper soil caused to crack open and settle down. There was evidence tending to show that coal had been mined under the lot by a former owner of the underlying

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Case Note. — When does statute of limitations commence to run against action for injury to surface by mining operations or other excavations.

For references to other notes discussing the question as to when the statute of limitations begins to run against actions for injury to property, the immediate cause of which may have been set in motion more than the statutory period before the bringing of the suit, see the note to Middlekamp v. Bessemer Irrigating Co. ante, 795.

So far as the cases are concerned which deal with applicability of the statute of limitations to actions for injury to the surface caused by mining operations or other excavations, the great weight of authority is to the effect that a cause of action does not arise until some actual mischief has been done, from which time the statute of limitations begins to run, regardless of when the mining or other excavating was done. WEST PRATT COAL CO. v. DORMAN; Ludlow v. Hudson River R. Co. 6 Lans. 128; Church of the Holy Communion v. Paterson Extension R. Co. 66 N. J. L. 218, 55 L.R.A. 81, 49 Atl. 1030; Sloss-Sheffield Steel & I. Co. v. Sampson (Ala.) 48 So. 493; Backhouse v. Bonomi, 9 H. L. Cas. 503; Darley Main Colliery Co. v. Mitchell, L. R. 11 App. Cas. 127; Crumbie v. Wallsend Local Board [1891] 1 Q. B. 503; Simon v. Nance, 45 Tex. Civ. App. 480, 100 S. W. 1038 (construction of ditch which was permitted to become so enlarged as to deprive adjoining land of lateral support); Smith v. Seattle, 18 Wash. 484, 63 Am. St. Rep. 910, 51 Pac. 1057 (removing of soil in street, to subsequent injury of adjoining property).

The leading case, of course, on this question, is Backhouse v. Bonomi, supra, which is sufficiently reviewed and quoted in WEST PRATT COAL CO. v. DORMAN.

In Ludlow v. Hudson River R. Co. supra, it was held that where an excavation is made by a railroad company in such a negligent manner that an adjoining property owner's land afterward caves away, the cause of action for damages does not accrue until the caving away of the land takes place. The court said: "The damages did not exist, and had not been incurred, when the work was done, or within six years thereafter. If an action had been brought before they had actually been sustained, the amount of recovery would have depended upon mere probabilities and the wildest conjecture. The consequential injury had not happened until the land of the plaintiff slided away, and hence no action could be maintained for the damages arising in consequence thereof. . . . The act which caused the injury ultimately was, when it was done, no trespass, or any innovation upon the plaintiff's rights, and there was no cause of action until the injury happened."

And, of course, where the interference with the enjoyment of the land is considered the cause of action, rather than the interference with the right of support, a new cause of action arises with every subsidence. Church of the Holy Communion v. Paterson Extension R. Co. supra (continued settling of church walls because of insufficiency of a retaining wall built by a railroad company when constructing its tracks in a cut alongside the property); Darley Main Colliery Co. v. Mitchell, supra, overruling Lamb v. Walker, L. R. 3 Q. B. Div. 389 (mining of coal resulting in a subsidence and a second subsidence more than the statutory period after ceasing of opera-

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minerals several years before suit brought, and that, both before and after the point of time one year before suit brought, defendant had mined coal there. The settling down of plaintiffs' lot occurred less than one year before the commencement of the suit. The single question raised by the record and argument of counsel is whether the trial court erred in refusing to defendant charges which put forward the proposition that if the coal the removal of which left the upper soil without proper support, and so caused its subsidence, was removed more than one year before the commencement of the suit, the plaintiffs could not recover.

The plaintiffs owned the surface; the defendant, the underlying minerals. The right to mine is servient to the right of the owner of the surface to have it perpetually sustained in its natural state—no question as to the right to have buildings sustained is involved—by adequate supports. Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 So. 350. The owner of the upper soil is entitled as of common right to support from subjacent strata, independent of the negligence of the owner of the minerals in working his mine. Humphries v. Brogden, 12 Q. B. 739. So that the charge of negligence to be found in some of the counts neither added to nor detracted from

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tions); Crumbie v. Wallsend Local Board, supra (continuous subsidence of house as the result of improper filling of sewer).

This was also the view of Chief Justice Cockburn in the dissenting opinion of Lamb v. Walker, supra, which case was overruled in the Colliery Case.

Lord FitzGerald in Darley Main Colliery Co. v. Mitchell, L. R. 11 App. Cas. 151, said: "There was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action."

In Sloss-Sheffield Steel & I. Co. v. Sampson, supra, where an action was brought for damages caused by operations in mining coal under the plaintiff's lands, causing the surface to crack, and destroying a well and diminishing the value of the real estate, it was said: "While there is a difference as to the commencement of the running of the statute of limitations between cases where the act complained of was unlawful in itself and those where the act was lawful and the damage claimed is consequential, yet, where the injury is continuing or recurring, the rule in each case is that damages can be recovered only for the injury occurring within the period of limitation."

In Crumbie v. Wallsend Local Board, supra, it was contended that there is a distinction between a case where the subsidence is continuous, and it is impossible really to distinguish between the damage at one period and another, and a case such as the Colliery Case, where the subsidences occur by fits and starts, that is, successive, independent subsidences. Lord Esher, however, said that the suggested distinction was too fine.

In Roberts v. Read, 16 East, 215, although the general highway act directed that actions against any persons for anything done or acted in pursuance thereof should be commenced within three months, and not afterwards, it was held that for the undermining of a wall adjoining a highway an action on the case for the consequential damage was not barred until after three months after the falling of the wall, the court saying that if the action had been trespass, the action must have been brought within three months after the act of trespass complained of.

The only case of importance holding to the contrary is Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, where it was held that the cause of action for an injury as the result of the subsidence of the surface over a mine arises at the time of the removal of the support, and not at the time of the resulting subsidence. The court said: "In this case the right of action arose when the mine operator failed to furnish sufficient support. That may have been more than six years before suit brought, or it may not. It may have been partly due to mining before and partly to mining afterwards; in which latter case the action would not be barred. If wholly due to the removal of coal six years before suit brought, and failure then to leave sufficient support, the action would be barred. The date of the 'cave-in' and partial destruction of the house is not the date of the cause of action, that was only the consequence of a previous cause, whether one month or twenty years before. It is argued that in some cases the surface owner could not know, by the most careful observation, whether the mine owner had neglected his duty within six years. We answer, that is only one of the incidents attending the purchase of land over coal mines. It is not improbable that this risk enters largely into the commercial value of all like surface land in that region. But, however this may be, we hold that the miner is not forever answerable for even his own default. Further, in no case is he answerable for the default of his predecessor before his possession. Neither equity nor law demands that any greater burden should be placed upon him than that indicated. Any heavier one would encourage the purchase of surface over coal mines for speculation in future lawsuits. We cannot concur in the argument of appellant's counsel, that plaintiffs could have had no cause of

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the cause of action stated. Under the evidence it was open, perhaps, to the jury to find that the mining which caused the cracking and settling down of plaintiffs' lot had been done by the defendant more than one year before suit brought. If such was the case, when did the statute of limitations begin to run? In Roundtree v. Brantley, 34 Ala. 544, 73 Am. Dec. 470, Polly v. McCall, 37 Ala. 20, and Savannah, A. & M. R. Co. v. Buford, 106 Ala. 303, 17 So. 395, after recognizing the principle of a class of cases in which parties are allowed to maintain suit before any actual injury is done, for the reason that wherever there is a wrong there must be a remedy, and plaintiff must at least be entitled to nominal damages, and that otherwise the adverse user might ripen into a title by lapse of time before there was any actual damage, it was determined that an interference with the natural flow of water by a structure on the land of an adjoining owner, causing an injurious reflux of water, confers a right of action whenever the injury actually occurs; and in the last-named case it was said: "The roadbed and embankment are permanent and continuous structures; and if their erection had given the plaintiff a cause of action, and then all the damage which could have resulted had resulted, the statute of limitations would have com-

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action antedating their deed. By their conveyance, there passed to them all the rights of their grantor. If the cause of the injury was within six years, although at the date of the deed the damage was not susceptible of computation, yet afterwards became so by the subsidence of the surface, their right to sue was then fixed,—a right which, from the nature of the case, could not have had more than a doubtful existence before the actual damage occurred." In this case authority was also cited to sustain the argument that the right to sue does not fall to the owner who is in possession, when the result demonstrates the cause of action arose before the date of his deed. The court, however, after recognizing the applicability of that rule in cases of damages arising from the exercise of eminent domain by turnpike and railroad companies, in refusing to recognize the applicability of the rule in this case, used language which it would seem it might with equal grace have used on the question of the statute of limitations, and which would necessarily have led to a different conclusion. The court, in this connection, said: "when the right to sufficient support has been violated, the cause of action, it is true, arises; but the owner in possession when the consequences follow is the one who suffers. There may, in the interval, have been several owners, none of whom sustained damage except the last. He alone has the right to sue, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession. Until they actually occur, no one can tell when they will occur, or that they ever will. Each grantee has the right to presume that the subjacant owner has performed his legal duty; and the price, while probably somewhat depreciated by the possible risk, is not fixed on a presumption that his land will subside because of any special failure in duty on the part of him who has taken out the coal." But see the review of this case in WEST PRATT COAL CO. v. DORMAN.

In Nicklin v. Williams, 10 Exch. 259, it seems to have been held that the cause of action for injuries to property caused by the subsidence of the soil as the result of mining was the original injury of withdrawing support. This case, however, was, in effect, at least, overruled in the Colliery Case.

In Houston Waterworks v. Kennedy, 70 Tex. 233, 8 S. W. 36, the court, distinguishing between an act as in that case, wrongful in itself, for which an action might have been maintained as soon as the tort was committed, and an act lawful in itself, for the injuries subsequently resulting from which a cause of action does not accrue until the injury is sustained, held that where the foundation of a house was cut through without the owner's knowledge, for the purpose of putting in a water pipe, causing the house afterwards to settle and the walls to crack, the owner's cause of action accrued at the time the foundation was cut through, and not at the time the damage became apparent.

In Griffin v. Drainage Commission, 110 La. 839, 34 So. 799, where an owner of property abutting on a street sought to recover damages for the gradual settling and injuring of his house, which commenced contemporaneously with the building of a drainage canal in close proximity thereto, and continued over a period of several years, it was held that under a statute declaring that prescription runs from the time the damage is sustained, the statute of limitations commenced to run at the time of the digging of the trench or canal, and that, not having shown what part of the damage was sustained after the period fixed for prescription, the owner of the building himself being in possession, he was precluded from recovering damages by bringing suit more than one year after the digging of the trench. In a syllabus by the court, the holding of this case was set out as follows: "Where the damage resulting from a wrongful act itself (noncontinuing) is continuing and progressive, the party whose property is damaged cannot postpone bringing an action for the same until after the full extent of the damage has been sustained, and then sue for the whole damage. If he does so, the claim for the portion of the damage which he sustained one year prior to the bringing of the action will have been prescribed."

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menced to run from the time of their completion. But if the thing complained of is not necessarily injurious, or is not an invasion of the rights of another, of itself affording no cause of action, then whatever of legal injury may result from it furnishes a cause of action accruing when the injury occurs, and then the statute of limitations commences to run."

These cases went upon the theory that the injuries complained of had causal origin in the maintenance of a nuisance, and it was considered by them that the injurious consequences resulting from the nuisance, rather than the act which produced the nuisance, was the cause of action. "Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage . . . and private nuisances, which are the objects of our present consideration, and may be defined: Anything done to the hurt or annoyance of the lands tenements, or hereditaments of another." 3 Bl. Com. 216. "The remedies by suit are: (1) By action on the case for damages, in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one." Id. 220. "Anything constructed on a person's premises, which of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property, is a nuisance." Grady v. Wolsner, 46 Ala. 381, 7 Am. Rep. 593; Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Richards v. Daugherty, 133 Ala. 569, 31 So. 934. The idea of nuisance receives a somewhat extended application in Sutherland on Damages, where it is said: "An actionable nuisance may be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. It may be created by an affirmative act causing annoyance and damage, or by neglect of some duty of prevention." § 1035.

The facts of the case under consideration constitute the plaintiffs' cause of offense a nuisance, and meet the conditions laid down as for the maintenance of an action on the case whenever the injury may actually occur. The structure was in its nature permanent and continuous, but its damnifying effects did not occur until after the lapse of time; and it is a matter of practical importance, though perhaps not touching the principal involved, that they may not be known until they do occur. Perhaps a more accurate use of language, without varying legal effect, would describe the first cause of plaintiff's injury as the destruction of a structure upon which the plaintiffs had a legal right to depend for the support of their land. It may be likened to a hole dug near to one's land, which, after a while and under the influence of the seasons, permits his land to slough away from time to time. The damages complained of flowed as consequences from a nuisance. In the leading case of Backhouse v. Bonomi, 9 H. L. Cas. 503, plaintiffs' lot and the house upon it had been caused to settle by excavation of the underlying strata. In the House of Lords, Lord Chancellor Westbury said: "I think it is abundantly clear, upon both principle and upon authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises, and that the action may then be maintained." Upon the same occasion Lord Cranworth observed: 'I think the error in the view which has sometimes been taken upon this subject is this: It has been supposed that the right of the party whose land is interfered with is a right to what is called 'the pillars,' or the support. In truth, his right is a right to the ordinary enjoyment of his land; and till that ordinary enjoyment is interfered with, he has nothing of which to complain. That seems to be the principle upon which this case ought to be disposed of." 16 Eng. Rul. Cas. 215. See also Church of the Holy Communion v. Paterson Extension R. Co. 66 N. J. L. 218, 55 L.R.A. 81, 49 Atl. 1030. These cases, and the analogy afforded by our own cases, supra, seem to leave no room for doubt that the statute of limitation will not begin to run in an action of the sort here involved until some actual mischief has been done to the upper soil.

Appellant urges upon our consideration the case of Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255. For precedent that case contents itself with a reference to an earlier decision of Backhouse v. Bonomi, supra, which was overruled on appeal in those decisions from which we have quoted, as it had been in the Exchequer Chamber. For conclusion it holds that "the miner is not forever answerable for even his own default,"—an argument *ab inconvenienti*, which seems too easily to outweigh the inconveniences which must result to the owners of the upper soil from such a ruling. Without attaching too much importance to the argument from inconvenience as making for one conclusion or another, we quote the remarks of Mr. Justice Willes, when deciding Bonomi v. Backhouse in Exchequer Chamber: "The contention . . . on behalf of the defendant is that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, ac-

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cording to this view, would have, therefore, to decide upon the speculative question whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage which in point of fact never might arise. This is certainly not a state of law to be desired." El. Bl. & El. 655.

In line with the authorities noted above, and the reasons upon which they proceed, we hold that a cause of action accrues to the owner of the upper soil when the failure of support by the underlying strata, through causes put into operation by mining them, interferes with the utility and enjoyment of the superincumbent soil.

Affirmed.

Dowdell, Ch. J., and Anderson and McClellan, JJ., concur.

ILLINOIS SUPREME COURT.

ABRAM POOLE et al.
v.
CITY OF LAKE FOREST, Impleaded, etc., Appellant.

(238 Ill. 305, 87 N. E. 320.)

Dedication — plat — shore.

1. The strip of land between the bluff and the water's edge is not dedicated to the public by leaving it blank when platting into lots, streets, and parks, the land on top of the bluff, and stating in the plat that the lake-front lots extend only to the top of the bluff.

Prescription — shore — public use.

2. The mere use by the public of a strip of lake shore for picnics, strolling, pleasure driving, and hauling sand, will not, no matter how long continued, vest in it the right to continue such use, where the use was not confined to a well-defined line of travel.

Taxation — failure to list — effect.

3. Mere failure to list shore property for taxation does not vest title thereto in the public.

Real property — possession — shore.

4. Possession of shore property is established by evidence of the exercise over it of such acts of ownership as might reasonably be expected in view of the nature and situation of the premises.

(February 19, 1909.)

APPEAL by defendant from a decree of the Circuit Court for Lake County in complainants' favor in a suit to quiet title to certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. **David Fales and Smoot & Eyer** for appellant.

Messrs. **Henry N. Tuttle and Hamlin & Boyden**, for appellees:

A blank space on a plat, which is not designated as any street, alley, or other public ground, does not show a dedication, and does not sustain a city's claim of a common-law dedication, where there is no proof of intention by the grantor to dedicate the land to public use, and an acceptance thereof by the public for such use.

Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035; Chicago v. Drexel, 141 Ill. 89,

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Case Note.* — *Leaving blank in plat as a dedication.

This note is, in the main, confined to cases where the space in question was left absolutely blank; a few analogous cases have, however, been included.

It is a general rule that, in order to show a dedication, it must clearly appear that the owner intended to give the land to the public. 9 Am. & Eng. Enc. Law p. 60.

Whether or not a dedication results from leaving a blank, therefore, is a question of intention; and this intention is largely determined by the surrounding circumstances. In each case the question is one of fact.

Words are held not necessary to a dedication if the intent can be gathered from other sources. The court in Rowan v. Portland, 8 B. Mon. 246, said: "We do not understand any of the cases as requiring that words shall be upon the map or plan of a town, expressing the objects and purposes of the different spaces and divisions appearing on its face, unless the case Wood v. Mansell, 3 Blackf. 125 be regarded as going thus far. Such words as mere names could not operate as grants *per se*, but only as explanations of the map. Where, from the position and relations of any open space upon the map, it might be doubtful for what use it was intended, or whether it was to be public or private, a word designating its character would be useful, and might be necessary. But when, from the position and relations of any open space in the town, it is apparent that it was intended to be public property, or for the public use, the dedication of such space to the public is as perfect as if the name or purpose were indicated by a written word; and after the sale of lots, made under such dedication, it can neither be revoked nor limited in its extent, on the ground of a supposed excess of the dedication beyond the requirements of the public. The proprietor will have lost all power over the subject, and the only power of the court is to ascertain and establish the fact and extent of the dedication.

Where this intention is not clearly shown, however, by the accompanying circumstances, leaving a space blank will not work a

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30 N. E. 774; Princeville v. Auten, 77 Ill. 325; Grube v. Nichols, 36 Ill. 92; McLaughlin v. Stevens, 18 Ohio, 94; Duluth v. St. Paul & D. R. Co. 49 Minn. 201, 51 N. W. 1163; Saulet v. New Orleans, 10 La. Ann. 81; Mason v. Chicago, 163 Ill. 351, 45 N. E. 567; West Point v. Bland, 106 Va. 792, 56 S. E. 802.

A conveyance of land offered for public purposes before acceptance is a revocation of the offer to dedicate, and any acceptance thereafter will be unavailing.

Chicago v. Drexel and Mason v. Chicago, supra; Reichert Mill. Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544; Russell v. Chicago & M. Electric R. Co. 205 Ill. 155, 68 N. E. 727; Willey v. People, 36 Ill. App. 609; Forbes v. Balenseifer, 74 Ill. 183.

The public does not acquire a right over unoccupied land by travel over the same, merely from acquiescence on the part of the owners.

Kyle v. Logan, 87 Ill. 64; Forbes v. Balenseifer, supra; Falter v. Packard, 219 Ill. 356, 76 N. E. 495; Brushy Mound v. McClintock, 150 Ill. 129, 36 N. E. 976; Chicago v. Stimson, 124 Ill. 510, 17 N. E. 43; Peyton v. Shaw, 15 Ill. App. 192; Fox v. Virgin, 5 Ill. App. 515, 11 Ill. App. 513; Baker v. Johnston, 21 Mich. 319; West Point v. Bland, 106 Va. 792, 56 S. E. 802.

A highway by prescription is limited to a specific way on a definite and certain line.

Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Brushy Mound v. McClintock, supra.

The fact that the property in question was not assessed for taxation, and that no

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dedication, and it was held in the following cases that no dedication had been established: New York v. Stuyvesant, 17 N. Y. 34 (blank space, claimed as square, appearing on partition map made at time when the lot was subject to be thrown open as public square by third persons, such map not intending to include all land in which parties had interest); Schuchman v. Homestead, 111 Pa. 48, 2 Atl. 407 (space between lots and river); McLaughlin v. Stevens, 18 Ohio, 94 (surplus land between street of specified width and river); Atty. Gen. v. Whitney, 137 Mass. 450 (large triangular-shaped lot near point where streets cross, not included within street lines); Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624 (strip between river and parallel street); Duluth v. St. Paul & D. R. Co. 49 Minn. 201, 51 N. W. 1163 (space between street and lake, divided from street by heavy line); Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014 (strip 100 feet wide on each side of railroad track); Robinson v. Coffin, 2 Wash. Terr. 251, 6 Pac. 41 (strip which would serve as convenient street marked with letter on plat on which streets were plainly marked and other subdivisions designated with letters); Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035 (blank triangular space on plat of lots and streets); Downend v. Kansas City, 156 Mo. 60, 51 L. R.A. 170, 56 S. W. 902 (strip on plat marked 5 feet, running along rear of lots); Toledo v. Converse, 21 Ohio C. C. 239 (plat showing triangular lot at intersection of streets, colored same as streets); Manitou v. International Trust Co. 30 Colo. 467, 70 Pac. 757 (irregular-shaped lot in center of town, colored green, separated from other tracts by highways); Weidemeyer v. Reitch (Tex. Civ. App.) 108 S. W. 167 (way between lots, appearing on map of addition to city, with no designation, and closed at one end); Hurley v. Mississippi & R. River Boom Co. 34 Minn. 143, 24 N. W. 917 (open, unmarked, triangular-shaped lot, abutting on river, with lots on two sides, held not dedicated as wharf; Skeen v. Lynch, 1 Rob. (Va.) 186 (strip lying between lower range of lots and river, and divided from lots by artificial line, where owner showed by other acts intention of retaining interest); Fisher v. Carpenter, 36 Kan. 184, 12 Pac. 941 (strip 250 feet long by 34 feet wide on one end, and 89 on the other, on plat having all streets and lots marked); Covington v. McDonald, 94 Ky. 1, 21 S. W. 235 (dotted line along center of space claimed as street, where note on map showed that there was no intention to so extend street at that time); Central Land Co. v. Providence, 15 R. I. 246, 2 Atl. 553; Van Valkenburgh v. Milwaukee, 30 Wis. 338 (strip included in red lines held not street, where purpose of red lines stated on plat to be to show form and dimensions of lots if adjoining streets were extended through tract); David v. New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586, (dots outlining divergence from line of street apparently draftsman's fanciful work); Saulet v. New Orleans, 10 La. Ann. 81 (square with nothing to distinguish limits from streets); Delord v. New Orleans, 11 La. Ann. 699 (mere omission to figure alluvion existing in front of property); Princeton v. Templeton, 71 Ill. 68 (strip shown on plat between street and lots, separated from street by dotted line); Lippincott v. Harvey, 72 Md. 572, 19 Atl. 1041 (plat containing dotted lines, having no writing between, claimed to represent street); Columbia & P. S. R. Co. v. Seattle, 33 Wash. 513, 74 Pac. 670 (no intention to dedicate street below high-water mark shown, where space left blank on plat upon which other streets were marked, although streets running at right angles were not closed at the point in question, but were closed at another point); Mt. Vernon v. Young, 124 Iowa, 517, 100 N. W. 694 (lot inclosed and separated by lines from all streets, held not street, although it did not conform to written description of lots).

In Ruch v. Rock Island, 5 Biss. 95, Fed. Cas. No. 12,105, it was held that the fact that one block on a town plat appeared unsubdivided and blank did not alone constitute a dedication, but a statement at the

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taxes were paid thereon by reason of such nonassessment, does not change the character of the property from a private to a public nature.

Hamilton v. Chicago, B. & Q. R. Co. 124 Ill. 246, 15 N. E. 854; Lake View LeBahn, 120 Ill. 92, 9 N. E. 269; Ottawa v. Yentzer, 160 Ill. 509, 43 N. E. 601; Chicago v. Borden, 190 Ill. 430, 60 N. E. 915; Illinois Ins. Co. v. Littlefield, 67 Ill. 368.

The acceptance of a plat by municipal authorities is not necessarily an acceptance as public property of all the streets and alleys that may be shown upon the plat.

Russell v. Chicago & M. Electric R. Co.; Reichert Mill. Co. v. Freeburg; and Chicago v. Drexel.—supra.

No right accrues to the city of Lake Forest from the fact that sand or gravel has been taken from the beach for many years past.

Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653.

Vickers, J., delivered the opinion of the court:

This is a bill filed by Abram Poole and others to quiet their title and to remove as a cloud therefrom the claim of the city of Lake Forest to a parcel of land located between the east line of lots 30 and 31 and the western shore of Lake Michigan. In 1857 the trustees of the Lake Forest Association, being possessed, as trustees, of sundry lands in townships 43 and 44 in Lake county, bordering on Lake Michigan, made a subdivision of said lands into a town fronting on Lake Michigan. They divided

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time by the owners that it was to be a public square was held to create a dedication.

And in Elliot v. Atlantic City, 149 Fed. 849, where originally the line of a street had been drawn for a certain width, and later a line had been drawn through the center, apparently adding one half the space to the adjacent lots, it was held that but half the original width of the street was dedicated for the public use.

In Steinauer v. Tell City, 146 Ind. 490, 45 N. E. 1056, where a town plat did not separate a small triangular lot at the intersection of two streets from the streets, it was held that the owner might file a corrected plat two years later, reserving the lot, no other evidence being introduced showing that he intended to dedicate the space.

But, as before stated, where the intention to dedicate is clearly shown, this effect will be given although the space in question contains no words indicating the purpose for which it was intended.

Thus, the court in East Birmingham Realty Co. v. Birmingham Mach. & Foundry Co. (Ala.) 49 So. 448 said: "In other words, that, though a map or plat does not designate *eo nomine* the street, highway, or alley space in the area plotted, such designation may as certainly appear from the situation created by the relative location of blank spaces and lots or blocks, and from the purpose to which the lots or blocks are expected to be devoted, and from the lines and courses indicated by the map, as they relate to lines of the subdivisions made."

And in Baker v. Barry, 22 R. I. 471, 48 Atl. 795, a blank space of 10 feet, left at the rear of two tiers of lots backing each other, was held to be dedicated as a public way, where the lots were bounded by a gangway. The court said: "Spaces left unmarked on a plat may show a dedication for a street or gangway when taken in connection with declarations of the owner or with user. 9 Am. & Eng. Enc. Law, 2d ed. p. 60, note 3, and cases cited. Such intent becomes conclusive when embodied in a deed by reference to the space as a gangway or street. The layout on the plat, the reference to it as a gangway in the deed of the trustees soon after, the continued reference to it in deeds since, and the subsequent use of it, give ample proof of the dedication of the strip as a gangway. Had the strip been named as a street, there could have been no question as to its dedication. But the purpose of the strip is just as evident as though the owner had written on it, 'This is for a gangway.'"

In the following cases an intention to dedicate was found, notwithstanding the fact that the spaces were unmarked: Oswald v. Grenet, 22 Tex. 94 (triangular lot so situated that building thereon would obstruct view of blocks); East Birmingham Realty Co. v. Birmingham Mach. & Foundry Co. supra (long space between manufacturing blocks, evidently intended for railway facilities); Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901 (strip evidently intended to give access to station, and so situated that, if it was not intended as public way, some lots would have no way of ingress or egress); Webb v. Demopolis, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289 (open space between street and river front on plat of town located especially because of waterway advantages); Coe College v. Cedar Rapids (Iowa) 87 N. W. 444 (space marked off in same manner as other streets, although width and name omitted); Uniontown v. Berry, 24 Ky. L. Rep. 1692, 72 S. W. 295 (land lying between street and river, where boundary of village included land to low-water mark); Ingraham v. Brown, 231 Ill. 256, 83 N. E. 156 (figures "138" marked on margin of blank space running between blocks in plat held to indicate street of that width); Davies v. Epstein, 77 Ark. 221, 92 S. W. 19; Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477 (street along river held to extend to river, where there was no line showing width of street; the court intimated that it would be otherwise if a limit had been fixed and a space left between the river and street); Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236 (plat with lot and blocks containing unmarked spaces fairly indicating that such spaces were intended as streets);

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the lands into lots for private ownership, and into streets, lanes, alleys, and parks for public use. The plant made by said trustees is the original map of the city of Lake Forest. This plat shows a frontage of the city on Lake Michigan of more than 13,000 feet. The shore or breach of Lake Michigan opposite the city of Lake Forest consists of a sloping, sandy beach, extending from the water line back for a distance of from a few feet to about 150 feet to an abrupt bluff, which is from 50 to 75 feet higher than the high point of the said beach below. By the plat made it is stated that all lots fronting on the lake should only extend to the top of the bluff. Lake avenue is laid out on top of the bluff, and parallels the shore of Lake Michigan practically from the northern to the southern limits of the city. At some points Lake avenue is far enough from the crest of the bluff to allow a tier of lots, which are platted, fronting on Lake avenue on the west and extending to the bluff on the east. Such lots were platted north from Deerpath avenue and south from Rosemary avenue. Between these points no lots were platted between the lake and Lake avenue, and the open space left between the water line and the avenue is designated as Forest Park. There are, however, no words on the map indicating what the beach strip north of the north line of Forest Park and south of the south line of the said park was intended to be used for. Lots 30 and 31 are located between the bluff and Lake avenue, and are a considerable distance north from the north end of Forest Park. Lots 30 and 31 were purchased by Abram Poole in 1880. Upon these lots Poole constructed a residence, which has been used and occupied by him and his family, either as a summer residence or as a permanent residence, all of the time since the residence was completed. Abram Poole testifies that, when he first purchased this property, he supposed that lots 30 and 31 extended to the water's edge. Under the belief that he was the owner of the beach strip east of his lots, Poole exercised acts of ownership over the premises down to the lake shore. He shored up the northeast corner of lot 30, built a bath house down near the water's edge, and used the land as his own from the time he acquired the title to lots 30 and 31. The trustees of the Lake Forest Association conveyed the beach strip in question to the trustees of Lake Forest University. On October 29, 1894, it having been discovered that Poole had no deed to the shore strip east of his lots, the trustees of Lake Forest University executed a quit-

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Boehler v. Des Moines, 111 Iowa, 417, 82 N. W. 914 (plat showing strip too narrow for lots between street and river, with only dotted line between it and street); Pittsburg v. Epping-Carpenter Co. 194 Pa. 318, 45 Atl. 129 (plan showing space between lots and river, where used for fifty years as wharf, and legislature had conferred right on city to maintain as wharf); San Francisco v. Burr (Cal.) 36 Pac. 771 (space not numbered as, or shape of, lot, but bounded by lines clearly indicating intention to create street, and lots sold as bounded on street); Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749 (shape, lines, and dimension of space indicating a street, although not expressly so designated); California v. Howard, 78 Mo. 88 (strip running along side of railroad affording only means, except by alley in rear, of reaching lots and other streets); London & S. F. Bank v. Oakland, 33 C. C. A. 237, 61 U. S. App. 224, 90 Fed. 691 (letters "st." placed between Ninth and Tenth streets, leaving blank space, while such letters of other streets placed between Eleventh and Twelfth streets); Oregon City v. Oregon & C. R. Co. 44 Or. 165, 74 Pac. 924 (strip of varying width extending through town, with streets opening into it, and which afforded only means of connection between portions of town); People v. Chicago & N. W. R. Co. 239 Ill. 42, 87 N. E. 946 (unmarked strip along branch of stream; no explanation for shape as lot; facts showing intent to establish street accompanied by showing that some lots would be altogether isolated from street if strip not so intended); Yost v. Leonard, 34 Iowa, 9 (blank in square formed by streets running at right angles); Hanson v. Eastman, 21 Minn. 509 (land appearing as continuation of street, affording only street access to lots, although a cul-de-sac); Princeville v. Auten, 77 Ill. 325 (blank square in village plat acquiesced in as public park); Parrish v. Stephens, 1 Or. 60 (space of varying width between blocks and river on plat, where spaces were laid off as streets, but not so marked); Buschmann v. St. Louis, 121 Mo. 523, 26 S. W. 687 (space between lots and river exact width of public wharf existing, which would leave lots with no public front if otherwise construed); Yates v. Judd, 18 Wis. 119 (part of tract delineated as portion of river not inclosed within boundary line of lots); Alves v. Henderson, 16 B. Mon. 131 (space between river and lots fronting toward river); Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228 (strip extending through entire width of tract, with lots abutting on both sides); De Armas v. New Orleans, 5 La. 132; Lafayette v. Holland, 18 La. 286; New Orleans v. Hopkins, 13 La. 331 (space between street and levee, where long use shown); Municipality No. 2 v. Palfrey, 7 La. Ann. 497 (lot not separated from street, or subdivided for sale, and used for long period by public); Sanborn v. Chicago & N. W. R. Co. 16 Wis. 20 (surveyor's figures so placed as to leave small triangular space unused and terminate street which was obviously intended to be continued); Porter

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claim deed conveying all right, title, and interest in and to the premises in controversy in this suit to Abram Poole. After obtaining this deed, Poole continued to exercise acts of ownership over the premises, and expended considerable money thereon for timbers to keep the bank from raveling down, and on the northeast corner he placed heavy timbers to keep waves from encroaching on the bluff, and did other work, such as setting out trees along the bluff, putting in tile drains down the bluff to prevent washing, and hauling a large quantity of dirt from other places and tamping it into the bluff. He made improvements more or less valuable every year during the twenty-seven years that he has had possession of the premises in question.

It will be seen from the foregoing statement that the title to the premises in question is in the Pooles. The trustees of Lake Forest University were made parties to this suit, but they make no claim to the premises They have been defaulted and the bill taken as confessed against them. The city of Lake Forest claims that the beach strip in question was dedicated to the public in 1857 by the trustees of the Lake Forest Association. The city also claims that, if there was no valid dedication of the premises to the public, the public has acquired an easement in the premises by continuous adverse use for more than twenty years. The court below found against the city of Lake Forest, and entered a decree in accordance with the prayer of the bill. This appeal is prosecuted to reverse that decree by the city of Lake Forest.

The contention of appellant, that the beach strip opposite lots 30 and 31, and other lots similarly situated, was dedicated to the public by the trustees of the Lake Forest Association, is largely based upon the statement in the plat that the lake-front lots extended only to the top of the bluff, and that the space between the top of the bluff and the water line is left without any indication on the plat that it was intended for private ownership. The space upon the plat where the premises in question are located is neither platted as lots or as a street, alley, or public grounds. The fact that the plat recited that lake-front lots extend only to the bluff, and that the space between the bluff and the water line is left unplatted, is relied on by appellant as evidence of an intention on the part of the original owners to dedicate these premises to the public. The mere leaving of a blank upon the plat, without any designation of its purpose, cannot be held sufficient proof of an intention of the owner to dedicate

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v. Carpenter, 39 Fla. 14, 21 So. 788 (spaces between blocks and lots, forming no part thereof, and indicating land for streets); Rowan v. Portland, 8 B. Mon. 232 (space between street and river, where town extended to river).

In Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961, a cul-de-sac appearing by lines, but without other designation, was held an offer to dedicate, but the owner was allowed to revoke his offer, where no sale with reference thereto had been made.

In Davies v. Epstein, supra, the court said: "It is inconceivable that the owner intended to lay out a town on the banks of navigable water, and parallel the bank with a street, and at the same time entirely cut it off from access by the public. This is contrary to reason, and to the obvious intention of the owner in selecting the site for the town. Under such circumstances a presumption necessarily arises of a dedication that will give the public access to the water."

And the court in Rowan v. Portland, supra said: "We come to the inquiry whether, upon the face of the map or plan of the town of Portland, the slip or space between Water and Front streets and the river is designated as having been intended and appropriated for public use. . . . That the town extended to the Ohio river, leaving no space between the town and the water, is a position which, in our opinion, does not admit of question. There is no line dividing or separating the town from the river. And, if there were, it should rather be presumed that the space between such line and the river was thus discriminated for the purpose of showing that it was intended for some use of the town different from that of the ordinary streets and public grounds . . . than that a town located upon the bank of such a river, and at a point selected for its commercial advantages, should be wholly shut out from free and common access to the river. The unreasonableness of this latter presumption has been more than once declared by this court, and the fact that a town is laid off upon the bank of a navigable river has been held to be sufficient evidence of its extending to the water, unless a contrary intention is manifestly indicated. . . . We are of opinion that the fair and necessary inference from the face of the map is that the entire slip along the whole front of the town (with the exception before referred to) was left open for the public use, and was intended to be and remain a common or public ground, affording free access from all parts of the town to all parts of the river in front of it; and that this access was given, not merely for the use of the water for ordinary domestic purposes, but for the use of the river as a great highway of commerce, and for the enjoyment and security of all the advantages which the location of the town upon such a river, and at a point eligible for the anchoring or mooring of vessels and for the deposit and landing or shipment of merchandise, was calculated to afford."

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the lands into lots for private ownership, and into streets, lanes, alleys, and parks for public use. The plant made by said trustees is the original map of the city of Lake Forest. This plat shows a frontage of the city on Lake Michigan of more than 13,000 feet. The shore or breach of Lake Michigan opposite the city of Lake Forest consists of a sloping, sandy beach, extending from the water line back for a distance of from a few feet to about 150 feet to an abrupt bluff, which is from 50 to 75 feet higher than the high point of the said beach below. By the plat made it is stated that all lots fronting on the lake should only extend to the top of the bluff. Lake avenue is laid out on top of the bluff, and parallels the shore of Lake Michigan practically from the northern to the southern limits of the city. At some points Lake avenue is far enough from the crest of the bluff to allow a tier of lots, which are platted, fronting on Lake avenue on the west and extending to the bluff on the east. Such lots were platted north from Deerpath avenue and south from Rosemary avenue. Between these points no lots were platted between the lake and Lake avenue, and the open space left between the water line and the avenue is designated as Forest Park. There are, however, no words on the map indicating what the beach strip north of the north line of Forest Park and south of the south line of the said park was intended to be used for. Lots 30 and 31 are located between the bluff and Lake avenue, and are a considerable distance north from the north end of Forest Park. Lots 30 and 31 were purchased by Abram Poole in 1880. Upon these lots Poole constructed a residence, which has been used and occupied by him and his family, either as a summer residence or as a permanent residence, all of the time since the residence was completed. Abram Poole testifies that, when he first purchased this property, he supposed that lots 30 and 31 extended to the water's edge. Under the belief that he was the owner of the beach strip east of his lots, Poole exercised acts of ownership over the premises down to the lake shore. He shored up the northeast corner of lot 30, built a bath house down near the water's edge, and used the land as his own from the time he acquired the title to lots 30 and 31. The trustees of the Lake Forest Association conveyed the beach strip in question to the trustees of Lake Forest University. On October 29, 1894, it having been discovered that Poole had no deed to the shore strip east of his lots, the trustees of Lake Forest University executed a quit-

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Boehler v. Des Moines, 111 Iowa, 417, 82 N. W. 914 (plat showing strip too narrow for lots between street and river, with only dotted line between it and street); Pittsburg v. Epping-Carpenter Co. 194 Pa. 318, 45 Atl. 129 (plan showing space between lots and river, where used for fifty years as wharf, and legislature had conferred right on city to maintain as wharf); San Francisco v. Burr (Cal.) 36 Pac. 771 (space not numbered as, or shape of, lot, but bounded by lines clearly indicating intention to create street, and lots sold as bounded on street); Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749 (shape, lines, and dimension of space indicating a street, although not expressly so designated); California v. Howard, 78 Mo. 88 (strip running along side of railroad affording only means, except by alley in rear, of reaching lots and other streets); London & S. F. Bank v. Oakland, 33 C. C. A. 237, 61 U. S. App. 224, 90 Fed. 691 (letters "st." placed between Ninth and Tenth streets, leaving blank space, while such letters of other streets placed between Eleventh and Twelfth streets); Oregon City v. Oregon & C. R. Co. 44 Or. 165, 74 Pac. 924 (strip of varying width extending through town, with streets opening into it, and which afforded only means of connection between portions of town); People v. Chicago & N. W. R. Co. 239 Ill. 42, 87 N. E. 946 (unmarked strip along branch of stream; no explanation for shape as lot; facts showing intent to establish street accompanied by showing that some lots would be altogether isolated from street if strip not so intended); Yost v. Leonard, 34 Iowa, 9 (blank in square formed by streets running at right angles); Hanson v. Eastman, 21 Minn. 509 (land appearing as continuation of street, affording only street access to lots, although a cul-de-sac); Princeville v. Auten, 77 Ill. 325 (blank square in village plat acquiesced in as public park); Parrish v. Stephens, 1 Or. 60 (space of varying width between blocks and river on plat, where spaces were laid off as streets, but not so marked); Buschmann v. St. Louis, 121 Mo. 523, 26 S. W. 687 (space between lots and river exact width of public wharf existing, which would leave lots with no public front if otherwise construed); Yates v. Judd, 18 Wis. 119 (part of tract delineated as portion of river not inclosed within boundary line of lots); Alves v. Henderson, 16 B. Mon. 131 (space between river and lots fronting toward river); Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228 (strip extending through entire width of tract, with lots abutting on both sides); De Armas v. New Orleans, 5 La. 132; Lafayette v. Holland, 18 La. 286; New Orleans v. Hopkins, 13 La. 331 (space between street and levee, where long use shown); Municipality No. 2 v. Palfrey, 7 La. Ann. 497 (lot not separated from street, or subdivided for sale, and used for long period by public); Sanborn v. Chicago & N. W. R. Co. 16 Wis. 20 (surveyor's figures so placed as to leave small triangular space unused and terminate street which was obviously intended to be continued); Porter

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claim deed conveying all right, title, and interest in and to the premises in controversy in this suit to Abram Poole. After obtaining this deed, Poole continued to exercise acts of ownership over the premises, and expended considerable money thereon for timbers to keep the bank from raveling down, and on the northeast corner he placed heavy timbers to keep waves from encroaching on the bluff, and did other work, such as setting out trees along the bluff, putting in tile drains down the bluff to prevent washing, and hauling a large quantity of dirt from other places and tamping it into the bluff. He made improvements more or less valuable every year during the twenty-seven years that he has had possession of the premises in question.

It will be seen from the foregoing statement that the title to the premises in question is in the Pooles. The trustees of Lake Forest University were made parties to this suit, but they make no claim to the premises They have been defaulted and the bill taken as confessed against them. The city of Lake Forest claims that the beach strip in question was dedicated to the public in 1857 by the trustees of the Lake Forest Association. The city also claims that, if there was no valid dedication of the premises to the public, the public has acquired an easement in the premises by continuous adverse use for more than twenty years. The court below found against the city of Lake Forest, and entered a decree in accordance with the prayer of the bill. This appeal is prosecuted to reverse that decree by the city of Lake Forest.

The contention of appellant, that the beach strip opposite lots 30 and 31, and other lots similarly situated, was dedicated to the public by the trustees of the Lake Forest Association, is largely based upon the statement in the plat that the lake-front lots extended only to the top of the bluff, and that the space between the top of the bluff and the water line is left without any indication on the plat that it was intended for private ownership. The space upon the plat where the premises in question are located is neither platted as lots or as a street, alley, or public grounds. The fact that the plat recited that lake-front lots extend only to the bluff, and that the space between the bluff and the water line is left unplatted, is relied on by appellant as evidence of an intention on the part of the original owners to dedicate these premises to the public. The mere leaving of a blank upon the plat, without any designation of its purpose, cannot be held sufficient proof of an intention of the owner to dedicate

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v. Carpenter, 39 Fla. 14, 21 So. 788 (spaces between blocks and lots, forming no part thereof, and indicating land for streets); Rowan v. Portland, 8 B. Mon. 232 (space between street and river, where town extended to river).

In Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961, a cul-de-sac appearing by lines, but without other designation, was held an offer to dedicate, but the owner was allowed to revoke his offer, where no sale with reference thereto had been made.

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the premises represented by such blank or undesignated space to public use.

In Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774, certain premises were platted along the lake shore in the town of Lake View as an addition to said town. On the plat a strip was left between the platted blocks and the shore line of Lake Michigan. Nothing was placed upon the plat to indicate the intention to devote said space to public use, and it was held that said plat did not amount to an offer to dedicate said strip to the town of Lake View as a public street, nor show a dedication. To establish a dedication, it should clearly appear that the owner intended to give the land to the public. It is not enough to show that it is not intended for private use. The particular use for which the land was intended must plainly appear. A situation very similar to that presented in the Drexel Case was again before this court in Mason v. Chicago, 163 Ill. 351, 45 N. E. 567, and the doctrine of the Drexel Case was reaffirmed; and in the more recent case of Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035, this court again reaffirmed the doctrine of the Drexel Case, and there held that the mere making of a plat leaving certain parts of the premises without any designation of the use to which they were to be put was not sufficient evidence of an intention to dedicate such premises to the public. In our opinion these cases are conclusive against appellant's contention that the plat operated as a dedication of these premises to the public. There is nothing on the face of the plat offered in evidence in this case from which an intention to dedicate the premises in question to the public can be claimed. If the trustees of the Lake Forest Association had desired to dedicate this beach strip to the public for a highway or a park along the beach, it is reasonable to suppose that they would have so designated it upon the plat. It will be seen by reference to the plat itself that Mayflower park, University park, Academy park, and Forest park are all clearly designated upon the face of the plat. Forest Park extends from Lake avenue to the shore of Lake Michigan, but it does not extend north so as to embrace the shore strip east of the platted lots between Lake avenue and the bluff. In 1875 the trustees of the Lake Forest Association made a conveyance to Lake Forest University of the entire shore strip, except that part of it immediately adjacent to Forest park. This act of the trustees of Lake Forest Association is inconsistent with an intention on their part to dedicate this strip to the public. It may well be that the trustees of the Lake Forest Association had not fully determined what disposition to make of the beach strip when the plat was made and recorded. It may be that it was reserved with the intention to ultimately dedicate it to the public should the future needs of the city make such course desirable. Whatever may have been the original purpose, the fact remains that the Lake Forest Association conveyed this beach strip to the Lake Forest University, and the trustees of the university conveyed it to the present owners. The evidence in this record being wholly insufficient to establish a dedication or an offer by the owners to dedicate the premises to the public, it is unnecessary to consider the question whether there has been an acceptance of such offer by the public.

It is contended, however, by appellant, that, independently of the question of a dedication of the lots in question, the right to use them for public purposes has become vested in the city of Lake Forest by prescription, and that for this reason the decree of the court below should be reversed. The evidence in support of this contention shows that the strip in question was used, to some extent, for the purpose of picnics, fishing, bathing, and other similar purposes. People from the village and elsewhere walked on the beach occasionally on Sundays and sometimes in the evenings. There is some evidence that occasionally a carriage would be seen driving along the beach. The principal use, however, that was made of the strip was by teamsters hauling sand from the beach. There was no road or street over the premises, and persons who went there drove or walked indiscriminately, wherever they saw proper to go. The city of Lake Forest never expended any money or labor in the construction or maintenance of the premises, either as a street or park. The evidence simply shows that the owner of these premises, whose residence was on the bluff above, acquiesced in the use of this beach by the public so long as such use did not interfere with his own rights. The evidence shows that the owner obtained an injunction against teamsters, and stopped them from hauling sand across these premises. These premises were uninclosed, and persons passing up and down the lake shore under the bluff, either for purposes of pleasure or business, would necessarily cross over the premises in question; but it is not contended that the travel was extensive, nor was it confined to any particular well-defined line. In Elliott on Roads and Streets, 2d ed. § 176, it is said: "The public cannot acquire a prescriptive right to pass over land generally, and, where a highway is claimed by prescription, a certain and well-defined line of travel must be shown."

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This rule has been approved as the law of this state. Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

Appellant points out the fact that the beach strip in question had never been listed for taxation, and that no taxes have been paid thereon by anyone, and contends that this fact proves that the premises in question were regarded as public property. The law does not demand the forfeiture of title simply because the owner of property does not cause it to be listed for taxation. The utmost that can be claimed by appellant from this circumstance is that the failure of the public authorities and the owner to have the premises listed and taxed is an evidentiary fact, tending to prove that the premises were regarded as public property. This fact, while entitled to consideration and due weight, is not conclusive upon the owner. As bearing upon this branch of the case, appellant cites and relies upon the case of Owen v. Brookport, 208 Ill. 35, 69 N. E. 952, where this court had under consideration the question whether a strip of land in front of the village of Brookport, and between the front tier of lots and the Ohio river, had been dedicated to the public as a street or highway. In front of a tier of lots fronting toward the Ohio river was an open space of ground marked on the plat "Water street," and the question involved was whether Water street extended to the water's edge or to the top of the bank only. In that case, as in the one at bar, the strip of land in question had not been listed for taxation by the persons who set up title against the public. The action was a proceeding in chancery for partition, and upon an appeal to this court the facts were, of course, open for consideration. In discussing the evidence in its bearing upon the question at issue, attention is called to the failure of the claimant to have the premises listed for taxation. All that is there said, however, upon this point, must be regarded merely as the conclusion of the court upon a question of fact. It is true that the conclusion there reached was that the *locus in quo* was a street, but the decision did not rest alone upon the failure to list the land in question for taxation. Other evidence, not necessary to recapitulate here, was in the record of that case, which satisfactorily showed an intention to dedicate the premises to the public, and that the same were accepted and used by the public for nearly half a century before the suit was brought. There are no rules of law laid down in that case that conflict with the conclusions we have reached in the case at bar.

Appellant finally contends that the averment in the bill that the appellees were in possession of the strip of land in question is not sustained by the proofs. We cannot assent to this contention. Appellees were in actual possession, at least, of that portion of the premises occupied by the bath house. They were claiming under a paper title which described accurately the premises involved in this suit. Where a party is in the actual possession of a part of a tract or a piece of land, claiming to be the owner of all of it, the paper title under which he claims is evidence of the extent of his possession. Aside from this, we think that the evidence sufficiently shows that appellees were in the actual possession of all of the premises. The evidence shows that such acts of ownership were exercised over this property as might reasonably be expected in view of the nature and situation of the premises. This is all that the law requires in this regard.

Finding no error in the record, the decree of the Circuit Court of Lake County is affirmed.

IOWA SUPREME COURT.

GEORGE A. MILLER et al., Appts.,
v.
CITY OF DES MOINES et al.

(— Iowa, —, 122 N. W. 226.)

Municipal authority — union labor.

1. A municipal corporation has no power to require its work to be performed only by union labor.

Same — public contracts — discrimination.

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Case Note. — Right of municipality or other public body to discriminate in favor of organized labor.

The doctrine of MILLER v. DES MOINES represents the consensus of judicial opinion on the question as to the right of public bodies to discriminate in favor of union labor. The cases are as follows:

In Holden v. Alton, 179 Ill. 318, 58 N. E. 556, where an ordinance passed in pursuance of a provision of the incorporation act required that all municipal printing should be let to the lowest bidder, an ordinance restricting awards of contracts for such printing to union shops was held illegal, as tending to create a monopoly, and as imposing an additional burden on taxpayers.

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revenue or its ability to pay does not prevent the granting of relief to complaining taxpayers against performance of the contract.

Same — right to relief.

4. A taxpayer of a municipality may maintain an action to test the validity of contracts awarded upon bids, where only those of persons employing union labor were considered.

Illegal contract — performance — return of price.

5. One who has performed public printing under a contract void because the municipality discriminated in favor of union labor in awarding it will not be compelled to return money already received therefor, where the price was not unreasonable and the suit is in equity, not begun until the time arrived for performing the contract, and no preliminary injunction was asked, while the nisi prius court upheld the validity of the contract, so that the performance could not, for a time, have been avoided.

(July 2, 1909.)

APPEAL by plaintiffs from a judgment of the District Court for Polk County dismissing a bill filed to restrain the performance of an alleged illegal contract for public printing. Modified.

The facts are stated in the opinion.

Messrs. **Bowen, Bremner, & Alberson,** and **Parrish & Dowell,** for appellants:

A taxpayer may bring an action to prevent misappropriation of public funds.

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ipal charter required that contracts for goods and supplies furnished the city must be let to the lowest responsible bidders, an ordinance requiring the union label on city printing was held void, in that it conflicted with the spirit and purpose of the charter, constituted class legislation, was arbitrarily discriminatory in its character, and contrary to public policy in that it stifled competition and fostered monopoly, and in that it violated the 14th Amendment by depriving those not using the union label of their "liberty" and the equal protection of the law in pursuing their vocation of printing.

And in Atlanta v. Stein, 111 Ga. 789, 51 L.R.A. 335, 36 S. E. 933, a case on all fours with MILLER v. DES MOINES, an ordinance requiring the union label of the Allied Printing Trades Council on all city printing was held void, as tending to encourage monopoly and defeat competition, notwithstanding there was no charter requirement that printing contracts should be let to the lowest bidder.

In Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314, which is quoted from with approval in the MILLER CASE, it was held that a stipulation that none but union labor should be employed by the contractor cannot be lawfully made in a contract for repairs to school buildings by a public corporation such as a board of education, as it constitutes a discrimination between different classes of citizens, and is of such a nature as to restrict competition, and to increase the cost of the work.

And in Lewis v. Board of Education, 139 Mich. 306, 102 N. W. 756, following Holden v. Alton, supra, it was held that the board of education of a municipal corporation has no power to require contractors respecting public buildings to employ union labor exclusively.

And in Fiske v. People, 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985, an ordinance giving a monopoly to union labor on city contracts by providing that all such contracts shall contain a stipulation that none but union labor will be employed was held void, as making an unconstitutional discrimination between different classes of citizens, and because it lays down a rule which restricts competition, and tends to increase the cost of work.

And Paterson Chronicle Co. v. Paterson, 66 N. J. L. 129, 48 Atl. 589, reaches the same conclusion through a similar course of reasoning.

In Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161, a requirement in a contract made by a board of supervisors for the construction of a public building, that the contractor should employ no workmen "except members of some trades organization, when practical," was held to be against public policy, as tending to waste the public money without justifiable cause.

In State ex rel. Robert Mitchell Furniture Co. v. Toole, 26 Mont. 22, 55 L.R.A. 644, 91 Am. St. Rep. 386, 66 Pac. 496, the court held that a valid contract for public supplies cannot be let upon a bid tendered pursuant to an advertisement limiting the right to bid to persons employing, or who will in the future employ, union labor only.

And a requirement by a board of supervisors advertising for bids for the printing of its journal, that the Allied Printing Trades Council label must be used by the printer, was held unlawful, as tending to create a monopoly by restricting competition to a special class of printers, in People ex rel. John Single Paper Co. v. Edgcomb, 112 App. Div. 604, 98 N. Y. Supp. 965.

In Grey v. People, 194 Ill. 486, 62 N. E. 894, it was held that the existence of a union labor ordinance did not invalidate an assessment for public improvement, where it did not appear that the contract for the improvement contained a union labor clause, or that such ordinance was enforced in any manner in the contract for work, since, as such ordinance was void, it must be presumed, in the absence of proof, that it was so treated by the municipal authorities.

The foregoing cases should not be confused with those which involve the right of an individual to discriminate in favor of organized labor, as that class of cases stands upon an entirely different footing. See State ex rel. Robert Mitchell Furniture Co. v. Toole, supra.

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Littler v. Jayne, 124 Ill. 123, 16 N. E. 874; Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678; Patterson v. Barber Asphalt Paving Co. 96 Minn. 9, 104 N. W. 566; Atlanta v. Stein, 111 Ga. 789, 51 L.R.A. 335, 36 S. E. 932; Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314; Anderson v. Orient F. Ins. Co. 88 Iowa, 579, 55 N. W. 348; Goetzman v. Whitaker, 81 Iowa, 527, 46 N. W. 1058; Snyder v. Foster, 77 Iowa, 640, 42 N. W. 506; Collins v. Davis, 57 Iowa, 256, 10 N. W. 643; Cornell College v. Iowa County, 32 Iowa, 520; Hospers v. Wyatt, 63 Iowa, 264, 19 N. W. 204; Dunham v. Fox, 100 Iowa, 131, 69 N. W. 436.

A taxpayer may bring an action to enjoin the carrying out of the provisions of an illegal contract for public work, notwithstanding that he was a bidder for the work contracted for.

Holden v. Alton, 179 Ill. 318, 53 N. E. 556.

An ordinance requiring the use of the Allied Printing Trades Council or union label on all printed matter furnished the city is void as class legislation.

State v. Garbroski, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; State ex rel. Bump v. Omaha & C. B. R. & Bridge Co. 113 Iowa, 30, 52 L.R.A. 315, 86 Am. St. Rep. 357, 84 N. W. 983; Pacific Junction v. Dyer, 64 Iowa, 38, 19 N. W. 862; Marshall & B. Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Adams v. Brenan, supra.

Such an ordinance is repugnant to the 14th Amendment to the Constitution of the United States.

Marshall & B. Co. v. Nashville, supra.

Such an ordinance is unreasonable, discriminatory, vicious, and against public policy.

Marshall & B. Co. v. Nashville, supra.

Such an ordinance tends to create a monopoly and restrict competition.

Lewis v. Board of Education, 139 Mich. 306, 102 N. W. 756; Atlanta v. Stein, supra; Marshall & B. Co. v. Nashville, 109 Tenn. 496, 71 S. W. 815; Fishburn v. Chicago, 171 Ill. 338, 39 L.R.A. 482, 63 Am. St. Rep. 236, 49 N. E. 532; Adams v. Brenan, supra.

The ordinance and contract thereunder are void because they throw upon the taxpayers an increased burden by increasing the cost of printing.

Holden v. Alton and Adams v. Brenan, supra.

The refusal of a city council to exercise, after an investigation, a discretion based on facts, which refusal will result in a misappropriation of the public funds, constitutes a legal fraud on the taxpayers.

Atlanta v. Stein, supra; Holden v. Alton, supra.

In exercising its discretion as to who is the lowest responsible bidder, the city council cannot act arbitrarily and give to its action any legal effect; it must make a determination based upon some facts tending to show that the lower bids are not the bids of responsible bidders.

People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4; State, McGovern, Prosecutor, v. Board of Public Works, 57 N. J. L. 580, 31 Atl. 613; Inge v. Board of Public Works, supra.

The fact that some of the councilmen thought their action was for the benefit of the public cannot afford a justification for limiting competition among bidders, or a justification for requiring such bidders to abandon the right to contract with whomsoever they choose for the performance of the work.

Adams v. Brenan, supra.

The contract for the printing of the city's proceedings and statements of expenses is illegal and void, in that the council, in awarding the contract, did not exercise its untrammeled judgment and honest discretion, but was controlled by an illegal ordinance.

Goddard v. Lowell, 179 Mass. 496, 61 N. E. 53; Atlanta v. Stein and Adams v. Brenan, supra.

The fact that the work or portions of it under the contract has been done and paid for does not affect the power of the court to compel restitution.

Holden v. Alton, supra.

Messrs. **William H. Baily, C. O. Holly, and W. E. Miller** for appellees.

Weaver, J., delivered the opinion of the court:

Ordinance No. 452 of the city of Des Moines, passed December 17, 1888, and amended April 17, 1899, enacts and establishes certain regulations concerning supplies procured or purchased for the use of the city. So far as is material to this case said ordinance is in the following words:

"Advertising for Supplies. Section 1. The city clerk is hereby required to advertise in at least two newspapers published in the city of Des Moines for three weeks, two insertions each week, for bids for furnishing all supplies of every kind for the several departments of the city not required to be advertised for by the board of public works. Whenever such supplies, together with the printed matter required to be advertised for by the board of public works, includes printed stationery, printed blanks, printed re-

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ports, or other printed matter, the same shall have printed thereon the Allied Printing Trades Council label.

"Statement of Supplies Needed. Sec. 2. Each officer or board in charge of any department shall furnish and file in the city clerk's office, thirty days before the first day of each fiscal year, a sworn, detailed statement of the supplies necessary for his or their department during the next fiscal year.

"Penalties. Sec. 3. Any person violating any of the provisions of this ordinance shall be subject to a fine of not less than $5 nor more than $10."

On December 19, 1899, an ordinance, No. 1060, was enacted, providing that all proceedings, ordinances, and resolutions of the city council shall be published in pamphlet form, under such regulations as may be imposed by the council. It was also further provided that the contract for the production of such pamphlets shall be let to the lowest bidder after a period of advertising for proposals. On July 18, 1906, ordinance No. 1383 was passed, amending § 3 of ordinance 1060, to make the same read as follows: "The city clerk shall each year, at the time of advertising for bids for supplies, advertise by two insertions in each of two daily papers for sealed proposals for publishing said pamphlets for the next year. Said bids, when received, shall be submitted to the council at their first meeting after bids are received, the contract shall be made with the lowest responsible bidder, but the council may reject all bids and direct the clerk to advertise for new proposals; each bid shall be accompanied by a certified check in the sum of $50, payable to the order of the treasurer, as security that the bidder will enter into contract for doing the work, and give the bond required. The contract shall be prepared by the solicitor and executed by the mayor on behalf of the city, and shall be accompanied by a bond in the penalty of $500, with a corporate surety, conditioned for the faithful performance of the contract. Said contract and bond shall be filed with the city clerk, but the city shall not be bound thereby until the contract and sureties in the bond have been approved by the city council. All ordinances and parts of ordinances inconsistent herewith are hereby repealed."

Pursuant to the terms of the last-mentioned ordinance the city clerk advertised for proposals for the work of publishing the council proceedings for the year beginning April 1, 1908. Responding to this call, bids were tendered by eight different firms or companies doing business as job printers in the city of Des Moines, as follows:

Bischard Bros.	$1.12	per page
Welch Printing Company..	1.01	" "
Iowa Printing Company...	.97	" "
Register & Leader Company	.95	" "
Kenyon Printing Company	.93	" "
Homestead Company	.92	" "
G. A. Miller Printing Company	.89½	" "
Globe Publishing Company	.89	" "

On May 14, 1908, the council voted to award the work to the Register & Leader Company, and directed the mayor to enter into a contract with said company on the terms of its bid. The contract was executed accordingly on or about the date last mentioned, and the printing of the council proceedings for the fiscal year has been done by the Register & Leader job office under the terms of said agreement. On May 16, 1908, this action was instituted. The plaintiffs are taxpayers in Des Moines, and are severally engaged in business as job printers in said city. The mayor, the city auditor, clerk, and treasurer, and the Register & Leader Company are impleaded with the city as defendants. The petition alleges that, of the eight bidders for the work of printing the council proceedings, as hereinbefore shown, the four whose bids were lower than the bid of the Register & Leader Company conducted what is known as nonunion offices, —that is, the said bidders did not employ exclusively what is known as "union labor," —and for that reason none of them was authorized to mark its work with the "union label," for which reason, as they allege, the city council wrongfully, and without authority of law, excluded the bids of such nonunion competitors from consideration in awarding the contracts, and awarded it to the Register & Leader Company, not because it was the lowest responsible bidder in fact, but because it was the lowest bidder among the union offices competing for the job. The petition proceeds to aver that each of the nonunion bidders is the proprietor of a well-established job printing business, with an office well supplied with all facilities to do good work of the kind required, and was and is at all times ready, able, and willing to do such work. Each is also alleged to be pecuniarily responsible, able to provide the bond required by the ordinances, and is in all respects as able and as well qualified to do and perform said work as are any of the competing union offices, save only in the right to attest their printed matter by the use of the union label. Plaintiffs also allege that ordinance No. 452, as amended by No. 966, is void and of no effect, as an attempt to authorize an unlawful discrimination between

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bidders of equal qualification and merit, thereby unreasonably restricting competition among bidders, and imposing undue burdens upon the taxpayers of the city. They allege that the council did follow and observe the provisions of said void ordinance in letting the contract in question, whereby the contract, as made, calls for an expenditure of the public funds largely in excess of the sum which would have been required had it been let to the lowest responsible bidder, as in law and in right it should have been. On this showing it is asked that a decree be entered adjudging said ordinance No. 452 to be void, and that the city, its council and officers, be enjoined from carrying out the contract made with the Register & Leader Company, and from issuing or paying any warrants upon the city treasury for work done under said contract, and for general relief. Answering the petition, the defendants say that the contract was let to the Register & Leader Company because it was the lowest responsible bidder for the work; that the use of the union label is a guaranty of the character of the work to which it is attached, and of the skill and labor employed therein, and that said label is copyrighted, but the use thereof is free to all persons who comply with certain reasonable conditions. They also deny that plaintiffs have any such interest in the matter of said contract for printing the council proceedings as enables them to maintain this action, and allege that the difference in expenditure between the cost of the printing at the contract price and the cost computed on the basis of the lowest bid therefor is only about $120,—a merely nominal sum as compared with the taxable value of property within the city,—and that it is therefore impossible that plaintiffs should be irreparably injured because of the alleged wrong or irregularity in the manner of letting the contract. They also deny each and every allegation of the petition imputing to them any wrongful or unlawful act or purpose in the consideration of the bids or in awarding the work to the successful competitor. No preliminary injunction was issuer, and some six months after the commencement of this action, plaintiffs filed an amendment to their petition, alleging that, during all the time since the filing of the petition, the city and the Register & Leader Company have been carrying out the contract made as aforesaid, in that, in compensation of the work so done, the city has paid the said company considerable sums of money, for a return of which judgment is demanded. The Register & Leader Company answer these complaints by alleging that it was duly adjudged by the council to be the lowest bidder, and that no consideration other than the amount and character of the work and the price to be paid entered into or was considered in awarding to it the contract; that relying on said contract, and carrying out its terms in good faith, it has performed the work demanded by the city, and received its pay therefor, and that the price paid is reasonable and just. It also avers that the use of the union label on the printing done was not considered or in any manner referred to in the bid of said company, or in the contract entered into between it and the city for the said work. All the defendants aver that ordinance No. 452 was repealed by implication in enacting ordinance No. 1383.

1. The controversy presented by this appeal is complicated by very few disputes of fact, while the questions of law involved, though not entirely easy of solution, are not difficult to state. The fact with which we are at this time principally concerned has reference to the manner and method pursued by the city council in passing upon the proposals tendered by the several bidders already named, and the considerations upon which the award was made. The evidence is undisputed that, with the possible exception of one, each of the bidders whose offer was lower than that of the Register & Leader Company was amply able, ready, and willing to accept the contract on the basis of their several bids, and to perform the same promptly in an efficient and workmanlike manner. Nor is there any claim that the sufficiency of their qualifications in this respect was unknown to any member of the council. They were well-known proprietors of job printing offices in the city, or, if not well known, there is not the slightest evidence of any attempt on the part of any member of the council to inquire into the facts, and ascertain whether they or any of them could perform the work if awarded the contract. The council at the time in question consisted of a mayor and four members, as follows: Mayor A. J. Mathis and Councilmen McVicar, Ash, Hamery, and Schramm. Of these, the first four were called as witnesses by the plaintiff, and, upon being interrogated as to the awarding of the contract and the reasons controlling the same, Mayor Mathis, after saying that he speaks only for himself, proceeds as follows: "I investigated far enough to know that, at the time this resolution was passed, that the company the contract was awarded to used the union label in accordance with the ordinance passed some years ago. That was as far as I went when I determined that the Register & Leader Company was the lowest bidder who used the union label. In addition to that I was fully satisfied that they

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would do good work. . . . I carried my investigation far enough to determine that the Register & Leader Company used the union label, and that was as far as I went. They had done good work for me. I knew that they were prompt in those things. . . . I made no investigation whether the Kenyon Printing Company, the George A. Miller Printing Company, the Homestead, or the Globe Publishing Company could do the work in a prompt and efficient manner." Mr. Ash having testified that he had inquired as to the kind of work done by the Register & Leader Company, and found that it had a good reputation for promptness and quality of work, further says that the provisions of ordinance No. 452 were talked of between him and the city clerk, and, while he had no personal knowledge on the subject, he understood that the Kenyon Printing Company, the George A. Miller Printing Company, the Homestead, and the Globe Publishing Company were nonunion offices. It was not his understanding when the vote was taken that the council intended to let the work to the lowest union bidder without regard to the quality of the work, but "to the lowest responsible union bidder whose work came up to the standard." Mr. Hamery testifies that he made some investigation prior to the award, and found that there was some objection to the Globe Publishing Company on account of the quality of some work it had done for the city on a former occasion. He further says: "I ascertained that the Register & Leader Company was the lowest union bidder. In my observation I have always found that union labor is the best labor that can be obtained for the money, and, consequently, I gave my vote, thinking they would use the best labor. I did not make any inquiry to ascertain whether any of the companies bidding lower than the Register & Leader were paying higher wages than the union scale. My idea was to get the best responsible bidder, and get the best work for the money, and get it out in a short time, and my conclusion as to this being the best bid was because union labor supplies the best work." Mr. McVicar, being called to the stand and asked whether the provisions of ordinance 452, requiring the union label on matter printed by the city, was taken into consideration by the council in awarding the contract, answered: "It was a consideration, but not the only consideration." On cross-examination he added that the council took into consideration the responsibility of the bidder, its equipment for the work, and its promptness in performing its contracts. It was important that the proceedings be published accurately and promptly and at a reasonable price. These things were of equal or greater importance than union labor. On redirect examination as to his investigation and knowledge of the ability of the lower bidders, he said: "I had experience with the Kenyon Company when it was a union shop, —when it was a reliable firm. Have had no experience with it when it was an open shop. Its bid of 93 cents per page was a reasonable price for the work. Had no experience with the Homestead Company and knew nothing to the contrary of their being a reliable shop. Did not know but they were perfectly reliable, efficient, and prompt. Had no fact on which to determine that they were not, except they were employing nonunion labor. When the George A. Miller Company was a union shop their work was all right. I have no fact on which to conclude that they were not a reputable shop now or on May 7th, except their employment of nonunion labor. And the same is true of the Kenyon Company. The prior work of the Globe Company had not been acceptable, and it was not properly equipped to handle the work. My experience is that there is a difference in union and nonunion printing, and I would give the union shop the preference because I think I would get better work. In awarding the contract, I took nothing into consideration except those things I regarded necessary for the best interests of the city, and I think the same considerations controlled the other members of the council." The fourth councilman, Mr. Schramm, was not a witness on the trial.

We shall not take time for an extended discussion of this evidence. Considered in the light of all the facts developed on the trial, it is impossible to escape the conclusion that, whether ordinance No. 452 was or was not regarded by the council as of any present force or validity, the nonunion bidders for this work were excluded from the competition, not because they lacked financial responsibility, business facilities, office equipment, experience, or reliability, but because they employed nonunion labor; and the contract was awarded to a higher bidder because it was the lowest among those bidders employing union labor. It may be true that in the absence of union bidders, or possibly in the absence of any competition between union bidders, the council would have felt at liberty to award the contract to a nonunion shop, but, with both present and bidding, there is here exhibited a set purpose to give the preference to a union bidder even at a larger price, so long, at least, as there was reason to believe the latter able to perform the required service satisfactorily. It is said by appellees, and correctly, that neither in the notice to bidders, the resolutions of the city council, nor in

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the contract with the Register & Leader Company, is there any mention of union shops or of the use of the union label; but this is not decisive of the question at issue, if it further appear with reasonable certainty that this test was in fact applied in awarding the contract, and discrimination made between the bidders upon that ground. That such discrimination was made is bluntly admitted by the mayor, the official head of the council. The testimony of the three councilmen on this point is somewhat more diplomatic in expression, but points not less unerringly to the same conclusion. In other words, with eight equally competent and responsible bidders seeking the contract, competition was limited by the council to the four highest upon the list, because they or some of them were privileged to use the union label, while the four others, whose bids were lower than the lowest union bidder, were excluded because of their employment of nonunion labor. We have then to inquire whether such discrimination is within the discretion which the laws of the state and the ordinances of the city gave to the council. No attempt is made in argument to uphold the validity of ordinance No. 452. That it is an unwarranted excess of the legislative power vested in the council is too clear for argument. Government is instituted for the benefit of all the people, and not for the benefit of any one class, to the exclusion of others. City officials are charged with the collection and disbursement of vast sums of money to which all the people must contribute in proportion to their estate, without regard to social position, political affiliation, religious belief, or economic theories. Experience has shown that the interests of the taxpayers are best conserved by offering contracts for public work to the competition of all persons able and willing to perform it. When the opportunity to compete is fairly and openly offered, and contracts are fairly awarded, there is ordinarily no room for official or private graft at public expense; but just in proportion as competition is restricted, and the award is hedged about with express or implied conditions by which a favored person or a favored class is insured a preference over others of equal ability and capacity, public rights are imperiled and public interests are sacrificed. Such discrimination tends to monopoly, and involves a denial of the equality of right and of opportunity which lies at the foundation of republican institutions. Appellees argue that this ordinance was impliedly repealed by the subsequent ordinance which requires printing contracts to be let to the lowest responsible bidder, and that its validity or its invalidity is not a material consideration here. That the members of the city council did not regard it as repealed is very clear from a reading of the record; but whether they believed it of binding force or effect is a subject into which we do not stop to inquire, so long as it is perfectly apparent that they did make the distinction and exclude one half of the bidders from equal opportunity and consideration in the competition. Dealing with a very similar situation, the supreme court of Illinois has well said: "It is immaterial whether there was any attempted ordinance as a basis for such action, or whether it had been approved. The statute and the ordinance required the contract to be let to the lowest bidder, and this implied equal opportunity and freedom in all who might choose to bid. The Sentinel Democrat Printing Company could not claim to be the lowest bidder when another and lower bid was rejected under such an arrangement to prevent other persons from competing." Holden v. Alton, 179 Ill. 318, 53 N. E. 556.

If, then, as tacitly conceded in argument, the enactment of such an ordinance is beyond the legislative authority of the city council, it follows as a matter of necessity that it cannot indulge in such discrimination in its administrative capacity. The citizen may be rich or poor in purse; union or nonunion upon the labor question; Catholic, Protestant, Jew, or infidel in matters of religion; Republican, Democrat, or Prohibitionist in political affiliation; but, by the stand of constitutional and statutory right, he is neither more nor less than a citizen of the state, entitled to an equal opportunity therein according to the capacity and ability with which nature may have endowed him. In denying him that opportunity a double wrong is perpetrated: first, upon the individual, who is entitled to be considered upon his personal merits, uninfluenced by these extrinsic considerations; and, secondly, upon the state at large, whose expenses are multiplied, and whose integrity jeopardized, by a system of favoritism, the demoralizing effect of which is patent to every thoughtful student of public affairs. It is not material that the sum of money involved in this controversy is insignificant as compared with the city's revenue or its ability to pay. The mischief is not so much in the particular case under review, as in its tendency and in the far-reaching consequences of legitimatizing a system or practice so pregnant with evil possibilities. As strikingly in point in this discussion, we quote again from the Illinois court in passing upon an order of a local board of education, requiring its work to be done by union labor: "It is plain that the rule adopted by the board and included in this contract is a

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discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board as an agency of the state . . . to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it do so, the provision would be absolutely null and void, as in conflict with the Constitution of the state. . . . There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract may have some sort of discretion to do so, and the only question in the case on the subject . . . is whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the state. . . . There can be no greater power of the board to act of its own motion than by virtue of positive law. The results in either case are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain, authorize these public officers, exercising a public trust, to do so. The individual may, if he chooses, give his money away, but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or anyone else the rights of those for whom he acts." Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314. It is true that in the cited case the discrimination condemned by the opinion was expressly stipulated for in the contract, but the principle is no less applicable to a case where the discrimination is actually applied in awarding the contract; for the right and power to make it being wholly wanting in the legislature or in the city council, the result is the same, and the action, "whatever form it may take, is void."

For the purposes of this action it may be freely conceded that the council and its members acted in perfect good faith, influenced by the belief that, in giving the contract to the lowest union bidder, they were in some way serving the best interests of the city; but the question here presented is not one of good faith, but of power and jurisdiction. Undoubtedly there is good authority for the proposition that, in selecting or ascertaining the "lowest responsible bidder," the council may take into consideration the comparative ability and qualification of the several bidders for the proposed work, and that the lowest price bid is not, in every instance, a controlling factor. But this rule, if adopted, presupposes that all bidders are given an equal opportunity, and that there is applied to them no arbitrary classification by which those of one class are to receive no consideration so long as a satisfactory bidder can be found in the other class. An award so made is not the result of the exercise of legal discretion. It is manifest abuse of discretion. Holden v. Alton, supra; Atlanta v. Stein, 111 Ga. 789, 51 L.R.A. 335, 36 S. E. 932; Atty. Gen. ex rel. Cook v. Detroit, 26 Mich. 263; Avery v. Job, 25 Or. 512, 36 Pac. 293; Faist v. Hoboken, 72 N. J. L. 361, 60 Atl. 1120; State, McGovern, Prosecutor, v. Board of Public Works, 57 N. J. L. 580, 31 Atl. 613; State ex rel. Robert Mitchell Furniture Co. v. Toole, 26 Mont. 22, 55 L.R.A. 644, 91 Am. St. Rep. 386, 66 Pac. 496; People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4; Lewis v. Board of Education, 139 Mich. 306, 102 N. W. 756; Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678; Goddard v. Lowell, 179 Mass. 496, 61 N. E. 53. That a taxpayer may maintain an action to test the validity of contracts awarded upon bids thus arbitrarily considered and other contracts in excess of authority is also well settled. The amount by which the tax upon his individual property may be increased, if at all, will not be inquired into. The case so presented will be heard on its merits, not alone to protect the rights and interests of the individual plaintiff, but to safeguard the rights of the general public, of which he is, in a sense, the representative in the action. Inge v. Board of Public Works, supra; Northern Trust Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460; Heath v. Albrook, 123 Iowa, 559, 98 N. W. 619; Dunham v. Fox, 100 Iowa, 131, 69 N. W. 436; Holden v. Alton, 179 Ill. 318, 53 N. E. 556. Finding, as we do, that the award of the contract was made arbitrarily, and not in the exercise of the legal discretion of the council upon consideration of the comparative merits of all the bids presented, we must hold the action void, and that the suit to adjudicate its invalidity is maintainable by the plaintiffs as taxpayers of the city.

2. We have left us to consider the effect of these conclusions upon the rights of the party to whom the contract was awarded. There is nothing in the record to indicate that this bidder or any other of the competitors employing union labor acted in bad faith, or brought to bear any improper influence upon the council to secure a preference in the award, but, as already remarked, the good faith of any or all of the parties

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cannot avail to give life to the contract when it is once determined that the council had no authority to make it in the manner in which it was attempted to be made. If the contract be void, as we have found it to be, it must be held void as to all parties thereto. In anticipation of this holding, the appellants have asked that we adjudicate the Register & Leader Company not entitled to receive payment for the work it has done under this contract, and that the amount paid for such service be recovered for the benefit of the city treasury. If this were an action at law, and the holder of the contract were in court, asking a recovery thereon against the city, the demand would be denied as a matter of course, and, under some circumstances, a return of the money already paid could well be adjudged. But plaintiffs' action is in equity. It was begun at or about the opening of the fiscal year. A temporary injunction against the execution of the contract was not sued out, nor was any measure taken to prevent the parties from proceeding thereunder, except as the pendency of the suit might act as a deterrent, until after the cause had been decided in the trial court and its decision was brought here for review upon appeal. Meanwhile, the wheels of municipal government could not stand still, and public printing could not be suspended pending the outcome of slow-moving litigation. A contract was outstanding which, if finally upheld, would render the city liable to the contractor for withholding the work, and the contractor liable to the city for refusing to do the work when tendered. The judgment of the district court affirmed the validity of the contract, and from that date the parties had apparent judicial sanction for continuing to observe its apparent obligation. Under such circumstances the city could not well readvertise and let the work to another contractor, thus adding confusion to a situation already sufficiently complicated. No bond had been put up by the plaintiffs to indemnify the city in case the bill was dismissed. Even had a temporary injunction issued against further performance of the contract, it was probably within the general powers of the city to procure from some source the printing required by current and immediate demands, and in such case there was nothing to prevent its applying to the same company, so long as the work was properly done at reasonable rates. In any event, the work has been done; it has been accepted by the city; it is of a character which cannot be returned to the contractors and thus place them *in statu quo;* it is work which, if not done by this contractor, would have to be done by some other person; the prices charged are not shown to be unreasonable; the invalidity of the contract is not chargeable to any wrong or omission on the part of the contractor, but solely to the act of the city, through its council. To say that the party doing such work must receive no remuneration therefor, and must return the compensation already received, is to impose all the penalty upon an innocent party for the profit of the only party chargeable with the wrong. We are not disposed to so order. Courts of equity often refuse to enforce a naked legal right where the results would be manifestly unjust or unconscionable. An illustrative case is found in Pickett v. School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105, involving a contract improperly made by the governing board with one of its members for the building of a schoolhouse. Before the building was entirely completed, litigation arose, and the district sought to have the contract declared void. The court there approves the doctrine that, in cases where the thing contracted for is itself against public policy, no right of recovery exists either upon the contract or upon *quantum meruit;* but where the subject-matter of the contract is itself lawful and beneficial, and the objection goes only to the manner or method in which it has been awarded or made, it is inequitable to allow the party entitled to avoid it to receive and retain the benefit without any compensation at all. Under somewhat similar circumstances the Minnesota court has said that if property which a board of public officers is authorized to purchase is accepted and retained by the municipality, it is just and reasonable that it be held for the reasonable value thereof, although the contract of purchase under which they were delivered was unauthorized or unratified. "The corporation could not be permitted to repudiate the contract and retain the fruits of it." Currie v. School Dist. No. 26, 35 Minn. 163, 27 N. W. 922. In point, also, is Gardner v. Butler, 30 N. J. Eq. 702.

We apply the principle to the case before us the more readily from the fact that the appeal was not submitted to this court for decision before the expiration of the term for which the disputed contract was made. We might, perhaps, be justified in refusing to pass upon the merits of the controversy; because, by the lapsing of the contract, the dispute over its validity is, to a great extent, reduced to a discussion of academic propositions. In view, however, of the importance of the case as a precedent, we have felt it our duty to ignore that feature. Indeed, we assume that appellants' motive in bringing the action was not so much to save the comparatively trifling sum involved in setting aside this contract, as it was to have the invalidity of the proceedings by which

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the award was made adjudicated and determined as a protection to themselves and to the public against similar irregularities in the future. That end is attained by our decision as already announced. Without, therefore, attempting to define what rights at law, if any, the city may have with respect to so much of the contract compensation, if any, as remains unpaid, the record as it stands does not call for equitable interference. For the reasons stated, the decision of the district court dismissing plaintiffs' demand for judgment against the contractor is affirmed, and in all other respects reversed. Decree will be entered in this court at the option of the appellants, exercised within thirty days; otherwise, the cause will be remanded to the trial court for decree not inconsistent with the views here expressed.

Reversed in part. Affirmed in part.

KANSAS SUPREME COURT.

PEOPLE'S STATE BANK OF MICHIGAN VALLEY et al., Plffs. in Err.,
v.
G. W. BROWN.

(— Kan. —, 103 Pac. 102.)

Sale — cash — default — right to reclaim — jury.

1. When a bargain is completed for the sale of specific personal property for cash, and delivery is made, if the buyer fails to pay the price promptly the seller has a right, as between the parties or against an attaching creditor, to reclaim the property, which is not lost by delay to assert it, unless an intention on his part is shown that the title should pass absolutely; and whether that is the case is ordinarily a question of fact, to be determined in view of all the circumstances.

Same — laches — effect.

2. In an action for conversion, the evidence tended to show these facts: A farmer residing some miles from a town delivered wheat to a buyer there, with the understanding that it was to be paid for at once. He received therefor a check on a local bank, which he took home with him, it being after banking hours. He did not present the check until his next trip to town, between two and three weeks later, when payment was refused. The buyer had no funds on deposit when the check was drawn, but had an arrangement with the bank, under which it paid his checks and took bills of lading on the shipment of grain as security. A week after the issuance of the check, the buyer became insolvent, and the bank attached the wheat. After the dishonor of the check, the seller sued the bank for the value of the wheat. Held, that his failure to make an earlier presentment of the check did not conclusively show a waiver of his right to reclaim the wheat.

(July 3, 1909.)

ERROR to the District Court for Osage County to review a judgment in plaintiff's favor in an action brought to recover damages for the conversion of certain grain sold on a condition which had not been complied with. Affirmed.

The facts are stated in the opinion.

Messrs. **A. B. Crum** and **O. B. Hartley**, for plaintiffs in error:

The title to the wheat levied on by the defendant bank passed from the seller to the buyer.

Bailey v. Long, 24 Kan. 95; Benjamin, Sales, 309; Tiedeman, Sales, § 85; McManus v. Walters, 62 Kan. 133, 61 Pac. 686, 21 Am. & Eng. Enc. Law, p. 482; Com. v. Adair, 121 Ky. 689, 86 S. W. 1130.

An unqualified delivery of goods sold for cash is a release or waiver of the right of the seller to the goods, whether this right is in the nature of a condition affecting the title, or only a lien for the price.

Haskins v. Warren, 115 Mass. 514; Freeman v. Nichols, 116 Mass. 309; Goodwin v. Boston & L. R. Co. 111 Mass. 487; McManus v. Walters, supra. Upton v. Sturbridge Cotton Mills, 111 Mass. 446.

Messrs. **J. H. Stavely** and **F. A. Waddle**, for defendants in error:

The worthless check issued by the grain company was not a payment, and the delivery of the wheat was only conditional.

National Bank v. Chicago, B. & N. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; Johnson-Brinkman

Headnotes by MASON, J.

Note. — The early cases passing upon the question of delay in attempting to regain property obtained under agreement to pay therefor on delivery, as waiver of that condition, will be found gathered in the note to Frech v. Lewis, 11 L.R.A.(N.S.) 948, referred to by the court in PEOPLE'S STATE BANK v. BROWN.

A search has disclosed but one case in addition to those dealt with in the opinion, which has passed upon the question since the writing of that note.

In Victor Safe & Lock Co. v. Texas State Trust Co. (Tex.) 104 S. W. 1040, affirming (Tex. Civ. App.) 99 S. W. 1049, a safe was sold, to be paid for on delivery; payment was not made as agreed; and several drafts were drawn, which were returned unpaid; letters relative to payment passed between the parties for a year, when the purchaser became insolvent. It was held, in an action to recover possession, that the vendor by his acts had waived his right to reclaim the property.

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Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; Mordis v. Kennedy, 23 Kan. 408, 33 Am. Rep. 169; Daugherty v. Fowler, 44 Kan. 628, 10 L.R.A. 314, 25 Pac. 40; Tiedeman Sales, §§ 36, 206, 207; Evansville & T. H. R. Co. v. Erwin, 84 Ind. 457; Dudley v. Sawyer, 41 N. H. 326; Ferguson v. Clifford, 37 N. H. 86; Dows v. Kidder, 84 N. Y. 121; Benjamin, Sales, 5th Eng. ed. p. 759; Turner v. Moore, 58 Vt. 455, 3 Atl. 467; Drake v. Scott, 136 Ala. 261, 96 Am. St. Rep. 25, 33 So. 873.

Mason, J., delivered the opinion of the court:

G. W. Brown sold and delivered some wheat to the Quenemo Mill & Elevator Company, and received therefor the company's check on the People's State Bank of Michigan Valley, situated in the same town. He carried the check home with him,—a distance of some 8 miles,—having received it after banking hours. Between two and three weeks later he took the check to Ottawa, where he did his banking; this being the first time since receiving it that he had been to either town. The check was then, in due course of business, presented to the drawee for payment, which was refused. When it was drawn, the elevator company had no funds on deposit, but had an arrangement with the bank by which its checks given for wheat were to be paid, the grain to be shipped, and the bill of lading turned over to the bank. The bank paid checks under this arrangement as they were presented, until about August 28th, when the company became insolvent, and the practice was discontinued. The bank then sued the company, and attached the wheat referred to, with other property. About September 19th Brown demanded of the bank either the payment of the check or the return of the wheat, and, receiving neither, on October 17th brought action against it for conversion. The plaintiff recovered judgment, and the defendant prosecutes error upon the sole ground that the evidence, the substance of which has been stated, showed conclusively that the title to the wheat had passed to the elevator company.

It was, of course, competent for Brown and the elevator company to make any agreement they saw fit as to when the absolute title to the wheat should pass; but, in the absence of anything to indicate the contrary, the transaction between them must be taken to have been the ordinary one of the sale of specific personal property for cash, delivery being made in the expectation of immediate payment. 24 Am. & Eng. Enc. Law, p. 1095, note 10. In such a case the failure of the buyer to pay the purchase price authorizes the seller to reclaim the property. "Where the sale is for cash, payment, it is said, must precede the transfer of title." 24 Am. & Eng. Enc. Law, p. 1052. See notes to the paragraph from which the sentence quoted is taken, including those found in the supplements. In these notes, cases are cited having a contrary tendency; but, so far as they are irreconcilable with the proposition stated, they are out of harmony with what is now the established doctrine on the subject. It is true that, as a matter of theory, a consistent and logical argument can be made to support the view, which is thus expressed in a recent textbook (Williston, Sales, § 346): "If after bargaining for a cash sale the seller subsequently voluntarily delivers to the buyer the goods with the intent that the buyer may immediately use them as his own [*i. e.*, not for inspection or a similar purpose], and without insisting upon contemporaneous payment, this action is absolutely inconsistent with the original bargain. Such a delivery is not only evidence of the waiver of the condition of cash payment; it should be conclusive evidence."

But as a practical necessity, to avoid the inconvenience of requiring the seller of an article to keep one hand upon it until with the other he grasps the currency tendered in payment, there must be some relaxation of this rule. Delivery and payment, as a practical matter, cannot be absolutely simultaneous. Some slight interval between the two acts is inevitable, and the criterion upon which the courts have agreed with substantial unanimity is that such interval does not conclusively prove a total abandonment of title and the right of possession by the seller, unless under all the circumstances of the case it in fact shows that result to have been intended. Some ingenuity has been exercised, with doubtful profit, in defining the character of the right remaining in the seller after a delivery and before payment, where there is no purpose to give credit. Whether it is more properly described as a lien, a retention of title, or an option to rescind the contract, is not very important so far as affects the solution of the problem presented here. It is a right of the seller to repossess himself of the goods if the buyer fails in the performance of the agreement on his part which was intended to be contemporaneous with the delivery. It is a peculiar right, growing out of a peculiar situation, and it is not necessary to give it a name the use of which might seem to decide controversies growing out of other relations. This right has long been recognized in Kansas (Daugherty v. Fowler, 44 Kan. 628, 10 L.R.A. 314, 25 Pac.

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40), and is now generally acknowledged elsewhere. "It may be stated, as a general rule fully established by the cases, that, if goods are sold on condition to be performed immediately, and the vendor makes an actual delivery upon the faith that the condition will be immediately performed, and demands such performance with reasonable speed, and it is refused, no property in the goods passes to the purchaser, but that he simply holds them in trust for the vendor until such payment is made or waived." 120 Am. St. Rep. 869, note.

The fact that Brown accepted a check did not imply an extension of credit, or preclude the exercise of the right of reclamation in the case of its nonpayment upon timely presentation. Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; National Bank v. Chicago, B. & N. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; Hall v. Missouri P. R. Co. 50 Mo. App. 179; Mathews v. Cowan, 59 Ill. 341; Canadian Bank v. McCrea, 106 Ill. 281; Peoria & P. U. R. Co. v. Buckley, 114 Ill. 337, 2 N. E. 179; Charleston & W. C. R. Co. v. Pope, 122 Ga. 577, 50 S. E. 374. The fact that the check might have been paid if it had reached the bank within a week from its date did not convert its acceptance by Brown into a payment. That would have been the result if payment had been prevented by the failure of the bank in the meantime, but such effect follows only where loss is occasioned to the drawer. 22 Am. & Eng. Enc. Law, p. 572; Mordis v. Kennedy, 23 Kan. 408, 33 Am. Rep. 169; Brown v. Schintz, 202 Ill. 509, 67 N. E. 172; Manitoba Mortg. & Invest. Co. v. Weiss, 18 S. D. 459, 112 Am. St. Rep. 799, 101 N. W. 37, 5 A. & E. Ann. Cas. 858. The elevator company had no funds in the bank, and therefore was not injured by the delay in the presentation of the check. The bank as an attaching creditor was not a purchaser in good faith, and was entitled to none of the peculiar rights growing out of that relation. 13 L.R.A. (N.S.) 705, note. On the other hand, it had the same standing as any other creditor. It had committed no wrong; and, if the title to the wheat had actually passed absolutely to the elevator company, there was no reason why it might not seize it to satisfy its claim against that company. So far there is no room for a substantial difference of opinion. But the real question upon which the affirmance or reversal of the case must turn is this: Did the delay of Brown to present the check for between two and three weeks, as a matter of law, amount to a waiver, or afford conclusive proof of a waiver, of his right to reclaim the wheat, thereby causing the elevator company's title to become absolute? This question must be determined upon principles entirely different from those involved under similar circumstances, where the rights of innocent purchasers have intervened. There the question presented is one of equitable estoppel, and delay is important as tending to mislead others to their prejudice. Here the question is one of evidence, and delay is important as tending to show an intention that title should pass. Equitable considerations are not involved. True, it seems but fair and just that the plaintiff should have either his wheat or his money, but the same would be true if he had sold it on credit, and the buyer had failed to pay at the promised time. In neither case could he maintain replevin if the title had actually passed from him.

It is said in the introduction to a note to McIver v. Williamson-Halsell-Frazier Co. bearing upon the subject under consideration, in 13 L.R.A.(N.S.) 697: "The authorities are agreed on the proposition, that, as between the immediate parties to a cash sale, the title does not pass until payment, even though there is a delivery of the goods by the seller to the buyer, unless the circumstances of such delivery are such as to show an intentional waiver by the seller of payment as a condition precedent to the passing of title. This question is generally said to be one of fact, to be determined by a jury." The cases are also collected and reviewed in notes in 120 Am. St. Rep. 864, and in 11 L.R.A.(N.S.) 948, in the latter of which it is said: "The decisions upon this point depend largely upon the facts and circumstances of each case. The question is: Did the vendor act within a reasonable time, to recover possession of the property; that is, within such a time as, taken in connection with other facts and circumstances, shows an intention to retain title until the condition of payment has been complied with?"

The case annotated (Frech v. Lewis, 218 Pa. 141, 11 L.R.A.(N.S.) 948, 120 Am. St. Rep. 864, 67 Atl. 45, 11 A. & E. Ann. Cas. 545) contains this strong statement of the requirement that the seller who wishes to assert the right of reclamation must act promptly: "The settled doctrine of our cases is to the effect that, where the contract of sale provides for payment of the purchase price on delivery of the articles sold, and the seller delivers the goods, but the buyer fails to pay, the right of property does not pass to the buyer with the possession, but remains with the seller, who may at this option reclaim the goods. In some jurisdictions the right of property is held to

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pass with the delivery, unless at the time the right to retake is expressly declared by the seller. We have not gone so far. Our cases proceed on the theory that until payment has been made, or waived, the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared, or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer of the act of the seller having been invested with the indicia of ownership, the policy of our law requires that this situation—the possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly; otherwise he will be held to have waived his right, and can only thereafter look to the buyer for the price. The question the present case suggests is, When does this inference of waiver arise? Our authorities admit of but one answer: Except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon the buyer's default. This does not mean that the seller must *eo instante* begin legal proceedings to recover the goods; but it does mean that the seller, when he discovers that his delivery is not followed by payment, as he had the right to expect, is at once put to his election whether he will waive the condition as to payment, and allow the delivery to become absolute, or retake property, and that he is to allow no unnecessary delay in making his choice. The object of the law is not to multiply his remedies because of his disappointment. He may not continue to hold his right to the goods, and at the same time hold the buyer as his creditor; one or the other he must relinquish, and do it promptly, or the law will forfeit his right to elect. Continued acquiescence in the buyer's possession of the goods will be taken as a choice on his part to regard the delivery as absolute, notwithstanding the buyer's default. The policy of the law, in requiring promptitude in the assertion of continued ownership of the goods, could easily be vindicated were it necessary. It answers every purpose here to show that the law requires it. . . . These cases, and others that might be cited, following the lead of Leedom v. Philips, 1 Yeates, 527, all hold that the duty is upon the seller, if he would retain his right to the property, to proceed promptly; and we know of no case in which a contrary doctrine is asserted. In some cases the expression, 'within a reasonable time,' is used where the right to reclaim is referred to; but this expression suggests no departure from the rule as declared in Leedom v. Philips, supra. By reasonable time is to be understood such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay, or in a delay occasioned by the vain hope and fruitless effort to obtain the money from the defaulting buyer. When the delay is to be accounted for by the latter consideration, it is accepted as an acquiescence in the delivery and the acceptance of the buyer as a debtor." This language is applicable to the facts here presented only so far as, in a general way, it argues the necessity of prompt action, for the giving of the check introduces a new element, and the situation does not arise of the vendee's failure to keep his agreement to pay being necessarily brought at once to the attention of the vendor. It illustrates, however, that the intention of the seller, although a question of fact, is determined by standards definitely fixed by law, one of them being that his conduct must be consistent throughout. In that case the vendor delayed for two months and a half to assert title to the property sold, in the meantime making repeated efforts to collect the purchase price.

In Smith v. Dennie, 6 Pick. 262, 17 Am. Dec. 368, merchandise was sold with the understanding that the vendee was to give an indorsed note. Delivery was made, and the vendor neglected for eight days to demand the note. Then a creditor of the vendee attached the property, and the vendor replevined it. The court held a verdict for the plaintiff in the replevin case to be against the evidence, saying: "Eight days passed between the delivery of the goods and any call for the indorsed note, nor was any intimation made of the security to be given, when the goods were delivered by the clerk, who does not appear to have been informed by the vendor of the terms of the sale. The latter, however, must be presumed to have known the next day that they had been delivered, and yet he did not send for the note, or give any manner of notice that it was required, until the attachment took place, eight days after the sale. We are apprehensive that to establish the right to reclaim under such circumstances would widen the door for fraudulent contrivances, and that afterthoughts respecting conditions will spring up to intercept attaching creditors when the sale was really unconditional, or at least when the vendor has thought his condition of so little importance as to be willing to abandon it and trust to the credit of the purchaser. We are of opinion that the verdict is against the evidence, for there was nothing in the case from which an in-

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tention to hold on upon the condition can be inferred, no declaration at the time, which, though not necessary, is important, and no call for security until it was forgotten or abandoned, and, perhaps, never would have been recurred to if the goods had not been attached." But in the opinion it was also said: "The vendor certainly had a right, the day after, to insist upon his indorsed note, or to rescind the bargain and reclaim the goods. If so, why not two days or three, and if so, the time which elapses is a mere fact, from which the jury may infer the intention. Circumstances of business and engagement may account for the delay; and, if they do, the right to security or to reclaim the goods, unless sold as before mentioned, is not impaired."

To say that the seller is required to reclaim his goods immediately, or as soon as possible, or even without any unnecessary delay, would be to overstep the rule derivable from the authorities; the requirement is that he must act with reasonable promptness. In Daugherty v. Fowler, 44 Kan. 628, 10 L.R.A. 314, 25 Pac. 40, this was the test proposed. In Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510, a delay of over a month was held not to be fatal. With a single exception the checks, the nonpayment of which gave rise to the litigation in the cases already referred to, were presented with absolute promptness, so that the question here involved did not arise. The exceptional case is Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527. There a barge of coal was sold and delivered, the transaction taking place at Cincinnati, where the vendors, who were residents of Pittsburgh, were represented by agents. A check on a Cincinnati bank was given to the agents, who sent it to their principals at Pittsburgh, where it was banked, reaching Cincinnati four days later, and being dishonored. In the meantime the vendees, whose deposit was less than the amount of the check when it was drawn, had failed, and the coal had been levied upon by their creditors. The vendors brought replevin for it, and were sustained in their action, the court saying: "No such delay is shown as would manifest an election not to rescind; nor does it appear that Haubold & Son [the vendors] were in any way injured thereby. It ought not, therefore, to affect the right of plaintiffs to treat the supposed payment by check as a nullity, and wholly to avoid the contract of sale." It will be observed that there the check was not presented within what would have been regarded as a reasonable time had the question been one of holding drawers who had suffered a loss by the delay. Having been received in Cincinnati, where the bank on which it was drawn was situated, due diligence for that purpose required its presentation not later than the next business day. 7 Cyc. Law & Proc. pp. 978, 979; 5 Am. & Eng. Enc. Law, p. 1042. But the delay was not conclusive upon the question of the passing of title to the coal, because it was accounted for by the situation of the parties. Here the delay was considerably greater, but was explained by circumstances which naturally account for it, without the necessity of supposing that the plaintiff intended to waive the right to reclaim his wheat. Long as the interval was between the making of the check and its presentation, Brown deposited it for collection at the first opportunity he had to attend to the matter in person, without making a trip to town for that very purpose. To say that to preserve his right of reclamation it was necessary for him to present the check not later than the day after he received it would be to establish too rigorous a rule. And, after passing that limit, there seems to be no place where a hard and fast line can be drawn, dividing reasonable and permissible delay from that which is unreasonable and prohibited. If the failure to make an earlier presentation did not bar him, his subsequent conduct did not have that effect, for within a short time after learning of the failure of the drawer he claimed ownership of the wheat, and, although he did not bring his action at once, he never thereafter ceased to assert his right to do so. We think, under the authorities it was a question of fact whether under all the circumstances his intention was that the absolute title to the wheat should pass to the elevator company, and the decision of the trial court cannot be disturbed on review.

The judgment is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

GEORGE EMIG'S Administrator, Appt.,
v.
MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(127 Ky. 588, 106 S. W. 230.)

Insurance — default — extension — discrimination — validity.

An insurance company will not, in computing the amount of cash surrender value or the sum applicable to the purchase of ex-

Case Note. — Computation of cash surrender value, extended or paid-up insurance, where policy holder has borrowed on the policy.

While there does not appear to be any other case in which there was a specific

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tended insurance after default in payment of premiums, be permitted to discriminate against policy holders who have borrowed on their policies, by exacting more than the loan with legal interest, and therefore a method of settlement by which the amount to be deducted from the reserve applicable to the purchase of extended insurance is ascertained by finding the sum which bears the same relation to such reserve as the amount borrowed bears to the cash surrender value, and thereby arbitrarily shortening the time of extended insurance, is invalid.

(December 18, 1907.)

APPEAL by plaintiff from a judgment of the Circuit Court for Campbell County in defendant's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. **L. J. Crawford, Hazelrigg, Chenault, & Hazelrigg,** and **R. A. Nagel** for appellant.

Mr. **W. O. Harris,** for appellee:

It is lawful to contract for a cash surrender value which is less than the full reserve.

Mutual Ben. L. Ins. Co. v. First Nat. Bank, 115 Ky. 772, 74 S. W. 1066; Penn's Mut. L. Ins. Co. v. Barnett, 124 Ky. 274, 96 S. W. 1120, 99 S. W. 228.

Messrs. **Dodd & Dodd** also for appellee.

Carroll, J., delivered the opinion of the court:

On March 20, 1893, the appellee company issued to George Emig a policy upon his life for the sum of $5,000, in consideration of $195 paid by him, and the agreement to pay annually a premium of $195 on the 20th day of March in every year during the continuance of the policy. The policy was an ordinary life policy, and was made payable to the insured. It contained several stipulations as to nonforfeiture, extended insurance, loan and cash surrender value; but, as in 1897 a new contract was made, and this substituted contract was in force from that time until the death of Emig, we will treat it as the contract under which the rights of the parties must be adjudicated. The contract of 1897 is as follows:

". . . When, after two full annual premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American experience mortality and interest at 4 per cent yearly (provided there be no loan on the policy) shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same

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decision upon the question whether an insurer had the right to settle with a borrowing policy holder on an entirely different basis than with other policy holders,—a basis that did not secure the same benefits to the borrower as to the nonborrower,—the courts in the following cases hold that, in computing the surrender value of a policy or the amount of extended or paid-up insurance to which the assured was entitled, the amount of his loan with interest should be first deducted from the reserve of his policy: Bryant v. Mutual Ben. L. Ins. Co. 109 Fed. 748; Rife v. Union Cent. L. Ins. Co. 129 Cal. 455, 62 Pac. 48; Mutual Ben. L. Ins. Co. v. Davis, 115 Ky. 404, 73 S. W. 1020; Mutual L. Ins. Co. v. Twyman, 122 Ky. 523, 121 Am. St. Rep. 471, 92 S. W. 335, 97 S. W. 391; Penn's Mut. L. Ins. Co. v. Barnett, 124 Ky. 274, 96 S. W. 1120, 99 S. W. 228.

And the same rule was applied in Mutual Ben L. Ins. Co. v. First Nat. Bank, 24 Ky. L. Rep. 580, 69 S. W. 1, which seems to be an earlier opinion of the case reported in 115 Ky. 757, 74 S. W. 1066 (specifically overruled in EMIG v. MUTUAL BEN. L. INS. Co. so far as it conflicts with the conclusion there reached), since the parties and subject-matter are identical, though there is nothing in the later case to indicate that the former opinion was withdrawn.

Such, also, was the conclusion reached in Northwestern Mut. L. Ins. Co. v. Ross, 63 Ga. 199, and in Hull v. Northwestern Mut. L. Ins. Co. 39 Wis. 397, in which the court treated notes given by the assured for premiums as loans to him by the insurer.

On the other hand, in Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935, and in Burridge v. New York L. Ins. Co. 211 Mo. 158, 109 S. W. 560, under a statute providing that, upon default in the payment of a premium after a certain number had been paid the balance of three fourths of the net value of the policy after deducting therefrom the indebtedness on account of past premiums should be applied to the purchase of temporary or extended insurance, it was held that such provision did not authorize the insurer to deduct loans to the insured from the net value of the policy, before its extended period was calculated.

In Bozeman v. Prudential Ins. Co. (Ky.) 113 S. W. 836, the policy in suit expressly provided that any indebtedness by the insured to the insurer should first be deducted from any option (as to surrender or extended insurance) proffered by the policy and chosen by him.

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conditions, except as to payment of premiums, as those of this policy. Third, if preferred, the company will, on the surrender of the policy fully receipted within the said three months, pay as a cash surrender value its entire net reserve by the American experience mortality and interest at 4½ per cent yearly, less a surrender charge equal to 1 per cent of the sum issued by the policy.

"If there be any loan on the policy, such indebtedness shall be paid off out of the cash surrender value, and the remainder paid in cash by the company; or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value.

"If death shall occur within one year after the nonpayment of premium and during the term of extended insurance, there shall be deducted from the amount payable any premium that would have become due on this policy if it had continued in full force, also the amount of any indebtedness on this policy at the time of such nonpayment of premium.

"The company will, at any time while the policy is in full force, loan up to the limit secured by its cash surrender value, upon satisfactory assignment of the policy to the company as collateral security.

"The figures given in the following table are based upon the assumption that all premiums (less current dividends) have been fully paid in cash. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply:

At End of Year	Cash Surrender Value Loan Value	In Case of Lapse of Policy		
		Extended Insurance		Paid-up Policy
		Years	Days	
5th	$400 00	5	218	$1,880
6th	497 55	6	134	1,050
7th	596 95	7	8	1,210
8th	698 30	7	206	1,370
9th	801 50	8	2	1,525
10th	906 45	8	130	1,675

Having paid the first premium when the policy was issued, Emig began to borrow money from the company to meet his subsequent premiums, until on March 20, 1902, he owed the company $854.35. He defaulted in the payment of the premium which fell due March 20, 1903, and also in the one that became due March 20, 1904, and died on June 1, 1904. By the default in the payment of the premium on March 20, 1903, his policy became forfeited, unless it was kept alive until his death by the nonforfeiture system, set out in the contract heretofore mentioned.

It will be observed that a clause in this contract provides in part that, "if there be any loan on the policy, such indebtedness shall be paid out of the cash surrender value, and the remainder paid in cash by the company." It being conceded that on March 20, 1903, Emig owed the company $854.35, with interest from March 20, 1902, and that he defaulted in the premium due March 20, 1903, it is the contention that on that date he was only entitled to the cash surrender value of the policy, less the loan. The cash surrender value on March 20, 1903, according to the calculation made by the company, and which is shown by the table, was $906.45, and the loan and interest to that date being $905.61, it only left due Emig on that day 84 cents. It is further insisted for the company that, if the other paragraph of this clause is put into operation, which provides, "or a value will be allowed by the company in the form of an extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value," the net reserve of the policy by the American experience mortality and interest at 4 per cent was on March 20, 1903, $1,001.95, and that, reducing this in the ratio of the indebtedness to the cash surrender value, left only 90 cents to be applied to the purchase of extended insurance at the company's rates published and in force at the date of the policy, which sum would have purchased insurance for $5,000, for two days and no longer. So that, in either event, looking at the matter from the company's standpoint, Emig is not entitled to recover more than 84 cents.

Emig's administrator insists that the provisions relied on by the company are against public policy and void, and that he is entitled to recover $5,000, less the amount of the note and interest thereon and the premiums due in 1903 and 1904. It does not appear that Emig made any election, or requested or demanded any settlement of any kind from the company, and so the matter stood from 1903 until this suit was brought, when the company for defense set up that it did not owe Emig anything.

In the body of the policy it is provided that "in case the premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, . . . then and in every such case this policy shall cease and determine, subject to the provisions of the company's nonforfeiture system, as indorsed hereon with the accompanying table;" and further, "this policy while

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in force will participate annually in the company's distribution of surplus, and after two years will be incontestable except for nonpayment of premiums." The company does not distinctly claim a forfeiture of the policy by reason of the nonpayment of the note; but it insists that, because of Emig's failure to pay the premium due March 20, 1903, it had the right under the contract to deduct from the sum then due him on the policy, ascertained according to its method of calculating, the amount of its note and interest, and by this process a forfeiture was in effect accomplished.

It is true the contract gave it the right to make the character of settlement it did, but it remains to be seen whether or not the provisions of the contract under which the company elected to settle with Emig are valid and enforceable, or void as against public policy. In brief, the question is, Will provisions of a policy be upheld that give an insurance company the right to settle on a different plan with a borrowing policy holder from that adopted with the policy holder who is not a borrower, thereby enabling it to exact more than its debt and legal interest? Under the contract, if Emig had not been a borrowing member, after he had paid two full annual premiums, the entire net reserve by the American experience mortality and interest at 4 per cent yearly would be applied by the company as a single premium at the company's rates to the purchase of nonparticipating insurance for the full amount insured by the policy; or, upon his written application for the reserve, would have been applied to the purchase of a nonparticipating paid-up policy; or, at his election, the company would pay as the cash surrender value of the policy its entire net reserve by the American experience mortality with interest at 4½ per cent yearly, less a surrender charge equal to 1 per cent of the sum insured by the policy. But, if a policy holder happened to be at the same time a borrower from the company, and had defaulted in the payment of a premium, then the company under the contract had the right to deduct the indebtedness out of the cash surrender value and pay the balance in cash, or allow a value in the form of extended or paid-up insurance, the amount of such value to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash value. It will thus be seen that the borrowing and the nonborrowing members are not treated alike; that the nonborrower has advantages and privileges that are not allowed the borrowing member. To illustrate, if on March 20, 1903, Emig had not been indebted to the company, and had defaulted in the annual premium then due, he would have been entitled to demand from the company nonparticipating term insurance for the full amount of his policy for such period as the same could be purchased by its entire net reserve by the American experience mortality and interest at 4 per cent yearly, or he could have demanded that the net reserve be applied to the purchase of a nonparticipating paid-up policy. But, being a borrower from the company, it claims the right to settle with him on an entirely different basis, and one that does not secure the benefits that as a nonborrower he could have demanded. It must be kept in mind that the cash surrender value of the policy as fixed in the tables and under which the company settled its account on March 20, 1903, with Emig, is not the full value of the policy that he would have received if he was not a borrower. By its settlement the company did not deduct the amount of Emig's note, with 6 per cent interest, and give him extended insurance for the time he was entitled to it. It arbitrarily adopted a method by which it exacted from him more than his debt and interest by failing to allow him credit for the full amount to which he was entitled.

To make plain the manner in which Emig was discriminated against, and the fact that the company exacted in the settlement it made more than the amount of its debt and legal interest, it is only necessary to direct attention to the admissions in the answer which show that the net reserve of the policy by the American experience mortality and interest at 4 per cent was, on March 20, 1903, $1,001.95, whereas the cash surrender value on that date was only $906.45. Electing as it did to take the amount of Emig's debt and interest, $905.61, from the $906.45, only left 84 cents due the assured. When, if the debt had been deducted from the net reserve of the policy, which was $1,001.95, there would have been due him $95.50; but, upon a fair settlement, the amount due him would have been more than this, because he was entitled to the dividend on his policy for the year 1903, which was not allowed him in fixing the amount at $1,001.95, as this sum only includes the dividends to March, 1902. Mutual Ben. L. Ins. Co. v. Davis, 115 Ky. 404, 73 S. W. 1020. In computing under the other clause, by which it allowed him a value to be applied to the purchase of extended or paid-up insurance, and finding that there was only due him 90 cents, it reduced the net reserve in the ratio of the indebtedness to the cash surrender value of the policy,

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and again discriminated against him and exacted more than the amount of the debt and legal interest.

We are wholly unable to perceive why an insurance company should be allowed to discriminate between its policy holders in this manner or exact indirectly more than legal interest. In lending money to its policy holders, an insurance company occupies exactly the same attitude as any other money lender. It is entitled to demand and collect the amount of its debt, with 6 per cent interest thereon, and no more. It is true the contract allows it to demand more than this, and the right to require the borrowing member to pay a larger sum than his debt and interest; but this character of contract, no matter how carefully it may be worded or how skilfully devised, will not be enforced. When the company lends money and takes as security for the loan a policy that amply secures it, there is no reason why it should be allowed privileges or rights not extended to ordinary money lenders. Our laws against usury and other devices and schemes resorted to by lenders, to enable them to charge debtors more than the legal rate of interest, are rigidly enforced, and no plan, however ingenious, will be allowed to defeat them.

Viewing the matter from this standpoint, what were the rights of the respective parties on March 20, 1903, when Emig defaulted in the payment of the premium then due? He owed the company $854.35, with interest thereon from March 20, 1902, and the company as security for this had a lien upon his policy. On that date the company had the right to ascertain the amount under the contract that Emig, treating him as a nonborrower, was then entitled to, which was the entire net reserve by the American experience mortality and interest at 4 per cent yearly, and to deduct from it the sum of his note and interest, and for the difference, if any, he was entitled—as he made no election—to extended insurance for the full amount of his policy for such period as this balance would carry it. If on March 20, 1903, Emig had not been a borrower from the company, the premiums he had paid would, under the contract and tables, have carried his insurance for the full amount for 8 years and 130 days. But, being a borrower, with his policy pledged to the company as security for the loan, it had the right on that day to demand the payment of its loan and give Emig, on the basis herein indicated, nonparticipating term insurance for the balance due. The fact that Emig had paid a sufficient number of premiums to carry his insurance 8 years and 130 days did not give him the right to insist that the company must carry his full insurance for that period of time and take out of it, if he died within that period, the amount of his debt with interest. This conclusion would give the insured the unreasonable advantage of having the full amount of insurance in force for a period of 8 years and 130 days, during all of which time he would be indebted to the company in the full amount of the loan value of his policy, and this without the payment of either premiums on the policy or interest on his note. The result would be that Emig's debt would be increasing and the value of his policy decreasing, until, at the expiration of the 8 years and 130 days, the company would have his note and as security a policy without value. To put it in another way, if he had outlived the period of extended insurance, the policy that the company accepted as security for the note would have lapsed entirely and been of no value, and consequently the company would have no security for the money advanced on it if the insured was insolvent, and yet the insured during this time would have had in his pocket practically the full value of the policy and, on his life, insurance for the full amount of the policy. Jagoe v. Ætna L. Ins. Co. 123 Ky. 510, 96 S. W. 598; Penn's Mut. L. Ins. Co. v. Barnett, 124 Ky. 266, 96 S. W. 1120, 99 S. W. 228. But provisions in a policy that give the company the right to take undue advantage of the insured, or that allow it the right to arbitrarily adopt a method by which it may indirectly exact from a borrowing member more than the debt and interest due by him, or to settle an indebtedness upon an erroneous and unfair basis, and one that will in effect work a forfeiture of the policy, will not be enforced. They are against public policy and void. New York L. Ins. Co. v. Curry, 115 Ky. 100, 61 L.R.A. 268, 103 Am. St. Rep. 297, 72 S. W. 736; Mutual L. Ins. Co. v. Twyman, 28 Ky. L. Rep. 167, 89 S. W. 178. These principles do not, of course, deny to an insurance company the right to declare a policy forfeited or lapsed for nonpayment of premiums, or prevent it from providing options in its policy between which the insured may elect, and that will bind him when an election has been made. These are reasonable conditions, and are not in the same class as the carefully adopted clauses that discriminate against borrowing members.

In support of its right to settle with Emig in the manner it did, the company relies upon the case of Mutual Ben. L. Ins. Co. v. First Nat. Bank, 115 Ky. 757, 74 S. W. 1066. There the contract and policy

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contained the same provisions as the one in the case at bar,—in fact it was issued by the same company. Sudduth, who was the policy holder and who had paid the premiums for twelve years, borrowed from the company on the policy $599.32, payable July 30, 1899, on which date his note fell due, but neither the note nor premium was paid. Sudduth died the following November. In a suit on the policy the company set up the defenses that are here made,—the only difference being that here the company found a balance due Emig of 84 cents, whereas in the Sudduth Case the amount of the note and interest was exactly the amount of the cash surrender value of the policy. This court—three of the judges dissenting—held that the company was entitled under the contract to make a settlement similar to the one made by the company with Emig.

The case of New York L. Ins. Co. v. Meinken, 25 Ky. L. Rep. 2113, 80 S. W. 175, also relied on by appellee, is not in point. It appeared that on November 8, 1893, the appellant insured the life of Meinken for $2,500, in consideration of $59.50 payable annually on the 8th of November in each year. The policy provided for extended insurance. The annual premiums were paid for the first three years in cash, and entitled the insured under the tables contained in the policy to extended insurance for the full amount of the policy up to April 8, 1899, or, if he demanded it, paid-up insurance for $167. Meinken defaulted in the payment of a premium note due in 1897, and died in February, 1901. In a suit by his administrator to recover $2,500, the full amount of the policy, the company denied liability, and alleged that the premiums paid did not carry the policy under the terms of the contract up to the date of the death of the insured, and that the policy had lapsed. In the course of the opinion, this court said: "In case of default in the payment of the annual premium, the insured had two options; first, the policy provided that he should be entitled to extended insurance for the full amount of the policy for a definite period; or, second, if the insured should make demand therefor, and surrender the policy within six months after default, he was entitled to paid-up insurance for a stipulated sum. But he could not claim both of these surrender values. Having failed to demand paid-up insurance, the policy was by its terms continued in force for the full amount of $2,500 for a definite period, but which had expired before his death." Here it will be observed that the insured defaulted in the payment of a note given for the premium, which was in effect the same as if he had failed to pay a premium, and the court held that, having failed to make an election within six months or at all, the company, under the terms of the policy, gave him extended insurance for the full amount for the full period to which under the tables he was entitled to extended insurance, and under the tables he was only entitled to extended insurance to April 8, 1899; and, consequently, as said by the court: "Having failed to demand paid-up insurance, the policy was by its terms continued in force for the full amount of $2,500 for a definite period, but which had expired before his death."

Nor is Mutual Ben. L. Ins. Co. v. Harvey, 117 Ky. 834, 111 Am. St. Rep. 269, 79 S. W. 218, authority for appellee. In that case Harvey paid the first five annual premiums on his policy, but failed to pay the one due in November, 1892, and the policy lapsed in accordance with its terms at that date. Harvey died in 1902. Suit was brought against the company to recover $507, the amount of paid-up insurance which under the contract it was claimed Harvey was entitled to in November, 1892, when he defaulted in the payment of premiums then due. The contract of insurance provided that if the policy holder, after paying two full premiums, defaulted in the payment of a premium, the amount due him should be applied, "first, to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force." In its answer the company averred that, as no written application was made for paid-up insurance, it gave to Harvey nonparticipating term insurance for the full amount of the policy for 3 years and 134 days, this being the extended insurance which the amount due him would purchase. The court, in upholding the contention of the company, said: "It will be observed that the nonforfeiture provisions of the policy provided that the assured shall be entitled to the first-named or term insurance, for the full amount of the policy, unless he makes application and surrenders his policy at his default. But he failed to make such application. And "there can be no question under the terms of the policy that such application and surrender by the beneficiaries of the policy is a condition precedent to the issual of paid-up insurance; otherwise it became the duty of the company, without application or re-

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quest, to set aside for the benefit of the assured extended insurance for the full amount of the policy."

It will therefore be observed that in the Meinken and Harvey Cases the insured failing to elect which option they would accept, the company made the only election it was authorized by the contract to make, and this election the court held binding on the insured.

There is no conflict between the doctrine announced by us in the case at bar and the opinions in these cases. We do not hold that there may not be options given in a policy, nor that if the insured fails to elect the company may not make an election for him. We are dealing distinctly with the rights of a borrowing member, and the principles announced are fully sustained by the opinions in Mutual Ben. L. Ins. Co. v. Davis, 115 Ky. 404, 73 S. W. 1020; Penn's Mut. L. Ins. Co. v. Barnett, 124 Ky. 266, 96 S. W. 1120, 99 S. W. 228. The First Nat. Bank Case, supra, in so far as it conflicts with this opinion, is overruled.

We are not prepared to say upon the record before us what balance was due Emig on March 20, 1903, computed upon the basis herein indicated. Upon a return of the case evidence may be taken by both parties, and the court will ascertain and adjudge the full amount that Emig was entitled to on March 20, 1903, and, after deducting therefrom the amount of his debt and interest, will compute the period for which the balance due would purchase extended insurance, and if the extended insurance carried the policy beyond the time of Emig's death, judgment will be rendered in favor of appellant for the amount of the policy and interest from the time it was due; otherwise the judgment will be for appellee.

Wherefore the judgment is reversed, with directions for a new trial consistent with this opinion.

Petition for rehearing denied.

MISSISSIPPI SUPREME COURT.

SAXONY MILLS, Appt.,
v.
WAGNER & COMPANY.

(— Miss. —, 47 So. 899.)

Attachment — creating trustee.

1. One indebted to a nonresident cannot place money in a bank to his credit, in defiance of his wishes, for the purpose of conferring jurisdiction in attachment proceedings upon a court where the bank is located. 23 L.R.A.(N.S.)

Foreign corporation — process — traveling salesman.

2. A mere traveling agent of a foreign corporation having no office or place of business in the state, who happens to reside there, is not within the provision of a statute that, if the defendant in any suit be a corporation, process may be served on the president, the cashier, secretary, treasurer, clerk, or agent of the corporation or upon any one of its directors.

Same — transacting business.

3. A corporation cannot be said to be doing business within a state from the mere fact that it sells goods there through the efforts of traveling salesmen, so as to bring it within the jurisdiction of the state courts.

(January 11, 1909.)

Case Note. — Soliciting trade as doing business within the state.

This question is considered in a note appended to Berger v. Pennsylvania R. Co. 9 L.R.A.(N.S.) 1214, wherein are gathered the cases up to the time of that decision. It is intended to include herein only the cases passing upon the question since that note was written.

It is not intended to include herein cases considering primarily the question of what is doing business within the state under the interstate commerce act. Cases are included, however, which discuss this act, if the conclusion of the court is not based thereon, although the result reached may have been influenced by the act or decisions as to what is doing business thereunder.

The question is fairly presented in SAXONY MILLS v. WAGNER & Co., and the doctrine therein enunciated, that the mere soliciting of trade is not doing business within the state so as to authorize constructive service upon a foreign corporation, is in harmony with the cases covered in the foregoing note, which is cited with approval on this point in the SAXONY CASE. This doctrine is also in acord with the majority of the cases since that note which are included herein.

As a general proposition, a corporation cannot be sued in any state other than that of its origin, unless it is doing business in such other state; and no state has the power to authorize suits against foreign corporations, or the service of process upon them, unless they are doing business within the state. In order that a corporation may be servable with process issued in a suit commenced in a state other than that of its origin, it must have engaged in business therein to the extent that it may be said, in legal parlance, to be doing business within the state. Whether a corporation is doing business in a state so as to be suable therein, or so as to render it subject to the service of process, is a Federal question. Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Wold

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APPEAL by defendant from a judgment of the Circuit Court for Yalobusha County in plaintiff's favor in an action brought to recover damages for breach of contract in the sale of certain flour. Reversed.

The facts are stated in the opinion.

Messrs. **Kimmons & Kimmons** for appellant.

Mr. **I. T. Blount**, for appellee:

A foreign corporation may be sued in any state where an agent may be found.

Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53; Illinois C. R. Co. v. Sanford, 75 Miss. 868, 23 So. 355, 942; Georgia Home Ins. Co. v. Holmes, 75 Miss. 390, 65 Am. St. Rep. 611, 23 So. 183.

Fletcher, J., delivered the opinion of the court:

The appellant, a nonresident corporation, was sued in 1905 by the appellees in the court of Justice Mauldin, at Water Valley, for damages on account of a shipment of flour. The suit was by attachment, and in order that jurisdiction should attach it was necessary, under § 133 of the Annotated Code of 1892, that the defendant company "be found" in the justice's district, or have property or debts in such district. It appears that Wagner & Company were indebted to appellant in the sum of $832.50, and, for the evident purpose of conferring upon the justice jurisdiction of the attachment suit, Wagner & Company deposited this sum of money in the Bank of Water Valley to the credit of the Saxony Mills, and thereafter sued out the attachment, alleging that the Bank of Water Valley was indebted to the Saxony Mills. The bank answered the writ of garnishment, stating that Wagner & Company had made this deposit, which was still in the possession of the bank, but that the Saxony Mills repudiated this transaction, disclaimed any ownership of the fund, and declined to recognize the deposit. In addition to this procedure, the summons in attachment was served

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v. J. B. Colt Co. 102 Minn. 386, 114 N. W. 243. And see Grant v. Cananea Consol. Copper Co. 189 N. Y. 241, 82 N. E. 191.

Under these circumstances an important decision is Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595, which holds that a railroad company was not doing business in a state other than that of its origin, so as to be suable therein or subject to service of process therein, because it employed an agent in such state whose business it was to solicit and procure passengers and freight to be transported over its line, and who in conducting its business employed several clerks and various passenger and freight agents. He, however, sold no tickets and received no payment for transportation of freight, although he took money of prospective patrons and issued orders for tickets, which gave a passenger the right to receive a ticket at the office of the railroad company in another state on presenting such order. He also occasionally sold to railroad employees having tickets over intermediate lines orders for reduced rates over the line of the company he represented; and in some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over his company's line, he gave in exchange bills of lading over his company's line; but these bills of lading recited that they would not be in force until the freight had been actually received by his company. To the same effect, under facts very similar, and in no case broader or tending more to show that the corporation was actually making contracts in the state through a soliciting agent, are North Wisconsin Cattle Co. v. Oregon Short Line R. Co. 105 Minn. 198, 117 N. W. 391; McGuire v. Great Northern R. Co. 155 Fed. 230; Goepfert v. Compagnie Generale Transatlantique, 156 Fed. 196. See also Peterson v. Chicago, R. I. & P. R. Co. supra.

Neither is a common carrier doing business within a state other than that of its origin because it authorizes agents of a railroad company located therein to sell coupon tickets in connection with tickets regularly issued and sold by such railroad company, entitling the buyer to transportation over its line. Allen v. Yellowstone Park Transp. Co. 154 Fed. 504.

A conclusion to the contrary was, however, reached in Bell v. New Orleans & N. E. R. Co. 2 Ga. App. 812, 59 S. E. 102, which held that an agent of a foreign railroad company, who merely had desk room in an office, and whose only business was to solicit and divert freight to the railroad he represented, without, however, any authority to sell tickets or make contracts or rates for the transportation of freight or passengers over such railroad, was nevertheless an agent of such railroad company doing business within the state, so that service of process against the company could be lawfully made upon him. The court cites as authority for this holding Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, and Tuchband v. Chicago & A. R. Co. 115 N. Y. 437, 22 N. E. 360. These decisions were based upon a state of facts that clearly distinguish them from the Bell Case. Thus, in Denver & R. G. R. Co. v. Roller, service was had upon the managing agent of a railroad company, who had offices in the state where the service was had. He was held out by the company as its managing agent, and not only solicited passenger and freight business for his company, but also issued shipping receipts, or bills of lading. The Tuchband Case is also dissimilar as to the facts and the principle of law involved. The question in that case was not whether the railroad company was doing business in the

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upon one T. L. Reynolds, a resident citizen of Water Valley, who was at the time a traveling salesman in the employ of the Saxony Mills. Mr. Reynolds seems to have accepted service and acknowledged that he was the agent of the appellant, and the officer so stated in his return. The appellant entered no appearance in the case, and judgment was taken in favor of Wagner & Company, as by default for the sum of $150, and the money in the bank was subjected to the payment of the judgment. It appears, however, that this fund was never so applied, but seems to have been paid to appellant. However that may be, it appears that in September, 1906, the judgment was unsatisfied, and upon suitable garnishment proceedings a debt due appellant by the Newburger Mercantile Company was sought to be subjected to the payment of this judgment. The sole defense interposed by the Saxony Mills is that the judgment rendered by Justice Mauldin in 1905 is void because that court never acquired jurisdiction. The circuit judge held that the judgment was not void, and gave judgment against the garnishee in favor of appellees, and the Saxony Mills prosecutes this appeal.

It is insisted by appellant that the act of Wagner & Company, in depositing the money in the bank to the credit of the Saxony Mills was unsanctioned by the appellant, and that jurisdiction could not thereby be conferred upon the court. We agree with this contention, and have no difficulty in

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state through a soliciting agent, so that service of process against it could be made upon him, but whether he was such an agent of the company as the statute authorized service to be made upon. The question as to whether or not the company was doing business in the state was not material, as it clearly appeared that it had property in the state and came within the Code provision authorizing service of process upon certain agents of any foreign corporation having property within the state. The court in the Bell Case apparently concedes that Green v. Chicago, B. & Q. R. Co. supra, is in conflict with the conclusion it reaches, as it clearly is; but the contention is made that that case is not binding upon it, as it therein recognizes, or, to use the language of the court, connotes the idea, that certain modes of service may be sufficient for state purposes, and not for Federal purposes; and it is said that, while the service of process therein sustained may be so insufficient that a judgment based thereon would have no extraterritorial effect, and would also be insufficient for Federal purposes, yet it would be valid and enforceable in the state.

And see Central R. Co. v. Eichberg, 107 Md. 363, 14 L.R.A.(N.S.) 389, 68 Atl. 690, which holds that a foreign railroad company doing business in the state through a domestic corporation which has power to and does make contracts for passenger and freight traffic in its behalf may be served with process by service upon an agent whose authority is limited to the soliciting of business, he referring all prospective patrons to the domestic corporation. This holding, however, is not in conflict with the majority doctrine, as the corporation was clearly doing business in the state, and the holding of the court is confined to the mere question of what is sufficient agency to authorize service of process on an agent.

A corporation by filling orders for goods, taken in another state by a local company to whom a commission is paid, is not thereby doing business in the state. Carpenter v. Willard Case Lumber Co. 158 Fed. 697.

Neither is a corporation doing business in another state by accepting bucket-shop business, turned over to it by a person in the bucket-shop business in such state, to whom it allowed a commission on such business. Swarts v. Christie Grain & Stock Co. 166 Fed. 338.

Neither is the maintenance by a corporation of an office in another state, in charge of a sales agent who takes orders for goods and transmits them to the home office for acceptance and to be filled, doing business therein. Case v. Smith, L. & Co. 152 Fed. 730.

Service of process against a foreign corporation upon a sales agent is not a service upon the corporation, where the agent is without apparent authority to represent it otherwise, and has no connection of any kind with the transaction sued upon. Hefner v. American Tube & Stamping Co. 163 Fed. 866.

And the fact that the agent sells goods manufactured by a foreign corporation under such circumstances as would estop the corporation from denying the agency is not doing business in the state through such agent so that he can be served with process issued against it. Wold v. J. B. Colt Co. 102 Minn. 386, 114 N. W. 243.

A single business transaction in the state by a foreign corporation through a soliciting agent is not sufficient to authorize suit against it therein, or service of process upon it. Ladd Metal Co. v. American Min. Co. 152 Fed. 1008. And see Penn Collieries Co. v. McKeever, 2 L.R.A.(N.S.) 127, and note thereto, and also note to A. Booth & Co. v. Weigand, 10 L.R.A.(N.S.) 693.

Generally, the same principles applicable in determining whether a corporation is doing business in a state other than that of its origin, so as to render it suable therein, also applies to the determination of the question whether a foreign corporation is doing business within the state, within statutes describing conditions upon which foreign corporations will be permitted to do business in such state; and it is generally held that merely soliciting business in another state, or the taking of orders subject to the approval of the home office and to be filled from the home office, is not doing business within

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concluding that one indebted to a nonresident cannot place money on deposit in a bank, in defiance of his creditor's wishes, for the purpose of conferring jurisdiction in attachment upon the court where the bank is located. This judgment must be upheld, if at all, upon the theory that the nonresident company had actually been served with process within the jurisdiction of the justice of the peace rendering the judgment. This matter, however, originated prior to the adoption of the present Code. We are not aided, in determining this question, by the provisions of §§ 919 and 920 of the Code of 1906 and chap. 123, p. 132, of the Laws of 1908. These new statutes, undertaking to define what shall constitute "doing business" within the state, and who are to be deemed agents of foreign corporations for the purpose of process, are not now before us. The case at bar is governed by the general rules of law on the subject, and by chap. 61, p. 49, of the Laws of 1894, which provides: "If the defendant in any suit or legal proceeding be a corporation, process may be served on the president or other head of the corporation, upon the cashier, secretary, treasurer, clerk, or agent of the corporation, or upon any one of the directors of such corporation; or, if the corporation be a sleeping-car company, upon any conductor thereof; or, if a steamboat company, upon the captain or other officer of a boat thereof. If no such persons or persons be found in the county, then it shall be sufficient to post a true copy of the process on the door

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the terms and meaning of such statutes. Bruner v. Kansas Moline Plow Co. 168 Fed. 218, affirming 7 Ind. Terr. 506, 104 S. W. 816; Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664; International Trust Co. v. A. Leschen & Sons Rope Co. 41 Colo. 299, 92 Pac. 727, 14 A. & E. Ann. Cas. 861; Bell Teleph. Co. v. Galen Co. (N. J. L.) 72 Atl. 47; Uihlein v. Caplice Commercial Co. (Mont.) 102 Pac. 564.

And the delivery of goods by a foreign corporation, in the state of its domicil, to an agent from another state, for sale therein on commission, is not doing business in such state within a statute penalizing foreign corporations doing business within the state without first complying with prescribed requirements. Three States Buggy & Implement Co. v. Com. 32 Ky. L. Rep. 385, 105 S. W. 971.

A contract by a foreign corporation, consigning to a factor in another state articles of commerce to be sold for an agreed commission, is not doing business in such state within the purview of a statute requiring a a license tax to be paid by a foreign corporation doing business within the state. Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1.

Occasional sales by a foreign corporation through its traveling representative are not sufficient to bring it within the purview of a statute requiring foreign corporations doing business in the state to first comply with certain requirements. To bring it within such statute, it is necessary that it should establish an agency or a branch office within the state. Novelty Tufting Mach. Co. v. Hutkoff, 56 Misc. 522, 107 N. Y. Supp. 88.

But storing goods in a state other than that of its domicil, for sale in each state on commission by an agent, and retaining title to the goods, and furnishing solicitors to assist in the sale thereof, is doing business in such state within a statute denying to foreign corporations doing business therein the right to sue in the state courts without compliance with certain prescribed requirements. Wilson-Moline Buggy Co. v. Priebe, 123 Mo. App. 521, 100 S. W. 558. To the same effect, except that no soliciting agents were furnished by the foreign corporation, see Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989.

So, a delivery of goods by a foreign corporation to an agent in the state of its origin, but for sale in another state from a general agency established therein, and the sale thereof in such state, is doing business therein within the purview of a statute prescribing a penalty for any foreign corporation doing business within the state without first complying with certain requirements. Milburn Wagon Co. v. Com. 31 Ky. L. Rep. 937, 104 S. W. 323.

Soliciting the sale of scholarships in a foreign corporation through a local agent who took orders therefor, and accepted part payment in advance, and also made collections on deferred payments, and who maintained an office for the transaction of such business, but at his own expense, is doing business in such state so as to bring the corporation within the statute denying to foreign corporations the right to sue in a state court unless they have first complied with certain requirements. International Text-book Co. v. Pigg, 76 Kan. 328, 91 Pac. 74. To the same effect under very similar facts, except that plaintiff corporation furnished an office to a local agent, see International Text-book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541.

A contract appointing an agent and authorizing him to solicit the sale of the goods of a foreign corporation for a period of years is an arrangement to establish its business permanently within the state, and hence is doing business in the state within the purview of a statute denying the privilege of appealing to state courts to foreign corporations doing business within the state without having first complied with certain specific requirements. Nevens v. Worthington, 150 Mich. 580, 18 L.R.A.(N.S.) 142, 114 N. W. 404.

Delivering merchandise in the state, and accepting payment therefor, although ordered and accepted in another state, is sufficient to bring a foreign corporation within the terms of a statute authorizing service of process against foreign corporations on the secretary of state where the cause of action

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of the office or principal place of business of the corporation. In suits against railroads, sleeping-car, telegraph, telephone, express, steamboat, and insurance companies or corporations, or in suits against a receiver or receivers in charge of the property of any such companies or corporations, the process may be served on any agent of the defendant, or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized; or may be served on any one of the foregoing officers of such corporation or company, and upon the secretary, cashier, treasurer, clerk, depot agent, attorney, or any other officer or agent of such receiver or receivers, or upon them in person. When any writ or process against such corporation, company, receiver, or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons; and all process and notices to be served upon such companies, corporations, or receivers, may be served as herein directed."

It will thus be seen that the statute makes special reference to railroads, sleeping-car, telegraph, telephone, express, steamboat, and insurance companies, and provides for service of process upon such companies by serving any of their agents. It is clear that no difficulty can arise in such cases, because all such companies have offices in the state, pay taxes here, have important property interests which the law protects, and in most cases have made large and valuable investments within our borders. This is the class of corporations to which reference is made by Justice Whitfield in his concurring opinion in Illinois C. R. Co. v. Sanford, 75 Miss. 862, 23 So. 355, 942. But the appellant corporation does not fall within this class. It has no office or place of business in the state of Mississippi. It has its place of business elsewhere, and sends its traveling salesmen into this state, who take orders which are transmitted to the home office and filled by shipment direct to the purchaser. The question is whether a court acquires jurisdiction of a case against such a nonresident corporation by serving process upon a traveling salesman. Is such an employee an "agent" of the corporation within the meaning of the statute above quoted? It is well settled that a corporation like the appellant company cannot be held to be "doing business" within the state, in the absence of a statute enlarging the usual significance of this well-known expression. It is hardly necessary to cite authority in support of this conclusion, as there is no intelligent dissent among the authorities. See the exhaustive note to Berger v. Pennsylvania R. Co. 9 L.R.A.(N.S.) 1214.

It is equallly well settled that, in the case of a corporation which is not "doing business" in this state, service of process upon a mere soliciting agent is not sufficient. Such an employee is not an agent of the corporation within the meaning of the statute. It is accurately stated by the Michigan court that the word "agent" in a statute like ours does not mean every man who is intrusted with a commission or employment, but designates the principal officers of the corporation, who, either generally or in respect to some particular department of the corporate business, have a controlling authority, either general or special. Lake Shore & M. S. R. Co. v. Hunt, 39 Mich. 469. It is said, again, that statutes providing for service of process upon an "agent" of a corporation are to be construed "to include only agents vested with some general authority and discretion, and not to extend to mere employees having no independent powers." 19 Enc. Pl. & Pr. p. 676; N. K. Fairbanks & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420.

It follows from these views that the justice's court was wholly without jurisdiction to render the original judgment, and the same is absolutely void. Such being the case, the writ of garnishment against the Newburger Mercantile Company should have been quashed.

Reversed and remanded.

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arises out of a business transaction within the state. Paulus v. Hart-Parr Co. 136 Wis. 601, 118 N. W. 248.

If the busines of a foreign corporation comes within the interstate commerce act, it cannot be held to be doing business in the state within the purview of statutes placing restrictions or limitations upon foreign corporations doing business in the state, or making certain requirements a condition of engaging in business therein, as such a holding would be within the inhibition of the interstate commerce clause against interference therewith or restrictions thereon, by any state. Butler Bros. Shoe Co. v. United States Rubber Co.; Thomas Mfg. Co. v. Knapp; International Trust Co. v. A. Lesch en & Sons Rope Co.; Underwood Typewriter Co. v. Piggott; Milburn Wagon Co. v. Com.; and Nevens v. Worthington,—supra; McBath v. Jones Cotton Co. 79 C. C. A. 203, 149 Fed. 383.

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NEBRASKA SUPREME COURT.

STATE OF NEBRASKA EX REL. JOHN M. RAGAN
v.
GEORGE C. JUNKIN, Secretary of State, Appt.

(— Neb. —, 122 N. W. 473.)

Constitutional law — judicial candidates — nomination — free speech — free assembly.

1. The legislative enactment in §§ 1 and 10, chap. 53, Sess. Laws 1909, that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured, criticized, or referred to in any manner, by any political party, or any political convention or primary, or at any primary election," is a violation of § 5 of the Bill of Rights, declaring that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense;" and of § 19 of the Bill of Rights, declaring that "the right of the people peaceably to assemble to consult for the common good, and to petition the government or any department thereof, shall never be abridged."

Same — "assemblage" — political convention.

2. A political convention is an "assemblage" within the meaning of the constitutional provision that the right of the people to assemble to consult for the common good shall never be abridged.

Same — elective franchise.

3. In prescribing a form of official ballot which limits the printed names of candidates for judicial and educational offices to nominees by petitions containing 5,000 names each, and in depriving all electors except 500 in each county of the right to take part in nominating a particular candidate, chapter 53, p. 256, Sess. Laws 1909, violates § 22 of the Bill of Rights, declaring that "all elections shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

Statute — fundamental invalidity — effect.

4. Where it appears on the face of a legislative act that an inducement for its passage was a void provision, the entire act falls.

Same — partial invalidity — effect.

5. Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced.

(Dean and Letton, JJ., dissent.)

(August 18, 1909.)

APPEAL by defendant from a judgment of the District Court for Lancaster County directing defendant to place relator's name on the primary election ballot. Affirmed.

The facts are stated in the opinion.

Mr. G. G. Martin, with Messrs. W. T. Thompson, Attorney General, and **Arthur F. Mullen,** for appellant:

The valid portions of the law can be separated from the invalid portions, leaving a complete law.

State ex rel Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941; State ex rel. Hahn v. Hardy, 7 Neb. 377; State ex rel. Miller v.

Headnotes by ROSE, J.

Note. — No other case passing on the constitutionality of a statute prohibiting the nominating, recommending, or censuring of specified officers by certain organizations or at designated elections has been disclosed.

A somewhat analogous decision is found in Ex parte Harrison, 212 Mo. 88, 16 L.R.A. (N.S.) 950, 126 Am. St. Rep. 557, 110 S. W. 709, where a statute requiring a report of a civic league upon a candidate for public office to state in full all the facts on which it is founded, together with the names and addresses of the persons furnishing it, was held to be a violation of the constitutional guaranty of freedom of speech. The court said: "The constitutional liberty of speech and of the press grants the right to freely utter and publish whatever a citizen may desire, and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious, or scandalous in their character, so that they become an offense against the public, and by their malice and falsehood injuriously affect the character, reputation, or pecuniary interest of individuals. . . . The general assembly, under the legislative power granted it by the people, subject to the limitations of the state and Federal Constitutions, unquestionably has the power to enact penal statutes and prescribe civil remedies 'for all abuses of that liberty' of speech or publication. If a publication is neither blasphemous, obscene, seditious, or defamatory, then, under the Constitution of this state, no court has the right to restrain it, nor the legislature power to punish it."

The case of Louthan v. Com. 79 Va. 196, 52 Am. Rep. 626, while not in point, is of interest. It was there held that a statute forbidding judges and state school officers participating actively in politics, making political speeches, or taking active part in political meetings, was unconstitutional where the Constitution gave any citizen a right to speak, write, and publish his sentiments.

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Lancaster County, 17 Neb. 85, 22 N. W. 228; State v. Hurds, 19 Neb. 316, 27 N. W. 139; Re Groff, 21 Neb. 647, 59 Am. Rep. 859, 33 N. W. 426; State ex rel. Singleton v. Van Duyn, 24 Neb. 586, 39 N. W. 612; Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280; Messenger v. State, 25 Neb. 674, 41 N. W. 638; Magneau v. Fremont, 30 Neb. 843, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280; Bailey v. State, 30 Neb. 855, 47 N. W. 208; Singer Mfg. Co. v. Fleming, 39 Neb. 685, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; State ex rel. Farmers' Mut. Ins. Co. v. Moore, 48 Neb. 870, 67 N. W. 876; State ex rel. Comstock v. Stewart, 52 Neb. 243, 71 N. W. 998.

The legislature has the right to require candidates for office to run by petition.

Healey v. Wipf (S. D.) 117 N. W. 521; State ex rel. Mize v. McElroy, 44 La. Ann. 796, 16 L.R.A. 278, 32 Am. St. Rep. 355, 11 So. 133; State ex rel. Runge v. Anderson, 100 Wis. 523, 42 L.R.A. 239, 76 N. W. 482; State ex rel. Bateman v. Bode, 55 Ohio St. 224, 34 L.R.A. 499, 60 Am. St. Rep. 696, 45 N. E. 195; Cooley, Const. Lim. 7th ed. p. 899.

The unconstitutional parts were not an inducement to the passage of the law.

State v. Insurance Co. of N. A. 71 Neb. 335, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767; Scott v. Flowers, 61 Neb. 620, 85 N. W. 857.

The limitation of 500 signers in a county is not a violation of § 22 of the Bill of Rights.

State ex rel. Adair v. Drexel, 74 Neb. 790, 105 N. W. 174; Davidson v. Hanson, 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93; State ex rel. Plimmer v. Poston, 58 Ohio St. 620, 42 L.R.A. 237, 51 N. E. 150; DeWalt v. Bartley, 146 Pa. 529, 15 L.R.A. 771, 28 Am. St. Rep. 814, 24 Atl. 185; Minor v. Olin, 159 Mass. 487, 34 N. E. 721; People ex rel. Dickerson v. Williamson, 185 Ill. 106, 56 N. E. 1127; Com. ex rel. McCormick v. Reeder, 171 Pa. 505, 33 L.R.A. 141, 33 Atl. 67.

Messrs. John C. Cowin and Charles O. Whedon, for appellee:

The act interferes with the constitutional rights of electors to exercise the right of franchise.

State ex rel. Adair v. Drexel, 74 Neb. 791, 105 N. W. 174; Dapper v. Smith, 138 Mich. 104, 101 N. W. 60; Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071; Britton v. Election Comrs. 129 Cal. 337, 51 L.R.A. 115, 61 Pac. 1115; People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 A. & E. Ann. Cas. 562.

23 L.R.A. (N.S.)

Rose, J., delivered the opinion of the court:

Defendant is secretary of state, and as such was requested to place the name of relator on the primary ballot as a Republican candidate for judge of the supreme court at the primary election to be held August 17, 1909, but refused on the ground that compliance would be a violation of the nonpartisan judiciary act, passed at the last session of the legislature. Sess. Laws 1909, chap. 53, p. 256. The controversy thus raised was submitted to the district court of Lancaster county, where the act in question was held void as being an invasion of the constitutional right of free assembly, of free speech, and of a free ballot. A peremptory writ of mandamus was accordingly allowed, directing defendant to place relator's name on the primary ballot in compliance with the primary election law and in disregard of the nonpartisan judiciary act. From the order allowing the writ, defendant appeals, and his record presents for review the correctness of the ruling of the trial court.

The 1st section of the nonpartisan judiciary act authorizes party nominations at conventions and primaries, and concludes as follows: "But candidates for the following offices, to wit, chief justice of the supreme court, judge of the supreme court, judge of the district court, county judge, regent of the state university, superintendent of public instruction, and county superintendent of public instruction, shall not be nominated, indorsed, recommended, censured, criticized, or referred to in any manner, by any political party, or any political convention or primary, or at any primary election; and no party name or designation shall be given upon any ballot to any candidate for any of said offices, and hereafter all candidates for all of said offices shall be nominated only by petition, and no candidate for any of said offices shall appear on any party ticket." Sess. Laws 1909, chap. 53, p. 256, § 1. According to this provision, candidates for judicial and educational offices cannot be "nominated, indorsed, recommended, censured, criticized, or referred to in any manner, by any political party, or any political convention or primary, or at any primary election." Does the Bill of Rights forbid such an enactment? It declares: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Const. art. 1. § 5. "The right of the people peaceably to assemble to consult for the common good,

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and to petition the government or any department thereof, shall never be abridged." Const. art. 1, § 19. The first provision quoted protects every person in his right to speak, write, and publish on all subjects, and the next permits him to assemble with others to consult for the common good. A political meeting or convention is an "assemblage" within the meaning of the constitutional provision that the right of the people to assemble and consult for the common good shall never be abridged. The right of a citizen to speak, write, and publish on all subjects does not terminate when he enters a political convention or assemblage. With good motives and for justifiable ends, the members of such a body may jointly speak and publish the truth about candidates for office, and this right extends to aspirants for judicial and educational offices.

Judge Cooley, in discussing the constitutional liberty of the press and of speech, said: "There are cases where it is clearly the duty of everyone to speak freely what he may have to say concerning public officers or those who may present themselves for public positions. Through the ballot box the electors approve or condemn those who ask their suffrages." Cooley, Const. Lim. 6th ed. p. 530. Delegates and members of political organizations not only take with them into their party councils the inalienable right to speak, write, and publish on all subjects, but the full benefit of this privilege can only be obtained by united action. Political parties are the great moving forces in the administration of public affairs, and their influence in elections cannot be eliminated by the legislature as long as the right to assemble and speak the truth remains in the charter of our liberties. Published criticisms of candidates, officers, and policies are potent factors in the struggle for civic virtue, and cannot be suppressed by legislative enactment. The privilege of speaking and publishing the truth with good motives and for justifiable ends was not inserted in the Bill of Rights by accident. The doctrine that the truth as to a man's conduct is no justification for publishing it in the press originated in the Star Chamber, and was in high favor in that tribunal, when printing became an effective means of disseminating what honest men said about the abuses of official power and the conduct and policies of public men. The hostility to such a restriction of free speech and of a free press resulted in the adoption of § 5 of the Bill of Rights. The nonpartisan judiciary act is void in so far as it declares that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured criticized, or referred to in any manner, by any political party, or any political convention or primary, or at any primary election."

The act under consideration prescribes the manner of nominating candidates for judicial and educational offices and the form of ballot to be used at the November election. In this connection the following provisions are assailed as unconstitutional: "Candidates for public office may be nominated otherwise than by convention, committee, or primary meeting, in the following manner: A certificate of nomination containing the name of the candidate for the office to be filled, stating the name, residence, business, and postoffice address of the candidate, shall be signed by electors residing in the district or political division in which the officers are to be elected, and filed with the clerk of the village, city, or county, or with the secretary of state, as the case may be. The number of signatures shall not be less than 5,000, not more than 500 of which shall be from one county, when the nomination is for chief justice or judge of the supreme court." Sess. Laws 1909, chap. 53, p. 258, § 3. Under the provisions quoted only 500 electors in a county can lawfully sign the nominating certificate of a candidate for judge of the supreme court, though there may be more than 5,000 legal voters therein. In other words, 500 electors in a county may participate in nominating a candidate for judge of the supreme court, and when they do so the other voters in the same county are deprived of the right to sign a nominating certificate for the same candidate. In Adams county, where relator resides, nearly 5,000 electors voted at the general election in 1908. Only 500 of them, under the nonpartisan judiciary act, can take part in nominating him for judge of the supreme court, and this would be true, if the entire electorate of 5,000 were a unit in demanding an opportunity to vote for him as a regular nonpartisan candidate at the November election. For want of the signatures of the supporters who are deprived of the right to sign the nominating certificate of the candidate of their choice, he may not be nominated. In such an event his name would not be printed on the official ballot for the November election, and their right to vote for him thereat as a regular nominee would be lost. Under these circumstances the empty privilege of writing on official ballots in blank spaces the names of persons who have not been nominated, with the prospect of having such votes classified in the election returns as "scattering," is not the full measure of an elector's rights within the meaning of the Constitution. Elect

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ors who desire to vote for a particular candidate for judge of the supreme court at the November election should be allowed to take part in nominating him, or in whatever preliminary step the law requires as a condition of allowing his name to be printed on the official ballot. This privilege is protected by the following section of the Bill of Rights: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const. art. 1, § 22.

When the lawmakers enter the party caucus, the party convention, the party committee, and the primary, to make regulations, they must act within the limits of the foregoing provision. The elective franchise may be invaded by such regulations when they prescribe the forms of the official ballots to be used at the general election and establish the methods of making nominations. These forms and methods may be as effective to deprive the voter of his rights as direct legislation relating to the November election. Chief Justice Holcomb, in discussing a primary law, said: "It is a part of the election machinery, by which is determined who shall be permitted to have their names appear on the official election ballot as candidates for public office. To say that the voters are free to exercise the elective franchise at a general election for nominees, in the choice of which unwarranted restrictions and hindrances are interposed, would be a hollow mockery. The right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by constitutional guaranty of freedom in the exercise of the elective franchise." State ex rel. Adair v. Drexel, 74 Neb. 790, 105 N. W. 179. In the case cited Chief Justice Holcomb adopted the following language of Prof. Wigmore: "Nomination for public office may be considered in two aspects: First, it involves the right of every eligible person to be voted for by any elector who desires to do so; secondly, it involves the right of each elector to exercise choice among all who are eligible. The two rights may be protected by the same legislation, but it is important to remember that there is involved not merely the right of an individual to be a candidate, but the right of every other person to select him for the office; practically the feasibility of independent political movements depends upon the second right." 23 Am. L. Rev. 730.

State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174, was cited with approval by the supreme court of Illinois in People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 A. & E. Ann. Cas. 562, where the following language was used by that court: "When statutes are enacted which regulate the form of the ballot to be used, what shall appear upon the ballot, and how the candidates whose names shall so appear shall be chosen, the provision of the Bill of Rights applies to the new condition. The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system, unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done, and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law." The supreme court of Illinois in a later case said: "The power of the individual voter at the polls to cast his vote untrammeled, for the candidate of his choice, is no more sacred than the right of the individual member of a political party to express his choice for party candidates at a primary election." Rouse v. Thompson, 228 Ill. 540, 81 N. E. 1115.

In depriving electors of the right to participate in nominating for judicial and educational offices the candidates of their choice, the nonpartisan judiciary act violates § 22 of the Bill of Rights. The duty to uphold all valid legislation has led to an earnest effort to find some substantial basis for sustaining those provisions which are not directly inhibited by the Constitution. This cannot be done, however, if either of the invalid provisions was an inducement to the passage of the bill. The void part of § 1 is repeated in § 10 with the legislative announcement that it is "declared to be the purpose of the people of Nebraska to remove all of said offices entirely from the domain of party politics." The leading provision for carrying into effect that purpose, the one disclosed by the act itself, is the void provision that candidates for those offices shall not be "nominated, indorsed, recommended, censured, criticized, or referred to, by any political party, or any political convention or primary, or at any primary election." It is true the legislature prescribed a form for a nonpartisan ballot and prohibited party designation of candidates thereon. This, however, did not prevent party activity in the election of judicial and educational officers. The legislative intention being to remove such offices from the domain of party politics, and the leading provision for carrying that pur-

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pose into effect being void, the bill necessarily shows on its face that the void part was an inducement to the passage of the act.

Even if the unconstitutional provisions were not the inducing cause of the legislation, the entire act must fall, unless the valid and invalid parts can be separated in such a way as to leave an independent statute capable of enforcement. The intention of the legislature must be expressed by written language. In segregating void provisions the language itself must be separated. "Where a part of an act is unconstitutional," wrote Chief Justice Holcomb, "because contravening some provision of the fundamental law, the language found in the invalid portion of the act can have no legal force or efficacy for any purpose whatever." State v. Insurance Co. of N. A. 71 Neb. 335, 100 N. W. 405. It is equally true that what remains must express the legislative will independently of the void part, since the court has no power to legislate. These propositions are elementary, and citation of precedents to support them is unnecessary. For the purpose of applying the rules stated, § 1 of the act is here reproduced: "Any convention or primary meeting, as hereinafter defined, held for the purpose of making nominations for public offices, and also voters of the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state; a convention or primary meeting within the meaning of this act is an organized assemblage of voters, representing a political party which, at the last election before the holding of such conventions or primary meetings, polled at least 1 per cent of the entire vote in the state, county, or other subdivision or district for which the nomination is made. A committee appointed by such convention or primary meeting may also make nominations for public offices, and is authorized to do so by resolutions, duly passed by the convention or meeting at which said committee was appointed. A state convention of any political party may take action upon any constitutional amendment which is to be voted upon at the following election, and said convention may declare for or against such amendment, and such declaration shall be considered as a portion of their ticket to be filed with the secretary of state and by him certified to the various county clerks. But candidates for the following offices, to wit, chief justice of the supreme court, judge of the supreme court, judge of the district court, county judge, regent of the state university, superintendent of public instruction, and county superintendent of public instruction, shall not be nominated, indorsed, recommended, censured, criticized, or referred to in any manner, by any political party, or any political convention or primary, or at any primary election; and no party name or designation shall be given upon any ballot to any candidate for any of said offices, and hereafter all candidates for all of said offices shall be nominated only by petition, and no candidate for any of said offices shall appear on any party ticket." Sess. Laws 1909, chap. 53, p. 256.

In this section the void provision already described limits the operation of what precedes it. The first part of the section authorizes nominations by conventions and primary meetings. This portion, with the void part stricken out, would authorize partisan nominations of candidates for judicial and educational offices, which is exactly the opposite in that respect of what the legislature intended. With the qualifying and void part eliminated, therefore, the first part of the section does not express the legislative will. These observations apply also to § 10, where the void provision in the 1st section is repeated.

Section 3 makes provision for nominating candidates for judicial and educational offices by petition or certificate of nomination. This section contains the void provision which deprives all electors in a county except 500 of the right to sign the nominating certificate of a particular "candidate by petition." The petition described in § 3 is a substantive part of the legislation, and reference to it is repeatedly made throughout the act. With the void provision stricken out, the petition mentioned by the legislature in other parts of the bill would not be the petition to which the legislature referred. It is therefore clear that, with the unconstitutional provisions eliminated, the balance of the act would not be what the lawmakers in fact enacted. There is no lawful way to separate the valid and invalid portions so as to leave an enforceable statute expressing the will of the legislature.

It follows that no part of the act can be sustained.

The judgment of the District Court is affirmed.

Reese, Ch. J., absent and not sitting.

Dean, J., dissenting:

I am unable to concur in the opinion of the majority of the court. From the arguments of counsel and the law applying to the facts, it does not clearly appear that the act in question comes within the inhibitory provisions of the fundamental law that have been invoked to destroy it. The act is

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attacked solely on constitutional grounds, and thus the recognized rules of this and other jurisdictions, in cases involving constitutional construction, should be applied to determine the right of the act to take a place among the laws of the state.

Viewed from any point, there is a delicacy that surrounds the discussion of some features of the case that would be gladly avoided, but due regard for the performance of a public duty otherwise directs. The legislature has for many years been modifying the general election laws in response to public demand. It gave us the Australian ballot system, and events have proven its wisdom. It gave us the statewide primary law, and, while it may be defective in some respects, it is within the province of the legislature to amend it. In any event it is not likely a return will be had to the convention system of nominating candidates for public office. The nonpartisan judiciary act, with but seven negative votes in the senate and but twenty-seven negative votes in the house recorded against it, is but an expansion of the general primary system. Its principle is not new to the statute books of five states or more. It is not an untried experiment.

In the preservation of the constitutional checks and balances of our system of government, is involved the preservation of government itself. It is fundamental that the legislative, executive, and judicial departments should each be free to perform their separate functions without interference from either of the others. Applying this principle to a legislative act, the validity whereof is attacked on the sole ground of being repugnant to the Constitution, a decent respect for the legislative and executive departments which have respectively passed and approved it inculcates an abiding desire on the part of the judiciary to refrain from disturbing it, except for the most weighty reasons. An act of the legislature is presumed to be constitutional. This presumption continues until the contrary is affirmatively shown by the challenging party. The legislature is presumed to know, to interpret, and to make effective by competent legislative enactment, the will of the people, and every act passed that is conformable to the Constitution has all the power of that instrument behind it. All intendments of the law favor these presumptions. The judiciary is not the master of the Constitution, but merely its interpreter, and, in the exercise of this prerogative, it is not the court's duty to declare an act unconstitutional, unless it clearly and beyond question contravenes some provision of the fundamental law, and every reasonable doubt will be resolved in favor of sustaining the act. By close adherence to this long familiar rule may the judiciary preserve itself from the imputation of even seeming to invade the legislative realm. It may thus avoid "bench legislation,"—an insidious judicial offense, and one which may in time, if indulged, imperil the perpetuity of our institutions. Cooley, Const. Lim. 7th ed. 227; Prof. Wigmore, 23 Am. L. Rev. 719; Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; Ogden v. Saunders, 12 Wheat. 270, 6 L. ed. 625, Hoover v. Wood, 9 Ind. 286; Re Wellington, 16 Pick. 96, 26 Am. Dec. 631.

The majority opinion holds: "Political parties are the great moving forces in the administration of public affairs." That evil influences and impure motives should creep into the management of political parties are circumstances that have been long recognized and are everywhere deplored; but the act is not aimed at the destruction, or even the impairment, of an exercise of the legitimate functions of political parties. The relator's argument on this point indicates he is seized with this fear, and in a manner his protest against the act is suggestive of John's protest at Runnymede. The nonpartisan act leaves the solution of political questions to political parties. It appears to be only a well-directed protest against the domination of nonpolitical departments of government by partisan political influence. Justice, in the proper application of its principles, is no respecter of party lines. No logical reason for the domination of our school system by the spirit of partisanship can be advanced. There is sufficient latitude on public questions and public problems that are in their nature purely political to absorb the legitimate attention of those whose guiding hands would direct the destinies of the political parties, and thus indirectly, but none the less potently, the destiny of state and nation. In the departments sought to be affected, the legislature has the right, within the bounds of the fundamental law, to exert its power to the end that they may be effectively removed by legislative enactment from the domain of partisan politics.

Who will question the propriety of legislation to the end that the judiciary may avoid even the appearance of securing place and power at the hands of the cunning captains of political patronage? He was a wise writer who said: "A gift doth blind the eyes." Is the gift less seductive, and will it less effectually dull the eye of the magistrate to the iniquities of the giver, because it takes the form of preferment in office? No one will question the propriety of giving added meaning to the vital truth expressed in the motto of our state, "Equal-

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ity before the Law." By what means may this result be the better maintained? Will it be by an immersion of the judiciary in the seething pool of partisan politics, or will it be by its separation from that stirring feature of political life in the manner pointed out by the act in question? The legislature, coming from the body of the people, and charged with legislative responsibility, solved the problem in a manner satisfying to itself by the passage of the nonpartisan judiciary act. Who, then, is to pass upon the wisdom or the unwisdom, the expediency or the inexpediency, that may be involved in its declared purpose? Not the judiciary, for it is not within its constitutional province, but the legislature alone, in the exercise of its power to amend and its power to repeal. Will it be seriously urged that loyalty to party or party leadership, because of past achievement, or promise of future performance, or for any sane reason, is always and everywhere and regardless of all else the paramount duty of the citizen, whether in or out of office? It is to be deplored that in some instances in public history, in the exuberance of an intense partisan spirit, loyalty to party leadership seems at times almost to have overcome loyalty to all else. Political parties will be always with us. They are inseparable from our form of government, but danger lies in the direction of the exercise of a spirit of excessive and unreasoning loyalty to party or to party leaders. See Messages of the Presidents (Washington), p. 54; 1 Bryce, American Commonwealth, p. 104.

The opinion holds, in effect, that because, under the provisions of the act in question, only 500 petitioners in Adams county, the home of relator, can take part in nominating him, he might thereby be prevented from receiving a nomination, and the electorate of his county, which contains about 5,000 electors, would thus be deprived the opportunity of voting for him. The point does not seem to be well taken. It does not appear reasonable to believe the enforcement of this feature of the act would be fraught with results so serious. There are eight counties contiguous to that of relator, having a population in each that is not much, if any, less than that of Adams county. Thus, in his own and in the eight neighboring counties, with one additional, the names of the requisite 5,000 signatures might be obtained by the relator, or by any qualified candidate. In the state at large the entire vote amounts to approximately 250,000. Two per cent of that number is the number of signatures required to place the name of relator in nomination. The most populous county in the state has approximately 25,000 voters. Two per cent of that number is the maximum number of signatures permitted by the act in any one county, so that upon a percentage basis, while it is true no percentage is named in the act, it is seen there is no distinction between the different portions of the state and no distinction as to the number of signatures required of candidates for position in the same class. The act seems to impose no unusual or unreasonable burden or restriction in the requirement that the signatures of 5,000 electors shall be obtained, with the limit of 500 in any one county. These are mere details of the law, regulations that are within the power of the legislature to prescribe. By the arrangement of the ballot, provision is made that the voter may write in the names of such additional persons as may commend themselves to his choice. Healey v. Wipf (S. D.) 117 N. W. 521; 23 Am. L. Rev. 719; Paine, Elections (1888), § 5.

The act is not obnoxious to the constitutional prohibition against class legislation, because it includes all candidates for judicial position in courts of record, and all candidates for executive school positions. It adds no new qualifications to the constitutional requirements respecting the position sought by relator. State ex rel. Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177; State, Dobbins, Prosecutor, v. Northampton Twp. 50 N. J. L. 496, 14 Atl. 587; Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; State ex rel. Selden v. Berka, 20 Neb. 375, 30 N. W. 267; State ex rel. Dawson County v. Farmers' & M. Irrig. Co. 59 Neb. 1, 80 N. W. 52. The majority opinion cites State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174. There a candidate for nomination was required, by the act there in question, to pay a sum equal to 1 per cent of the salary of the desired office for the term, to entitle his name to appear on the primary ballot. In brief, the act required him to purchase the right to submit his name to the electorate as a party candidate for nomination. The act was held to be clearly repugnant to the Constitution; but it does not so clearly appear that the rule there invoked applies to the facts in the case at bar. People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 A. & E. Ann. Cas. 562, and Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109, are cited in the majority opinion. The soundness of all that is said in the cited portions of the cases may be conceded. For the most part they appear to show a connection between the primary election and the general election.

The opinion discusses two features that were not argued in the brief of relator. Reference is had to the feature limiting the

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number of signatures that may be obtained in any one county to 500, and to that other feature which discusses freedom of speech and the right to peaceably assemble. It is an established rule of this court that assignments which are not argued in the briefs of the party complaining are deemed to be waived and will receive no attention here. The reason for the rule and its application is sound. It is fair to all litigants, avoids surprise to counsel, and gives to each party an equal opportunity to be heard on contested matter. In Brown v. Dunn, 38 Neb. 52, 56 N. W. 703, the rule was applied by Ragan, C.: "We will not examine errors alleged in a petition in error, unless such errors are specifically pointed out and relied upon in the briefs filed in the case, under the rules of this court." In support of his ruling he cites Phenix Ins Co. v. Reams, 37 Neb. 423, 55 N. W. 1074. To the same effect are the following: Peaks v. Lord, 42 Neb. 15, 60 N. W. 349; Madsen v. State, 44 Neb. 631, 62 N. W. 1081; Blodgett v. McMurtry, 54 Neb. 71, 74 N. W. 392; Scott v. Chope, 33 Neb. 41, 49 N. W. 940; Glaze v. Parcel, 40 Neb. 732, 59 N. W. 382; Gulick v. Webb, 41 Neb. 706, 43 Am. St. Rep. 720, 60 N. W. 13; Erck v. Omaha Nat. Bank, 43 Neb. 613, 62 N. W. 67; Johnson v. Gulick, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883; Walter A. Wood Mowing & Reaping Mach. Co. v. Gerhold, 47 Neb. 397, 66 N. W. 538; Mandell v. Weldin, 59 Neb. 699, 82 N. W. 6.

The majority opinion holds: "Where it appears on the face of a legislative act that an inducement for its passage was a void provision, the entire act falls." And that: "Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced." Even assuming that the portions of the act in question are invalid that are pointed out by the majority opinion, yet it does not appear that they are so intermingled with the valid portions that they cannot be separated so as to leave an enforceable statute. The act in question would still be enforceable by omitting from its 1st section the following words: "Indorsed, recommended, censured, criticized, or referred to in any manner." With these words omitted the 1st section would provide that candidates for the judiciary and executive school offices "shall not be nominated by any political party, or any political convention or primary, or at any primary election." Applying the same rule to the feature of § 3 of the act, which limits the number of signatures to 500 names in any one county, and with these words omitted, "not more than 500 of which shall be from one county," the section would then read: "The number of signatures shall not be less than 5,000 . . . when the nomination is for chief justice or judge of the supreme court." The limitation of 500 signatures to any one county is not essential to the practical operation of the act. With this feature omitted, 5,000 voters from any portion of the state would nominate, and thus the relator, by his own showing, would not be deprived of any substantial right. The act would then merely change the place of nomination from the floor of the party convention, or from the party primary, to the body of the people, without regard to party affiliation. Has a political party an inherent right to nominate party candidates for nonpolitical offices? Are not all the people greater than a mere party subdivision of the people?

Cooley, in his Constitutional Limitations (7th ed. p. 247), concerning a legislative act, says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall." In support of this view the author cites many authorities. The majority opinion contains a citation from State v. Insurance Co. of N. A. 71 Neb. 325, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767. Fairly construed, it reaffirms the rule laid down by Judge Cooley. Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248: "Outside of society, and disconnected with political society, no person has or can exercise the elective franchise as a natural right, and he only receives it upon entering into the social compact subject to such qualifications as may be prescribed by the state or body politic." People v. Barber, 48 Hun, 198, 201: "The elective suffrage is not a natural right of the citizen. It is a franchise dependent upon law, by which it must be conferred to permit its exercise. Spencer v. Board of Registration, 1 MacArth. 169, 29 Am. Rep. 582."

The inducement for the passage of the act is not expressed in its details, but is found in its broader language, which is expressive of a laudable desire to separate the judicial and the school system from partisan political control, by nonpartisan nominations and nonpartisan elections.

In the belief that the judgment of the trial court should be reversed, and the act in question sustained, this dissent is submitted.

Letton, J., dissenting:

While I agree with much that is said in the majority opinion, I must dissent from

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the conclusion reached. That opinion holds:

1. That the provision of the law under consideration which declares that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured, criticized, or referred to in any manner, by any political party, or any political convention or primary, or at any primary election," is void as being in violation of the provisions of the Bill of Rights protecting liberty of speech and the right of free public assembly. So far as the prohibition of free speech by citizens assembled together in conventions is concerned, this provision of the act is clearly and manifestly void. Its enforcement in this respect would be an assault of the gravest and most heinous character upon the liberty of the citizen, and one that no free people would long endure. It is opposed to that spirit of liberty which is our dearest heritage, and which should be most jealously conserved and strongly defended by legislature, courts, and private citizen alike. It cannot be defended as a valid exercise of legislative power, and, indeed, counsel for respondent laudably has made no attempt to do so. But, perhaps, recognizing its inability and the folly of attempting to curb and limit free speech and free assemblage in a land of liberty, the legislature wisely attached no penalty or punitive sanction to a violation of its commands in these respects. Since a disregard of this provision can meet no punishment, all that part of the act may be treated as surplusage. It may be considered as an indication of what the legislature would have liked to do if it had the power, or perhaps as advisory in its nature. But I cannot go so far as the majority in holding this whole provision void. Not all of it is obnoxious to or inhibited by any provision of the Constitution. The regulation of primary elections is concededly within the province of the legislature, and that portion of this provision which prohibits the nomination of such candidates at any primary election is not in violation of any constitutional provision, and is a proper regulation. The legislature may, as it did for many years before the passage of the Australian ballot law, leave the whole matter of the nomination of candidates and the preparation of ballots to be used at the general election to individual or party care; the only regulation at that time being that the elector should deliver in full view of the people assembled at the polls a piece of paper with the name of the person voted for written or printed thereon and a pertinent description of the office. Gen. Stat. 1873, chap. 20, § 29. Or it may take into its hands the entire control and direction of the nomination of candidates and the preparation and furnishing of official ballots. Its action in regard to these matters, where no constitutional right is assailed, is conclusive alike upon the courts and upon the citizen.

In this state the printing and furnishing of official ballots has for years been assumed by the state. No other ballots than those furnished by public authority can be used. The manner in which the names of candidates shall appear upon such official ballot, whether with or without party designation, is a matter entirely within the control and discretion of the legislature, provided only that in this respect no discrimination or partiality is shown which will defeat the constitutional requirements providing for "a free ballot and a fair count." Political parties may or may not be recognized by the legislature in regulating the form of ballots, and there is no constitutional requirement which compels their notice. The legislature has the option whether or not the ballots shall be "official" and printed at public expense, and whether party designations shall appear thereon; and it has the power to decide whether the names of candidates printed upon the "official ballots" shall be ascertained by petition, by convention, by primary election, or by any other manner which accomplishes the end sought, a reasonable limitation of the number of names necessary to print in order to afford every elector a fair opportunity to express his preference. While at the general election the elector may vote for whom he pleases by writing any name upon the ballot, it is manifestly impossible for the state to print in advance the name of every possible candidate, and the exercise of some method of selection is necessary to avoid needless expense and an unwieldy and cumbersome ballot. The state, too, has the right reasonably to classify offices, and to provide that candidates for certain offices shall be selected by primary election and for others by petition. This state having heretofore adopted the primary system of nominations as to certain offices, it has the power to prohibit nominations at a primary election for such offices as to which it is provided nomination shall be by petition. In my judgment the prohibition of the nomination of candidates for judicial and educational offices at primary elections is a valid exercise of legislative power, but the prohibition of free speech and free assemblage contained in the act is not and ought not to be of more practical or legal effect

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than "sounding brass or tinkling cymbals" or "the crackling of thorns under a pot."

2. Coming now to the provision limiting signatures to petitions for candidates for the office of supreme judge to not more than 500 in any one county: In its practical operation I seriously doubt whether this would hinder or obstruct any voter in the exercise of the elective franchise. Everyone who has observed the degree of care and discrimination, or rather lack of these qualities, which the average man ordinarily employs before he affixes his name to petitions, must come to the conclusion that, after obtaining 500 signers in a few counties in the more densely populated portion of the state, there would be little or no difficulty in filling the quota from the eighty or more counties left to canvass. But, however this may be, the possibility exists that the reputation of a candidate entirely fitted and qualified for, and who might adorn, the position, may be so purely local that, unless the voters of his own immediate locality furnish the 5,000 names necessary under the law, thousands of voters in that locality would be placed at a serious disadvantage, as compared with voters in other parts of the state, by being compelled to write the name of their choice upon the official ballot, instead of its being printed thereon. The contingency is in my opinion remote, but it may happen. The unexpected often happens. It is the duty of the courts to preserve and uphold every constitutional safeguard thrown around the exercise of the elective franchise, and since the view taken by the majority is in the direction of promoting and preserving wider freedom of choice, and removes a hindrance or obstruction to the right of selection, I concur in the holding that this provision is discriminatory and void. But the limitation as to 500 signatures only applies to judges of the supreme court. No such provision is made as to other candidates, and this single provision certainly was not the inducement for the passage of the act. As to all other officers, the majority opinion condemns the act upon one ground alone, that of the empty and forceless inhibition of free speech. I am firmly convinced that this alone is mere redundant matter, and is not of sufficient importance to justify setting the law aside.

This brings me to the question of what effect on the whole law is had by excising both of these provisions. It is a fundamental and elementary proposition that, under our system of government, what laws shall be passed, what political or governmental policy pursued, or what economic theory adopted in the affairs of government, are matters with which the legislature is alone concerned, and for which it is alone responsible to the people of the state. It may be as well to say in this connection that whether the act was passed by a bare majority or whether it was unanimously adopted, whether the policy is new or whether ancient, whether its intent is wise or whether unwise, whether passed from partisan motives or not, and whether the result may prove to be good or evil, are matters with which the court has no concern. Many laws, in fact most of great importance, have a partisan origin, and are obnoxious to many persons; but with this we have nothing to do. Does the law, or do any of its provisions, violate the Constitution? This is the sole question. If any portion of the act does so, is that portion such an essential and necessary element that its elimination leaves a law incomplete and fragmentary, and which does not accord with the legislative purpose and intent, and which is incapable of enforcement? It is the duty of the court to construe and interpret acts passed by the legislature so as to uphold them if their language reasonably admits of such interpretation, and not to set them aside unless they clearly contravene the constitutional limitations upon legislative power. All doubts must be resolved in favor of the statute, and all presumptions are that the legislature passed a valid act and kept within its constitutional powers. As a corollary, if a part of a statute fails as being obnoxious to the limitations of that instrument, if, after the elimination of the objectionable part, enough of the law remains so that the intention of the legislature may be carried out, and the desired end and purpose of the enactment accomplished, the act may stand. These propositions are so elementary that citation of authorities is needless; and, indeed, these are the canons recognized in the majority opinion. I agree with the language of Judge Holcomb, quoted in the majority opinion, that "the language found in the invalid portion of the act can have no legal force or efficacy for any purpose whatever," and with the language of the majority opinion that "what remains must express the legislative will, independently of the void part, since the court has no power to legislate."

Tested by this rule, does "what remains express the legislative will?" I am convinced that there is no difficulty with the law in this respect. After eliminating the prohibition of free speech and the provision limiting the number of signatures for the

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office of supreme judge, we find an act which in substance provides that candidates for judicial and educational offices shall be nominated by petition, and not at primary elections, prescribing the number of signatures to entitle the candidate to the printing of his name upon the official ballot, and providing that the names shall be printed thereon without party designation. I see no obstacle to the carrying out of these provisions. I am of the opinion that, since the entire control of the printing of the official ballot has been placed in the hands of the public authorities, and since, if any candidate should "be nominated, indorsed, recommended, censured, criticized, or referred to" by any political party or political convention, this could have no possible effect upon the printing of any name or party designation upon the official ballot, the declared end and purpose of the act to remove the election of candidates for such offices from the domain of party politics may be accomplished so far as it may be done among a free people. The legislature cannot prevent free speech; but it can control and regulate the official ballot and the manner of selection of names of candidates to be printed thereon. It has the right to do so in such a manner as to remove, as far as it may, consistent with constitutional rights, certain offices or all offices, if it chooses, "from the domain of partisan politics," if in its judgment it believes it to be for the best interests of the state. It cannot abolish parties nor prevent their formation; it cannot prevent the free and open discussion of the qualifications and fitness for office of candidates, either by newspapers, individuals, or assemblages of citizens, whether in church, mass meeting, or political convention; but it has the undoubted right to mitigate, if it can, any evils that it believes to flow from nominations by political parties, so long as it acts in such a manner that there shall be no infringement upon the requirement of the Constitution that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Art. 1, § 22.

I believe that, with the excision of the immaterial and unessential provisions mentioned, the law is still in accordance with the legislative purpose and intent, and with the Constitution of the state; that these portions may be declared invalid, and the remainder of the statute upheld as a valid exercise of legislative power. For these reasons, I must dissent from the conclusion reached that the law is altogether void.

NORTH DAKOTA SUPREME COURT.

CHARLES G. LARSON, Appt.,
v.
FRANK NEWMAN, Admr., etc., of George J. Newman, Deceased, et al., Respts.

(— N. D. —, 121 N. W. 202.)

Broker — sale of land — termination of authority.

1. A landowner made a contract in writing with S. & Co., land agents, authorizing them to sell a piece of land on terms stated in the contract. Afterwards the firm of S. & Co. dissolved. S., continuing the business, made a contract to sell the land to plaintiff on terms somewhat different from those authorized in the agency contract, and signed the landowner's name thereto by himself as agent. In an action to compel the landowner to specifically perform the contract, held that whatever authority was conferred upon S. & Co. by the agency contract was terminated upon the dissolution of the copartnership, and S. had no further power under that contract.

Same — exceeding authority — binding effect.

2. The sale by an agent on any other terms and conditions than those authorized by the principal is not binding on the latter.

Same — ratification — evidence — sufficiency.

3. Evidence insufficient to show a ratification by the principal of the contract of sale by S. to plaintiff.

(March 13, 1909.)

Headnotes by CARMODY, J.

Case Note. — Dissolution of partnership authorized to act as agent, as termination of agency.

This note does not cover the general question whether partnership contracts are terminated by a dissolution of the firm, but it is confined strictly to the effect of dissolution upon contracts of agency. Neither are cases of joint agents other than partnerships within its scope.

The dissolution of a partnership authorized to act as an agent is generally held to revoke the agency.

Thus, the dissolution of a partnership avoids an order given to a carrier, authorizing the delivery of goods to such partnership for the purpose of cartage; and a firm composed of two of the members of the former partnership of three has no authority to continue to act thereunder. Angle v. Mississippi & M. R. Co. 9 Iowa, 487.

So, the principal is entitled to discontinue the agency, where, upon dissolution of a partnership which had acted as agent in collecting rents, the partners offer each to collect a part of the rent in the future. Thomas v. Gwyn, 131 N. C. 460, 42 S. E. 904.

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APPEAL by plaintiff from a judgment of the District Court for Ward County in defendants' favor in an action brought to compel specific performance of an alleged contract to sell certain land. Modified.

The facts are stated in the opinion.

Messrs. **Johnson & Nestos** and **Skulason & Burtness** for appellant.

Messrs. **Engerud, Holt, & Frame,** with Messrs. **Palda & Burke,** for respondents:

Upon dissolution of the firm the agency ceased.

Martine v. International L. Ins. Soc. 53 N. Y. 341, 13 Am. Rep. 529; Johnson v. Wilcox, 25 Ind. 182.

A sale by an agent on any other terms and conditions than those authorized by the principal is not binding on the latter.

De Sollar v. Hanscome, 158 U. S. 216, 29 L. ed. 956, 15 Sup. Ct. Rep. 816; Holbrook v. McCarthy, 61 Cal. 216; Speer v. Craig, 16 Colo. 478, 27 Pac. 891; Taylor v. White, 44 Iowa, 295; Veeder v. McMurray (Iowa) 23 N. W. 285; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Dayton v. Buford, 18 Minn. 126, Gil. 111; Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

Carmody, J., delivered the opinion of the court:

The plaintiff in this action seeks to compel the defendant to specifically perform a certain written contract, alleged to have been duly subscribed and executed by the plaintiff, and duly subscribed and executed on the part of the defendant by one C. Sangalli, thereunto duly authorized by an instrument in writing theretofore duly executed and subscribed by the defendant, by the terms of which the defendant agreed to sell and convey to the plaintiff certain real estate consisting of 160 acres in Ward county. At the time of trial there was another action pending relative to the land in

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And a contract existing between a partnership and a steel company, by which the partnership was constituted a selling agent, is terminated by the dissolution of the partnership. Meysenburg v. Littlefield, 135 Fed. 184.

So, an automobile company entering into a contract with a partnership for handling its machines, relying upon the qualifications of one of the partners as a salesman, is entitled to the personal services of such partner, and, upon dissolution of the firm, may abandon its contract. Wheaton v. Cadillac Automobile Co. 143 Mich. 21, 106 N. W. 399.

And a principal employing two persons as joint agents to take charge of a building for a year may terminate the agency before the expiration of that time in case one of the parties becomes incapacitated by reason of an accident. Salisbury v. Brisbane, 61 N. Y. 617.

And a contract to furnish a carriage for a given time, made with one by name, without knowledge that such person had a partner, cannot be enforced for the remainder of the period, where the partnership is dissolved, and the one with whom the contract was made assigns all of his interest to the unknown partner, since the contract is personal. Robson v. Drummond, 2 Barn. & Ad. 303.

The mere change of a firm's name, however, will not annul its authority as agent, where the same persons compose the new firm, Billingsley v. Dawson, 27 Iowa, 210. The court said: "The confidence or trust of agency was reposed in the individuals having the interest and bearing the relation of partners, and not in the name they had assumed. So long as the interest and relation remain unchanged, they might properly exercise the powers conferred by the principal, although they did it under another name. The counterpart of this proposition would be equally true; to wit, that other individuals, although under the same name as that of the agents when constituted such, would not have the authority to bind the principal. To illustrate a little further, A. B. makes John Smith his agent; but the agent, being anxious to obtain a name affording some index to his individuality, procures an act of the legislature or an order of court . . . changing his name to John Short, or any other. Does he thereby lose his powers as agent, or may they be exercised by some other John Smith? We think not."

Where dissolution results from death.

The same result is reached where the dissolution is brought about by the death of a partner.

Thus, the death of one of two partners authorized to receive insurance premiums terminates the relation, and the principal is not bound by the subsequent acts of the surviving member. Martine v. International L. Ins. Soc. 53 N. Y. 339, 13 Am. Rep. 529. The court said: "The death of one member of a firm operates immediately and inevitably as a dissolution. . . . During the existence of a partnership, each member is deemed to be authorized to transact any business for the firm; but upon dissolution this authority ceases, and the only authority of the survivor is to close up the business. He has no right to create new obligations, nor, indeed, to do anything in the name of the firm, except such as is necessary in adjusting and closing its concerns. . . . It is a general rule of the common law that an authority by a principal to two persons to do an act is joint, and the act must be concurred in by both. . . . When a firm is appointed to an agency, this rule would necessarily be modified to the extent that either member of a firm could do any act within the scope of the agency, the same as he could

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controversy, in which defendant George J. Newman was plaintiff, and Sangalli and plaintiff, Larson, were defendants. They stipulated that the rights of the parties to said action would be determined by the judgment in the case at bar. The trial court made findings, and entered judgment dismissing this action, canceling the contract alleged to have been entered into, and awarding the respondents possession of the real estate in controversy, and ordered $100 attorney fees to be taxed in favor of the respondents and against the plaintiff. Plaintiff appealed from the judgment, and demands a review of the entire case in this court. The facts which are material to the determination of the questions involved are as follows: On August 24, 1904, the defendant, who was then, and his heir at law now is, the owner of the real estate in question, listed the same for sale with the firm of C. Sangalli & Company, consisting of three members, real estate agents at Berthold. The listing contract is as follows:

Agent's Authority to Sell Land.

Berthold, N. Dak., August 24, 1904.

I hereby constitute and appoint C. Sangalli & Co., of Berthold, N. D., my exclusive agent to sell the following described lands: The northwest quarter of section 2 in township No. 155 of range No. 86, county of Ward, state of N. Dak. My net price to you on this land is $1,700. I want $1,200 paid down, and will allow the balance to be paid in balance mtge. to be assumed by purchaser, annual payments, with interest at the rate of —— per cent per annum, and I hereby agree to pay you a commission of ——— of said net price, and in case of sale to furnish at my own expense a complete abstract of title, and to convey the above-described premises by a good and sufficient deed or deeds of conveyance. Notify me if

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perform any other partnership act. By appointing a partnership firm it would be implied that the authority was joint and several. But, upon dissolution of the firm, such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act, nor agreed to be responsible for his acts; and the latter could incur no obligation against the deceased member or his representatives."

And likewise a commission of authority to act as insurance agents, issued to two jointly, is terminated by the death of one, and a subagent of the survivor derives no authority from his appointment. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

So, the estate of one who was a member of a law partnership is not liable for money collected by the surviving partner after deceased's death, since the agency terminated at the member's death. Johnson v. Wilcox, 25 Ind. 182.

And there are *dicta* in Davidson v. Provost, 35 Ill. App. 126, and Rowe v. Rand, 111 Ind. 206, 12 N. E. 377, that the death of one partner renders the further execution of agency impossible, and therefore terminates it.

Where authority was conferred upon two jointly to place the principal's name on a note as security, and there was no proof of a partnership, the court in Gilman v. Kibler, 5 Humph. 19, said that it would be difficult to maintain that the survivor could execute the power. The question in case a partnership should be established, however, was not determined.

A case is taken out of the general rule where, after the death of one of a firm of two architects, authorized to superintend the construction of a building, the other is recognized as having authority to continue the supervision. Davidson v. Provost, 35 Ill. App. 126.

The case of Smith v. Hill, 13 Ark. 173, does not appear to be in entire harmony with the general rule. It was held in this case that a contract with a firm of attorneys for the services of a particular partner at a stipulated fee could not be broken by the client upon such partner's death, without a tender to the survivor of a fair compensation for the services then rendered; and that, if the survivor rendered the full service with ordinary professional skill, he might recover the entire fee. The court said: "When, then, the nature of the attorney's employment is considered, and it is remembered that the engagement of the attorney, with its legal incidents, is the consideration of the contract for the fee . . . that every step thenceforward in the preparation of the cause for trial, either in examination of the law, consultation, or otherwise, is part performance of the contract, and that the firm was legally bound for due professional diligence and skill on the part of the individual partner whose services were contracted for, we are of opinion that, on the death of this partner, after the contract for his services, and before the trial term, it was not competent at that term—as was attempted in this case—for the client to refuse the services of the surviving partner without an actual tender of a fair compensation for the professional engagement made and aid already rendered under the responsibilities of the law; and consequently that the surviving partner, under such circumstances, had a right to tender and to render the services at his own risk, and, if rendered, and they could not be justly assailed for falling below the standard of due professional skill and diligence,—and they have not been thus assailed in this case,—that he would be entitled to the entire fee."

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you get offer of $1,600. Gen'l Delivery. Chicago, Ills. 86 acres broken. This authority to remain in force for the period of 2 months from date, and to continue in force thereafter until I shall have served 15 days' notice of cancelation upon C. Sangalli & Co., my herein constituted agent.

George J. Newman.

Mtge. $500, 10 per cent. Due 8—20—08.

Immediately after making the agency contract, defendant left the state, and his residence was unknown to Sangalli & Company until about July 1, 1906, when Sangalli received a letter from him, asking if he had any chance to sell the land, how crops were looking, etc., giving his address as New York city. In the meantime, and before the contract in question for the sale of the land was entered into, the firm of Sangalli & Company was dissolved, and the business was continued by C. Sangalli, which dissolution was unknown to defendant. On the 31st day of August, 1905, and after the dissolution of the firm of C. Sangalli & Company, C. Sangalli, claiming under said contract to be the agent of defendant, entered into a contract with plaintiff, as follows:

Earnest-Money Contract of Sale.

Berthold, N. Dak., August 31, 1905.

Received of Charles G. Larson one hundred dollars ($100) as earnest money, and in part payment for the purchase of the following described property situated in the county of Ward and state of North Dakota, *viz.:* The northwest quarter section No. two (N. W. ¼ sec. 2), in township one hundred and fifty-five (155) north, of range eighty-six (86) west. Containing one hundred and sixty (160) acres, more or less, according to the United States government survey thereof. Which I, as duly authorized agent of George J. Newman, the owner of the above-described real estate, sold and agreed to convey to said Charles G. Larson for the sum of one thousand and eight hundred dollars ($1,800), on terms as follows, *viz.:* One hundred dollars ($100) in hand paid, as above, and $1,200 November 30, 1905; $500 mortgage to be assumed by the purchaser, payable on or before the dates as named above, or as soon thereafter as a warranty deed conveying a good title to said land is tendered, time being considered of the essence of this contract. And it is agreed that if the title to said premises is not good and canot be made good within one year from date hereof, this agreement shall be void, and the above one hundred dollars ($100) refunded. But if the title to said premises is now good, in his name, or can be made good withhin one year, and said purchaser refuses to accept the same, said one hundred dollars ($100) shall be forfeited to the said C. Sangalli. But it is agreed and understood by all parties to this agreement that said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract.

George P. Newman,
By C. Sangalli, Agent. [Seal.]

I hereby agree to purchase the said property for the price and upon the terms above mentioned, and also agree to the conditions of forfeiture and all other conditions therein expressed.

Charles G. Larson. [Seal.]

..... the undersigned, owner of the above-described land, do hereby ratify the above sale and agreement.

..... [Seal.]

On receipt by Mr. Sangalli of the letter hereinbefore mentioned, he sent defendant a copy of the contract of sale, and also a deed for his signature, to which he replied as follows:

New York, July 21, 1906.

Friend Charles:—

In the earnest-money contract it says 190' payable on or before the dates as named above, etc. Now I don't know what that 190' is or what it is for. I had a notary public look at it and he did not understand it. He told me to write and have it explained. Now Charles, I have almost entirely forgotten the conditions of the contract I made with you; I did not think when I made it that you would find a buyer and now it is almost two years ago and the land certainly went up a little in that time. Now Charles, between you and me and the fence post, don't you think we could make Larson come up a little more on the price; he wants the land because it is handy to Parker. Sound him and tell me what you think of it. Now tell me what your commission is, and who pays it, Larson or I. Tell me if Larson is on the place this year. Let me know what taxes I had to pay last year, and if Stevenson has paid my interest to the Second National Bank of Minot. Now Charles, that is asking a good deal of you but I hope you will do it. Remember your commission will be all right. If there is not any other land handy he will come up. All right.

Now Charles, this is between you and me only. I wrote to Stevenson last summer; it looks funny he could not tell you my address. Now you know how land is selling

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better than I do. If you work for my best interest I will be thankful and a little more.

Yours very truly,

Geo. J. Newman.

Address as before.

At the time of the alleged sale, the land in question was rented for a term which would expire about November 1, 1906. Plaintiff made no payment, and took no possession of said premises, until the fall of 1906, when he put some grain into a granary on the premises. After the commencement of this action a stipulation was entered into between plaintiff and defendant, by the terms of which the plaintiff was to farm the land during the season of 1907 without it interfering with the rights of any of the parties to this action. On or about the 1st day of October, 1906, defendant returned to Berthold, when Sangalli and the plaintiff requested him to execute a deed for the land, which he failed and refused to do. The plaintiff then deposited $1,200 in a bank at Berthold, with instructions to turn it over to defendant upon his executing a sufficient deed of warranty conveying to plaintiff the said land. He also notified defendant in writing of the deposit. After the commencement of this action, defendant died, and upon the trial his administrator, Frank Newman, and his sole heir, Ann Newman, were by stipulation substituted as parties defendant.

Is the contract of sale herein mentioned defendant's contract? It was not signed by him in person. Plaintiff contends that Sangalli had authority, under the written agency contract, to sell, and make an executory contract binding upon defendant, and further claims that he, by his letters to Sangalli dated June 29 and July 21, 1906, and by other actions, ratified the contract of sale made for him by Sangalli to plaintiff. On the other hand, respondent contends that said contract of agency only conferred upon Sangalli & Company the authority ordinarily possessed by real estate brokers, and that it did not empower them to make a written contract which would bind defendant; that even if it did create an agency to sell and contract in defendant's name, the contract executed by Sangalli is not binding on defendant, for whatever power the agency contract conferred was in Sangalli & Company, which was a copartnership composed of three members, and was dissolved before the sale contract herein mentioned was executed between Sangalli and plaintiff, and, further, that the terms of sale stated in the agency contract were $1,200 cash and the assumption of a $500 mortgage which was then on the premises; while the contract entered into between Sangalli and plaintiff was for $100 cash and $1,200 payable on the 30th day of November, 1905, which was three months after the contract was made; the plaintiff to assume the $500 mortgage. Appellant cites a large number of cases to sustain his contention that Sangalli under the agency contract hereinbefore mentioned, had power to execute the contract of sale, and that it was valid and binding upon defendant. Under our view of the case it is not necessary to pass upon this contention, as we are agreed that whatever authority was conferred upon Sangalli & Company by the agency contract was terminated upon the dissolution of the copartnership, and Sangalli had no further power under that contract. Martine v. International L. Ins. Soc. 53 N. Y. 339, 13 Am. Rep. 529; Johnson v. Wilcox, 25 Ind. 182. The sale contract was unauthorized, void, and not binding upon the defendant for the reason that the terms of sale therein set forth were materially different from those required by the agency contract, in that the agency contract required the $1,200 to be paid in cash, while the sale contract gave three months' time for the payment of said sum. It also contains some provisions regarding title to the land, the forfeiture of $100 to Sangalli in case the plaintiff refused to accept same, and some other provisions not contained in the agency contract. The sale by an agent on any other terms and conditions than those authorized by the principal is not binding on the latter. De Sollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; Holbrook v. McCarthy, 61 Cal. 216; Speer v. Craig, 16 Colo. 478, 27 Pac. 891; Taylor v. White, 44 Iowa, 295; Veeder v. McMurray (Iowa) 23 N. W. 285; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Dayton v. Buford, 18 Minn. 126, Gil. 111; Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331. And, unless defendant ratified the contract of sale entered into between Sangalli and the plaintiff, the judgment of the district court must be affirmed, except as to attorney fees of $100.

Appellant contends that the defendant Newman ratified the contract of sale by his letters to Sangalli dated June 29 and July 21, 1906, hereinbefore referred to, and also by his conversation and conduct after his return to Berthold in the fall of 1906. The letter written to Sangalli by defendant on June 29, 1906, only refers to the land as follows: "Let me know if you had any chance to sell that land and how crops are looking and all the news in general." In answer to

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this letter, Sangalli sent him a copy of the contract of sale, and also deed for his signature. In reply thereto, defendant wrote the letter in which he stated that he had received the earnest-money contract, part of it he did not understand, and had a notary public look at it, who did not understand it, and asked him to write and have it explained. And then goes on to say: "Now Charles, I have almost entirely forgotten the conditions of the contract I made with you. I did not think when I made it that you would find a buyer, and now it is almost two years ago, and the land certainly went up a little in that time. Now Charles, between you and me and the fence post, don't you think we could make Larson come up a little more on the price; he wants the land because it is handy to Parker. Sound him and tell me what you think of it. Now tell me what your commission is, and who pays it, Larson or I. Tell me if Larson is on the place this year. Let me know what taxes I had to pay last year, and if Stevenson has paid my interest to the Second National Bank of Minot. Now Charles, that is asking a good deal of you, but I hope you will do it. Remember your commission will be all right. Now Charles, this is between you and me only." This letter, which is the one principally relied upon by appellant, is, in our opinion, far from a ratification of the sale contract. It does not state that he will consummate the sale, or that he is satisfied with it, or that Sangalli was authorized to make it; neither did he execute the deed sent him by Sangalli. On his return to Berthold in the fall of 1906 he repudiated the contract, and refused to carry out its terms. True, plaintiff testified that, in a conversation he had with Newman after his return to Berthold, he promised to go to Minot the next day and fix up the deal on the terms of the sale contract. This testimony was seasonably objected to by respondents, and was inadmissible under the statute which deprives a party to an action against the heirs or representatives of a deceased to testify as to conversations or transactions had with the said deceased. Rev. Codes 1905, § 7252; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Regan v. Jones, 14 N. D. 591, 105 N. W. 613. The trial court allowed attorney fees at $100. This was error, and that amount must be deducted from the costs taxed in the district court, and the judgment modified to that extent.

The judgment as modified is affirmed.

All concur.

Petition for rehearing denied May 15, 1909.

23 L.R.A.(N.S.)

TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE FRANK A. SMYTHE.

(— Tex. Crim. App. —, 120 S. W. 200.)

Appropriations — abandoned wife — fine.

1. A statute directing the payment to a wife of a fine imposed upon her husband for abandoning her violates a constitutional provision that no appropriation for private or individual purposes shall be made.

Sentence — suspending — abandoning wife — payments.

2. A constitutional provision that no power of suspending laws shall be exercised except by the legislature is violated by a statute permitting the court to release from custody one convicted of abandoning his wife, upon his entering into a recognizance to pay her a weekly sum.

Jury — abandoning wife — fine.

3. A statute permitting the court, instead of imposing the fine provided for abandoning one's wife, or in addition thereto, to require the husband to pay her a certain sum weekly, deprives him of his constitutional right to trial by jury.

(Ramsey, J., dissents.)

(May 12, 1909.)

APPEAL by petitioner from an order of the Criminal District Court for Harris County dismissing a petition for a writ of habeas corpus to secure the re-

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Case Note. — Constitutionality of statute requiring a husband, upon conviction of abandonment, to provide for support of wife or family.

The unconstitutionality of the statute under consideration in RE SMYTHE was reaffirmed in Burch v. State (Tex. Crim. App.) 120 S. W. 206.

It was held in People v. Stickle, 156 Mich. 557, 121 N. W. 497, that the executive pardoning power was not invaded by a statute providing that, upon conviction of a husband who shall desert and abandon his wife or minor children without providing for their necessities, shall be imprisoned, unless he shall enter into a bond conditioned to furnish them with necessary and proper shelter, food, care, and clothing, whereupon the court may suspend sentence, as the jurisdiction thereby conferred upon the court was simply the well-recognized judicial power to suspend sentence. The court said that such power and the power to grant pardons are distinct and different in origin and nature, and that it has never been supposed that the power to suspend sentence is other than a judicial function.

Nor does such statute interfere with or impose conditions upon the judicial power of the court to impose sentence. Ibid.

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lease of petitioner from custody to which he had been committed for abandoning his wife. Reversed.

The facts are stated in the opinion.

Mr. K. C. Barkley for appellant.

Mr. F. J. McCord for the State.

Brooks, J., delivered the opinion of the court:

Relator was arrested on a capias issued upon an indictment returned into the criminal district court of Harris county, wherein relator was charged, in substance, with unlawfully and wilfully and without cause abandoning his wife. He made application for writ of habeas corpus to Hon. J. K. P. Gillaspie, judge of said court, which having been refused by him, relator filed his petition in this court, seeking release.

We do not deem it necessary to state seriatim the insistences upon which relator predicates his release in this case, but suffice it to say that all of his positions raise the question as to the constitutionality and validity of the abandonment of wife or children statute to be found in Acts 30th Legislature, 1907, chap. 62, p. 133. We hold that said act is totally invalid. It will be seen from an inspection of said act that, after relator is fined under the same, said fine shall be paid into court for the benefit of the wife, or to the guardian or custodian of the minor child or children. Section 6, art. 16, of the state Constitution, reads as follows: "No appropriation for private or individual purposes shall be made." Then the article goes on and provides for a regular statement, under oath, and an account of the receipts and expenditures of all public money. The first clause cited of said section is the one that we hold absolutely invalidates the penal clause in the statute under consideration, since it provides that, when the relator is fined, said fine shall be paid to the wife or the minor child or children. However beneficent the purpose of this legislation, all of which we readily and cheerfully concede, yet we must hold that no penal statute can be passed in this state, in the light of the provision of the Constitution quoted, which statute permits the fine, after collection, to be paid to the individual, whoever that individual may be. It clearly follows that, when the fine is imposed, said fine becomes the money of the state of Texas. Then, for the law to provide that that money must be paid to the party injured by the violation of the law is a direct appropriation of public funds for private or individual purposes. Suppose the legislature had provided that where a man beats another with a stick, or offers him any other unlawful violence other than death, the fine that should be collected for said unlawful act should be turned over to the victim of said assault. Certainly it could not be insisted that this character of law would not infringe the provision of the Constitution cited. Nor would the fact that the husband is under moral and civil liability to support the wife and child render the act less obnoxious to the provision under consideration. The Constitution of this state does not, nor can it be bent to, meet beneficent purposes, however noble the design may be, because to appropriate this money of the state of Texas to support the wife or child would be equally in violation of the letter and spirit of the law as it would be to appropriate money for any other character of fine to the party who was injured by the violation of the law under which the fine was imposed.

The abandonment statute under consideration further provides "that before the trial (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court, in its discretion, having regarded the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian, or custodian of the minor child or children, and to release the defendant from custody, on probation, during the time of the imprisonment, upon his entering into a recognizance, with two good and sufficient sureties, in double the amount of the fine imposed, payable to the county judge." The condition of the bond, in substance, is that if the defendant shall make his personal appearance in court when ordered to do so by the court during the suspension of imprisonment or probation, and shall further comply with the terms of the order, then the recognizance shall be void; otherwise, in full force and effect. Section 28, art. 1, of the state Constitution, provides: "No power of suspending laws in this state shall be exercised except by the legislature." The clause of the statute under consideration, last cited, clearly authorizes the county judge to suspend the law, in that he suspends the punishment. A law without a punishment, especially a penal law, has no validity or force whatever; and when one suspends the penalty he suspends the law. Therefore we hold that this section of the act in question violates the section of the Constitution last quoted.

Without passing upon the other questions in the other sections of the act, we will say that the bond authorized to be exe-

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this letter, Sangalli sent him a copy of the contract of sale, and also deed for his signature. In reply thereto, defendant wrote the letter in which he stated that he had received the earnest-money contract, part of it he did not understand, and had a notary public look at it, who did not understand it, and asked him to write and have it explained. And then goes on to say: "Now Charles, I have almost entirely forgotten the conditions of the contract I made with you. I did not think when I made it that you would find a buyer, and now it is almost two years ago, and the land certainly went up a little in that time. Now Charles, between you and me and the fence post, don't you think we could make Larson come up a little more on the price; he wants the land because it is handy to Parker. Sound him and tell me what you think of it. Now tell me what your commission is, and who pays it, Larson or I. Tell me if Larson is on the place this year. Let me know what taxes I had to pay last year, and if Stevenson has paid my interest to the Second National Bank of Minot. Now Charles, that is asking a good deal of you, but I hope you will do it. Remember your commission will be all right. Now Charles, this is between you and me only." This letter, which is the one principally relied upon by appellant, is, in our opinion, far from a ratification of the sale contract. It does not state that he will consummate the sale, or that he is satisfied with it, or that Sangalli was authorized to make it; neither did he execute the deed sent him by Sangalli. On his return to Berthold in the fall of 1906 he repudiated the contract, and refused to carry out its terms. True, plaintiff testified that, in a conversation he had with Newman after his return to Berthold, he promised to go to Minot the next day and fix up the deal on the terms of the sale contract. This testimony was seasonably objected to by respondents, and was inadmissible under the statute which deprives a party to an action against the heirs or representatives of a deceased to testify as to conversations or transactions had with the said deceased. Rev. Codes 1905, § 7252; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Regan v. Jones, 14 N. D. 591, 105 N. W. 613. The trial court allowed attorney fees at $100. This was error, and that amount must be deducted from the costs taxed in the district court, and the judgment modified to that extent.

The judgment as modified is affirmed.

All concur.

Petition for rehearing denied May 15, 1909.

23 L.R.A.(N.S.)

TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE FRANK A. SMYTHE.

(— Tex. Crim. App. —, 120 S. W. 200.)

Appropriations — abandoned wife — fine.

1. A statute directing the payment to a wife of a fine imposed upon her husband for abandoning her violates a constitutional provision that no appropriation for private or individual purposes shall be made.

Sentence — suspending — abandoning wife — payments.

2. A constitutional provision that no power of suspending laws shall be exercised except by the legislature is violated by a statute permitting the court to release from custody one convicted of abandoning his wife, upon his entering into a recognizance to pay her a weekly sum.

Jury — abandoning wife — fine.

3. A statute permitting the court, instead of imposing the fine provided for abandoning one's wife, or in addition thereto, to require the husband to pay her a certain sum weekly, deprives him of his constitutional right to trial by jury.

(Ramsey, J., dissents.)

(May 12, 1909.)

APPEAL by petitioner from an order of the Criminal District Court for Harris County dismissing a petition for a writ of habeas corpus to secure the re-

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Case Note. — Constitutionality of statute requiring a husband, upon conviction of abandonment, to provide for support of wife or family.

The unconstitutionality of the statute under consideration in RE SMYTHE was reaffirmed in Burch v. State (Tex. Crim. App.) 120 S. W. 206.

It was held in People v. Stickle, 156 Mich. 557, 121 N. W. 497, that the executive pardoning power was not invaded by a statute providing that, upon conviction of a husband who shall desert and abandon his wife or minor children without providing for their necessities, shall be imprisoned, unless he shall enter into a bond conditioned to furnish them with necessary and proper shelter, food, care, and clothing, whereupon the court may suspend sentence, as the jurisdiction thereby conferred upon the court was simply the well-recognized judicial power to suspend sentence. The court said that such power and the power to grant pardons are distinct and different in origin and nature, and that it has never been supposed that the power to suspend sentence is other than a judicial function.

Nor does such statute interfere with or impose conditions upon the judicial power of the court to impose sentence. Ibid.

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lease of petitioner from custody to which he had been committed for abandoning his wife. Reversed.

The facts are stated in the opinion.

Mr. K. C. Barkley for appellant.

Mr. F. J. McCord for the State.

Brooks, J., delivered the opinion of the court:

Relator was arrested on a capias issued upon an indictment returned into the criminal district court of Harris county, wherein relator was charged, in substance, with unlawfully and wilfully and without cause abandoning his wife. He made application for writ of habeas corpus to Hon. J. K. P. Gillaspie, judge of said court, which having been refused by him, relator filed his petition in this court, seeking release.

We do not deem it necessary to state seriatim the insistences upon which relator predicates his release in this case, but suffice it to say that all of his positions raise the question as to the constitutionality and validity of the abandonment of wife or children statute to be found in Acts 30th Legislature, 1907, chap. 62, p. 133. We hold that said act is totally invalid. It will be seen from an inspection of said act that, after relator is fined under the same, said fine shall be paid into court for the benefit of the wife, or to the guardian or custodian of the minor child or children. Section 6, art. 16, of the state Constitution, reads as follows: "No appropriation for private or individual purposes shall be made." Then the article goes on and provides for a regular statement, under oath, and an account of the receipts and expenditures of all public money. The first clause cited of said section is the one that we hold absolutely invalidates the penal clause in the statute under consideration, since it provides that, when the relator is fined, said fine shall be paid to the wife or the minor child or children. However beneficent the purpose of this legislation, all of which we readily and cheerfully concede, yet we must hold that no penal statute can be passed in this state in the light of the provision of the Constitution quoted, which statute permits the fine, after collection, to be paid to the individual, whoever that individual may be. It clearly follows that, when the fine is imposed, said fine becomes the money of the state of Texas. Then, for the law to provide that that money must be paid to the party injured by the violation of the law is a direct appropriation of public funds for private or individual purposes. Suppose the legislature had provided that where a man beats another with a stick, or offers him any other unlawful violence other than death, the fine that should be collected for said unlawful act should be turned over to the victim of said assault. Certainly it could not be insisted that this character of law would not infringe the provision of the Constitution cited. Nor would the fact that the husband is under moral and civil liability to support the wife and child render the act less obnoxious to the provision under consideration. The Constitution of this state does not, nor can it be bent to, meet beneficent purposes, however noble the design may be, because to appropriate this money of the state of Texas to support the wife or child would be equally in violation of the letter and spirit of the law as it would be to appropriate money for any other character of fine to the party who was injured by the violation of the law under which the fine was imposed.

The abandonment statute under consideration further provides "that before the trial (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court, in its discretion, having regarded the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian, or custodian of the minor child or children, and to release the defendant from custody, on probation, during the time of the imprisonment, upon his entering into a recognizance, with two good and sufficient sureties, in double the amount of the fine imposed, payable to the county judge." The condition of the bond, in substance, is that if the defendant shall make his personal appearance in court when ordered to do so by the court during the suspension of imprisonment or probation, and shall further comply with the terms of the order, then the recognizance shall be void; otherwise, in full force and effect. Section 28, art. 1, of the state Constitution, provides: "No power of suspending laws in this state shall be exercised except by the legislature." The clause of the statute under consideration, last cited, clearly authorizes the county judge to suspend the law, in that he suspends the punishment. A law without a punishment, especially a penal law, has no validity or force whatever; and when one suspends the penalty he suspends the law. Therefore we hold that this section of the act in question violates the section of the Constitution last quoted.

Without passing upon the other questions in the other sections of the act, we will say that the bond authorized to be exe-

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cuted might be $2,000, since the maximum fine could be $1,000. In the light of this suggestion, it occurs to us that, even conceding the validity of the bond, which we do not, it should be made within the jurisdiction of the county court. Furthermore, this statute is invalid, since it deprives the defendant of the right of trial by jury, which is also guaranteed by the Constitution. The first clause of the act, in defining the offense, says "that every person who shall, without good cause, abandon his wife and neglect and refuse to maintain and provide for her," etc. This section of the act might be upheld on the theory that by the words "good cause" the legislature intended to say "lawful cause,"—that is further to say, those causes enumerated under the divorce law,—and hence might be upheld on the theory that the legislature did not intend to punish the husband for failing to support, or for having abandoned the wife, except for those causes not expressly defined in the divorce law of this state. If this is the meaning of the legislature in the act under consideration, then, if this legislation is re-enacted, or similar legislation is passed, the basis for a prosecution should be succinctly and clearly laid down.

Relator is accordingly discharged.

Ramsey, J., dissenting:

Relator was arrested on a capias issued upon an indictment returned into the criminal district court of Harris county, wherein relator was charged, in substance, with unlawfully and wilfully and without cause abandoning his wife. He made application for writ of habeas corpus to Hon. J. K. P. Gillaspie, judge of said court, which having been refused by him, relator filed his petition in this court, seeking release.

1. A number of questions are raised on the application, and relator assigns many grounds why his arrest should be held unlawful and his release ordered. Among other things, it is urged that the indictment returned against him is not good, in that it is not averred that he abandoned his wife without "good" cause, but that it is only averred that he unlawfully and wilfully and without cause abandoned his said wife. This matter cannot be raised in this proceeding. It is well settled that a writ of habeas corpus is not available to test the sufficiency of a complaint or indictment. See Ex parte Beverly, 34 Tex. Crim. Rep. 644, 31 S. W. 645; Ex parte Cox, 53 Tex. Crim. Rep. 240, 109 S. W. 369.

2. The act under which the indictment was returned is chapter 62, p. 133, of the Acts of the 30th Legislature of 1907. Section 1 of this act, which undertakes to define the offense, is as follows: "That every person who shall, without good cause, abandon his wife, and neglect and refuse to maintain and provide for her, or any person who shall abandon his or her minor child or children, under the age of twelve years, in destitute or necessitous circumstances, and wilfully neglect or refuse to maintain or provide for such child or children, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail not less than one year nor more than two years, or by both such fine and imprisonment; and should a fine be imposed, it shall be paid into court for the benefit of the wife, or to the guardian or custodian of the minor child or children; provided, that before the trial (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court, in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian, or custodian of the minor child or children, and to release the defendant from custody, on probation, during the time of the imprisonment, upon his entering into a recognizance, with two good and sufficient sureties, in double the amount of the fine imposed, payable to the county judge. The conditions of the recognizance shall be such that, if the defendant shall make his personal appearance in court whenever ordered to do so by the court during the suspension of imprisonment or probation, and shall further comply with the terms of the order, then the recognizance shall be void, otherwise in full force and effect. If the court be satisfied by information and due proof, under oath, that at any time during the suspension of imprisonment or probation that the defendant has violated the terms of such order, the court may forthwith proceed with the trial of the defendant under the original indictment, or sentence him under the original conviction, as the case may be. In case of forfeiture of recognizance, and enforcement thereof by execution, the sum recovered shall be paid to the wife, guardian, or custodian of the minor child or children."

The grounds urged as reasons for holding this act unconstitutional are as follows: First. That such act is void because it deprives the defendant of a speedy public trial; and in support of this propo-

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sition the following authorities are cited: Tex. Const. art. 1, § 10; Code Crim. Proc. 1895, art. 4; Waldon v. State, 50 Tex. Crim. Rep. 514, 98 S. W. 848, 14 A. & E. Ann. Cas. 342. Second. The act is unconstitutional because it gives the court power to suspend the law; and on that question the following authorities are cited: Tex. Const. art. 1, § 28; Burton v. Dupree, 19 Tex. Civ. App. 275, 46 S. W. 272; Jannin v. State, 42 Tex. Crim. Rep. 631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; San Antonio & A. P. R. Co. v. Lester, 99 Tex. 219, 89 S. W. 752; Ex parte Coombs, 38 Tex. Crim. Rep. 648, 44 S. W. 859, 47 S. W. 163; Curtis v. Gulf, C. & S. F. R. Co. 26 Tex. Civ. App. 304, 63 S. W. 149; Sutherland, Stat. Constr. § 69. Third. That the act is unconstitutional in that it deprives defendant, in part, of the right of trial by jury. Fourth. That such act is unconstitutional because, in effect, it gives the court the right to imprison for debt. Fifth. That the act is invalid in that it is void for uncertainty, because it defines no offense.

Elaborating these positions somewhat, the argument of appellant is: The Constitution provides that in all criminal prosecutions the accused shall have a speedy public trial; whereas this act undertakes to suspend an indictment over appellant indefinitely, in that it provides that "before the trial, with the consent of the defendant, or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court, in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife . . . and to release the defendant from custody on probation." The act also, it is stated, provides for the defendant entering into recognizance, and further states: "The condition of this recognizance shall be such that if the defendant shall make his personal appearance in court whenever ordered to do so by the court during the suspension of imprisonment or probation, and shall further comply with the terms of the order, then the recognizance shall be void, otherwise in full force and effect." "If the court be satisfied . . . that at any time during the suspension of imprisonment or probation that the defendant has violated the terms of such order, the court may forthwith proceed with the defendant under the original indictment, or sentence him under the original conviction, as the case may be." The argument is made that the act is unconstitutional in that it deprives defendant, in part, of the right of trial by jury; and we are reminded that Tex. Const. art. 1, § 15, provides: "The right of trial by jury shall remain inviolate." Yet this law says: "Instead of imposing the punishment herein provided, or in addition thereto . . . the court, in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife . . . and to release the defendant from custody on probation." It is urged that the effect of this provision deprives the defendant of the right of trial by jury as to whether he shall pay this sum weekly or monthly to his wife, or, in lieu thereof, go to jail; that this, in effect, gives the court the right to try him and impose this obligation upon him, which is in fact a criminal sentence, without the right of trial by jury. On the proposition that the act is unconstitutional because in effect it gives the court the right to imprison for debt, we are referred to article 1, § 18, of our Constitution, which provides: "No person shall ever be imprisoned for debt;" and yet this law, it is urged, seeks to compel the defendant to pay a certain sum weekly for the support of his wife, and says, in effect, "If you pay this debt we have imposed upon you, you may remain at liberty; but if you fail to pay it, the court will imprison you under the provisions of this act." This, it is urged, in letter and in spirit, is a violation of this safeguard of liberty which is written in every constitution of the English-speaking race. Finally, the argument is made that this act defines no offense, as no person could tell what would constitute "good cause" as named therein, and as Penal Code 1895, art. 3, shows that neither layman nor judge is permitted to go outside of the Penal Code for the definitions of offenses; that it is not the aim of the law to try a man for the violation of a law written nowhere except in the minds of the trial judge or jury.

We have thus set out at length the positions of counsel, with a statement of the arguments and reasons, as well as a collection of the authorities which it is contended support them. In addition to the reasons urged by appellant why this law should be held invalid, it is also suggested in the opinion of the majority of the court that it is in contravention of § 6, art. 16, of the state Constitution. This entire article is as follows: "No appropriation for private or individual purposes shall be made.

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A regular statement, under oath, and an account of the receipts and expenditures of all public money, shall be published annually in such manner as shall be prescribed by law." There are a number of these cases pending in this court, involving the validity of this statute. For the reason that the question is so clearly presented in the brief filed by relator, and inasmuch as the sole question here presented is the constitutionality of this measure, I have deemed it appropriate to write my views in this case, although cases involving the same matter have been pending in this court before this appeal was filed. I shall discuss all the matters urged why the act is unconstitutional, though somewhat in the reverse order.

(1) It is contended that the act does not define an offense in plain and intelligible language, and therefore is invalid, and relator is entitled to a discharge. If the statement and proposition is correct, the result must follow; but I cannot accede to the contention that the act does not define an offense and provide an appropriate penalty therefor. The act does provide that every person who shall, without good cause, abandon his wife, and neglect and refuse to maintain and provide for her, or any person who shall abandon his or her minor child or children under the age of twelve years, in destitute or necessitous circumstances, and wilfully neglect or refuse to maintain or provide for such child or children, shall be deemed guilty of a misdemeanor. This, I think, defines the offense, and such is the uniform holding of all the courts where the question has arisen, so far as I have been able to discover. This precise question came before the supreme court of Missouri in the case of State v. Davis, 70 Mo. 467. The statute construed in that case is, so far as relates to the definition of the offense, almost a literal copy of our statute. It is as follows: "Every husband shall be deemed guilty of a misdemeanor who shall, without good cause, abandon his wife, and fail, neglect, or refuse to maintain and provide for her, or who shall, without good cause, abandon his child or children under the age of twelve years, born in lawful wedlock, and fail, neglect, or refuse to maintain and provide for such child." In discussing the case, the court says: "The abandonment of a child is a statutory offense, and the language of the statute is sufficient in an indictment to charge the crime. Abandonment does not mean a mere temporary absence from home, or temporary neglect of parental duty. Bouvier defines abandonment thus: 'The act of a husband or wife who leaves his or her consort wilfully, and with an intention of causing perpetual separation.' Webster defines it as 'a total desertion; a state of being forsaken.' Additional words in the indictment would have been but definitions of the term 'abandonment,' in words which perhaps would equally require definitions." This act is very similar in many ways to our statute in reference to negligent homicide, which statute has been sustained almost from the foundation of the government. Articles 683, 684, 685, 686, and 687, Penal Code 1895, are as follows:

"Art. 683. Homicide by negligence is of two kinds: (1) Such as happens in the performance of a lawful act; and (2) that which occurs in the performance of an unlawful act. . . .

"Art. 684. If any person, in the performance of a lawful act, shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree.

"Art. 685. A 'lawful act' is one not forbidden by the penal law, and which would give no just occasion for a civil action.

"Art 686. To constitute this offense there must be an apparent danger of causing the death of the person killed, or some other.

"Art. 687. The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances."

It is true that article 687 undertakes to define what is meant by the degree of care and caution, as those words are used in the statute, and it is defined to be such as a man of ordinary prudence would use under like circumstances; but it is not believed that this definition is important as affecting the validity of the statute, or more than a declaration of what would be implied in the law in the absence of such a definition. It will thus be seen by an inspection of these acts that negligent homicide of either the first or second degree is not fully defined, except such homicide as occurs through negligence of the party charged, and as may happen in the performance of a lawful act, or as may occur in the performance of an unlawful act. It is clear that such homicide may occur in any one of a thousand ways, and that no man born of woman has written or would ever be able to write in the statute every circumstance or state of case under which a killing might occur. And so, in construing this statute, the law undertakes to visit punishment upon and create an offense in the act and out of the fact of abandonment of the wife or child without good cause. What is good cause in a case must depend upon the facts and circumstances of each particular case, judged by all the surround

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ings. It would be impossible, in the nature of things, to define the offense further, nor do we think it essential to its validity that it should be further defined. The grounds and causes of abandonment, the facts and circumstances surrounding such environments, are as various and innumerable as the emotions of men or their shifting environments, and as many-sided and complex as the shades and shadows of life, and as abounding as the "multitudinous laughter of the seas." Again, we think it perhaps correct to say that the statute may be sustained on the proposition and theory suggested by Judge Brooks in the majority opinion, that the term "good cause" is synonymous with the term "lawful cause." If it can in fairness be held that the terms are synonymous, it will not, as I believe, change the rule as to the validity of the statute.

(2) Again, I think the statute is not obnoxious to the claim and contention that it warrants an imprisonment for debt. It no more does this than does any other article of our criminal statute, which provides for the confinement of a defendant on conviction in default of the payment of the fine assessed against him. It may be that some features and provisions of the act are not warranted under our Constitution, and that it should be held that it is not competent to permit the court in its discretion "to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian, or custodian of the minor child or children, and to release the defendant from custody, on probation." It may be that this provision ought to be held obnoxious to and in contravention of article 1, § 28, of the Constitution, depriving the court of the power to suspend the law, and it may be that this provision is not in consonance with the spirit of article 1, § 18, which provides that the right of trial by jury shall remain inviolate. I am not prepared to agree that the act is in contravention of article 16, § 6, of our Constitution, quoted above. It occurs to me that the intent and purpose of that provision of the Constitution was to prohibit the legislature from making appropriations out of funds raised by public taxes, as gratuities to private individuals, and was not meant to lay an embargo or inhibition on the disposition to be made of mere penalties for the violations of our criminal law. However, this becomes unimportant, for the reason that, if the provisions affecting the remedy and enforcement of the fine provided for in this act are for any reason invalid, these provisions, so far as they contravene the Constitution, must fail. I am inclined to think personally that it is within the power of the legislature to provide that, when the fine is paid into court, the same should be for the benefit of the wife, or, in a proper case, for the benefit of the minor child or children. I am inclined to believe that the fine assessed against relator is subject to the control and disposition of the legislature, and it may make such direction and provision for its disposition as it sees proper. This, as I understand, is the rule both at common law and in this state. Nor is it certain that provision cannot be made by bond or recognizance for the payment of the fine assessed (none other) in instalments, and for security to be taken therefor by an instrument in the nature of a recognizance.

However, I am clear that if, for any or all of the reasons suggested above, the provisions for the collection and payment of the fine should be declared to be unconstitutional, it does not and cannot, in the slightest manner, affect the validity of this act. To my mind it is demonstrably clear that we have a statute in which an offense is defined and in which a penalty is named. This portion of the act is complete and perfect in itself, and if the mere process by which the payment of such fine shall be provided for should be held to be invalid and nugatory, it cannot affect the result. It is the uniform rule that where a part of an act is valid and part invalid, if the valid provisions are separable, the act may be sustained and the invalid portion fail. Such is the rule laid down by Mr. Cooley in his work on Constitutional Limitations, at pages 209, 210, 211: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the Constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional because it is not within the scope of legislative authority. It may either propose to accomplish something prohibited by the Constitution, or to accomplish some lawful, and even laudable, object by means

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repugnant to the Constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." And such is the holding of this court.

This rule will be recognized by every lawyer. Ought it to be applied, and can it in fairness be applied, to this question? It is undeniable, if my view is correct, that the act defines an offense. It is undeniable that it fixes in definite and clear terms a penalty. If the act had stopped there, it would not be questioned that it would be valid. All that follows is merely directory, and has reference to the manner and means of enforcing the penalty imposed by law. If these regulations fail, the validity of the act is not affected, because, in the absence of such regulations, other provisions of law are provided for the collection of fines and their enforcement. How can it be said that the act would be valid if these matters of detail in reference to the collection of a fine were omitted, and yet invalid because of their insertion? If they fail, it is as if they had not been written in the act. If they had not been written in the act, the court would apply the orderly processes which the law gives for the collection of the penalties. When they do fail, the law will supply and apply the provision, and the same result would ensue. In practically all new offenses created by our legislature, no provision is made for the enforcement of the penalties provided by law. None is required; and if these provisions fail we have a perfect act, and a law from which relator cannot escape punishment because he may object merely to the methods of enforcing the penalties that are denounced by law.

It is a well-settled rule that we ought, if possible, to sustain this law, and every law passed by the legislature, unless it is clearly unconstitutional. The main purpose of this law was to discourage wife and child abandonment. These are matters in which the state has an interest. It prevents mendicancy, prostitution, and illiteracy, and the throwing upon the public burdens which husband and parent ought to bear. It is the undoubted purpose of the legislature, in the interest of the helpless women and dependent children of this state, with a view of discouraging vicious and profligate husbands and fathers from abandoning their wives and offspring, to make it an offense, and thus deter and prevent such deplorable conditions, and, if still committed, to visit the offender with appropriate punishment. The incidental fact that, in their zeal, the legislature go beyond the constitutional limits imposed on them as to the mere regulation of the method of payment, and the beneficent intent in its payment, ought not to undo this much-needed legislation,—legislation, to borrow a phrase from my Brother Brooks, as beneficent as the angels ever smiled upon.

I believe the law is valid and ought to be sustained; and, in view of the importance of the question to the public and society at large, I have thus in some detail written out my views.

UTAH SUPREME COURT.

TWENTY-SECOND CORPORATION OF CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Respt.,

v.

OREGON SHORT LINE RAILROAD, Appt.

(— Utah, —, 103 Pac. 243.)

Eminent domain — damaging property — noise.

1. The operation of trains and engines on tracks lawfully constructed for the purpose

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Note. — As to effect of legislative authority upon liability for a private nuisance, see note to Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A.(N.S.) 49, and the subsequent case of Alabama & V. R. Co. v. King, 22 L.R.A.(N.S.) 603, and the further references in the note appended to that case.

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of switching and making up trains near a church, the effect of which is to interrupt religious services therein and annoy the speakers, singers, and congregation by the noise, is not a damaging of the property within the meaning of a constitutional provision requiring compensation to be made in case property is damaged for public use.

Appeal — theory of case — sustaining judgment.

2. A judgment in favor of a religious society for disturbance of its meetings by the operation of a railroad in the vicinity, which is based on the theory that such operation damaged the property within the meaning of a constitutional provision requiring compensation in such cases, cannot be sustained on appeal, on the theory that such operation constituted a nuisance, where the case was neither tried nor submitted to the jury upon any such theory.

Nuisance — noise — operation of railroad.

3. It seems that the noises attendant upon the careful and prudent operation of a railroad switch yard, which affect alike all within hearing distance thereof, cannot be regarded as a private nuisance to a religious society whose services are disturbed and interrupted by them.

(July 6, 1909.)

APPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's church property, alleged to have been caused by the operation of defendant's trains. Reversed.

The facts are stated in the opinion.

Messrs. **P. L. Williams, George H. Smith, John G. Willis, and H. B. Thompson** for appellant.

Messrs. **Moyle & Van Cott and E. C. Ashton,** for respondent:

Damages caused by the construction, maintenance, and operation of its line of railway near the plaintiff's premises can be recovered.

Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750; Chicago, P. & St. L. R. Co. v. Nix, 137 Ill. 141, 27 N. E. 81; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; Chicago & E. I. R. Co. v. McAuley, 121 Ill. 160, 11 N. E. 67; Hentz v. Long Island R. Co. 13 Barb. 646; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A.(N.S.) 49, 85 S. W. 881; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Joyce, Nuisances, pp. 223, 224; Rainey v. Red River, T. & S. R. Co. (Tex. Civ. App.) 80 S. W. 95; Stockdale v. Rio Grande Western R. Co. 28 Utah, 201, 77 Pac. 849; Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259.

Frick, J., delivered the opinion of the court:

This is an action for damages alleged to have been caused by the operation of appellant's trains to respondent's property used for church and other purposes.

The material facts, briefly stated, are, in substance, as follows: Respondent, in 1890, erected a certain building 40x60 feet, to which it added, in 1900, what is termed "the annex," 40x70 feet. These buildings are used for church purposes; that is, the usual Sunday and week-day services are held in them, and, in connection therewith, Sunday school and other religious exercises were also conducted therein. The buildings were also frequently used for entertainments, theatricals, dances, and other gatherings, so that the buildings were used for religious purposes several times on each Sunday and sometimes one or more times during the week for other purposes. The secular meetings were held mostly on evenings, while on Sundays the religious services were conducted in the forenoons, afternoons, and evenings. Prior to 1890, when the first building was erected, the appellant, or its predecessor in interest, had constructed and operated a certain line of railroad west of and in what is known as Fourth West street, running north and south. When the railroad was first built, but one track was laid. Some years thereafter, the evidence does not disclose when, another track was added. These tracks were west of what we shall, for convenience, term the church property, between 300 and 400 feet. The church property, upon which the buildings in question are located, consists of a parcel of ground 5x15 rods, running north and south, fronting on Third North street, which runs east and west. The westerly side line of this parcel of ground is 15 rods, or 247½ feet, east of the east margin of Fourth West street. From this it will be seen that there was a parcel of ground 15 rods in length between the church property and the street on which the railroad tracks were laid. About the year 1903, appellant obtained a strip of ground, by purchase or otherwise, off the west end of the 15-rod strip aforesaid, and also, by virtue of an ordinance, obtained permission from the mayor and city council of Salt Lake City to construct additional tracks in Fourth West street. These tracks were laid in 1905 or 1906. The evidence disclosed that there were fourteen tracks that were operated by appellant. The nearest of these tracks is 105 feet west from the west side line of the church property, and 115

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feet west from the west side of the buildings thereon. The other tracks are all to the west; the farthest being between 300 and 400 feet distant. The station or depot of appellant is some blocks south, while its yards, which are termed "the north yards," repair and car shops, are a half or three quarters of a mile north of said buildings. The additional tracks before referred to were constructed to accommodate the increased railway traffic, and to permit appellant to break up and make up its freight and passenger trains, after arriving, and before departing, in the north yards. In this way many trains, or parts of trains, as well as switch engines, pass north and south over the tracks immediately west of the church buildings each day and night. These engines made noises by ringing the bells and sounding the whistles in passing north and south along First West street, and especially in crossing Third North street, which, as we have said, runs east and west in front of the church buildings. It is alleged that the noises emanating from the engines, as aforesaid, disturbed the meetings and exercises that were conducted in said buildings, and caused great annoyances to the speakers and singers, and at times interfered with the music, and were a great annoyance to those in attendance at the meetings.

To avoid, as far as possible, any misconception with regard to what caused the interferences and annoyances, we shall give the statements of the witnesses in their own language. Mr. Nebeker, who was, perhaps, as familiar with the prevailing conditions as anyone, when asked to state what caused the disturbances and annoyances to the speakers and attendants at the various church and other meetings, said it was "the whistling of engines, the puffing of the engines, and the ringing of bells, and the jostling of the cars, switch engines, switching of the cars, and the noises caused by the momentum of the train passing." This witness gives ten specific instances by giving the dates when either the speakers or singers, or some ceremony, was interrupted by the noises referred to by him. The witness, however, says that the disturbances and annoyances occurred at numerous other times; but he was unable to give any specific dates. Mr. Archer, another witness, could not give specific dates, but said that the disturbances and anoyances were frequent, and were caused by the "passing of trains and the noise consequent thereto, the whistling and puffing of the engines, and the noise of the cars passing." Mrs. Solomon, another witness, said the disturbances were occasioned by "the trains passing and engines whistling; trains making a rumbling noise and puffing." Mr. Holmes said that the disturbances arose from noises from "the movements of the trains, the noise of the trains, the whistling and the running of the engines and the cars." Mr. Morris said the disturbances were caused "by noises made by the frequent passing of the trains and the shrieking of whistles and the ringing of bells. Mr. Beesley, when asked what caused the disturbances and annoyances, said: "It is the passing of railroad trains on the Oregon Short Line tracks, and the noises attendant to the screeching of the whistles and the ringing of bells." The other witnesses, Mr. Blake, Mrs. Davis, Miss Davis, Mr. Paul, Mr. Hardy, Miss Thomas, Mr. Thomas, Mr. and Miss Rees, gave the cause of the disturbances in about the same language. Mr. Rees, however, spoke of trains and engines sometimes stopping at or near Third North street, and whistling for or when signals were given. These witnesses also said that the interruptions would sometimes occur from four to ten times during a meeting lasting two hours, and they said that the average number of interruptions at a meeting would be four or five, and would be from ten, fifteen, or twenty seconds duration. Mr. Nebeker gave one instance when smoke from an engine entered the building through the open windows, and he says "the smoke was very offensive." This, as far as we are able to discover from the record, is the only witness who specially speaks of the smoke. It may have been incidentally mentioned by some others; but, if so, we have failed to discover it. This, for reasons hereafter stated, is, however, not of great importance. The witnesses were, by the trial court, permitted to go into great detail with respect to the ceremonials and other religious exercises that were conducted in the buildings, and the interruptions that took place from the causes and in the manner stated, and they all testified that the noises were very disagreeable and annoying. Some of them characterized them as "humiliating," in view of the sacredness of the ceremonies that were conducted from time to time.

Upon the foregoing facts the court, after telling the jury that no recovery could be had for the use of the two tracks first laid, instructed the jury as follows: "But the defendant is liable for the damages, if any, occasioned by reason of the matters complained of involved in the operation of the additional tracks and yards constructed in 1906; and you are instructed that, although the defendant may have operated its engines and cars engaged in such additional operations as above defined in a careful and prudent manner, which manner of operation is not disputed, it is nevertheless liable for

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the damage, if any is proven by the evidence, to the plaintiff, resulting from the noises involved in such additional operation, such as the blowing of the whistle of the engines, the discharging of steam, the puffing of engines, and the rumbling and jostling together of cars. No question of negligence is involved in this action." Upon the instructions given, the jury found for the respondent, assessing the damages at $4,000. The court entered judgment on the verdict, and, after refusing a new trial, the case is brought to this court on appeal.

The appellant excepted to the foregoing instruction, and the principal question arising on this appeal relates to the propositions of law contained in said instruction. We remark that appellant excepted to the instruction as a whole. If it were not for the fact that the other parts of the instruction did not contain anything except a restatement of matters also contained in other instructions, and thus what was said by the court was merely introductory to the real proposition of law contained in the foregoing quotation, and that from the entire record it is palpaple that the court's attention was specifically directed to the propositions of law contained in that part of the instruction now objected to, and that the court deliberately stated the law applicable to the facts as above indicated, we might be powerless to review the instruction. In view of the foregoing conditions, however, we feel constrained to give the appellant the benefit of the doubt, and shall review the case upon the propositions of law stated in the instruction excepted to.

It will be observed that in this case no question is raised with respect to interruptions of ingress or egress to and from the property alleged to have been damaged; nor is there any claim that there was any physical injury to the buildings or property; nor do the facts make a case where the erection of coal chutes, roundhouses, machine or repair shops, water tanks, or other like structures in close proximity to church buildings, constituting a nuisance, is complained of. The record presents a case where the only interferences and annoyances complained of affect those using the buildings for a special purpose, and the interferences and annoyances arise wholly out of the noises incident to the operation of locomotive engines, trains of cars, and switch engines upon railroad tracks which were lawfully laid. Appellant contends that under those circumstances respondent is simply suffering from the ordinary interferences and annoyances which are incident to the operation of trains over a railroard track or tracks lawfully constructed, and that all these are suffered by all the residents along the railroad track in common with respondent, and hence no recovery can be had. Respondent, however, contends that our Constitution (art. 1, § 22) provides that "private property shall not be taken or damaged for public use without just compensation," and that this provision is broad enough to authorize a recovery, in view of the evidence in this case. Similar provisions are found in the Constitutions of nearly half of the different states of this Union, and have been the subject of frequent and learned discussions by the appellate courts in a great number of cases since the provision was first adopted, in 1870, by the state of Illinois. The leading case in Illinois in which a constitutional provision just like the one quoted above was construed is Rigney v. Chicago, 102 Ill. 64. In a similar case, entitled Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820, the construction placed upon the provision contained in the Illinois Constitution in the Rigney Case was upheld by the Supreme Court of the United States. In the Rigney Case it was in effect held that the clause in the Constitution is limited to damages arising from some physical injury to property, or from some physical disturbance or interference with some property right, as contradistinguished from mere annoyance. The extent to which the so-called "damage clause" in the Illinois Constitution is given effect is perhaps best illustrated in a much later case by the supreme court of Illinois, entitled Aldrich v. Metropolitan West Side Elev. R. Co. 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155, in which it is held, in effect, that interferences like those in question in the case at bar do not give a right to recover in an independent action.

The supreme court of Washington, in a recent case, has had occasion to pass upon the "damage clause" of the Constitution of that state. Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 361, 362, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840, 842. In that case the cases from the different jurisdictions where the damage clause has been construed and passed upon are very ably reviewed and discussed. The court, in passing upon the damage clause and what is included within it, said: "The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon, and the emission of smoke, physically injuring property, are injurious physical effects to the corpus of respondents' property, which, we think, come within the scope of the term 'damaged' as used in the constitutional provision. . . . But the ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors, are necessarily incidental

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to the proper operation of the road, and, when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by anyone acquiring property in or about such a city, and are regarded as *damnum absque injuria*." In the following cases damage provisions similar to ours are found either in the Constitutions or in the statutes of the several states and are thoroughly discussed and applied: Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Gilbert v. Greeley, S. L. & P. R. Co. 13 Colo. 501, 22 Pac. 814; Brown v. San Francisco, 124 Cal. 274, 57 Pac. 82; Van De Vere v. Kansas City, 107 Mo. 93, 28 Am. St. Rep. 396, 17 S. W. 695; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A.(N.S.) 49, 85 S. W. 881.

In the foregoing cases it would seem that about all the cases upon the subject were examined, reviewed, and, where deemed necessary, distinguished. In all of them it is in effect held that the damage clause of the Constitution was not intended to, nor does it, cover actions for annoyances from noises and the like arising from the operation of railroads. It seems needless to cite the many cases referred to in the cases above cited, nor could we add anything to what is there said upon the question. It seems to us, however, that the clause in the Constitution that private property shall not be taken nor damaged clearly means that some physical injury or damage to the property itself shall be committed, and does not include something which merely affects the senses of the persons who use the property. To obtain relief for the latter consequences in a case of nuisance, no constitutional nor statutory enactment was necessary. Indeed, counsel for respondent in effect concede this on page 16 of their brief, where it is said: "Respondent in this case has never contended that the constitutional provision heretofore referred to, 'that private property shall not be taken or damaged for public purposes without just compensation,' creates any new right." If this be so, then, in order to bring the case within the damage clause of the Constitution, there must be some physical interference with the property itself, or with some easement which constitutes an appurtenant thereto. This, to a certain extent, at least, is illustrated and applied in the recent cases of Kimball v. Salt Lake City, 32 Utah, 253, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395, and Hempstead v. Salt Lake City, 32 Utah, 261, 90 Pac. 397. Buildings and property may be physically affected by jarring or by the throwing of cinders or ashes thereon in considerable or large quantities, and possibly otherwise; but it is not easy to perceive how property or buildings of any kind can be physically injured by mere noises, however disagreeable or "humiliating" they might be to the occupants of the property. Such noises, no doubt, can become a disturbance and an annoyance to all those who, for any purpose, may have occasion to go upon, or with others make some use of, certain buildings or property; but the effect would be to or upon the sensibilities of such persons, and not to or upon the property as such.

But it is contended by respondent's counsel that numerous cases can be found where damages have been allowed for disturbances such as are made apparent by this record. It may be conceded that there are some cases, notably from Nebraska and Texas, which seem to go to this extent. Omaha & N. P. R. Co. v. Janecek, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478, and Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 N. W. 259, are such cases. While the Nebraska decision does seem to be based upon this ground, it nevertheless appears from that case that at least some physical injury was caused to the property itself, apart from mere noises. Moreover, a critical examination of the cases cited by the Nebraska supreme court in support of its decision will disclose that in nearly all, if not all, of them, some easement or appurtenance to the property in question was physically interfered with, and in that way the cases in fact are within the rule laid down in the Washington case from which we have quoted. The Texas case is an extreme case. The railroad track was laid within less than 40 feet from a dwelling house, and it thus left the dwelling as though it had been erected on an ordinary railroad right of way. The decision in that case, however, seems to be squarely based upon the ground that noises which affected the owner's enjoyment of the property came within the damage clause of the Constitution. By reference to a much later case emanating from the same court, it will, upon a critical examination, be seen that it is not so clear that even in Texas a recovery may be had for all annoyances arising from the mere operation of a railroad. See Rainey v. Red River, T. & S. R. Co. 99 Tex. 276, 3 L.R.A.(N.S.) 590, 122 Am. St. Rep. 622, 89 S. W. 768, 90 S. W. 1096, 13 A. & E. Ann. Cas. 580. That case is also reported in (Tex. Civ. App.) 80 S. W. 95, where it was decided by the Texas court

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of civil appeals, from which court it was taken to the supreme court of Texas, and the judgment of the lower court was reversed, as appears from the citation first given. The question involved there was a nuisance which was created and maintained by the erection of a roundhouse and machine shops.

The legal and equitable principles involved in cases relating to the construction and maintenance of machine shops, roundhouses, and like structures have no application to the mere operation of a railroad, as the following cases, which are cited and relied upon by counsel for respondent, clearly show. The leading case cited is the case of Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. The decision in that case is squarely based upon the fact that the railroad company, in erecting and maintaining machine and repair shops and a roundhouse in close proximity to a church, caused a nuisance, in view that the church had been erected and used for a long time prior to the erection of the railroad shops. It was made to appear that a large number of chimneys or smokestacks were so constructed as to pour the smoke and offensive odors arising therefrom directly through the windows into the church building, and that the noises emanating from the shops were such as to render worship in the church almost impossible. The court, in substance, held that the railroad company had no right to erect its shops at such a place; that such shops could and ought to be erected and maintained at some other place, where their maintenance would result in the least possible annoyance to others, and not under the very windows of a church. The court, in the course of the opinion, however, clearly distinguishes that case from one like the case at bar. At page 331 of 108 U. S., Mr. Justice Field, in speaking for the court, says: "Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum abseque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

The case of Chicago G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85, in principle is precisely like the case in 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, just referred to, and for that reason the United States court of appeals for the eighth circuit followed it. The opinion is written by Mr. Justice Wilkes of the supreme court of Tennessee in the case of Louisville & N. Terminal Co. v. Lellyett, supra, and while he discusses the damage clause of the Constitution, he likewise draws the distinction with respect to the principles involved between annoyances and interferences which arise from the operation of machine shops and other like structures and those arising from the operation of railroad trains. After reading the opinion in that case, but little, if any, room for discussion is left. In view that what is said in the opinion by Mr. Justice Wilkes in a large degree applies to the case at bar, we take the liberty to quote somewhat at length from what is said at pages 400 and 401 of 114 Tenn., as follows: "When the first tracks were laid, the property now in controversy, as well as that contiguous, was vacant. With the growth of the city this space has been occupied and residences have been erected. Thus, both the travel and traffic of the roads, as well as the growth of the locality, have gone hand in hand. We are of the opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy. In other words, the roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property; and for this purpose to lay such additional tracks, side tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight; and it is only for the additional conveniences of roundhouses, sandhouses, coal bins, coal chutes, and the switch yards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that plaintiff can complain, if they materially damage the plaintiff's property."

We have already shown that nothing is made to appear from the record before us that respondent is interfered with or annoyed by any shops or other structures which might be located and operated elsewhere; but the interferences and annoyances are all attributed to the operation of the additional tracks which counsel for respondent concede were necessary to accommodate the increased traffic of appellant's railroad. Nor is there any claim made of negligent management or operation, nor that the noises and disturbances by ringing bells and sounding whistles were unnecessarily or wilfully

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done. Neither is there any proof or claim that the buildings sustained any physical injury, nor that their use, occupancy, or access thereto was in any way interfered with except by the noises occasioned by the operation of the trains. But it is contended: That, although respondent may not recover damages under the damage clause of the Constitution, it may, nevertheless, recover for any interference or annoyance which is caused by what is termed a "private" as contradistinguished from a "public" nuisance; that neither the state nor the city could legally authorize the appellant to create a private nuisance and permit interference with respondent's rights with impunity. That neither the state nor the city could grant anyone the right to create or maintain a private nuisance with impunity no doubt is sound, and is conceded to be the law. The question, however, is: Does the operation of a railroad by passing of trains, whether few or many, when operated with ordinary care, constitute either a public or a private nuisance? Can the noises that emanate from moving trains be eliminated without preventing the trains from running at all? Moreover, do not such noises affect all who are similarly situated along the line of the railroad? If not in the same degree, do they not affect all to some extent? If this be so, how can it be said that, in a legal sense, such noises constitute a nuisance either public or private? The court of appeals of New York, in a comparatively recent case, namely, Bennett v. Long Island R. Co. 181 N. Y. 431, 74 N. E. 418, in passing upon this point, uses the following language: "The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense; but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent." This doctrine is referred to and followed in nearly, if not quite, all of the cases we have herein cited. Nor do the following cases cited by counsel for respondent lay down a different doctrine: Whitney v. Bartholomew, 21 Conn. 213; Duncan v. Hayes, 22 N. J. Eq. 25; Churchill v. Burlington Water Co. 94 Iowa, 89, 62 N. W. 646; Robinson v. New York & E. R. Co. 27 Barb. 513; Blanc v. Murray, 36 La. Ann. 166, 51 Am. Rep. 7; Equitable Co-operative Foundry Co. v. Hersee, 103 N. Y. 25, 9 N. E. 487.

These are all cases passing on interferences where the business complained of could as well have been conducted at some other place, or the interferences or annoyances were of that character which could be remedied, and hence it was held that the conduct of the business at the place and in the manner it was conducted constituted a private nuisance which could be abated, or for the maintenance of which the complaining party could recover damages. The case at bar, however, did not proceed upon the theory of either a public or a private nuisance. True, counsel for respondent now contend that the judgment may be sustained upon the theory of a private nuisance; but the contention must fail if for no other reason than the one that the case was neither tried nor submitted to the jury upon any such theory. This is made clear from the instruction quoted from at the beginning of this opinion. Indeed, counsel do not claim that there was any wilful or negligent conduct in operating the trains over appellant's railroad, nor that the noises were excessive or avoidable. If they had relied upon such a state of facts, the question whether the excessive noises constitute a nuisance or not would necessarily have to be determined as a question of fact, and not one of law. Requena v. Los Angeles, 45 Cal. 55; People ex rel. Britton v. Park & O. R. Co. 76 Cal. 156, 18 Pac. 141; People ex rel. Teschemacher v. Davidson, 30 Cal. 379.

It is true that, in addition to the foregoing cases, there are some in which the courts have held that noises and other interferences arising from the operation of railroad trains are proper elements of damage when they affect the use and enjoyment of property. Among this class of cases are those which relate to the condemnation of property for public purposes, including railroads, where all the property is not taken, but the property not taken is, nevertheless, affected, or where some easement appurtenant to the property not taken is interfered with so as to affect the salable or usable value thereof. In that class of cases noises and similar interferences which may affect the market value of the property not taken are ordinarily permitted to be shown, not as independent elements of damage, but as elements to be considered in connection with all other things which may depreciate the market value of the property interfered with, but not taken. Weyer v. Chicago, W. & N. R. Co. 68 Wis. 180, 31 N. W. 710, and Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557, are cases where the doctrine is illustrated and applied. It is clear-

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ly pointed out, however, in those cases, that the interferences from noises and similar agencies cannot be made the subject of independent actions. One of the reasons why such interferences are permitted to be shown in the class of cases referred to is indicated by the supreme court of Pennsylvania in Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871. It is there said that in that class of cases consequential damages may be offset by special benefits, and the property owner may thus show all matters specially affecting his property or the enjoyment thereof as an offset, or a partial offset, against supposed special benefits accruing to his property by reason of the contemplated improvement.

It may be noticed that our own statute (subdivisions 3 and 4 of § 3598, Comp. Laws 1907) provides for allowances and offsets of this character; but, as pointed out in the Lippincott Case, while such annoyances are proper to be shown in the class of cases last referred to, they, nevertheless, cannot be made the subject of independent actions for damages. Nor can the owner of property abutting on a street complain because some other street is being interfered with, in which he has no special easement, but only the right of passage in common with the public generally, unless, perhaps, such interference constitutes a public nuisance. Nor would a rule which permitted property owners to recover damages for disturbances from noises arising through the operation of trains either in the public streets (except, perhaps, by an interference with an easement, in front of the owner's property), or upon ground owned by the railroad company, be either just or equitable. If mere annoyances through noises which are necessarily incident to the conduct of a lawful business in its nature public can be made the subject of damage suits, then we can see no point at which a line may be drawn when such actions may not be maintained. If mere annoyances from noises give a right of action for damages, then everyone who is annoyed must be permitted to sue for and recover damages to the extent to which he is affected. The question, therefore, in each case, would depend upon the intensity of the noises and the extent of the annoyance. Everyone who may live within the radius to which the noises may extend would have a right of action, and the amount of recovery would be graduated by the distance one lived from the source of the noise, unless the noise was diminished by some artificial means. No doubt, in this case the interferences and annoyances are considerable and may be said to be out of the ordinary. The mere fact, however, that men, women, and children use the building in question for worship, for religious edification, for the inculcation of morals, or for amusement, gives them no higher right as an association to sue for and recover damages than it would an individual whose family is occupying a home in the same vicinity.

In the eye of the law, property rights are the same, by whomsoever occupied or owned. Property dedicated to worship is just as, and no more, sacred than property devoted to any other lawful purpose. An unlawful interference with property or property rights used for one lawful purpose will receive the same consideration and protection as that used for any other. The fact that the degree of interference while attending church services may be greater, nevertheless it is no different in kind from interference from the same cause to the home. If, therefore, it should be held that noises arising out of the present state of industrial pursuits and business activities shall give a right of action, all enterprises from which annoyances arise must be held liable in actions for damages. There is, there can be, no middle ground; and under our theories of government, grounded upon the fundamental principle of equality before the law, all must either suffer some annoyance, or all who cause them must be held liable for damages. The law seeks for practical as well as just results whenever such are obtainable. The practical way, therefore, out of such a difficulty, is that the interferences and annoyances which are common to all,—that is, where all suffer from the same kind of interference and annoyance, and the difference of annoyances as between communities or individuals is one of degree merely, and not of kind, and the annoyance is caused by something which is a necessary part of some lawful enterprise which is in its nature public and cannot be shifted from place to place,—all must bear the annoyance as best they may. If the respondent can show that blowing whistles, ringing bells, and the rumbling of the trains are avoidable without undue interference with the operation and usefulness of the railroad, or that it is unnecessary to blow the whistles and ring the bells, or that these things are done wilfully and for the purpose of interfernig with and annoying the persons who are using the buildings for the purposes indicated in the record, then, upon such allegation and proof, the law no doubt will afford some relief. The record, however, simply makes a case where the things complained of emanate from the carrying on of a quasi public enterprise which cannot be shifted from place to place, and where the noises are a mere incident to

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the business itself, which is conceded to be lawful and carried on with ordinary care.

Respondent has referred us to the case of Stockdale v. Rio Grande Western R. Co. 28 Utah, 201, 77 Pac. 849; but there is nothing said in that case which conflicts with, or in fact is not in strict harmony with, what we have said in this case; nor is there anything in San Pedro, L. A. & S. L. R. Co. v. Board of Education, 32 Utah, 305, 11 L.R.A.(N.S.) 645, 90 Pac. 565, which in any way affects any question which is involved in the case at bar. Under the circumstances disclosed by this record, therefore, we cannot see wherein the appellant has violated any duty or has disregarded or invaded any of respondent's rights. It was error, therefore, to give the instruction which we have quoted, and to permit a recovery thereunder.

All the other assignments, except those relating to the admission of certain evidence, although numerous, are sufficiently covered by what we have said. The assignments relating to the admission of evidence, by reason of the conclusions reached, have become wholly immaterial, because they cannot possibly arise in the same way upon a retrial of the case, if one be had.

For the reasons stated, the judgment is reversed, and the cause remanded, with directions to the District Court to grant a new trial, and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

Straup, Ch. J., and McCarty, J., concur.

CALIFORNIA SUPREME COURT.

RE ESTATE OF R. R. MILLER, Deceased.

DELIA F. MILLER, Appt.,
v.
T. R. ARCHER, Exr., etc., of R. R. Miller, Deceased, et al., Respts.

(— Cal. —, 103 Pac. 842.)

Will — contest — forfeiture.

That an unsuccessful contestant of a will had probable cause for his contest will not avoid a provision in the will forfeiting the share of any beneficiary who makes any contest of the will.

(August 11, 1909.)

APPEAL by Delia F. Miller from so much of a decree of the Superior Court for San Bernardino County as denied her the right to receive a bequest under the will of R. R. Miller, deceased. Affirmed.

The facts are stated in the opinion.

Mr. **Walter M. Campbell**, for appellant:

If probable cause existed for the bringing of a contest, a provision for forfeiture is inoperative.

Friend's Estate, 209 Pa. 442, 68 L.R.A. 447, 58 Atl. 853; Chew's Appeal, 45 Pa. 228; Re Owens, 32 Pittsb. L. J. N. S. 257; Re Lynn, 31 Pittsb. L. J. N. S. 258; Reilly's Estate, 200 Pa. 288, 49 Atl. 939; Jackson v. Westerfield, 61 How. Pr. 399; Rhodes v. Muswell Hill Land Co. 29 Beav. 560; Mallet v. Smith, 6 Rich. Eq. 12, 60 Am. Dec. 107; Fifield v. Van Wyck, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446; Black v. Herring, 79 Md. 146, 28 Atl. 1063; Lee v. Colston, 5 T. B. Mon. 247; Bryant v. Thompson, 59 Hun, 551, 14 N. Y. Supp. 28; Page, Wills, p. 807; Schouler, Wills, 3d ed. 605; 1 Roper, Legacies, 2 Am. ed. 795.

Mr. **T. R. Archer**, for respondents:

Probable cause would not suffice to exempt the contestant from the operation of the forfeiture clause.

Cooke v. Turner, 15 Mees. & W. 727; Donegan v. Wade, 70 Ala. 501; Re Garcelon, 104 Cal. 570, 32 L.R.A. 595, 43 Am. St. Rep. 134, 38 Pac. 414; Hoit v. Hoit, 42 N. J. Eq. 388, 59 Am. Rep. 43, 7 Atl. 856; Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419; Breithaupt v. Bauskett, 1 Rich. Eq. 465; Thompson v. Gaut, 14 Lea, 310; Smithsonian Inst. v. Meech, 169 U. S. 399, 42 L. ed. 794, 18 Sup. Ct. Rep. 396; 1 Roper, Legacies, 2d Am. ed. 795.

Messrs. **Gregg & Surr** also for respondents.

Angellotti, J., delivered the opinion of the court:

This is an appeal by Delia F. Miller from so much of the decree of final distribution in the matter of the estate of deceased as denies her the right to receive a bequest of $1,500, given her by the terms of his last will. The will of deceased, executed the day before his death, disposed of his estate, which was apparently his separate property, as follows:

"I give and bequeath to my wife, Mrs. Delia F. Miller, the sum of fifteen hundred ($1,500) dollars.

"Second. I give, bequeath, and devise to my adopted daughter, Mrs. Florence M. Stevenson, of Los Angeles, California, all the rest, residue, and remainder of my estate, both personal and real property, and wherever situated.

"Third. I further provide that, in case any devisee or legatee under this will make any contest of this will, then the share

Note. — See case note to Re Hite, 21 L.R.A.(N.S.) 953, as to what amounts to a contest within the forfeiture clause in a will.

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herein provided for any such legatee or devisee shall not be paid, but the same shall be forfeited and passed to the others under this will."

When the will was offered for probate, said Delia F. Miller instituted a contest thereto on the grounds of incompetency to make a will, and undue influence, alleged to have been exercised by Florence M. Stevenson. An answer to her opposition to the probate was filed, and the issues made were tried by the court, a jury having been waived. The court found against the allegations of Mrs. Miller, and admitted the will to probate. No appeal was ever taken from the judgment of the court in the matter of the contest, and such judgment became final prior to the application for distribution. When the estate was ready for distribution, Florence M. Stevenson presented her petition, asking that the whole of said estate be distributed to her, claiming that, by reason of the contest of the will, made by Mrs. Miller, the latter had forfeited all rights under the same, and that she had become entitled to receive Mrs. Miller's share as well as her own. Mrs. Miller also filed her petition, alleging that she had made the contest believing, and having good reason to believe, that the will was invalid on the grounds stated in her opposition. The trial court found that, at the time of the contest, there was probable cause for the same on the ground of undue influence, but no probable cause for a contest on the ground of incompetency. It concluded that, by reason of the contest, Mrs. Miller had forfeited the legacy of $1,500 given her by the will, and distributed all of the estate to Florence M. Stevenson, the other beneficiary under the will.

The contest provision of the will is clear and unambiguous in its terms, and it cannot be disputed that Mrs. Miller, by reason of the facts hereinbefore set forth, has lost her right to receive the legacy given her by the will, if such provision is valid and is to be enforced according to its terms. The question of the validity of a condition against contests contained in a will is not now an open one in this state. In the recent case of Hite's Estate (Cal.) 21 L.R.A. (N.S.) 953, 101 Pac. 443, this question was presented, and the court held, following the principles enunciated in Re Garcelon, 104 Cal. 570, 590, 32 L.R.A. 595, 43 Am. St. Rep. 134, 38 Pac. 414, that such a condition is not against public policy. This ruling was in accord with what is now the universally accepted doctrine. If it be not against public policy, we know of no reason why it must not be enforced according to its terms. A testator has the lawful right to dispose of his property upon whatever condition he desires, as long as the condition is not prohibited by some law or opposed to public policy, such as conditions in restraint of marriage or of lawful trade, "and when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes." Smithsonian Inst. v. Meech, 169 U. S. 398, 415, 42 L. ed. 793, 18 Sup. Ct. Rep. 396.

Appellant's principal contention is that there was no forfeiture in this case, for the reason that she had probable ground for contest. A similar question was presented by the briefs in Hite's Estate, supra, but was there dismissed by the court without discussion. No such exception is stated in the contest provision contained in the will, and we know of no principle that authorizes us to declare it. To so do would be to substitute our own views for a clearly expressed intent of the testator to the contrary. We are aware that some text writers have expressed views tending to support appellant's contention in this behalf, and that it is the rule adopted in Pennsylvania (Friend's Estate, 209 Pa. 442, 68 L.R.A. 447, 58 Atl. 853); but we cannot perceive any proper basis upon which to rest such a conclusion. Like the doctrine accepted in many decisions, to the effect that no forfeiture of the legacy results under such a provision when there is no gift over of the legacy in the event of a contest, although a forfeiture of land devised will result under such circumstances without a specific devise over,—a doctrine repudiated by us in Hite's Estate, supra,—it is a mere attempt at an artificial distinction to avoid the force of a plain and unambiguous condition against contests. See Hoit v. Hoit, 42 N. J. Eq. 388, 59 Am. Rep. 43, 7 Atl. 856. See also Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419. This point was expressly made in Re Garcelon, supra, and was disposed of in the opinion by a statement to the effect that the views set forth were really conclusive of every question discussed by counsel. This, we think, was necessarily so. If the forfeiture provision, as plainly and unambiguously written, is not against public policy, it must be enforced as written.

The portion of the decree of distribution appealed from must be affirmed, and it is so ordered.

We concur: **Shaw, J.; Sloss, J.; Melvin, J.; Lorigan, J.; Henshaw, J.**

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the business itself, which is conceded to be lawful and carried on with ordinary care.

Respondent has referred us to the case of Stockdale v. Rio Grande Western R. Co. 28 Utah, 201, 77 Pac. 849; but there is nothing said in that case which conflicts with, or in fact is not in strict harmony with, what we have said in this case; nor is there anything in San Pedro, L. A. & S. L. R. Co. v. Board of Education, 32 Utah, 305, 11 L.R.A.(N.S.) 645, 90 Pac. 565, which in any way affects any question which is involved in the case at bar. Under the circumstances disclosed by this record, therefore, we cannot see wherein the appellant has violated any duty or has disregarded or invaded any of respondent's rights. It was error, therefore, to give the instruction which we have quoted, and to permit a recovery thereunder.

All the other assignments, except those relating to the admission of certain evidence, although numerous, are sufficiently covered by what we have said. The assignments relating to the admission of evidence, by reason of the conclusions reached, have become wholly immaterial, because they cannot possibly arise in the same way upon a retrial of the case, if one be had.

For the reasons stated, the judgment is reversed, and the cause remanded, with directions to the District Court to grant a new trial, and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

Straup, Ch. J., and McCarty, J., concur.

CALIFORNIA SUPREME COURT.

RE ESTATE OF R. R. MILLER, Deceased.

DELIA F. MILLER, Appt.,
v.
T. R. ARCHER, Exr., etc., of R. R. Miller, Deceased, et al., Respts.

(— Cal. —, 103 Pac. 842.)

Will — contest — forfeiture.

That an unsuccessful contestant of a will had probable cause for his contest will not avoid a provision in the will forfeiting the share of any beneficiary who makes any contest of the will.

(August 11, 1909.)

APPEAL by Delia F. Miller from so much of a decree of the Superior Court for San Bernardino County as denied her the right to receive a bequest under the will of R. R. Miller, deceased. Affirmed.

The facts are stated in the opinion.

Mr. **Walter M. Campbell**, for appellant:

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The portion of the decree of distribution appealed from must be affirmed, and it is so ordered.

We concur: **Shaw, J.; Sloss, J.; Melvin, J.; Lorigan, J.; Henshaw, J.**

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KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,
v.
MARY J. HICKLIN et al.

(— Ky. —, 115 S. W. 752.)

Evidence — fire — locomotive — other fires.

1. In an action to hold a railroad company liable for loss of property through fire set out by its locomotive, evidence is admissible that, at times other than that at which the loss occurred, sparks and cinders had escaped from defendant's locomotives and set fire to logs and grass along the right of way.

Railroad — fire — insurance — plaintiff.

2. A railroad company cannot defeat an action for the value of insured property destroyed by its negligence, which is brought by its owner, on the theory that, under a statute requiring every action to be prosecuted in the name of the real party in interest, the action should have been prosecuted by the insurer.

Insurance — wrongful destruction — subrogation.

3. An insurance company which is compelled to pay a loss caused by fire set out by the negligence of a railroad company cannot, after the owner of the property has collected its value from the railroad company, and it has satisfied its liability under the policy, maintain an action against the railroad company to compel it to make good its loss.

(January 27, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Crittenden County in plaintiffs' favor in an action brought to recover the value of property destroyed by fire for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. J. M. Dickinson, with Messrs.

Case Note. — May one who destroys insured property defeat an action by the owner upon the ground that the right of action is in the insurer.

All the authorities are in accord upon the proposition that, in the absence of statutes requiring actions to be brought by the real party in interest, the owner of insured property which has been destroyed by another has a right of action for such destruction, regardless of whether or not he has been reimbursed for his loss by the insurer. Newell v. Norton, 3 Wall. 257, 18 L. ed. 271; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566; Inman v. South Carolina R. Co. 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. Rep. 249; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; United States v. American Tobacco Co. 166 U. S. 468, 41 L. ed. 1081, 17 Sup. Ct. Rep. 619; Rintoul v. New York C. & H. R. R. Co. 21 Blatchf. 439, 17 Fed. 905; The Yeager, 4 Woods, 18, 20 Fed. 653; Bennitt v. The Guiding Star, 53 Fed. 936, affirmed in 10 C. C. A. 454, 22 U. S. App. 344, 62 Fed. 407; Over v. Lake Erie & W. R. Co. 63 Fed. 34; Southern Bell Teleph. & Teleg. Co. v. Watts, 13 C. C. A. 579, 25 U. S. App. 214, 66 Fed. 460; Judd v. New York & T. S. S. Co. 54 C. C. A. 238, 117 Fed. 206, affirmed on rehearing in 62 C. C. A. 515, 128 Fed. 7; White v. The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Peoria M. & F. Ins. Co. v. Frost, 37 Ill. 333; Chicago & A. R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896; Dunleavy v. Stockwell, 45 Ill. App. 230; Cunningham v. Evansville & T. H. R. Co. 102 Ind. 478, 52 Am. Rep. 683, 1 N. E. 800; Lake Erie & W. R. Co. v. Griffin, 8 Ind. App. 47, 52 Am. St. Rep. 465, 35 N. E. 396; Allen v. Barrett, 100 Iowa, 16, 69 N. W. 272; Kansas City, Ft. S. & M. R. Co. v. Blaker, 68 Kan. 244, 64 L.R.A. 81, 75 Pac. 71, 1 A. & E. Ann. Cas. 883; Hanton 23 L.R.A.(N.S.) v. New Orleans & C. R. Light & P. Co. (La.) 50 So. 544, Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618; Dyer v. Maine C. R. Co. 99 Me. 195, 67 L.R.A. 416, 58 Atl. 994, 2 A. & E. Ann. Cas. 457; Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; Clark v. Wilson, 103 Mass. 219, 4 Am. Rep. 532; Hayward v. Cain, 105 Mass. 213; Perrott v. Shearer, 17 Mich. 48; Peter v. Chicago & W. M. R. Co. 121 Mich. 324, 46 L.R.A. 224, 80 Am. St. Rep. 500, 80 N. W. 295; Nichols v. Chicago, St. P. M. & O. R. Co. 36 Minn. 452, 32 N. W. 176; Brookhaven Lumber & Mfg. Co. v. Illinois C. R. Co. 68 Miss. 432, 10 So. 66; Weber v. Morris & E. R. Co. 35 N. J. L. 409, 10 Am. Rep. 253, s. c. 36 N. J. L. 213; Carpenter v. Eastern Transp. Co. 71 N. Y. 574; Kansas City, M. & O. R. Co. v. Shutt (Okla.) 104 Pac. 51; Gales v. Hailman, 11 Pa. 515; Lindsay v. Bridgewater Gas. Co. 14 Pa. Co. Ct. 181; Burnside v. Union S. B. Co. 10 Rich. L. 113; Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; Texas & P. R. Co. v. Levi, 59 Tex. 674; Cushman & R. Co. v. Boston & M. R. Co. (Vt.) 73 Atl. 1073; E. T. & H. K. Ide v. Boston & M. R. Co. (Vt.) 74 Atl. 401; Allen v. Chicago & N. W. R. Co. 94 Wis. 93, 68 N. W. 873; Clark v. Blything, 2 Barn. & C. 254; Yates v. Whyte, 4 Bing. N. C. 272; Robinson v. New Brunswick R. Co. 23 N. B. 323.

But under statutes requiring suits to be brought by the real party in interest, it has been held that the insurer must bring the action against the wrongdoer if the whole value of the property has been paid by it, or must be joined with the owner if only part has been paid. Munson v. New York C. & H. R. R. Co. 32 Misc. 282, 65 N. Y. Supp. 848; Cunningham v. Seaboard Air Line R. Co. 139 N. C. 427, 2 L.R.A. (N.S.) 921, 51 S. E. 1029; Pratt v. Radford, 52 Wis. 114, 8 N. W. 606.

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Trabue, Doolan, & Cox and Blue & Nunn, for appellant:

Where an insurer of property destroyed by fire through the negligence of another has fully compensated the owner for the loss, the insurer, upon equitable principles of subrogation, is entitled to recover from the wrongdoer, and is the real party in interest in an action brought for that purpose, within the meaning of the Civil Code of Practice.

Kerr, Ins. § 234; Ostrander, Ins. 2d ed. § 126; 2 May, Ins. 4th ed. § 454; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 96, 44 L. ed. 87, 20 Sup. Ct. Rep. 33; United States v. American Tobacco Co. 166 U. S. 474, 41 L. ed. 1083, 17 Sup. Ct. Rep. 619; Wager v. Providence Ins. Co. 150 U. S. 108, 37 L. ed. 1017, 14 Sup. Ct. Rep. 55; St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 462, 32 L. ed. 799, 9 Sup. Ct. Rep. 469; Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 320, 29 L. ed. 878, 6 Sup. Ct. Rep. 750, 1176; Cunningham v. Seaboard Air Line R. Co. 139 N. C. 427, 2 L.R.A.(N.S.) 922, 51 S. E. 1029; Stewart v. Price, 64 L.R.A. 615, note; Allen v. Chicago & N. W. R. Co. 94 Wis. 93, 68 N. W. 873.

In such case an action by the owner, without joining the insurer, must be dismissed.

Newman, Pl. & Pr. 2d ed. § 106; Carpenter v. Miles, 17 B. Mon. 598; Vanbuskirk v. Levy, 3 Met. (Ky.) 134.

The right of subrogation extends to insurance companies, where the insured property is destroyed by fire through the fault or negligence of railroads.

27 Am. & Eng. Enc. Law, p. 260.

Evidence of sparks escaping from other engines at other times and places than the fire complained of is not admissible except when direct evidence of condition and management of spark arresters and engines cannot be produced.

Cincinnati, N. O. & T. P. R. Co. v. Falconer, 30 Ky. L. Rep. 152, 97 S. W. 727; Chesapeake & O. R. Co. v. Richardson, 30 Ky. L. Rep. 786, 99 S. W. 642; Kentucky C. R. Co. v. Barrow, 89 Ky. 639, 20 S. W. 165; Mills v. Louisville & N. R. Co. 116 Ky. 309, 76 S. W. 29; Illinois C. R. Co. v. Scheible, 24 Ky. L. Rep. 1708, 72 S. W. 326.

Messrs. **Carl Henderson** and **A. C. Moore,** for appellees:

The wrongdoer has no right to the benefits of the insurance, and cannot rely, either in full or *pro tanto*, as a defense, on the insurance money received by the owner of the property from his insurance.

Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; Perrott v. Shearer, 17 Mich. 48; Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; Mathews v. St. Louis & S. F. R. Co. 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591; 24 Am. & Eng. Enc. Law, p. 304; Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618.

Evidence was admissible to show that other trains had permitted live sparks and cinders to escape from their locomotives, and that some of them had set fire to logs and grass along the right of way.

Louisville & N. R. Co. v. Taylor, 92 Ky. 55, 17 S. W. 198; Louisville & N. R. Co. v. Samuel, 22 Ky. L. Rep. 305, 57 S. W. 235; Illinois C. R. Co. v. Scheible, 24 Ky. L. Rep. 1710, 72 S. W. 325; Cincinnati, N. O. & T. P. R. Co. v. Cecil, 28 Ky. L. Rep. 832, 90 S. W. 585; 2 Thomp. Neg. §§ 2291, 2293.

Clay, C., delivered the opinion of the court:

Charging that their house in Marion, Crittenden county, Kentucky, had been destroyed by the negligence of the Illinois Central Railroad Company in permitting sparks to escape from its engine and alight thereon, plaintiffs, Mary J. Hicklin and others, instituted this action against the railroad company to recover damages in the sum of $1,100. The jury returned a verdict in favor of plaintiffs in the sum of $650. From the judgment based thereon, this appeal is prosecuted.

A reversal is asked upon two grounds: First, the admission of incompetent evidence; second, error of the court in sustaining a demurrer to the second paragraph of defendant's answer.

1. The incompetent evidence complained of was to the effect that other trains of appellant, at other times than on the night of the fire, had permitted live sparks and cinders to escape from their locomotives and set fire to logs and grass along the right of way. The admissibility of such evidence is no longer an open question. In a long line of decisions this court has held in favor of its admissibility. Chesapeake & O. R. Co. v. Richardson, 30 Ky. L. Rep. 786, 99 S. W. 642; Cincinnati, N. O. & T. P. R. Co. v. Falconer, 30 Ky. L. Rep. 152, 97 S. W. 727; Kentucky C. R. Co. v. Barrow, 89 Ky. 638, 20 S. W. 165; Illinois C. R. Co. v. Scheible, 24 Ky. L. Rep. 1708, 72 S. W. 325.

2. Appellant's main ground of reversal is the action of the court in sustaining a demurrer to the second paragraph of its answer, which is as follows: "For further answer defendant says that plaintiffs' house was insured in the Citizens' Fire Insurance Company of Missouri for the sum of $700,

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as it is informed, which was the full value of said house, and that plaintiffs have received pay from said insurance company in the sum of $700 on account of said fire, which sum fully repaid the plaintiffs for any loss they sustained by reason of said fire; and the defendant now says that if said fire was caused by any negligence or carelessness upon the part of defendant for which it is liable, which it denies, said Citizens' Fire Insurance Company is entitled to recover for same, instead of these plaintiffs; and it pleads and relies upon the said payment to the plaintiffs by said insurance company in bar of plaintiffs' right to recover herein." It is the contention of counsel for appellant that, upon the payment of the loss by the insurance company, it was immediately subrogated to the rights of the property holders, and became the real party in interest, and that, under the provisions of § 18 of the Civil Code of Practice, requiring every action to be prosecuted in the name of the real party in interest, except as provided in § 21, the insurance company, alone, was entitled to recover from the railroad company.

The law is well settled that a wrongdoer has no right to the benefits of the insurance, and cannot rely, either in full or *pro tanto*, on the defense that the owner of the property had been previously paid by the insurance company. Payment to the owner by an insurance company of the amount of his loss does not bar the right against another originally liable for the loss. The insurance company does not stand in the relation of a joint tort feasor with the party through whose negligence the property is destroyed. Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; Perrott v. Shearer, 17 Mich. 48; Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; Mathews v. St. Louis & S. F. R. Co. 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591; 24 Am. & Eng. Enc. Law, p. 304; Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618. In the case of Anderson v. Miller, supra, the rule is thus stated: "The question of who will be entitled to the proceeds of the recovery, the insurer or the insured, is a matter between them, and constitutes no defense to an action for damages caused by the wrong, which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer." Chief Justice Cooley, in discussing the same question in the case of Perrott v. Shearer, supra, said: He (the defendant) is found to be the wrongdoer, and he cannot relieve himself from responsibility to account for the full valuation (of the goods), except by restoring them. "He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased or diminished by the fact that such a contract exists. He has no equities, as against the plaintiff, which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he ran when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner . . . keeps his interest insured, he cannot be held to pay the money expended for that purpose, for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is therefore entitled to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is therefore justly entitled to no return."

As we understand appellant's position, however, it is not that the payment by the insurance company constitutes a defense in favor of appellant, but that appellant was entitled to litigate the question with the insurance company, which was the real party in interest, and that appellant's answer was therefore good as a plea in abatement. The availability of this plea depends altogether upon the question: Who was entitled to sue—the party holding the legal title, or the insurance company, which, upon the payment of the insurance, was subrogated to the rights of the property owner? In 30 Cyc. Law & Proc. p. 78, the rule is thus stated: "After some vacillation, the courts of the Code states have very generally rejected or refused to adopt the doctrine that beneficial ownership is necessary for a standing as real party in interest. Without denying that beneficial ownership is sufficient, in connection with the corresponding cause of action, the prevailing view now entertained by these courts recognizes the legal title also as sufficient. The sounder view is, rather, that it is enough to entitle plaintiff to maintain the action, as real party in interest, if he has the legal title to the demand, and defendants will be protected in a payment to or recovery by him. A third person not a party to the action may, it is true, be entitled to claim from plaintiff a portion of the fruits of the action, or all its fruits, as the case may be; but as against the defendant a plaintiff is the real party in interest if he has and shows the complete legal title to the cause of action asserted, so that he can legally discharge the defendant from his obligation." Manley v. Park, 68 Kan. 400, 66 L.R.A. 967, 75 Pac. 557, 1

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A. & E. Ann. Cas. 832; Allen v. Brown, 44 N. Y. 228; Eaton v. Alger, 47 N. Y. 345. But defendant's right to object is limited by the purpose of the statute, and its evident purpose is not to allow defendant to demand the adjudication of equities which exist wholly between plaintiff and third persons. Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970; Allen v. Brown, supra. So far as the defendant is concerned, the purpose of the statute is fully attained if, in the suit as brought, defendant is not shut out from his proper defense and counterclaim and will be fully protected by the judgment, whether for or against plaintiff, in the event of any other claim on the same cause. Los Robles Water Co. v. Stoneman, 146 Cal. 203, 79 Pac. 880; Greene v. McAuley, 70 Kan. 601, 68 L.R.A. 308, 79 Pac. 133.

In the case at bar the defendant did not ask that the insurance company be made a party to the action. It may be that, as between plaintiffs and the insurance company, the latter would be equitably entitled to the damages that plaintiffs recovered. The fact, however, that a third party might be entitled to the damages as between him and plaintiffs, is not sufficient to bar the right of action by the plaintiffs. The legal title to the property destroyed was in the plaintiffs. As between the plaintiffs and the defendant the former were the real parties in interest. It is immaterial to the railroad company what may be the equities between the plaintiffs and the insurance company. All that it can demand is that a judgment in favor of the plaintiffs will be a complete defense to any further action for the same cause. In our opinion the judgment in favor of plaintiffs is conclusive, and no action can now be maintained against the railroad company by the insurance company. Any right of action the insurance company may have is against the plaintiffs. For the reasons given, the trial court did not err in sustaining a demurrer to the second paragraph of defendant's answer.

Judgment affirmed.

NEBRASKA SUPREME COURT.

ROBERT McGUIRE, Appt.,
v.
HUGH G. CLARK et al.

(— Neb. —, 122 N. W. 675.)

Deed — delivery — evidence — sufficiency.

On a record showing that the owner of a government homestead, for the purpose of apparently devesting himself of title, in furtherance of a design to pre-empt a tract of government land, signed, acknowledged, and registered a deed to his brother without the latter's knowledge, a finding that there was no delivery of the deed was held proper, where grantor never intended to deliver it, kept it in his own hands, and retained possession of the homestead.

(September 25, 1909.)

APPEAL by plaintiff from a judgment of the District Court for Custer County dismissing an action brought to quiet title to certain lands. Affirmed.

The facts are stated in the opinion.

Mr. **Robert A. Moore**, for appellant:

When the terms used in a deed make an absolute conveyance with all the terms of warranty, it is beyond the power of the court to say, from the construction of the instrument, that the grantor did not intend to convey the entire title.

Struve v. Republican Valley R. Co. 2 Neb. (Unof.) 585, 89 N. W. 604; Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Leavitt v. Bell, 55 Neb. 62, 75 N. W. 524; Hagensick v. Castor, 53 Neb. 495, 73 N. W. 932; Wells v. Steckelberg, 52 Neb. 598, 66 Am. St. Rep. 529, 72 N. W. 865; Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774.

The delivery by the grantor of the deed for record, and the grantee's claim of title to the land by virtue of the deed, make the delivery of the deed complete.

Compton v. White, 86 Mich. 635, 48 N. W. 635; Bowman v. Griffith, 35 Neb. 361,

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Note. — The effect of the grantor's act in procuring the recording of a deed without the knowledge of the grantee, or previous understanding with him to that effect, is discussed in notes to Munro v. Bowles, 54 L.R.A. 884, and Pentico v. Hayes, 9 L.R.A. (N.S.) 224. It is apparent from those notes that the foregoing case is in accord with the weight of authority in holding that while the recording of the deed under such circumstances is some evidence of delivery, it is not conclusive, and the finding that there was no intention on the part of the grantor to deliver the deed deprives his act in procuring it to be recorded of any effect as a delivery. It is apparent, however, that the grantor might, under some circumstances, be estopped, as against third persons, to deny a delivery of the deed. As to permitting undelivered deed wrongfully recorded by grantee to remain on record as estoppel of grantor or his successors to deny its delivery as against one purchasing in reliance on the record, see case note to Alabama Coal & Coke Co. v. Gulf Coal & Coke Co. 7 L.R.A. (N.S.) 712. On the general question as to the validation of undelivered deed by ratification or estoppel of grantor, see case note to Phelps v. Pratt, 9 L.R.A. (N.S.) 945.

Headnote by ROSE, J.

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53 N. W. 140; Palmer v. Palmer, 62 Iowa, 204, 17 N. W. 463; Cecil v. Beaver, 28 Iowa, 246, 4 Am. Rep. 174; Issitt v. Dewey, 47 Neb. 196, 66 N. W. 288; Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850, 109 N. W. 175; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439.

Mr. **H. M. Sullivan** for appellees.

Rose, J., delivered the opinion of the court:

This is an action to quiet plaintiff's title to a quarter section of land in Custer county. Patrick McGuire, a brother of plaintiff, acquired the land as a government homestead, having obtained the final receipt September 10, 1886, and the patent April 11, 1889. Plaintiff's claim to title rests on a warranty deed from Patrick McGuire. It was dated November 1, 1886, and recorded June 19, 1888. The county records show a reconveyance from Robert McGuire to Patrick McGuire December 23, 1889, but plaintiff alleged it was a forgery, and that, in his absence from the state, Patrick McGuire induced someone to impersonate plaintiff, and to execute, acknowledge, and deliver the forged instrument. Plaintiff further averred that Patrick McGuire, on the strength of the apparent title based on the forged deed, borrowed money and mortgaged plaintiff's land to secure the loan; that the mortgage was foreclosed; and that defendants, with full knowledge of the forgery and of plaintiff's ownership, bought the property, and claim title through mesne conveyances from the purchaser at the foreclosure sale. Plaintiff also alleged he first learned of the forgery, of the mortgage, and of the foreclosure proceedings in February, 1906. Defendants denied plaintiff's alleged ownership and title, and averred that Patrick McGuire, without plaintiff's knowledge and without consideration, signed, acknowledged, and registered the deed under which plaintiff claims title. They also alleged that the deed was never delivered; that it was never the intention of Patrick McGuire to deliver it, or by means of it to devest himself of title, or to convey the land to plaintiff; that grantor kept the deed and retained possession of the land; and that the deed was made for the purpose of ostensibly devesting the title of grantor, in furtherance of a design on his part to preempt a tract of government land near his homestead. Defendants also pleaded mesne conveyances from the purchaser at the foreclosure sale, and the defense of adverse possession. In addition they denied knowledge of the alleged forgery. On all the issues raised by the pleadings the trial court found in favor of defendants, and dismissed the suit. Plaintiff appeals.

Thirty-one errors are assigned, but the sum of all of them is that the judgment is not sustained by the evidence. Plaintiff relies on his deed from the patentee, shows he did not reconvey the land, and argues his title has never been devested. To justify the dismissal of the suit, defendants argue that plaintiff's deed was never delivered to him, and that, therefore, he never had any title to the land in controversy. They also rely on adverse possession as a defense, and insist the finding in their favor on that issue is sustained by the evidence. The first question presented by the record, therefore, is: Do the proofs show a delivery of the deed from Patrick McGuire to his brother Robert McGuire? There was no actual delivery or formal acceptance, but plaintiff insists the deed was signed and acknowledged by the grantor, and recorded pursuant to his order. These acts, according to plaintiff's view of the law, amounted to a delivery and transferred to him grantor's title to the land. Delivery was a question of fact for the determination of the trial court, and registration of the deed was prima facie evidence thereof. Gustin v. Michelson, 55 Neb. 22, 75 N. W. 153. On this issue the trial court found: "The said Patrick McGuire on November 1, 1886, made a deed to said premises, and inserted therein the name of his brother Robert McGuire, as the grantee thereof. Whereupon the said Patrick McGuire procured said deed to be recorded in the office of the county clerk of Custer county, Nebraska, ex-officio register of deeds of said county, paid the recording fee therefor, and had said deed returned to him, the said Patrick McGuire, who always thereafter retained the possession of said land. The court finds that said deed was never delivered by the said Patrick McGuire to Robert McGuire; that the said Robert McGuire paid nothing therefor, and that there was no consideration for the same; that the said Patrick McGuire did not intend, when he executed and recorded said deed, to convey the title to said premises to the said Robert McGuire, but supposing that, under the Federal law, he could not remove from the homestead, while the title thereto still remained in him, to a preemption, for the purpose alone of apparently vesting the title in his brother, the plaintiff, he executed said deed, and at the same time made said pre-emption entry; that the said Patrick McGuire thereafter, and some time during the years 1894 and 1895, died; that the said Robert McGuire never knew anything of said transaction and never knew anything about said deed or the fact that the same had been made and recorded until long after Patrick McGuire had died, and some time during the year

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1898. The court finds that the said Robert McGuire never claimed to own said land, never was in possession thereof, never ratified and approved any conveyance thereof to himself, and never ratified, approved, or accepted said deed of the said Patrick McGuire prior to the year 1906."

In determining whether these conclusions were properly drawn from the evidence, the entire record has been examined. Registration of the deed is the only evidence of delivery. Other proof of an intention on part of grantor to deliver the deed is entirely wanting. There was no evidence that the parties had previously made a contract of sale, or that grantor was indebted to plaintiff, or that the latter's creditors were asserting liens. On the other hand, there is proof that grantee had recently come from Ireland with money furnished by grantor, and that the money had been refunded. Both parties were unmarried. In acquiring the property for himself, grantor had endured the hardships of a frontier life. After registration of the deed, he mortgaged the land to procure funds for his own benefit. The testimony of the grantee himself shows that he never saw the deed; that he did not know it was placed on record, or who caused it to be recorded; that it was not delivered to him personally by his brother or by anyone else; and that he paid his brother nothing for it. There is also testimony that grantor kept the deed in his own possession after it was recorded; that he retained possession of the premises thereafter; and that it was not his intention to convey the premises to his brother. Grantee was never in possession of the land. He did not attempt to encumber or convey it. No creditor of his attempted to subject the property to the payment of debts. In addition, witnesses testified, in effect, that grantor said his purpose was to acquire more land, and not to part with what he already had. This court is committed to the rule that actual delivery and formal acceptance of a deed are not essential to its validity, where grantor placed it on record for the purpose and with the intent of transferring the title, pursuant to a valid agreement between the parties. Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850, 109 N. W. 175. In the case cited, and in other cases announcing a similar doctrine, the intention to transfer the title is a material element. In the present case such an intention is entirely wanting. While registration is evidence of delivery, as held in Gustin v. Michelson, supra, the mere recording of an acknowledged deed, without an intention to deliver it, does not operate as a delivery or as a transfer of title to grantee. Samson v. Thornton, 3 Met. 275, 37 Am. Dec. 135; Barns v. Hatch, 3 N. H. 304, 14 Am. Dec. 369; Derry Bank v. Webster, 44 N. H. 264; Wiggins v. Lusk, 12 Ill. 132; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Chess v. Chess, 1 Penr. & W. 32, 21 Am. Dec. 350; Doe ex dem. Herbert v. Herbert, Breese (Ill.) 278, 12 Am. Dec. 192; Union Mut. L. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Hooper v. Vanstrum, 92 Minn. 406, 100 N. W. 229; Hogadone v. Grange Mut. F. Ins. Co. 133 Mich. 339, 94 N. W. 1045; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188; Triplett v. Scott, 12 Ill. 137. In holding that a recorded deed, without an intention on part of the grantor to deliver it or to devest himself of title, was not effective as a conveyance, the Supreme Court of the United States, by Mr. Justice Field, said: "The evidence offered, so far as appears by the record, showed that the grantor never parted with its possession, except as may be inferred from the fact of its registry. And the grantee testified that he never knew of its existence until after the death of the grantor, among whose papers it was found, and that he never claimed any interest in the property. Yet the court instructed the jury that, as there was no contest of creditors against the deed, the instrument was binding, whether delivered or not. In this instruction there was also clear error. The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery. But here any such presumption is repelled by the attendant and subsequent circumstances. Here the registry was, of course, made without the assent of the grantee, as he had no knowledge of the existence of the deed, and the property it purported to convey always remained in the possession and under the control of the grantor." Younge v. Guilbeau, 3 Wall. 636, 18 L. ed. 262. That a deed may be inoperative where it was signed, acknowledged, and recorded for a purpose other than to transfer title was announced by the supreme court of New Hampshire in the following language: "It is not now to be questioned that a delivery is essential to the existence of the deed. It is not necessary that the deed be delivered by the grantor into the hands of the grantee; it may be delivered to a third person for the use of the grantee; it may be delivered absolutely or conditionally; but there must be a de-

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livery. . . . And we are of opinion that the sending of the instrument in this case to be recorded, coupled with the declaration that it was made to prevent the land from being taken to pay an unjust debt, does not amount to a delivery. There was nothing said or done in this case which shows a delivery." Barns v. Hatch, supra.

Cases involving the acts of grantors in leaving deeds with magistrates or recording officers for delivery are distinguishable from the present case. In those cases the intention to deliver the deed or to transfer the title is shown by proof or inferred from circumstances. Here a different purpose is fairly established under the rule that delivery is a question of intent, as announced in Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439. In Samson v. Thornton, supra, Chief Justice Shaw said: "A deed takes effect by delivery. An execution and registration of a deed, and a delivery of it to the register for that purpose, do not vest the title in the grantee. Nothing passes by it. Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146. This is distinguishable from the case of Hedge v. Drew, 12 Pick. 141, 22 Am. Dec. 416, where the father proposed to the daughter to execute a deed to her, and to leave it with the register for her use, and she expressed her assent to, and satisfaction with, the arrangement. She thereby made the register her agent to receive the deed."

Under the law applicable to the proofs in the present suit, the deed from Patrick McGuire to Robert McGuire was never delivered, and through it grantee acquired no title to the land in controversy. The trial court was right in so holding, and it follows that plaintiff's suit was properly dismissed. It is therefore unnecessary to discuss the question as to adverse possession.

Affirmed.

Dean, J., having been of counsel below, did not sit.

WISCONSIN SUPREME COURT.

F. M. HASBROUCK, Appt.,
v.
ARMOUR & COMPANY et al., Respts.

(— Wis. —, 121 N. W. 157.)

Pleading — conclusion.

1. An averment of joint placing on the market and guaranteeing the quality of an article by manufacturer and retailer is a conclusion, where the pleader has stated that it was manufactured by the one party, and sold and delivered to the other, from whom the plaintiff purchased.

23 L.R.A.(N.S.)

Sale — dangerous article — liability of manufacturer.

2. A manufacturer of soap who sells only to the trade is not liable in tort for injury to a consumer by a needle which is in some way embedded in a cake of soap without his knowledge, which cake is sold with others in the usual way to the dealer; and it is immaterial that purity of the product is guaranteed.

Same — retailer — liability.

3. A retail vendor of soap is not liable to a consumer for an injury by a needle embedded in a cake by the manufacturer, where he did not know of its presence, which could not have been ascertained by him in the exercise of ordinary care.

(Dodge and Barnes, JJ., dissent.)

(May 11, 1909.)

APPEAL by plaintiff from an order of the Circuit Court for Winnebago County sustaining separate demurrers to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. **H. B. Jackson**, with Messrs. **Eaton & Eaton**, for appellant:

It is an unlawful act negligently to permit to be concealed within a package of soap a dangerous piece of steel, and then to cause it to be placed in the hands of another, with the invitation to use it, so as to wound him.

Watson v. Augusta Brewing Co. 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152; Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1105; Sherman v. Western Transp. Co. 62 Barb. 150.

Plaintiff was entitled to act on the representation, though made to the public, and not to him personally.

Anderson v. Smith, 104 Minn. 40, 115 N. W. 743; Froeberg v. Smith, 106 Minn. 72, 118 N. W. 57; Bigelow, Torts, 8th ed. § 170, p. 82; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Dixon v. Bell, 5 Maule & S. 198; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Elkins v. McKean, 79 Pa. 493; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154.

The defendant, by its guaranty, took upon itself the risk and hazard.

Cameron v. Mount, 86 Wis. 477, 22 L.R.A. 512, 56 N. W. 1094; Kuehn v. Wilson, 13 Wis. 105.

Note. — The question of the liability of a manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in article sold, is discussed in the case note to Tomlinson v. Armour & Co. 19 L.R.A.(N.S.) 923.

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Contractual relations between plaintiff and defendant were unnecessary.

21 Am. & Eng. Enc. Law, 2d ed. pp. 461, 462; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418.

Messrs. **Thompsons, Pinkerton, & Jackson**, for respondent Armour & Company:

A manufacturer of articles for common use, harmless in themselves, who sells them to a retailer, does not incur a liability in tort to a third person purchasing from the retailer and having no contract relation with the manufacturer, who sustains injuries through a defect in the article sold, the manufacturer not knowing of the defect.

Winterbottom v. Wright, 10 Mees. & W. 109; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; 29 Cyc. Law & Proc. pp. 478, 479; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 866; Lewis v. Terry, 111 Cal. 45, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; Wellington v. Downer Kerosene Oil Co. 104 Mass. 64; Skinn v. Reutter, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152; Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Peters v. Johnson, 50 W. Va. 644, 57 L.R.A. 428, 88 Am. St. Rep. 909, 41 S. E. 190; Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; Elkins v. McKean, 79 Pa. 500; Ives v. Welden, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408; Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; Coughtry v. Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387; Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; Heaven v. Pender, L. R. 11 Q. B. Div. 503; Zieman v. Kieckhefer Elevator Mfg. Co. 90 Wis. 497, 63 N. W. 1021; Heizer v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; O'Neill v. James, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177; Nelson v. Armour Packing Co. 76 Ark. 353, 90 S. W. 288, 6 A. & E. Ann. Cas. 237.

Where the instrumentality which is the cause of the injury is not in its nature imminently dangerous; where it does not depend upon fraud, concealment, or implied invitation; and where the plaintiff is not in privity of contract,—an action for negligence cannot be maintained, since the misfortune to the third party cannot be regarded as a natural consequence of the maker's negligence.

McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651; Daugherty v. Herzog, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; Kuelling v. Roderick Lean Mfg. Co. 88 App. Div. 309, 84 N. Y. Supp. 622; Carter v. Harden, 78 Me. 529, 7 Atl. 392; Field v. French, 80 Ill. App. 78; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Bragdon v. Perkins-Campbell Mfg. Co. 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; Swan v. Jackson, 55 Hun, 194, 7 N. Y. Supp. 821; Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258; Slattery v. Colgate, 25 R. I. 220, 55 Atl. 639.

Messrs. **Williams & Williams**, for respondent S. Heymann Company:

A seller is not bound to discover latent defects in articles which he sells, even where they are intended for domestic use; and to hold him liable for damages it must be shown that he knew, or had good reason to believe, that the latent defect which caused the injury existed.

Green v. Ashland Water Co. 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722; Akers v. Overbeck, 18 Misc. 198, 41 N. Y. Supp. 382; Sheffer v. Willoughby, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; McQuaid v. Ross, 85 Wis. 492, 22 L.R.A. 187, 39 Am. St. Rep. 864, 55 N. W. 705; Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 513; Marvin Safe Co. v. Ward, 46 N. J. L. 19.

Strangers cannot sue for the negligent breach of a contract.

National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; 1 Shearm. & Redf. Neg. § 116-2; Jaggard, Torts, § 260.

The mere allegation that a needle was permitted to be in the soap is not a proper allegation of negligence.

Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 572.

Were the action against S. Heymann Company not in tort, but on implied warranty, it could not be sustained.

Green v. Ashland Water Co. 101 Wis. 263, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722; Lukens v. Freiund, 27 Kan. 664, 41 Am. Rep. 429; Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258.

Timlin, J., delivered the opinion of the court:

The complaint averred that the respond

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ent Armour & Company is a corporation of Illinois, licensed to do business in this state, and the respondent S. Heymann Company is a Wisconsin corporation. The former is engaged in the manufacture and sale throughout this state of toilet soap, and the latter is doing a mercantile business in the city of Oshkosh. Armour & Company make and sell "Armour & Co.'s Toilet Soap No. 175" as a harmless article for the purpose of use in cleaning the face, hands, and body, and hold out to the public that this soap would supply every need for all toilet purposes, and guarantee the purity and harmlessness thereof, and that the soap is free and clear from all harmful ingredients or foreign substances which might injure persons using the same in the ordinary manner. On and prior to September 20, 1906, Armour & Company, its agents, servants, and employees, carelessly and negligently permitted and allowed a cake of the soap so manufactured by it to contain a needle, or small, round, sharp piece of steel, embedded therein. This made the use of said soap dangerous, and was liable to cause injury to persons using the soap in the ordinary and usual manner. Some time prior to September 20, 1906, Armour & Company sold and delivered to S. Heymann Company a quantity of this soap, in which was contained the defective piece or cake above described, in which the needle was so concealed as not to be visible to the naked eye. This was purchased by the latter from the former, to be sold by the latter to the general public, and with the understanding that the soap was harmless and free from all dangerous particles or ingredients which might or which would injure the body of the person using the same for toilet purposes. Both defendants then jointly caused to be placed upon the market and sold to the general public this soap so negligently made, containing this needle; and the plaintiff purchased from S. Heymann Company a quantity of this kind of soap, and received the defective cake or piece above described. While properly using the soap so purchased for toilet purposes, the plaintiff was injured by this needle in the soap entering the palm of his right hand and producing the most serious consequences, including paralysis and disability.

The pleader says this injury was sustained by reason of "want of ordinary care and prudence of the defendants, their agents, servants, and employees, in manufacturing said soap and putting the same on the market for sale for general use, and allowing a sharp piece of needle or steel to become embedded therein, which was liable to injure persons using the same in the ordinary and usual manner." Each of the defendants demurred: "(1) For that it appears . . . that several causes of action have been improperly united. (2) For that it appears . . . that the complaint does not state facts sufficient to constitute a cause of action against this defendant." The pleader, appellant in this court, begins his brief with this statement: "This is an action in tort founded upon negligence alleged in the complaint, set forth at length in the printed case." In the face of this authoritative declaration of the purpose of the pleader, we shall spend no time searching for any other or different intent on his part. The averments of the pleading are appropriate to such declaration.

Before we can determine whether or not two causes of action are improperly united, we must find the two causes of action, and then ascertain whether they are such as may be joined. The complaint avers that both defendants "jointly caused to be placed on the market and to be sold to the general public Armour & Company's toilet soap so carelessly and negligently made, containing said sharp, round piece of steel, or needle." But in the face of express averments in the same pleading, that Armour & Company manufactured the soap, and negligently permitted a cake of soap so manufactured by it to contain this needle; that Armour & Company sold and delivered to its codefendant quantities of its soap, including a box of soap containing this defective piece or cake of soap; and that the plaintiff purchased from S. Heymann Company,—the last-quoted words must be considered a conclusion or inference of the pleader from the specific facts otherwise appearing in the complaint. So with the averment "that the purity and harmlessness (of the soap) was guaranteed by the said defendants, and the same to be free and clear from all foreign substances which might injure the person using the same in the ordinary and usual manner." There being no purchase by the plaintiff from Armour & Company, but the latter having sold to S. Heymann Company, and S. Heymann Company thereafter to the plaintiff, and no joint act of sale or contract by the defendants, and the plaintiff claiming in tort, this averment must also be deemed a legal inference of the pleader from the facts stated; and it must be considered that the soap was offered to the public successively in the usual manner, by each defendant, as a harmless and useful toilet article, or that in each successive sale the vendor so represented the soap to his immediate purchaser.

The first inquiry, therefore, is whether the foregoing pleading states a cause of action

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for negligence. Negligenee in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another. This duty may, by operation of law, arise between persons who by contract bring themselves into certain relations as bailor and bailee, carrier and passenger, master and servant, and others. Or the duty may be imposed, independently of contract relations, by statute, ordinance, or rule of the common law, and due only to particular persons or classes of persons, as users of a highway or other way, abutting owners, fellow travelers on the highway, and others. Or the duty may be due to all persons, as the duty to refrain from acts apparently dangerous to life or limb, as when in play "the fool casteth firebrands and arrows;" or where one exercises a conceded right in a manner apparently and unnecessarily dangerous. The duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, to one to whom the duty is due. In each of these relations, legal duty may vary in kind or in the degree of care required, or the act or omission may vary in the obviousness of its consequences; and therefore legal investigation, in order to judge of the quality of the act omitted or improperly performed, frequently inquires in what relation the parties to the action stood as to one another. This relation has been termed "privity;" and in the law of negligence we find cases asserting, and others denying, this requirement of privity between the party injured and the party negligent; but with respect to the breach of a duty due from the defendant to all persons, it must be apparent that no such inquiry is relevant. A manufacturer, dealer, or other person may bring himself, however, into privity with others under exceptional circumstances, and thereby be charged with a duty toward such persons different or greater from that which he owes to all persons, as in the case of a purchase by the vendee from the manufacturer or dealer, for the use of a third person specially designated to the manufacturer, or dealer, as in George v. Skivington, L. R. 5 Exch. 1, and Woodward v. Miller, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; and in the case of implied invitation to servants of another master to use a defective appliance furnished to that master for the use of the latter and his servants, as in Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; Coughtry v. Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387, and Heaven v. Pender, L. R. 11 Q. B. Div. 503; and in the case of a caterer furnishing a dinner for the use of the master of the feast and the guests of the latter, where one of the guests is injured by the negligence of the caterer in failing to properly prepare or select the food (Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154), and in the case of a manufacturer or vendor of remedies who sells to a dealer, but undertakes, by directions or recommendations on or accompanying the package, to communicate directly with the consumer or user (Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118). But where the manufacturer or vendor had not, at the time of the injury, brought himself into any privity with the person injured, within the rule of the foregoing cases, or similar and analogous circumstances, the duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with the duty imposed by law on all persons with respect to the public generally. There is no privity, no particular relation carrying with it special duties or a special degree of care in such case. Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 572; Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258; McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 537, 50 Atl. 641; Bragdon v. Perkins-Campbell Co. 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; Zieman v. Kieckhefer Elevator Mfg. Co. 90 Wis. 497, 63 N. W. 1021; Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543. The cases are collected in Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, and the rule well stated from the view point that no duty rests upon the manufacturer and seller to dealers, in favor of the purchaser from the latter, with certain specified exceptions.

The manufacturer or dealer who puts out, sells, and delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which, by reason of negligent construction, he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated. So, a manufacturer or vendor putting out and selling articles inherently dangerous, such as explosives or poisons, without notice to others of their dangerous nature or qualities, or with a misleading notice, or negligently in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. So, a manufacturer or vendor

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making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labeling, or directing the use of such articles, if such injury to others might have been reasonably foreseen in the exercise f ordinary care. The reason for these rules is apparent. The manufacturer or vendor should have no immunity from duties common to all, merely because he is a manufacturer or vendor. At the same time, there is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in the instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of nonliability. If a general rule of statute or common law requires him to take precautions to protect the public against a dangerous substance by proper designation of the thing manufactured or sold, he owes a duty to the public so to do, and for failure in that regard he is liable for the consequences reasonably to be anticipated. In Ives v. Welden, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408, this duty was imposed by statute; in Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, by common law.

We must assume upon this pleading that the needle was not knowingly placed in the soap by the manufacturer, and that the soap was sold by the manufacturer to the dealer without knowledge that it contained this needle. There is in some sense an implied invitation to use the soap for toilet purposes, but no knowledge or reasonable means of knowledge from the ordinary composition of the product, or from anything brought to the notice of the manufacturer, that such use would be dangerous. A guaranty or warranty not knowingly false or fraudulent does not affect the liability in tort for negligence. The unintentional and negligent dropping of a needle into the mixture is a remote possibility, an extraordinary occurrence; and serious injury resulting from such act to persons using the soap for toilet purposes is an unusual and remote consequence of the careless dropping of such needle into the mixture. There are, no doubt, well-authenticated instances of severe illness, and even death, resulting from a puncture or scratch by a needle or a pin; but these are not ordinary consequences of such accidents, but are extraordinary, unusual, and remote consequences, which a person of ordinary prudence and discretion, standing in this relation to the user or purchaser, is not expected to foresee and provide against. "Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof." Johanson v. Webster Mfg. Co. (Wis.) 120 N. W. 832. Another definition is that "negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it." Kendrick v. Towle, 60 Mich. 363, 367, 1 Am. St. Rep. 526, 27 N. W. 567; Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; Hope v. Fall Brook Coal Co. 3 App. Div. 70, 38 N. Y. Supp. 1040; Webb's Pollock, Torts, Am. ed. pp. 29, 30, and cases in notes.

There was, therefore, in the instant case, no breach of a duty imposed by law on the manufacturer for the protection of the public, or for the protection of the vendee of his vendee,—no actionable negligence shown. Consequently the plaintiff has failed to state a cause of action against the defendant Armour & Company.

With reference to the S. Heymann Company, there is no negligence charged in the complaint. The needle was so embedded in the soap as to be invisible to the naked eye. Heymann Company did not know of its presence in the soap. In the exercise of ordinary care, it could not have been ascertained that the needle was in the soap. This needle happened in the soap through no omission or default of theirs. They consequently are not holden to the plaintiff upon any ground of negligence.

The order sustaining the demurrer is affirmed.

Dodge and Barnes, JJ., dissent.

CALIFORNIA SUPREME COURT.

ANNA AGNES PEREIRA, Respt.,
v.
FRANK PEREIRA, Appt.

(— Cal. —, 103 Pac. 488.)

Divorce — reconciliation — agreement for recompense.

1. A provision in a contract by persons between whom divorce proceedings are pending because of the husband's misconduct, which is intended to effect a reconciliation and dismissal of the proceedings, to the effect that, in case the husband should so con-

Case Note. — Validity of anticipatory contract making provision for wife in the event of her obtaining divorce for subsequent fault of husband.

An extensive search has brought to light no other case squarely presenting this ques-

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duct himself as to give the wife a new cause of action for divorce, he would pay her a sum which is less than his yearly net income, in full satisfaction of all claims against his estate, is void as contrary to public policy.

Same — separate property — business — interest.

2. In dividing the property in a divorce proceeding, the capital which the husband has invested in business at the time of the marriage is to be regarded as separate estate, and also the profits which have been derived from the business since the marriage which are justly due to the capital invested, which, in case the business is profitable, are at least the usual interest on a long-term investment well secured.

Appeal — divorce — aiding appellee.

3. The wife's share of community property cannot be increased upon the husband's appeal in a divorce proceeding.

Divorce — division of community.

4. Upon reversal of a judgment in a divorce proceeding upon the husband's appeal because of error in classing as community in the division of the property that which was his separate estate, the trial court is at liberty to make a new apportionment of community between the parties in such shares as shall seem just under all the circumstances.

Same — inquiry — necessity.

5. An inquiry with respect to property rights and the custody of children prior to the entry of the final decree in a divorce proceeding is not prevented by statutes which provide that, in actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that a divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and that one year after the entry of such interlocutory judgment the court may enter a final judgment granting a divorce and such other and further relief as may be necessary to a complete disposition of the action; although other sections speak of the disposition of the community property in case of a dissolution of the marriage, and declare that the court, in ordering a decree of divorce, must make such orders for the disposition of community property as provided by law, and that marriage is dissolved only by the judgment of a court of competent jurisdiction declaring a divorce.

On rehearing.

Same — interest — capital.

6. In the absence of evidence on the part of the husband against whom a divorce is granted that the capital invested in his business was entitled to more than legal interest out of the profits of the business, that is all that he can claim in fixing the amount of community property to be divided between himself and wife.

Claim — right of wife.

7. Before full legal interest on the capital invested in the business of a man against whom a divorce is sought shall be allowed out of the profits of the business as against the claims of the community, the wife is entitled to an opportunity to show that it earned a smaller proportion of such profits.

(June 30, 1909.)

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tion, but Trust Co. of America v. Nash, 50 Misc. 295, 98 N. Y. Supp. 734, was a decision upon the validity of a contract making certain provision for a wife if she should in the future obtain an absolute divorce, where the parties had separated and were living apart when the agreement was entered into. Thus it did not appear whether grounds for divorce existed at that time, but it seems probable that they did. The provision in question was held valid, the court saying: "If this agreement could fairly and reasonably be construed as offering an inducement and advantage to the wife if she would procure a divorce from her husband, it would clearly be contrary to public policy and void. . . . In my opinion, however, it cannot be so construed. It is true that the agreement throughout contains provisions from which it may be inferred that the parties contemplated the possibility of an action for divorce in which the wife would be plaintiff, and provision was made for certain contingencies which might result from such an action if successful. This, however, was not in itself unlawful, so long as no premium was put, by the agreement, upon the procuring of such a divorce."

It will be noted that the decision in PEREIRA v. PEREIRA was upon the ground of public policy, and it has therefore seemed desirable to call attention to a few cases involving the validity of an agreement by a husband to provide for his wife in the event of such subsequent conduct on his part as to necessitate or result in their separation. Such agreements seem to have been generally upheld. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 444; Reamey v. Bayley, 7 Sadler (Pa.) 239, 11 Atl. 438; Woodruff v. Woodruff, 121 Ky. 784, 90 S. W. 266, 91 S. W. 265. See also Duffy v. White, 115 Mich. 264, 73 N. W. 363. And see Darcey v. Darcey (R. I.) post, 886, 71 Atl. 595, where it was held that a husband and wife have power to enter into a contract by which he undertakes to transfer real estate to her in case he resumes relations with a paramour.

But an antenuptial agreement providing that, in case of the separation of the parties for any cause whatsoever, the husband should make certain provision for the wife, was held invalid in Watson v. Watson, 37 Ind. App. 548, 77 N. E. 355.

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APPEAL by defendant from a judgment of the Superior Court for Alameda County granting plaintiff a divorce. Modified.

The facts are stated in the opinion.

Messrs. **Arthur J. Dannenbaum** and **Myer Jacobs**, for appellant:

Profits realized by the husband after his marriage, out of separate property owned by him at the time of his marriage, is the separate property of the husband.

Re Higgins, 65 Cal. 407, 4 Pac. 389; Re Granniss, 142 Cal. 1, 75 Pac. 324; Re Bauer, 79 Cal. 310, 21 Pac. 759.

Where property is acquired by funds belonging partly to the separate property of one spouse and partly to the community property, the property so acquired becomes in part the separate property of the spouse who furnishes the funds from his or her separate property, and in part the community of both spouses, in proportion to the separate and community funds invested in it.

Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Re Bauer, 79 Cal. 304, 21 Pac. 759; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Loring v. Stuart, 79 Cal. 202, 21 Pac. 651; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819.

The contract is a valid contract.

Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227; Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675.

The wife cannot ask for the increase of her proportion of the community property, upon the appeal of the husband.

Olmsted v. Russ, 122 Cal. 224, 54 Pac. 745; South San Bernardino Land & Improv. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Bates v. Babcock, 95 Cal. 479, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; Klauber v. San Diego Street Car Co. 98 Cal. 105, 32 Pac. 876.

Messrs. **Charles S. Wheeler, Snook & Church**, and **J. F. Bowie** for respondent.

Shaw, J., delivered the opinion of the court:

The plaintiff obtained an interlocutory judgment of divorce on the ground of extreme cruelty. This judgment also declared that the plaintiff should have three fifths of the community property when the divorce became final, that she should thereafter have custody of her minor child by the marriage, and it provided for temporary alimony to her, and for the custody of the child during the time that would elapse between the interlocutory judgment and the final judgment. The defendant appealed from this interlocutory judgment within sixty days after the rendition thereof. This appeal is presented upon the judgment roll and upon a bill of exceptions containing the evidence. It is conceded that the evidence was sufficient to justify the divorce and the award of the custody of the child to plaintiff. The claim of the appellant is that the court erred in the finding as to the amount of the community property, and in excluding evidence relating thereto.

1. The first point to be noticed is the ruling of the court declaring void a contract between the parties, relating to their property and the division thereof, and in refusing to enforce or consider it in that connection. We are of the opinion that the court properly refused to consider this contract on the ground that it was plainly against public policy. The present action was begun on January 21, 1905. A previous action of divorce on the ground of extreme cruelty, consisting in large part of the same acts assigned in the present complaint, was commenced by the plaintiff against the defendant on September 23, 1904. After that action was begun, the parties became reconciled, resumed marital relations, and on November 1, 1904, the plaintiff dismissed the action. On November 4, 1904, in pursuance of negotiations begun before the dismissal, but after the reconciliation, the contract in question was executed. It was dated November 1st, and it recites that the previous action was then pending. Therein the plaintiff expressly waived the cause for divorce alleged in said complaint, and agreed to dismiss the action. The contract further provided: That none of the relatives of either party should settle in, be invited to, or visit, the home without the consent of both parties; that if the husband should thereafter so conduct himself as to give the wife a new cause of action for divorce, and she should establish the same in a subsequent action against him for divorce or maintenance, the husband should thereupon pay to the wife $10,000, which should be a full satisfaction, settlement, and discharge of all claims of the wife in such action "for alimony, costs, counsel fees, support, maintenance of herself, homestead, homestead right, property, and benefit of every kind and character." It also declared that, "in the event of the institution of such subsequent action, all claims and demands by her on her part in or to any moneys, property rights, or property, community or otherwise, now or hereafter owned or acquired by" the defendant, other than said $10,000, "are hereby forever settled, liquidated, relinquished, released, waived, and abandoned, and no claim, demand, or monetary or property benefit or relief shall ever be claimed, asserted, or sought in, by, or by reason of said subsequent action, should it be instituted, except only to the extent aforesaid."

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The Civil Code provides that the husband and wife may enter into any engagement with the other respecting property, which they might enter into if not married, subject to the law as to fiduciary relations in general (§ 158); and that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation; but that they cannot, by contract, otherwise alter their legal relations, except as to property (§159). There was in this contract no agreement for separation, and hence the agreement to pay $10,000 cannot be upheld as a provision for the support of the wife on a separation, as provided in § 159. The real effect of the contract to pay the $10,000, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong. The evidence and findings show that the defendant was then possessed of property worth about $77,000, was engaged in a very lucrative business, and was receiving an income of about $11,000 a year, which he had every reason to believe would continue. By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that $10,000 would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce, or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations, and inflict the injury. As it was obviously adapted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution. The law does not countenance such agreements. "Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, . . . is void as *contra bonos mores*." Loveren v. Loveren, 106 Cal. 512, 39 Pac. 802, quoting Phillips v. Thorp, 10 Or. 494; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Newman v. Freitas, 129 Cal. 289, 50 L.R.A. 548, 61 Pac. 907. In Seeley's Appeal, 56 Conn. 206, 14 Atl. 291, the court says: "Inasmuch as the state rests upon the family, and is vitally interested in the permanency of a marriage relation once established, it, for the promotion of public welfare, and of private morals as well, makes itself a party to every marriage contract entered into within its jurisdiction, in this sense, that it will not permit the dissolution thereof by the other parties thereto. Its consent in the form of a decree of its court passed after hearing in due process of law is a prerequisite to a divorce. . . . Courts will not enforce any contract which is the price of consent by one party to the marriage relation to the procurement of a divorce by the other." And, in reference to a similar agreement to that in the case at bar, the court in the case just cited said: "Presumably each party saw in that agreement an individual advantage; to him, in that he possibly paid her less thereby than the judgment of the court upon hearing would compel; to her, in that he refrained therefor from answering the allegations of her petition by proof, and thus possibly permitted a divorce which he could have prevented."

Before the contract was made, or its terms agreed to, the parties had made up their former differences and had become reconciled. It shows by its terms that it is not an agreement to settle property rights accruing by reason of a marital offense already perpetrated and complete as a cause for divorce. There is therefore no force in the claim, as applied to this case, that it is competent evidence, or valid as a settlement of such rights, even if it were conceded that such an agreement might under some circumstances be permitted to stand. The court also found that this contract was procured by the husband through undue influence and by fraud. Our conclusions upon the point that it was against public policy make it unnecessary to consider the sufficiency of the evidence to sustain these findings.

2. The court found that the community property of the parties was of the value of $57,664.77. It is claimed that this is not sustained by the evidence.

There is practically no conflict on the subject; there being no witness to that point except the defendant. The findings state that this property consisted of the real estate on which the defendant carried on business, which was of the value of $45,000, and certain money on hand, making up the remainder. The evidence shows that the plaintiff and defendant intermarried on April 19, 1900. At that time the defendant was, and he ever since has been, carrying on a saloon and cigar business, then producing a net income of about $5,000 annually. He owned the cigar and saloon stock and fixtures, worth in all about $15,500, and had, besides, some $6,000 in cash. Soon after the marriage he bought the home wherein the parties afterwards lived, paying $2,700 therefor, and he afterwards expended thereon $2,300 in improving it. This home is

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adjudged to be his separate property, and plaintiff is given no interest in it. A year and a half after his marriage he bought the property in which he was carrying on business, at the price of $40,000. He paid in cash therefor $5,000, and afterwards, out of his income, he paid the balance of the price, and accumulated the cash on hand at the time of the trial, in addition, amounting to over $12,000. His net income at the time of the trial was about $11,000 a year. From the time of his marriage to the time of trial he allowed his wife $75 a month to run the house, and she made her own clothes. There is an unexplained discrepancy between the total amount of his income less the household expenses, and his total gains. He must have received more than he was willing to disclose, if his net income, over household expenses, amounted to as much as the money which he admits he has received, not allowing anything for his personal expenses.

The court may have believed that he had other property which he had succeeded in concealing. There was some justification for this inference, for he was caught in the act of attempting to conceal $7,761 of the cash on hand, by means of a New York draft, which he had carried in his pocket for the four months preceding the trial. It appears, however, that the decision of the court was made upon the theory that all of his gains received after marriage, from whatever sources, were to be classed as community property, and that no allowance was made in favor of his separate estate on account of interest or profit on the $15,500 invested in the business at the time of the marriage. This capital was undoubtedly his separate estate. The fund remained in the business after marriage and was used by him in carrying it on. The separate property should have been credited with some amount as profit on this capital. It was not a losing business, but a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property; but without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and, as the business was profitable, it would amount at least to the usual interest on a long investment well secured. Boggess v. Richards, 39 W. Va. 576, 26 L.R.A. 537, 45 Am. St. Rep. 938, 20 S. E. 599; Trapnell v. Conklyn, 37 W. Va. 252, 38 Am. St. Rep. 30, 16 S. E. 570; Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98. We think the court erred in refusing to increase the proportion of separate property and decrease the community property to the extent of the reasonable gain to the separate estate from the earnings properly allowable on account of the capital invested.

It is true that the disposition of the community property by the superior court, in all particulars, including matters committed to its discretion, is subject to revision in this court on appeal. Civil Code, § 148; Eslinger v. Eslinger, 47 Cal. 64; Brown v. Brown, 60 Cal. 580; Strozynski v. Strozynski, 97 Cal. 192, 31 Pac. 1130. In each of these cases the supreme court increased the wife's share of the community property from one half, as given by the trial court, to three fourths. But the wife has not appealed, and we cannot, upon the husband's appeal, change the judgment by increasing the share of community property given to the wife. The only error, in respect to community property, which we can consider upon this appeal by the husband, is the error in classing as community property that part of the gains which was derived from the "issues and profits" of his separate property (Civil Code, § 163), the amount of which we cannot determine. It will be necessary to remand the case for a retrial of this issue. The court below will be free, upon such new trial, to apportion a larger share of the community property to the plaintiff, or to divide it between the parties in such shares as it shall deem just, under all the circumstances. The present division seems fair in point of fact.

3. The appellant further claims that, under the amendment of 1903 to §§ 131 and 132 of the Civil Code, the court has no power, at or before the time of rendering the interlocutory judgment of divorce, to make any inquiry, finding, or decree with respect to the property rights of the parties, or with respect to any other subject connected with the divorce, except the right of the complainant to a divorce. Section 131 on this point is as follows: "In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce." Section 132 provides that, when "one year has expired after the entry of such interlocutory judgment, the court on

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motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action. . . . The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either." As these provisions were made after the other sections of the Code had been in force for many years, it was to be expected that the new provisions would not in all respects be consistent in language with other sections on the same subject. In § 146 the Code speaks of a disposition of the community property "in case of the dissolution of the marriage." In § 147 the Code declares that "the court in rendering a decree of divorce must make such order for the disposition of the community property and of the homestead as in this chapter provided," and in § 90 it declares that marriage is dissolved only by the judgment of a court of competent jurisdiction declaring a divorce. From these provisions it is argued by the appellant that the court's power to make a disposition of the property rights of the parties exists only at the time when the divorce judgment becomes final, and that any act attempted to be accomplished before that, in the way of a trial or interlocutory judgment declaring the property rights or the rights to the custody of children, is *coram non judice*, and void.

We do not think that the Code provision requires such a narrow construction. When the history of legislation on the subject and the conditions existing at the time of the adoption of the amendment of 1903 are considered, the purpose, meaning, and effect of that amendment are not difficult to discover. While the law deems it necessary to provide that a divorce may be granted when conditions are such as to make the marriage relation intolerable, it is nevertheless true that the policy of the law does not favor the dissolution of marriages. It has been generally believed that many divorces were sought, not in good faith, but because a roving fancy had found another affinity more attractive, and that a dissolution was often desired solely for the purpose of forming a new marital connection. With the design of providing conditions under which it would be understood that ardent passions of this character must perforce have time to cool before a new marriage relation could be actually formed, the legislature, in 1897, enacted a law in effect providing that no marriage should be entered into by any divorced person until at least one year had elapsed after the decree of divorce was rendered. Stat. 1897, chap. 36, p. 34. It had become customary to avoid the provisions of this act by the expedient of going to an adjacent state for the purpose of entering into a new marital relation. This court was compelled to hold that marriages contracted in another state were valid in this state, although they were entered into within less than a year after a divorce had been granted in this state to one of the parties. Re Wood, 137 Cal. 129, 69 Pac. 900. The purpose of the amendment of 1903 was to carry into effect the object attempted to be attained by the statute in 1897. To do this the expedient was adopted of delaying the final judgment in divorce cases for the period of one year after it was judicially ascertained that a divorce should be granted. By thus making the right to a divorce ineffective for the period of one year, it became impossible for the parties to contract a valid new marriage anywhere until at least a year after the trial of the action of divorce had taken place. Except so far as was necessary to accomplish this object, it was not the intent of the statute to change in any respect the practice and procedure in actions for divorce. We do not doubt that the court has the same power now that it has always had to try and determine the issues between the parties in a divorce action with respect to property and custody of children, and that this may, and generally should, be done at the same time as the issues with respect to the cause for divorce are tried and determined. Unquestionably the court would have power under the present law, as it always has had the power under previous laws, to postpone the trial and decision of the property rights and custody of the children to any reasonable time after the rendition of the judgment of divorce, whether interlocutory or final. The amendment has not changed its power in this respect. It is proper in all actions for divorce to try the entire action at the same time as the issues respecting divorce are tried and to give an interlocutory judgment declaring the rights of the parties with respect to property and children.

We commend the action of the court below in this case in declaring, in its interlocutory decree concerning the property, that the rights therein specified should become final at the time the decree of divorce became final. We are not called upon here to determine whether the adjudication of property rights would or would not have been final at the

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as it is informed, which was the full value of said house, and that plaintiffs have received pay from said insurance company in the sum of $700 on account of said fire, which sum fully repaid the plaintiffs for any loss they sustained by reason of said fire; and the defendant now says that if said fire was caused by any negligence or carelessness upon the part of defendant for which it is liable, which it denies, said Citizens' Fire Insurance Company is entitled to recover for same, instead of these plaintiffs; and it pleads and relies upon the said payment to the plaintiffs by said insurance company in bar of plaintiffs' right to recover herein." It is the contention of counsel for appellant that, upon the payment of the loss by the insurance company, it was immediately subrogated to the rights of the property holders, and became the real party in interest, and that, under the provisions of § 18 of the Civil Code of Practice, requiring every action to be prosecuted in the name of the real party in interest, except as provided in § 21, the insurance company, alone, was entitled to recover from the railroad company.

The law is well settled that a wrongdoer has no right to the benefits of the insurance, and cannot rely, either in full or *pro tanto*, on the defense that the owner of the property had been previously paid by the insurance company. Payment to the owner by an insurance company of the amount of his loss does not bar the right against another originally liable for the loss. The insurance company does not stand in the relation of a joint tort feasor with the party through whose negligence the property is destroyed. Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; Perrott v. Shearer, 17 Mich. 48; Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; Mathews v. St. Louis & S. F. R. Co. 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591; 24 Am. & Eng. Enc. Law, p. 304; Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618. In the case of Anderson v. Miller, supra, the rule is thus stated: "The question of who will be entitled to the proceeds of the recovery, the insurer or the insured, is a matter between them, and constitutes no defense to an action for damages caused by the wrong, which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer." Chief Justice Cooley, in discussing the same question in the case of Perrott v. Shearer, supra, said: He (the defendant) is found to be the wrongdoer, and he cannot relieve himself from responsibility to account for the full valuation (of the goods), except by restoring them. "He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased or diminished by the fact that such a contract exists. He has no equities, as against the plaintiff, which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he ran when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner . . . keeps his interest insured, he cannot be held to pay the money expended for that purpose, for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is therefore entitled to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is therefore justly entitled to no return."

As we understand appellant's position, however, it is not that the payment by the insurance company constitutes a defense in favor of appellant, but that appellant was entitled to litigate the question with the insurance company, which was the real party in interest, and that appellant's answer was therefore good as a plea in abatement. The availability of this plea depends altogether upon the question: Who was entitled to sue—the party holding the legal title, or the insurance company, which, upon the payment of the insurance, was subrogated to the rights of the property owner? In 30 Cyc. Law & Proc. p. 78, the rule is thus stated: "After some vacillation, the courts of the Code states have very generally rejected or refused to adopt the doctrine that beneficial ownership is necessary for a standing as real party in interest. Without denying that beneficial ownership is sufficient, in connection with the corresponding cause of action, the prevailing view now entertained by these courts recognizes the legal title also as sufficient. The sounder view is, rather, that it is enough to entitle plaintiff to maintain the action, as real party in interest, if he has the legal title to the demand, and defendants will be protected in a payment to or recovery by him. A third person not a party to the action may, it is true, be entitled to claim from plaintiff a portion of the fruits of the action, or all its fruits, as the case may be; but as against the defendant a plaintiff is the real party in interest if he has and shows the complete legal title to the cause of action asserted, so that he can legally discharge the defendant from his obligation." Manley v. Park, 68 Kan. 400, 66 L.R.A. 967, 75 Pac. 557, 1

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A. & E. Ann. Cas. 832; Allen v. Brown, 44 N. Y. 228; Eaton v. Alger, 47 N. Y. 345. But defendant's right to object is limited by the purpose of the statute, and its evident purpose is not to allow defendant to demand the adjudication of equities which exist wholly between plaintiff and third persons. Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970; Allen v. Brown, supra. So far as the defendant is concerned, the purpose of the statute is fully attained if, in the suit as brought, defendant is not shut out from his proper defense and counterclaim and will be fully protected by the judgment, whether for or against plaintiff, in the event of any other claim on the same cause. Los Robles Water Co. v. Stoneman, 146 Cal. 203, 79 Pac. 880; Greene v. McAuley, 70 Kan. 601, 68 L.R.A. 308, 79 Pac. 133.

In the case at bar the defendant did not ask that the insurance company be made a party to the action. It may be that, as between plaintiffs and the insurance company, the latter would be equitably entitled to the damages that plaintiffs recovered. The fact, however, that a third party might be entitled to the damages as between him and plaintiffs, is not sufficient to bar the right of action by the plaintiffs. The legal title to the property destroyed was in the plaintiffs. As between the plaintiffs and the defendant the former were the real parties in interest. It is immaterial to the railroad company what may be the equities between the plaintiffs and the insurance company. All that it can demand is that a judgment in favor of the plaintiffs will be a complete defense to any further action for the same cause. In our opinion the judgment in favor of plaintiffs is conclusive, and no action can now be maintained against the railroad company by the insurance company. Any right of action the insurance company may have is against the plaintiffs. For the reasons given, the trial court did not err in sustaining a demurrer to the second paragraph of defendant's answer.

Judgment affirmed.

NEBRASKA SUPREME COURT.

ROBERT McGUIRE, Appt.,
v.
HUGH G. CLARK et al.

(— Neb. —, 122 N. W. 675.)

Deed — delivery — evidence — sufficiency.

On a record showing that the owner of a government homestead, for the purpose of apparently devesting himself of title, in furtherance of a design to pre-empt a tract of government land, signed, acknowledged, and registered a deed to his brother without the latter's knowledge, a finding that there was no delivery of the deed was held proper, where grantor never intended to deliver it, kept it in his own hands, and retained possession of the homestead.

(September 25, 1909.)

APPEAL by plaintiff from a judgment of the District Court for Custer County dismissing an action brought to quiet title to certain lands. Affirmed.

The facts are stated in the opinion.

Mr. **Robert A. Moore**, for appellant:

When the terms used in a deed make an absolute conveyance with all the terms of warranty, it is beyond the power of the court to say, from the construction of the instrument, that the grantor did not intend to convey the entire title.

Struve v. Republican Valley R. Co. 2 Neb. (Unof.) 585, 89 N. W. 604; Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Leavitt v. Bell, 55 Neb. 62, 75 N. W. 524; Hagensick v. Castor, 53 Neb. 495, 73 N. W. 932; Wells v. Steckelberg, 52 Neb. 598, 66 Am. St. Rep. 529, 72 N. W. 865; Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774.

The delivery by the grantor of the deed for record, and the grantee's claim of title to the land by virtue of the deed, make the delivery of the deed complete.

Compton v. White, 86 Mich. 635, 48 N. W. 635; Bowman v. Griffith, 35 Neb. 361,

Headnote by ROSE, J.

23 L.R.A. (N.S.)

Note. — The effect of the grantor's act in procuring the recording of a deed without the knowledge of the grantee, or previous understanding with him to that effect, is discussed in notes to Munro v. Bowles, 54 L.R.A. 884, and Pentico v. Hayes, 9 L.R.A. (N.S.) 224. It is apparent from those notes that the foregoing case is in accord with the weight of authority in holding that while the recording of the deed under such circumstances is some evidence of delivery, it is not conclusive, and the finding that there was no intention on the part of the grantor to deliver the deed deprives his act in procuring it to be recorded of any effect as a delivery. It is apparent, however, that the grantor might, under some circumstances, be estopped, as against third persons, to deny a delivery of the deed. As to permitting undelivered deed wrongfully recorded by grantee to remain on record as estoppel of grantor or his successors to deny its delivery as against one purchasing in reliance on the record, see case note to Alabama Coal & Coke Co. v. Gulf Coal & Coke Co. 7 L.R.A. (N.S.) 712. On the general question as to the validation of undelivered deed by ratification or estoppel of grantor, see case note to Phelps v. Pratt, 9 L.R.A. (N.S.) 945.

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53 N. W. 140; Palmer v. Palmer, 62 Iowa, 204, 17 N. W. 463; Cecil v. Beaver, 28 Iowa, 246, 4 Am. Rep. 174; Issitt v. Dewey, 47 Neb. 196, 66 N. W. 288; Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850, 109 N. W. 175; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439.

Mr. **H. M. Sullivan** for appellees.

Rose, J., delivered the opinion of the court:

This is an action to quiet plaintiff's title to a quarter section of land in Custer county. Patrick McGuire, a brother of plaintiff, acquired the land as a government homestead, having obtained the final receipt September 10, 1886, and the patent April 11, 1889. Plaintiff's claim to title rests on a warranty deed from Patrick McGuire. It was dated November 1, 1886, and recorded June 19, 1888. The county records show a reconveyance from Robert McGuire to Patrick McGuire December 23, 1889, but plaintiff alleged it was a forgery, and that, in his absence from the state, Patrick McGuire induced someone to impersonate plaintiff, and to execute, acknowledge, and deliver the forged instrument. Plaintiff further averred that Patrick McGuire, on the strength of the apparent title based on the forged deed, borrowed money and mortgaged plaintiff's land to secure the loan; that the mortgage was foreclosed; and that defendants, with full knowledge of the forgery and of plaintiff's ownership, bought the property, and claim title through mesne conveyances from the purchaser at the foreclosure sale. Plaintiff also alleged he first learned of the forgery, of the mortgage, and of the foreclosure proceedings in February, 1906. Defendants denied plaintiff's alleged ownership and title, and averred that Patrick McGuire, without plaintiff's knowledge and without consideration, signed, acknowledged, and registered the deed under which plaintiff claims title. They also alleged that the deed was never delivered; that it was never the intention of Patrick McGuire to deliver it, or by means of it to devest himself of title, or to convey the land to plaintiff; that grantor kept the deed and retained possession of the land; and that the deed was made for the purpose of ostensibly devesting the title of grantor, in furtherance of a design on his part to preempt a tract of government land near his homestead. Defendants also pleaded mesne conveyances from the purchaser at the foreclosure sale, and the defense of adverse possession. In addition they denied knowledge of the alleged forgery. On all the issues raised by the pleadings the trial court found in favor of defendants, and dismissed the suit. Plaintiff appeals.

Thirty-one errors are assigned, but the sum of all of them is that the judgment is not sustained by the evidence. Plaintiff relies on his deed from the patentee, shows he did not reconvey the land, and argues his title has never been devested. To justify the dismissal of the suit, defendants argue that plaintiff's deed was never delivered to him, and that, therefore, he never had any title to the land in controversy. They also rely on adverse possession as a defense, and insist the finding in their favor on that issue is sustained by the evidence. The first question presented by the record, therefore, is: Do the proofs show a delivery of the deed from Patrick McGuire to his brother Robert McGuire? There was no actual delivery or formal acceptance, but plaintiff insists the deed was signed and acknowledged by the grantor, and recorded pursuant to his order. These acts, according to plaintiff's view of the law, amounted to a delivery and transferred to him grantor's title to the land. Delivery was a question of fact for the determination of the trial court, and registration of the deed was prima facie evidence thereof. Gustin v. Michelson, 55 Neb. 22, 75 N. W. 153. On this issue the trial court found: "The said Patrick McGuire on November 1, 1886, made a deed to said premises, and inserted therein the name of his brother Robert McGuire, as the grantee thereof. Whereupon the said Patrick McGuire procured said deed to be recorded in the office of the county clerk of Custer county, Nebraska, ex-officio register of deeds of said county, paid the recording fee therefor, and had said deed returned to him, the said Patrick McGuire, who always thereafter retained the possession of said land. The court finds that said deed was never delivered by the said Patrick McGuire to Robert McGuire; that the said Robert McGuire paid nothing therefor, and that there was no consideration for the same; that the said Patrick McGuire did not intend, when he executed and recorded said deed, to convey the title to said premises to the said Robert McGuire, but supposing that, under the Federal law, he could not remove from the homestead, while the title thereto still remained in him, to a preemption, for the purpose alone of apparently vesting the title in his brother, the plaintiff, he executed said deed, and at the same time made said pre-emption entry; that the said Patrick McGuire thereafter, and some time during the years 1894 and 1895, died; that the said Robert McGuire never knew anything of said transaction and never knew anything about said deed or the fact that the same had been made and recorded until long after Patrick McGuire had died, and some time during the year

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1898. The court finds that the said Robert McGuire never claimed to own said land, never was in possession thereof, never ratified and approved any conveyance thereof to himself, and never ratified, approved, or accepted said deed of the said Patrick McGuire prior to the year 1906."

In determining whether these conclusions were properly drawn from the evidence, the entire record has been examined. Registration of the deed is the only evidence of delivery. Other proof of an intention on part of grantor to deliver the deed is entirely wanting. There was no evidence that the parties had previously made a contract of sale, or that grantor was indebted to plaintiff, or that the latter's creditors were asserting liens. On the other hand, there is proof that grantee had recently come from Ireland with money furnished by grantor, and that the money had been refunded. Both parties were unmarried. In acquiring the property for himself, grantor had endured the hardships of a frontier life. After registration of the deed, he mortgaged the land to procure funds for his own benefit. The testimony of the grantee himself shows that he never saw the deed; that he did not know it was placed on record, or who caused it to be recorded; that it was not delivered to him personally by his brother or by anyone else; and that he paid his brother nothing for it. There is also testimony that grantor kept the deed in his own possession after it was recorded; that he retained possession of the premises thereafter; and that it was not his intention to convey the premises to his brother. Grantee was never in possession of the land. He did not attempt to encumber or convey it. No creditor of his attempted to subject the property to the payment of debts. In addition, witnesses testified, in effect, that grantor said his purpose was to acquire more land, and not to part with what he already had. This court is committed to the rule that actual delivery and formal acceptance of a deed are not essential to its validity, where grantor placed it on record for the purpose and with the intent of transferring the title, pursuant to a valid agreement between the parties. Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850, 109 N. W. 175. In the case cited, and in other cases announcing a similar doctrine, the intention to transfer the title is a material element. In the present case such an intention is entirely wanting. While registration is evidence of delivery, as held in Gustin v. Michelson, supra, the mere recording of an acknowledged deed, without an intention to deliver it, does not operate as a delivery or as a transfer of title to grantee. Samson v. Thornton, 3 Met. 275, 37 Am. Dec. 135; Barns v. Hatch, 3 N. H. 304, 14 Am. Dec. 369; Derry Bank v. Webster, 44 N. H. 264; Wiggins v. Lusk, 12 Ill. 132; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Chess v. Chess, 1 Penr. & W. 32, 21 Am. Dec. 350; Doe ex dem. Herbert v. Herbert, Breese (Ill.) 278, 12 Am. Dec. 192; Union Mut. L. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Hooper v. Vanstrum, 92 Minn. 406, 100 N. W. 229; Hogadone v. Grange Mut. F. Ins. Co. 133 Mich. 339, 94 N. W. 1045; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188; Triplett v. Scott, 12 Ill. 137. In holding that a recorded deed, without an intention on part of the grantor to deliver it or to devest himself of title, was not effective as a conveyance, the Supreme Court of the United States, by Mr. Justice Field, said: "The evidence offered, so far as appears by the record, showed that the grantor never parted with its possession, except as may be inferred from the fact of its registry. And the grantee testified that he never knew of its existence until after the death of the grantor, among whose papers it was found, and that he never claimed any interest in the property. Yet the court instructed the jury that, as there was no contest of creditors against the deed, the instrument was binding, whether delivered or not. In this instruction there was also clear error. The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery. But here any such presumption is repelled by the attendant and subsequent circumstances. Here the registry was, of course, made without the assent of the grantee, as he had no knowledge of the existence of the deed, and the property it purported to convey always remained in the possession and under the control of the grantor." Younge v. Guilbeau, 3 Wall. 636, 18 L. ed. 262. That a deed may be inoperative where it was signed, acknowledged, and recorded for a purpose other than to transfer title was announced by the supreme court of New Hampshire in the following language: "It is not now to be questioned that a delivery is essential to the existence of the deed. It is not necessary that the deed be delivered by the grantor into the hands of the grantee; it may be delivered to a third person for the use of the grantee; it may be delivered absolutely or conditionally; but there must be a de-

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livery. . . . And we are of opinion that the sending of the instrument in this case to be recorded, coupled with the declaration that it was made to prevent the land from being taken to pay an unjust debt, does not amount to a delivery. There was nothing said or done in this case which shows a delivery." Barns v. Hatch, supra.

Cases involving the acts of grantors in leaving deeds with magistrates or recording officers for delivery are distinguishable from the present case. In those cases the intention to deliver the deed or to transfer the title is shown by proof or inferred from circumstances. Here a different purpose is fairly established under the rule that delivery is a question of intent, as announced in Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439. In Samson v. Thornton, supra, Chief Justice Shaw said: "A deed takes effect by delivery. An execution and registration of a deed, and a delivery of it to the register for that purpose, do not vest the title in the grantee. Nothing passes by it. Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146. This is distinguishable from the case of Hedge v. Drew, 12 Pick. 141, 22 Am. Dec. 416, where the father proposed to the daughter to execute a deed to her, and to leave it with the register for her use, and she expressed her assent to, and satisfaction with, the arrangement. She thereby made the register her agent to receive the deed."

Under the law applicable to the proofs in the present suit, the deed from Patrick McGuire to Robert McGuire was never delivered, and through it grantee acquired no title to the land in controversy. The trial court was right in so holding, and it follows that plaintiff's suit was properly dismissed. It is therefore unnecessary to discuss the question as to adverse possession.

Affirmed.

Dean, J., having been of counsel below, did not sit.

WISCONSIN SUPREME COURT.

F. M. HASBROUCK, Appt.,
v.
ARMOUR & COMPANY et al., Respts.

(— Wis. —, 121 N. W. 157.)

Pleading — conclusion.

1. An averment of joint placing on the market and guaranteeing the quality of an article by manufacturer and retailer is a conclusion, where the pleader has stated that it was manufactured by the one party, and sold and delivered to the other, from whom the plaintiff purchased.

23 L.R.A.(N.S.)

Sale — dangerous article — liability of manufacturer.

2. A manufacturer of soap who sells only to the trade is not liable in tort for injury to a consumer by a needle which is in some way embedded in a cake of soap without his knowledge, which cake is sold with others in the usual way to the dealer; and it is immaterial that purity of the product is guaranteed.

Same — retailer — liability.

3. A retail vendor of soap is not liable to a consumer for an injury by a needle embedded in a cake by the manufacturer, where he did not know of its presence, which could not have been ascertained by him in the exercise of ordinary care.

(Dodge and Barnes, JJ., dissent.)

(May 11, 1909.)

APPEAL by plaintiff from an order of the Circuit Court for Winnebago County sustaining separate demurrers to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. **H. B. Jackson**, with Messrs. **Eaton & Eaton**, for appellant:

It is an unlawful act negligently to permit to be concealed within a package of soap a dangerous piece of steel, and then to cause it to be placed in the hands of another, with the invitation to use it, so as to wound him.

Watson v. Augusta Brewing Co. 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152; Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1105; Sherman v. Western Transp. Co. 62 Barb. 150.

Plaintiff was entitled to act on the representation, though made to the public, and not to him personally.

Anderson v. Smith, 104 Minn. 40, 115 N. W. 743; Froeberg v. Smith, 106 Minn. 72, 118 N. W. 57; Bigelow, Torts, 8th ed. § 170, p. 82; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Dixon v. Bell, 5 Maule & S. 198; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Elkins v. McKean, 79 Pa. 493; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154.

The defendant, by its guaranty, took upon itself the risk and hazard.

Cameron v. Mount, 86 Wis. 477, 22 L.R.A. 512, 56 N. W. 1094; Kuehn v. Wilson, 13 Wis. 105.

Note. — The question of the liability of a manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in article sold, is discussed in the case note to Tomlinson v. Armour & Co. 19 L.R.A.(N.S.) 923.

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Contractual relations between plaintiff and defendant were unnecessary.

21 Am. & Eng. Enc. Law, 2d ed. pp. 461, 462; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418.

Messrs. **Thompsons, Pinkerton, & Jackson**, for respondent Armour & Company:

A manufacturer of articles for common use, harmless in themselves, who sells them to a retailer, does not incur a liability in tort to a third person purchasing from the retailer and having no contract relation with the manufacturer, who sustains injuries through a defect in the article sold, the manufacturer not knowing of the defect.

Winterbottom v. Wright, 10 Mees. & W. 109; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; 29 Cyc. Law & Proc. pp. 478, 479; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 866; Lewis v. Terry, 111 Cal. 45, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; Wellington v. Downer Kerosene Oil Co. 104 Mass. 64; Skinn v. Reutter, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152; Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Peters v. Johnson, 50 W. Va. 644, 57 L.R.A. 428, 88 Am. St. Rep. 909, 41 S. E. 190; Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; Elkins v. McKean, 79 Pa. 500; Ives v. Welden, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408; Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; Coughtry v. Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387; Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; Heaven v. Pender, L. R. 11 Q. B. Div. 503; Zieman v. Kieckhefer Elevator Mfg. Co. 90 Wis. 497, 63 N. W. 1021; Heizer v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; O'Neill v. James, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177; Nelson v. Armour Packing Co. 76 Ark. 353, 90 S. W. 288, 6 A. & E. Ann. Cas. 237.

Where the instrumentality which is the cause of the injury is not in its nature imminently dangerous; where it does not depend upon fraud, concealment, or implied invitation; and where the plaintiff is not in privity of contract,—an action for negligence cannot be maintained, since the misfortune to the third party cannot be regarded as a natural consequence of the maker's negligence.

McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651; Daugherty v. Herzog, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; Kuelling v. Roderick Lean Mfg. Co. 88 App. Div. 309, 84 N. Y. Supp. 622; Carter v. Harden, 78 Me. 529, 7 Atl. 392; Field v. French, 80 Ill. App. 78; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Bragdon v. Perkins-Campbell Mfg. Co. 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; Swan v. Jackson, 55 Hun, 194, 7 N. Y. Supp. 821; Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258; Slattery v. Colgate, 25 R. I. 220, 55 Atl. 639.

Messrs. **Williams & Williams**, for respondent S. Heymann Company:

A seller is not bound to discover latent defects in articles which he sells, even where they are intended for domestic use; and to hold him liable for damages it must be shown that he knew, or had good reason to believe, that the latent defect which caused the injury existed.

Green v. Ashland Water Co. 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722; Akers v. Overbeck, 18 Misc. 198, 41 N. Y. Supp. 382; Sheffer v. Willoughby, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; McQuaid v. Ross, 85 Wis. 492, 22 L.R.A. 187, 39 Am. St. Rep. 864, 55 N. W. 705; Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 513; Marvin Safe Co. v. Ward, 46 N. J. L. 19.

Strangers cannot sue for the negligent breach of a contract.

National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; 1 Shearm. & Redf. Neg. § 116-2; Jaggard, Torts, § 260.

The mere allegation that a needle was permitted to be in the soap is not a proper allegation of negligence.

Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 572.

Were the action against S. Heymann Company not in tort, but on implied warranty, it could not be sustained.

Green v. Ashland Water Co. 101 Wis. 263, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722; Lukens v. Freiund, 27 Kan. 664, 41 Am. Rep. 429; Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258.

Timlin, J., delivered the opinion of the court:

The complaint averred that the respond

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ent Armour & Company is a corporation of Illinois, licensed to do business in this state, and the respondent S. Heymann Company is a Wisconsin corporation. The former is engaged in the manufacture and sale throughout this state of toilet soap, and the latter is doing a mercantile business in the city of Oshkosh. Armour & Company make and sell "Armour & Co.'s Toilet Soap No. 175" as a harmless article for the purpose of use in cleaning the face, hands, and body, and hold out to the public that this soap would supply every need for all toilet purposes, and guarantee the purity and harmlessness thereof, and that the soap is free and clear from all harmful ingredients or foreign substances which might injure persons using the same in the ordinary manner. On and prior to September 20, 1906, Armour & Company, its agents, servants, and employees, carelessly and negligently permitted and allowed a cake of the soap so manufactured by it to contain a needle, or small, round, sharp piece of steel, embedded therein. This made the use of said soap dangerous, and was liable to cause injury to persons using the soap in the ordinary and usual manner. Some time prior to September 20, 1906, Armour & Company sold and delivered to S. Heymann Company a quantity of this soap, in which was contained the defective piece or cake above described, in which the needle was so concealed as not to be visible to the naked eye. This was purchased by the latter from the former, to be sold by the latter to the general public, and with the understanding that the soap was harmless and free from all dangerous particles or ingredients which might or which would injure the body of the person using the same for toilet purposes. Both defendants then jointly caused to be placed upon the market and sold to the general public this soap so negligently made, containing this needle; and the plaintiff purchased from S. Heymann Company a quantity of this kind of soap, and received the defective cake or piece above described. While properly using the soap so purchased for toilet purposes, the plaintiff was injured by this needle in the soap entering the palm of his right hand and producing the most serious consequences, including paralysis and disability.

The pleader says this injury was sustained by reason of "want of ordinary care and prudence of the defendants, their agents, servants, and employees, in manufacturing said soap and putting the same on the market for sale for general use, and allowing a sharp piece of needle or steel to become embedded therein, which was liable to injure persons using the same in the ordinary and usual manner." Each of the defendants demurred: "(1) For that it appears . . . that several causes of action have been improperly united. (2) For that it appears . . . that the complaint does not state facts sufficient to constitute a cause of action against this defendant." The pleader, appellant in this court, begins his brief with this statement: "This is an action in tort founded upon negligence alleged in the complaint, set forth at length in the printed case." In the face of this authoritative declaration of the purpose of the pleader, we shall spend no time searching for any other or different intent on his part. The averments of the pleading are appropriate to such declaration.

Before we can determine whether or not two causes of action are improperly united, we must find the two causes of action, and then ascertain whether they are such as may be joined. The complaint avers that both defendants "jointly caused to be placed on the market and to be sold to the general public Armour & Company's toilet soap so carelessly and negligently made, containing said sharp, round piece of steel, or needle." But in the face of express averments in the same pleading, that Armour & Company manufactured the soap, and negligently permitted a cake of soap so manufactured by it to contain this needle; that Armour & Company sold and delivered to its codefendant quantities of its soap, including a box of soap containing this defective piece or cake of soap; and that the plaintiff purchased from S. Heymann Company,—the last-quoted words must be considered a conclusion or inference of the pleader from the specific facts otherwise appearing in the complaint. So with the averment "that the purity and harmlessness (of the soap) was guaranteed by the said defendants, and the same to be free and clear from all foreign substances which might injure the person using the same in the ordinary and usual manner." There being no purchase by the plaintiff from Armour & Company, but the latter having sold to S. Heymann Company thereafter to the plaintiff, and no joint act of sale or contract by the defendants, and the plaintiff claiming in tort, this averment must also be deemed a legal inference of the pleader from the facts stated; and it must be considered that the soap was offered to the public successively in the usual manner, by each defendant, as a harmless and useful toilet article, or that in each successive sale the vendor so represented the soap to his immediate purchaser.

The first inquiry, therefore, is whether the foregoing pleading states a cause of action

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for negligence. Negligenee in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another. This duty may, by operation of law, arise between persons who by contract bring themselves into certain relations as bailor and bailee, carrier and passenger, master and servant, and others. Or the duty may be imposed, independently of contract relations, by statute, ordinance, or rule of the common law, and due only to particular persons or classes of persons, as users of a highway or other way, abutting owners, fellow travelers on the highway, and others. Or the duty may be due to all persons, as the duty to refrain from acts apparently dangerous to life or limb, as when in play "the fool casteth firebrands and arrows;" or where one exercises a conceded right in a manner apparently and unnecessarily dangerous. The duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, to one to whom the duty is due. In each of these relations, legal duty may vary in kind or in the degree of care required, or the act or omission may vary in the obviousness of its consequences; and therefore legal investigation, in order to judge of the quality of the act omitted or improperly performed, frequently inquires in what relation the parties to the action stood as to one another. This relation has been termed "privity;" and in the law of negligence we find cases asserting, and others denying, this requirement of privity between the party injured and the party negligent; but with respect to the breach of a duty due from the defendant to all persons, it must be apparent that no such inquiry is relevant. A manufacturer, dealer, or other person may bring himself, however, into privity with others under exceptional circumstances, and thereby be charged with a duty toward such persons different or greater from that which he owes to all persons, as in the case of a purchase by the vendee from the manufacturer or dealer for the use of a third person specially designated to the manufacturer, or dealer, as in George v. Skivington, L. R. 5 Exch. 1, and Woodward v. Miller, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; and in the case of implied invitation to servants of another master to use a defective appliance furnished to that master for the use of the latter and his servants, as in Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; Coughtry v. Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387, and Heaven v. Pender, L. R. 11 Q. B. Div. 503; and in the case of a caterer furnishing a dinner for the use of the master of the feast and the guests of the latter, where one of the guests is injured by the negligence of the caterer in failing to properly prepare or select the food (Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154), and in the case of a manufacturer or vendor of remedies who sells to a dealer, but undertakes, by directions or recommendations on or accompanying the package, to communicate directly with the consumer or user (Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118). But where the manufacturer or vendor had not, at the time of the injury, brought himself into any privity with the person injured, within the rule of the foregoing cases, or similar and analogous circumstances, the duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with the duty imposed by law on all persons with respect to the public generally. There is no privity, no particular relation carrying with it special duties or a special degree of care in such case. Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 572; Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258; McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 537, 50 Atl. 641; Bragdon v. Perkins-Campbell Co. 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; Zieman v. Kiecklhefer Elevator Mfg. Co. 90 Wis. 497, 63 N. W. 1021; Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543. The cases are collected in Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, and the rule well stated from the view point that no duty rests upon the manufacturer and seller to dealers, in favor of the purchaser from the latter, with certain specified exceptions.

The manufacturer or dealer who puts out, sells, and delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which, by reason of negligent construction, he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated. So, a manufacturer or vendor putting out and selling articles inherently dangerous, such as explosives or poisons, without notice to others of their dangerous nature or qualities, or with a misleading notice, or negligently in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. So, a manufacturer or vendor

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making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labeling, or directing the use of such articles, if such injury to others might have been reasonably foreseen in the exercise f ordinary care. The reason for these rules is apparent. The manufacturer or vendor should have no immunity from duties common to all, merely because he is a manufacturer or vendor. At the same time, there is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in the instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of nonliability. If a general rule of statute or common law requires him to take precautions to protect the public against a dangerous substance by proper designation of the thing manufactured or sold, he owes a duty to the public so to do, and for failure in that regard he is liable for the consequences reasonably to be anticipated. In Ives v. Welden, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408, this duty was imposed by statute; in Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, by common law.

We must assume upon this pleading that the needle was not knowingly placed in the soap by the manufacturer, and that the soap was sold by the manufacturer to the dealer without knowledge that it contained this needle. There is in some sense an implied invitation to use the soap for toilet purposes, but no knowledge or reasonable means of knowledge from the ordinary composition of the product, or from anything brought to the notice of the manufacturer, that such use would be dangerous. A guaranty or warranty not knowingly false or fraudulent does not affect the liability in tort for negligence. The unintentional and negligent dropping of a needle into the mixture is a remote possibility, an extraordinary occurrence; and serious injury resulting from such act to persons using the soap for toilet purposes is an unusual and remote consequence of the careless dropping of such needle into the mixture. There are, no doubt, well-authenticated instances of severe illness, and even death, resulting from a puncture or scratch by a needle or a pin; but these are not ordinary consequences of such accidents, but are extraordinary, unusual, and remote consequences, which a person of ordinary prudence and discretion, standing in this relation to the user or purchaser, is not expected to foresee and provide against. "Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof." Johanson v. Webster Mfg. Co. (Wis.) 120 N. W. 832. Another definition is that "negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it." Kendrick v. Towle, 60 Mich. 363, 367, 1 Am. St. Rep. 526, 27 N. W. 567; Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; Hope v. Fall Brook Coal Co. 3 App. Div. 70, 38 N. Y. Supp. 1040; Webb's Pollock, Torts, Am. ed. pp. 29, 30, and cases in notes.

There was, therefore, in the instant case, no breach of a duty imposed by law on the manufacturer for the protection of the public, or for the protection of the vendee of his vendee,—no actionable negligence shown. Consequently the plaintiff has failed to state a cause of action against the defendant Armour & Company.

With reference to the S. Heymann Company, there is no negligence charged in the complaint. The needle was so embedded in the soap as to be invisible to the naked eye. Heymann Company did not know of its presence in the soap. In the exercise of ordinary care, it could not have been ascertained that the needle was in the soap. This needle happened in the soap through no omission or default of theirs. They consequently are not holden to the plaintiff upon any ground of negligence.

The order sustaining the demurrer is affirmed.

Dodge and Barnes, JJ., dissent.

CALIFORNIA SUPREME COURT.

ANNA AGNES PEREIRA, Respt.,
v.
FRANK PEREIRA, Appt.

(— Cal. —, 103 Pac. 488.)

Divorce — reconciliation — agreement for recompense.

1. A provision in a contract by persons between whom divorce proceedings are pending because of the husband's misconduct, which is intended to effect a reconciliation and dismissal of the proceedings, to the effect that, in case the husband should so con-

Case Note. — Validity of anticipatory contract making provision for wife in the event of her obtaining divorce for subsequent fault of husband.

An extensive search has brought to light no other case squarely presenting this ques-

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duct himself as to give the wife a new cause of action for divorce, he would pay her a sum which is less than his yearly net income, in full satisfaction of all claims against his estate, is void as contrary to public policy.

Same — separate property — business — interest.

2. In dividing the property in a divorce proceeding, the capital which the husband has invested in business at the time of the marriage is to be regarded as separate estate, and also the profits which have been derived from the business since the marriage which are justly due to the capital invested, which, in case the business is profitable, are at least the usual interest on a long-term investment well secured.

Appeal — divorce — aiding appellee.

3. The wife's share of community property cannot be increased upon the husband's appeal in a divorce proceeding.

Divorce — division of community.

4. Upon reversal of a judgment in a divorce proceeding upon the husband's appeal because of error in classing as community in the division of the property that which was his separate estate, the trial court is at liberty to make a new apportionment of community between the parties in such shares as shall seem just under all the circumstances.

Same — inquiry — necessity.

5. An inquiry with respect to property rights and the custody of children prior to the entry of the final decree in a divorce proceeding is not prevented by statutes which provide that, in actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that a divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and that one year after the entry of such interlocutory judgment the court may enter a final judgment granting a divorce and such other and further relief as may be necessary to a complete disposition of the action; although other sections speak of the disposition of the community property in case of a dissolution of the marriage, and declare that the court, in ordering a decree of divorce, must make such orders for the disposition of community property as provided by law, and that marriage is dissolved only by the judgment of a court of competent jurisdiction declaring a divorce.

On rehearing.

Same — interest — capital.

6. In the absence of evidence on the part of the husband against whom a divorce is granted that the capital invested in his business was entitled to more than legal interest out of the profits of the business, that is all that he can claim in fixing the amount of community property to be divided between himself and wife.

Claim — right of wife.

7. Before full legal interest on the capital invested in the business of a man against whom a divorce is sought shall be allowed out of the profits of the business as against the claims of the community, the wife is entitled to an opportunity to show that it earned a smaller proportion of such profits.

(June 30, 1909.)

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tion, but Trust Co. of America v. Nash, 50 Misc. 295, 98 N. Y. Supp. 734, was a decision upon the validity of a contract making certain provision for a wife if she should in the future obtain an absolute divorce, where the parties had separated and were living apart when the agreement was entered into. Thus it did not appear whether grounds for divorce existed at that time, but it seems probable that they did. The provision in question was held valid, the court saying: "If this agreement could fairly and reasonably be construed as offering an inducement and advantage to the wife if she would procure a divorce from her husband, it would clearly be contrary to public policy and void. . . . In my opinion, however, it cannot be so construed. It is true that the agreement throughout contains provisions from which it may be inferred that the parties contemplated the possibility of an action for divorce in which the wife would be plaintiff, and provision was made for certain contingencies which might result from such an action if successful. This, however, was not in itself unlawful, so long as no premium was put, by the agreement, upon the procuring of such a divorce."

It will be noted that the decision in PEREIRA v. PEREIRA was upon the ground of public policy, and it has therefore seemed desirable to call attention to a few cases involving the validity of an agreement by a husband to provide for his wife in the event of such subsequent conduct on his part as to necessitate or result in their separation. Such agreements seem to have been generally upheld. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 444; Reamey v. Bayley, 7 Sadler (Pa.) 239, 11 Atl. 438; Woodruff v. Woodruff, 121 Ky. 784, 90 S. W. 266, 91 S. W. 265. See also Duffy v. White, 115 Mich. 264, 73 N. W. 363. And see Darcey v. Darcey (R. I.) post, 886, 71 Atl. 595, where it was held that a husband and wife have power to enter into a contract by which he undertakes to transfer real estate to her in case he resumes relations with a paramour.

But an antenuptial agreement providing that, in case of the separation of the parties for any cause whatsoever, the husband should make certain provision for the wife, was held invalid in Watson v. Watson, 37 Ind. App. 548, 77 N. E. 355.

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APPEAL by defendant from a judgment of the Superior Court for Alameda County granting plaintiff a divorce. Modified.

The facts are stated in the opinion.

Messrs. **Arthur J. Dannenbaum** and **Myer Jacobs**, for appellant:

Profits realized by the husband after his marriage, out of separate property owned by him at the time of his marriage, is the separate property of the husband.

Re Higgins, 65 Cal. 407, 4 Pac. 389; Re Granniss, 142 Cal. 1, 75 Pac. 324; Re Bauer, 79 Cal. 310, 21 Pac. 759.

Where property is acquired by funds belonging partly to the separate property of one spouse and partly to the community property, the property so acquired becomes in part the separate property of the spouse who furnishes the funds from his or her separate property, and in part the community of both spouses, in proportion to the separate and community funds invested in it.

Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Re Bauer, 79 Cal. 304, 21 Pac. 759; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Loring v. Stuart, 79 Cal. 202, 21 Pac. 651; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819.

The contract is a valid contract.

Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227; Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675.

The wife cannot ask for the increase of her proportion of the community property, upon the appeal of the husband.

Olmsted v. Russ, 122 Cal. 224, 54 Pac. 745; South San Bernardino Land & Improv. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Bates v. Babcock, 95 Cal. 479, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; Klauber v. San Diego Street Car Co. 98 Cal. 105, 32 Pac. 876.

Messrs. **Charles S. Wheeler, Snook & Church**, and **J. F. Bowie** for respondent.

Shaw, J., delivered the opinion of the court:

The plaintiff obtained an interlocutory judgment of divorce on the ground of extreme cruelty. This judgment also declared that the plaintiff should have three fifths of the community property when the divorce became final, that she should thereafter have custody of her minor child by the marriage, and it provided for temporary alimony to her, and for the custody of the child during the time that would elapse between the interlocutory judgment and the final judgment. The defendant appealed from this interlocutory judgment within sixty days after the rendition thereof. This appeal is presented upon the judgment roll and upon a bill of exceptions containing the evidence. It is conceded that the evidence was sufficient to justify the divorce and the award of the custody of the child to plaintiff. The claim of the appellant is that the court erred in the finding as to the amount of the community property, and in excluding evidence relating thereto.

1. The first point to be noticed is the ruling of the court declaring void a contract between the parties, relating to their property and the division thereof, and in refusing to enforce or consider it in that connection. We are of the opinion that the court properly refused to consider this contract on the ground that it was plainly against public policy. The present action was begun on January 21, 1905. A previous action of divorce on the ground of extreme cruelty, consisting in large part of the same acts assigned in the present complaint, was commenced by the plaintiff against the defendant on September 23, 1904. After that action was begun, the parties became reconciled, resumed marital relations, and on November 1, 1904, the plaintiff dismissed the action. On November 4, 1904, in pursuance of negotiations begun before the dismissal, but after the reconciliation, the contract in question was executed. It was dated November 1st, and it recites that the previous action was then pending. Therein the plaintiff expressly waived the cause for divorce alleged in said complaint, and agreed to dismiss the action. The contract further provided: That none of the relatives of either party should settle in, be invited to, or visit, the home without the consent of both parties; that if the husband should thereafter so conduct himself as to give the wife a new cause of action for divorce, and she should establish the same in a subsequent action against him for divorce or maintenance, the husband should thereupon pay to the wife $10,000, which should be a full satisfaction, settlement, and discharge of all claims of the wife in such action "for alimony, costs, counsel fees, support, maintenance of herself, homestead, homestead right, property, and benefit of every kind and character." It also declared that, "in the event of the institution of such subsequent action, all claims and demands by her on her part in or to any moneys, property rights, or property, community or otherwise, now or hereafter owned or acquired by" the defendant, other than said $10,000, "are hereby forever settled, liquidated, relinquished, released, waived, and abandoned, and no claim, demand, or monetary or property benefit or relief shall ever be claimed, asserted, or sought in, by, or by reason of said subsequent action, should it be instituted, except only to the extent aforesaid."

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The Civil Code provides that the husband and wife may enter into any engagement with the other respecting property, which they might enter into if not married, subject to the law as to fiduciary relations in general (§ 158); and that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation; but that they cannot, by contract, otherwise alter their legal relations, except as to property (§159). There was in this contract no agreement for separation, and hence the agreement to pay $10,000 cannot be upheld as a provision for the support of the wife on a separation, as provided in § 159. The real effect of the contract to pay the $10,000, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong. The evidence and findings show that the defendant was then possessed of property worth about $77,000, was engaged in a very lucrative business, and was receiving an income of about $11,000 a year, which he had every reason to believe would continue. By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that $10,000 would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce, or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations, and inflict the injury. As it was obviously adapted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution. The law does not countenance such agreements. "Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, . . . is void as *contra bonos mores*." Loveren v. Loveren, 106 Cal. 512, 39 Pac. 802, quoting Phillips v. Thorp, 10 Or. 494; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Newman v. Freitas, 129 Cal. 289, 50 L.R.A. 548, 61 Pac. 907. In Seeley's Appeal, 56 Conn. 206, 14 Atl. 291, the court says: "Inasmuch as the state rests upon the family, and is vitally interested in the permanency of a marriage relation once established, it, for the promotion of public welfare, and of private morals as well, makes itself a party to every marriage contract entered into within its jurisdiction, in this sense, that it will not permit the dissolution thereof by the other parties thereto. Its consent in the form of a decree of its court passed after hearing in due process of law is a prerequisite to a divorce. . . . Courts will not enforce any contract which is the price of consent by one party to the marriage relation to the procurement of a divorce by the other." And, in reference to a similar agreement to that in the case at bar, the court in the case just cited said: "Presumably each party saw in that agreement an individual advantage; to him, in that he possibly paid her less thereby than the judgment of the court upon hearing would compel; to her, in that he refrained therefor from answering the allegations of her petition by proof, and thus possibly permitted a divorce which he could have prevented."

Before the contract was made, or its terms agreed to, the parties had made up their former differences and had become reconciled. It shows by its terms that it is not an agreement to settle property rights accruing by reason of a marital offense already perpetrated and complete as a cause for divorce. There is therefore no force in the claim, as applied to this case, that it is competent evidence, or valid as a settlement of such rights, even if it were conceded that such an agreement might under some circumstances be permitted to stand. The court also found that this contract was procured by the husband through undue influence and by fraud. Our conclusions upon the point that it was against public policy make it unnecessary to consider the sufficiency of the evidence to sustain these findings.

2. The court found that the community property of the parties was of the value of $57,664.77. It is claimed that this is not sustained by the evidence.

There is practically no conflict on the subject; there being no witness to that point except the defendant. The findings state that this property consisted of the real estate on which the defendant carried on business, which was of the value of $45,000, and certain money on hand, making up the remainder. The evidence shows that the plaintiff and defendant intermarried on April 19, 1900. At that time the defendant was, and he ever since has been, carrying on a saloon and cigar business, then producing a net income of about $5,000 annually. He owned the cigar and saloon stock and fixtures, worth in all about $15,500, and had, besides, some $6,000 in cash. Soon after the marriage he bought the home wherein the parties afterwards lived, paying $2,700 therefor, and he afterwards expended thereon $2,300 in improving it. This home is

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adjudged to be his separate property, and plaintiff is given no interest in it. A year and a half after his marriage he bought the property in which he was carrying on business, at the price of $40,000. He paid in cash therefor $5,000, and afterwards, out of his income, he paid the balance of the price, and accumulated the cash on hand at the time of the trial, in addition, amounting to over $12,000. His net income at the time of the trial was about $11,000 a year. From the time of his marriage to the time of trial he allowed his wife $75 a month to run the house, and she made her own clothes. There is an unexplained discrepancy between the total amount of his income less the household expenses, and his total gains. He must have received more than he was willing to disclose, if his net income, over household expenses, amounted to as much as the money which he admits he has received, not allowing anything for his personal expenses.

The court may have believed that he had other property which he had succeeded in concealing. There was some justification for this inference, for he was caught in the act of attempting to conceal $7,761 of the cash on hand, by means of a New York draft, which he had carried in his pocket for the four months preceding the trial. It appears, however, that the decision of the court was made upon the theory that all of his gains received after marriage, from whatever sources, were to be classed as community property, and that no allowance was made in favor of his separate estate on account of interest or profit on the $15,500 invested in the business at the time of the marriage. This capital was undoubtedly his separate estate. The fund remained in the business after marriage and was used by him in carrying it on. The separate property should have been credited with some amount as profit on this capital. It was not a losing business, but a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property; but without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and, as the business was profitable, it would amount at least to the usual interest on a long investment well secured. Boggess v. Richards, 39 W. Va. 576, 26 L.R.A. 537, 45 Am. St. Rep. 938, 20 S. E. 599; Trapnell v. Conklyn, 37 W. Va. 252, 38 Am. St. Rep. 30, 16 S. E. 570; Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98. We think the court erred in refusing to increase the proportion of separate property and decrease the community property to the extent of the reasonable gain to the separate estate from the earnings properly allowable on account of the capital invested.

It is true that the disposition of the community property by the superior court, in all particulars, including matters committed to its discretion, is subject to revision in this court on appeal. Civil Code, § 148; Eslinger v. Eslinger, 47 Cal. 64; Brown v. Brown, 60 Cal. 580; Strozynski v. Strozynski, 97 Cal. 192, 31 Pac. 1130. In each of these cases the supreme court increased the wife's share of the community property from one half, as given by the trial court, to three fourths. But the wife has not appealed, and we cannot, upon the husband's appeal, change the judgment by increasing the share of community property given to the wife. The only error, in respect to community property, which we can consider upon this appeal by the husband, is the error in classing as community property that part of the gains which was derived from the "issues and profits" of his separate property (Civil Code, § 163), the amount of which we cannot determine. It will be necessary to remand the case for a retrial of this issue. The court below will be free, upon such new trial, to apportion a larger share of the community property to the plaintiff, or to divide it between the parties in such shares as it shall deem just, under all the circumstances. The present division seems fair in point of fact.

3. The appellant further claims that, under the amendment of 1903 to §§ 131 and 132 of the Civil Code, the court has no power, at or before the time of rendering the interlocutory judgment of divorce, to make any inquiry, finding, or decree with respect to the property rights of the parties, or with respect to any other subject connected with the divorce, except the right of the complainant to a divorce. Section 131 on this point is as follows: "In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce." Section 132 provides that, when "one year has expired after the entry of such interlocutory judgment, the court on

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motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action. . . . The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either." As these provisions were made after the other sections of the Code had been in force for many years, it was to be expected that the new provisions would not in all respects be consistent in language with other sections on the same subject. In § 146 the Code speaks of a disposition of the community property "in case of the dissolution of the marriage." In § 147 the Code declares that "the court in rendering a decree of divorce must make such order for the disposition of the community property and of the homestead as in this chapter provided," and in § 90 it declares that marriage is dissolved only by the judgment of a court of competent jurisdiction declaring a divorce. From these provisions it is argued by the appellant that the court's power to make a disposition of the property rights of the parties exists only at the time when the divorce judgment becomes final, and that any act attempted to be accomplished before that, in the way of a trial or interlocutory judgment declaring the property rights or the rights to the custody of children, is *coram non judice*, and void.

We do not think that the Code provision requires such a narrow construction. When the history of legislation on the subject and the conditions existing at the time of the adoption of the amendment of 1903 are considered, the purpose, meaning, and effect of that amendment are not difficult to discover. While the law deems it necessary to provide that a divorce may be granted when conditions are such as to make the marriage relation intolerable, it is nevertheless true that the policy of the law does not favor the dissolution of marriages. It has been generally believed that many divorces were sought, not in good faith, but because a roving fancy had found another affinity more attractive, and that a dissolution was often desired solely for the purpose of forming a new marital connection. With the design of providing conditions under which it would be understood that ardent passions of this character must perforce have time to cool before a new marriage relation could be actually formed, the legislature, in 1897, enacted a law in effect providing that no marriage should be entered into by any divorced person until at least one year had elapsed after the decree of divorce was rendered. Stat. 1897, chap. 36, p. 34. It had become customary to avoid the provisions of this act by the expedient of going to an adjacent state for the purpose of entering into a new marital relation. This court was compelled to hold that marriages contracted in another state were valid in this state, although they were entered into within less than a year after a divorce had been granted in this state to one of the parties. Re Wood, 137 Cal. 129, 69 Pac. 900. The purpose of the amendment of 1903 was to carry into effect the object attempted to be attained by the statute in 1897. To do this the expedient was adopted of delaying the final judgment in divorce cases for the period of one year after it was judicially ascertained that a divorce should be granted. By thus making the right to a divorce ineffective for the period of one year, it became impossible for the parties to contract a valid new marriage anywhere until at least a year after the trial of the action of divorce had taken place. Except so far as was necessary to accomplish this object, it was not the intent of the statute to change in any respect the practice and procedure in actions for divorce. We do not doubt that the court has the same power now that it has always had to try and determine the issues between the parties in a divorce action with respect to property and custody of children, and that this may, and generally should, be done at the same time as the issues with respect to the cause for divorce are tried and determined. Unquestionably the court would have power under the present law, as it always has had the power under previous laws, to postpone the trial and decision of the property rights and custody of the children to any reasonable time after the rendition of the judgment of divorce, whether interlocutory or final. The amendment has not changed its power in this respect. It is proper in all actions for divorce to try the entire action at the same time as the issues respecting divorce are tried and to give an interlocutory judgment declaring the rights of the parties with respect to property and children.

We commend the action of the court below in this case in declaring, in its interlocutory decree concerning the property, that the rights therein specified should become final at the time the decree of divorce became final. We are not called upon here to determine whether the adjudication of property rights would or would not have been final at the

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expiration of six months from the time of the entry of the interlocutory decree, if no appeal had been taken, and the parties had, before the expiration of one year and after the expiration of the six months, by mutual consent, procured an order from the court annulling the interlocutory decree of divorce; or whether such annulment would have had the effect of setting aside the decree relating to property rights and children. These questions are not involved in this case, and it will be well to leave them for future disposition in some case where they are directly presented. In the present case the court determined all the issues in one trial, and rendered an interlocutory judgment declaring the rights of the parties upon all the issues, and providing that the same should in all respects become final only at the time when the decree of divorce became final, in the meantime allowing temporary alimony. We see no objection to this practice, and commend it as not only within the power of the court, but as a proper method of the exercise of that power.

The judgment as to the amount and value of the community property and as to the disposition thereof between the parties is reversed, and the cause is remanded for a new trial and judgment upon that issue alone. In all other particulars the judgment is affirmed.

We concur: **Angellotti, J.; Sloss, J.; Henshaw, J.; Lorigan, J.; Melvin, J.**

A petition for rehearing having been filed, the following **Per Curiam** response was handed down July 30, 1909:

Since the filing of the opinion in this case, the plaintiff has asked that, instead of remanding the case for a new trial of the issues as to the property, the judgment be modified in regard thereto, and has filed a written consent that the defendant be allowed, as part of his separate estate, out of the cash on hand, interest at the rate of 7 per cent on the $15,500 found to be the capital invested in his business. This removes the objection to directing a modification of the judgment. The defendant introduced no evidence to show that the capital invested was entitled to a greater return than legal interest, and, in the absence of such evidence, the burden of proof being upon him, that would be the utmost he could claim. The wife would have been entitled to an opportunity to prove, if she could, that it earned a smaller proportion of the profits than legal interest, and, she being the respondent, it was for that reason considered necessary to order a new trial for that purpose. Her consent aforesaid avoids this necessity, and leaves the case in such condition that a modification of the judgment will end the litigation, with justice to both parties. Fox v. Hale & N. Silver Min. Co. 122 Cal. 221, 54 Pac. 731.

Interest at 7 per cent on the $15,500 from April 19, 1900, the date of the marriage, to November 3, 1905, the time of the trial, amounts to $6,012.70. Deducting this from $12,139.03, found to be the cash on hand at the time of the trial, leaves $6,126.33, as the part of the cash belonging to the community. The plaintiff's three fifths of this is $3,675.86, and the defendant's two fifths is $2,450.47.

It is ordered that the judgment be modified by changing the respective statements of the shares of each in the cash on hand therein, so that the part relating to the plaintiff's share shall read as follows: "Second. The sum of three thousand six hundred and seventy-five and 86-100 dollars ($3,675.86) in cash, being three fifths of the sum of $6,126.33 in cash, found by the supreme court to be community property of the plaintiff and defendant; and that no interest in defendant's separate property be awarded to plaintiff." And so that the part relating to the defendant's share shall read as follows: "Second. The sum of two thousand four hundred and fifty and 47-100 dollars ($2,450.47) in cash, being two fifths of the sum found to be community property as aforesaid." And that as so modified the judgment stand affirmed; the plaintiff to recover all costs.

RHODE ISLAND SUPREME COURT.

ELLEN M. DARCEY, Appt.,
v.
PATRICK L. DARCEY.

(— R. I. —, 71 Atl. 595.)

Pleading — demurrer — grounds — sufficiency.

1. Grounds of demurrer to a bill for specific performance of a contract, that the complainant does not state such a case as would entitle him to the relief sought, that the contract is void and of no effect, and that the promise is such that it cannot be enforced, are too general to be considered by the court.

Note. — Thorough searching has disclosed no other decision involving an agreement by a husband to transfer property to his wife in the event of his resuming illicit relations with another woman. As to the validity of a contract making provision for wife in the event of her obtaining divorce for subsequent fault of husband, see Pereira v. Pereira (Cal.) 103 Pac. 488, ante, 880, and accompanying note.

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Husband and wife — contract — validity.

2. Under statutory authority to a married woman to make any contract as though she were single, a husband and wife have power to enter into a contract by which he undertakes to transfer real estate to her in case he resumes illicit relations with a paramour.

Contract — consideration — condonation of marital offense.

3. A contract by which a man undertakes to convey real estate to his wife upon resumption of illicit relations with his paramour, in case she condones his past offense and discontinues a proceeding for divorce against him, is supported by a valuable consideration.

Damages — liquidated — penalty.

4. An agreement by a man to convey real estate to his wife in case he resumes illicit relations with his paramour, in case she condones his offense and discontinues divorce proceedings against him, provides for liquidated damages, and not a penalty or forfeiture.

Same — excess — power of court.

5. The court cannot say that a conveyance of one half of a man's real estate to his wife as compensation for past unfaithfulness to his marriage vows is excessive damages for the wrong done her, when the parties have agreed that such compensation is just; nor that his agreement to convey the other half in case of future misconduct provides more than adequate compensation.

(January 13, 1909.)

APPEAL by complainant from a decree of the Superior Court for Providence and Bristol Counties dismissing a bill filed to compel specific performance of a contract to convey real estate. Reversed.

The facts are stated in the opinion.

Mr. Hugh J. Carroll, for appellant:

Such contracts between husband and wife are enforceable.

Dakin v. Dakin, 97 Mich. 284, 56 N. W. 562; Duffy v. White, 115 Mich. 264, 73 N. W. 363; Chase v. Phillips, 153 Mass. 17, 26 N. E. 136; O'Day v. Meadows, 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702; Burkholder's Appeal, 105 Pa. 37; Beach, Contr. §§ 1546, 1547; Masterson v. Masterson, 22 Ky. L. Rep. 1193, 60 S. W. 301; Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 444.

Messrs. **Claude J. Farnsworth** and **Thomas F. Vance** for appellee.

Dubois, J., delivered the opinion of the court:

This is an appeal from the decree of the superior court sustaining the respondent's demurrer and dismissing the complainant's bill in equity.

The bill of complaint was brought by the complainant against the respondent for the purpose of enforcing his specific performance of the following agreement:

This agreement made and entered into the 27th day of November, A. D. 1906, by and between Patrick L. Darcey, known also as Lawrence P. Darcey, and Ellen M. Darcey, his wife, both of Pawtucket, in the county of Providence, state of Rhode Island, witnesseth:

Whereas, the parties hereto have been living apart, and said wife has a suit for divorce now pending in the supreme court of this state against her said husband; and whereas, they are desirous of settling their differences and become reconciled, it is therefore agreed as follows:

I. Said P. L. Darcey, husband as aforesaid, agrees to execute and deliver to his said wife a good and sufficient deed of one-half interest in the real estate owned by said husband on the westerly side of High street, Pawtucket, and land situate and known as the northeasterly side of Broadway, in said Pawtucket (Nos. 86, 88, and 90 Broadway), one half of the land on Osborn street, Providence, Rhode Island, with the buildings and improvements thereon, which said land shall hereafter be owned in common by them, each owning one half.

II. Said Ellen M. Darcey shall also have the rents of the estates which she is at present receiving.

III. Said Patrick L. Darcey further agrees that he shall never again consort with, keep the company of, or support or pay any money or other valuables to, a certain woman known by the name of Hughes, or the child she claims belongs to said Patrick L. Darcey. If said Patrick L. Darcey shall break this agreement concerning said woman, either in letter or spirit, then this condonation shall be void, and said Patrick L. Darcey shall immediately convey to said Ellen M. Darcey his remaining interest in the above-mentioned land; and, in case of his neglect or refusal so to do on the occurrence of such breach of this agreement by him, the superior court of this county is hereby authorized, on the application of said Ellen M. Darcey, to appoint a commissioner to make such conveyance to said Ellen M. Darcey and her heirs.

IV. And the said Ellen M. Darcey hereby agrees to discontinue the said petition for divorce and to condone the matters between herself and her said husband, in consideration of the premises, and to live with said Darcey as his lawful wife, and care for him as such and of their common home and estates.

In witness whereof, the parties hereto do

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hereunto set their hands and seals, binding themselves and their several and respective heirs, the day and year above written.

Paragraph II. erased before signing.

L. P. Darcey. [Seal.]
Ellen M. Darcey. [Seal.]

In presence of H. J. Carroll.

The demurrer referred to was based upon the following grounds:

"(1) That said complainant does not state such a case as would entitle him to the relief sought.

"(2) That said agreement mentioned in said bill of complaint is void and of no effect.

"(3) That said agreement mentioned in said bill of complaint was given without any consideration whatsoever.

"(4) That said agreement is a voluntary one and cannot be enforced in a court of equity.

"(5) That the promise of the gift of the land in question under the conditions set out in the agreement is such that, under the allegations set out in the bill, cannot be enforced and the respondent compelled to make a transfer thereof.

"(6) That said agreement to make said transfer under the conditions set out in the bill was entered into by the respondent without any valuable consideration.

"(7) That said bill does not set out the whole of said agreement, nor make a copy of the same a part of said bill of complaint.

"(8) That by said bill it appears that said complainant has not kept and performed her part of said agreement."

The reasons given by the superior court for sustaining the demurrer and for dismissing the bill were: "The agreement of which the complainant prays specific performance is plainly in the nature of a penalty agreed upon by the parties for the future breach of said agreement by the respondent. Equity will not lend its aid to enforce a penalty or a forfeiture, and the complainant cannot have in this proceeding the relief which she seeks."

The first, second, and fifth grounds of demurrer are too general to be considered; the seventh and eight specifications are without merit; and the third and fourth grounds add nothing to those contained in the sixth paragraph. Therefore the only questions necessary to be considered are the following: Were the parties capable of entering into the agreement? Second, was the agreement entered into without a valuable consideration? And, third, shall the conveyance promised by the respondent upon breach of his said agreement be regarded as a penalty or forfeiture, or in the nature of liquidated damages?

There can be no question but that the complainant and respondent had the right to enter into the agreement. Under the provisions of Pub. Laws, chap. 335, § 1, passed May 14, 1896, Gen. Laws 1896, chap. 194, § 3, was amended so as to read as follows: "Sec. 3. A married woman may make any contract whatsoever the same as if she were single and unmarried, and with the same rights and liabilities." The agreement is based upon a valuable consideration. "A valuable consideration is some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise." 1 Page, Contr. § 274, and cases cited. By clause IV. of the agreement the said Ellen M. Darcey agrees to discontinue her petition for divorce, and the bill avers and the demurrer admits that she did discontinue the same. This was clearly a forbearance to prosecute a legal right which she had. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 446; Duffy v. White, 115 Mich. 270, 73 N. W. 363; Polson v. Stewart, 167 Mass. 216, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737, and cases cited. See also Adams v. Adams, 91 N. Y. 384, 43 Am. Rep. 675, in which the remarks of Rapallo, J., are pertinent: "We are unable to perceive on what ground the arrangement can be regarded as against public policy. It tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy; but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors *the* settlement of controversies between all *other* persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." We regard the conveyance to be made by the respondent upon violation of his agreement, in the light of liquidated damages, and not as a penalty or forfeiture.

The bill alleges and the demurrer admits that the respondent has performed that portion of his contract set out in the first paragraph thereof, and that thereby the complainant has become the owner of an undivided one-half part of the real estate and improvements therein mentioned. It is apparent from the agreement that this was regarded by the parties as compensation to the wife for the injury that she had theretofore sustained by reason of the misconduct of her husband. If one half of this real estate was deemed by the parties to be the equivalent of adequate damages for past misconduct, why should we question

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it? No one claims that the agreement was made with intent to delay, hinder, or defraud creditors. The innocent and injured wife and her guilty husband were also fully competent to fix the amount of damages the wife would sustain in case of the husband's future adultery with his former paramour, in which case the home reestablished in pursuance of the agreement would be broken up, in violation thereof; and again the wife would be abandoned for the mistress, and made to suffer as much or more than before. In such circumstances can we say that the other half of the real estate is more than adequate compensation to the petitioner? We think not.

The bill alleges and the demurrer admits that the respondent has violated the essential condition of his agreement. We find, therefore, that the agreement is valid and subsisting, that it is founded on a valuable consideration, that the complainant has performed her part of the agreement, and that the respondent has broken the same. The complainant is entitled to the relief sought.

The decree of the Superior Court is hereby reversed, and the cause is remanded to the Superior Court, with direction to overrule the respondent's demurrer, and for further proceedings in conformity herewith.

IOWA SUPREME COURT.

FARMERS' SAVINGS BANK OF ARISPE, IOWA, Appt., v. ARISPE MERCANTILE COMPANY et al.

(139 Iowa, 246, 117 N. W. 672.)

Pleading — separate counts — renewal note — invalidity.

1. That the indorsement on a renewal note set out in one count of a complaint to recover the amount due proves to be a forgery does not preclude a recovery on the original note, which is set out in another count.

Note — renewal — forgery — original liability.

2. The giving of a renewal note has no effect, in the absence of an agreement therefor, to discharge either the makers or indorsers of the original obligation, if for any reason not chargeable to the wrong or fraud of the holder, the renewal proves to be invalid.

(September 22, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Union County in defendants' favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Mr. R. Brown, for appellant:

The defendants, as indorsers, were liable on the first note, after the renewal note proved without value.

Hill v. Aultman, 68 Iowa, 630, 27 N. W. 788; Gamble v. Mullin, 74 Iowa, 99, 36 N. W. 909; Potter v. Chicago, R. I. & P. R. Co. 46 Iowa, 399; Steele v. Crabtree, 130 Iowa, 313, 106 N. W. 753; Ford v. Chicago, R. I. & P. R. Co. 106 Iowa, 85, 75 N. W. 650; Humboldt State Bank v. Rossing, 95 Iowa, 1, 63 N. W. 351; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769; Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281; Alpena Nat. Bank v. Greenbaum, 80 Mich. 1, 44 N. W. 1123; Stratton v. McMakin, 84 Ky. 641, 4 Am. St. Rep. 215; 4 Am. & Eng. Enc. Law, 2d ed. pp. 339–341.

Mr. J. H. Macomber also for appellant.

Messrs. **Sullivan & Fry** for appellees.

Weaver, J., delivered the opinion of the court:

This action was begun upon a promissory note purporting to have been made by the Arispe Mercantile Company by Burr Forbes, president, and Frank Forbes, secretary, payable to the order of Burr Forbes & Son, and indorsed by that firm to the plaintiff bank. To this claim the defendants Forbes & Son, who are sued as indorsers, answer, denying any indebtedness thereon, and alleging that the note was never delivered to the bank, but placed in its custody for safe-keeping, and was never indorsed by the payee therein named. The mercantile company also pleaded substantially the same matter in defense. After this defense had been raised, the plaintiff amended its petition by adding a second count, alleging that on May 25, 1904, and prior to the making of the note in suit, the Arispe Mercantile Company made to Burr Forbes & Son its promissory note for $1,000, due August 25, 1904, which note was then indorsed to the plaintiff. It is further alleged that this note fell due, and, not being paid, the mercantile company made, and Burr Forbes & Son indorsed to the plaintiff in renewal thereof, the note mentioned in the first count; but said plaintiff further says that, doubts having arisen as to the validity of said renewal note, it asks that, in case it be found not entitled to recover thereon, it

Note. — See note to Hier v. Harpster, 13 L.R.A. (N.S.) 204, upon payment of promissory note by maker which proves ineffectual as a satisfaction, as affecting the liability of a surety thereon. And see also note to Bank of Benson v. Jones, 16 L.R.A. (N.S.) 343, as to whether surety is discharged by obligee's surrender of original obligation and acceptance of another which is defective.

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may have judgment against the defendants upon the original note, which it alleges has never been paid.

1. It is not material that we consider the evidence bearing upon the genuineness of the indorsement upon the note described in the first count of the petition; for, if its forgery has been established, it does not necessarily defeat the plaintiff's recovery on the second count. The only instruction given by the trial court with reference to the matters pleaded in the second count is in the fifth paragraph of its charge, and the following is the material part thereof: "You are instructed that if the plaintiff has shown and proved by a preponderance of the evidence that the note in question, Exhibit A, was renewal of the note of date May 25, 1904, and that one of the defendants, Burr Forbes or Frank Forbes, delivered said note in question, Exhibit A, to the plaintiff in renewal of the note for $1,000 of date May 25, 1904, and you further find that at the time of the delivery of the note in question, Exhibit A, to plaintiff by one of the defendants, that the indorsement now appearing on said note was then on the note, then you are instructed that this in law would amount to an adoption of the signatures then appearing on said note, and on this issue of the indorsement you should find for the plaintiff and against Burr Forbes & Son. And, in connection herewith, if you find that the defendants Burr Forbes & Son indorsed Exhibit A, then you are instructed that a valuable consideration would be presumed, and plaintiff should recover against the defendants Burr Forbes & Son, unless Burr Forbes & Son show and prove by a preponderance of the evidence that there was no valuable consideration for said note in question, Exhibit A. But, if you find the fact to be that the defendant Burr Forbes & Son received $1,000 for the sale of the first note of date May 25, 1904, and that this note in question, Exhibit A, is a renewal thereof, and you find that the defendants Burr Forbes & Son indorsed Exhibit A as heretofore defined, then your verdict should be for the plaintiff, and against Burr Forbes & Son. Should you find under the evidence that there was no valuable consideration, or should you find that the defendant did not indorse the note as heretofore defined, then your verdict should be for the defendants Burr Forbes & Son." It will be observed that this instruction gives the jury no authority to find for plaintiff on the second count of its petition, but, at most, authorizes them to look to the original note only as bearing upon the consideration of the note mentioned in the first count. In this we think there was error; for, as we have already said, we may resume the proof of the alleged forgery to have been complete, yet the right of recovery on the original note would not necessarily be impaired. The giving of a renewal note had no effect, in the absence of an agreement therefor, to discharge either the makers or indorsers of the original obligation, if, for any reason not chargeable to the wrong or fraud of the holder, the renewal proves to be invalid. Indeed, in accordance with a long line of precedents, it is always allowable for the plaintiff to declare in his petition in one count upon a promissory note or other written obligation, and in another upon the original indebtedness or consideration for which the note was given. Kimball v. Bryan, 56 Iowa, 632, 10 N. W. 218. The two claims are not inconsistent, and, where but one recovery is sought, no election is required. O'Conner v. Hurley, 147 Mass. 145, 16 N. E. 764; Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86; Winsted Bank v. Webb, 39 N. Y. 325, 100 Am. Dec. 435. It should be noted, also, in the case before us that the answer to the claim set up on the original note is a mere denial. No want of consideration for said note is pleaded, and, while the plea refers to and incorporates by reference the answer to the first count, there is nothing which by the most liberal construction can be held to constitute a plea to the consideration for the note. A mere denial of indebtedness upon a promissory note or written promise to pay does not put the consideration of the promise in issue. Nelson v. White, 61 Ind. 139; Sharpless v. Giffen, 47 Neb. 146, 66 N. W. 285; Phœnix Ins. Co. v. Hague (Tex. Civ. App.) 34 S. W. 654; University of Des Moines v. Livingston, 57 Iowa, 307, 42 Am. Rep. 42, 10 N. W. 738. We call attention to the condition of the issues principally to emphasize our conclusion that the failure of the court to instruct upon this branch of the law of the case was clearly prejudicial. Moreover, a reading of the record makes it very evident that there was such a manifest failure of justice as requires the granting of a new trial.

For the reasons stated, the judgment of the District Court is reversed.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

BOSTON ELEVATED RAILWAY COMPANY, Plff. in Err.,
v.
PAULINE A. SMITH.

(94 C. C. A. 84, 168 Fed. 628.)

Street railway company — injury to passenger — sudden start.

1. The fact that an electric street car

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will start with more or less of a jerk is one of the risks assumed by passengers, so that the mere facts that a car starts with a sudden movement or jerk, and that a passenger is thrown to the floor and hurt, do not make out a case of negligence which will render the company liable for the injury; but to render it liable the start must be shown to have been unusually sudden and violent.

Same — passenger not seated.

2. Negligence on the part of a street car conductor is not shown by his giving the signal to start the car as soon as a heavy woman passenger is safely inside the vestibule, where there are no extraordinary or exceptional circumstances making it his duty to exercise special care to wait until she is seated before starting.

(March 16, 1909.)

ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Colt, Putnam, and Lowell, Circuit Judges.

Messrs. **M. F. Dickinson** and **Walter Bates Farr** for plaintiff in error.

Mr. **Julian C. Woodman**, for defendant in error:

Assuming that the conductor has a right to give the signal to start when the passenger has reached the vestibule of the car, it follows that the carrier then owes a duty to such person to so start the car that he

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Case Note — Negligence in starting street car with jerk.

This question presupposes that the car was at a standstill when suddenly started with a jerk. Therefore cases of negligence in the sudden acceleration of speed, or jolts caused by sharp curves or defective tracks, are eliminated.

The general rule appears to be, as stated in BOSTON ELEV. R. CO. v. SMITH, that the mere facts that a street car started with a jerk, and that a passenger fell and was hurt, do not make out a case of negligence against the company. Jameson v. Boston Elev. R. Co. 193 Mass. 560, 79 N. E. 751; Rochat v. North Hudson County R. Co. 49 N. J. L. 445, 10 Atl. 710; Hayes v. Forty-second Street & G. Street Ferry R. Co. 97 N. Y. 259; Black v. Third Ave. R. Co. 2 App. Div. 387, 37 N. Y. Supp. 830; Hirsch v. Union R. Co. 48 Misc. 527, 96 N. Y. Supp. 333; Normington v. Interborough Rapid Transit Co. 48 Misc. 526, 96 N. Y. Supp. 261; Bollinger v. Interurban Street R. Co. 50 Misc. 293, 98 N. Y. Supp. 641.

But in order to establish negligence, the plaintiff must go further, and make it affirmatively appear that the car was started with an extraordinary or unusual jerk. Pryor v. Metropolitan Street R. Co. 85 Mo. App. 367.

Mere statements by the witnesses that the start was violent or sudden do not show that the movement differed in any way from that usually attending the starting of a street car, and are not sufficient evidence of negligence. Hayes v. Forty-second Street & G. Street Ferry R. Co. and Bollinger v. Interurban Street R. Co., supra.

But if it is made to appear that the jerk was sufficient to throw down many of the passengers, this is sufficient to establish the fact that it was an unusual and negligent start. Grötsch v. Steinway R. Co. 19 App. Div. 130, 45 N. Y. Supp. 1075.

In Evansville Street R. Co. v. Meadows, 13 Ind. App. 155, 41 N. E. 398, where it appeared that the driver of a street car left the mules unattended, and was at the other end of the car when they started forward with a jerk, throwing a ten-year-old child from the car, it was held that actionable negligence was shown.

To establish negligence, it may not be necessary to show that the sudden start of a standing car with a jerk was unusual or violent, if it appears that the passenger at the time was in the act of alighting, and by reason of the jerk was thrown down and injured. Pittsburgh R. Co. v. Bloomer, 77 C. C. A. 146, 146 Fed. 720; Birmingham Union R. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; Cody v. Market Street R. Co. 148 Cal. 90, 82 Pac. 666; Denver Consol. Tramway Co. v. Rush, 19 Colo. App. 70, 73 Pac. 664; Georgia R. & Electric Co. v. Reeves, 123 Ga. 697, 51 S. E. 610; Chicago City R. Co. v. Dinsmore, 162 Ill. 658, 44 N. E. 887; Paducah Traction Co. v. Baker (Ky.) 18 L.R.A.(N.S.) 1185, 113 S. W. 449; United R. & Electric Co. v. Beidelman, 95 Md. 480, 52 Atl. 913; United R. & Electric Co. v. Woodbridge, 97 Md. 629, 55 Atl. 444; Bell v. Central Electric R. Co. 125 Mo. App. 660, 103 S. W. 144; Black v. Metropolitan Street R. Co. 130 Mo. App. 548, 109 S. W. 86; Martin v. Second Ave. R. Co. 3 App. Div. 448, 38 N. Y. Supp. 220; Gregorio v. New York City R. Co. 49 Misc. 249, 97 N. Y. Supp. 373; Paul v. Salt Lake City R. Co. 30 Utah, 41, 83 Pac. 563, s. c. on subsequent appeal 34 Utah, 1, 95 Pac. 363.

In Kantrowitz v. Metropolitan Street R. Co. 63 App. Div. 65, 71 N. Y. Supp. 394, it was held that the company was not liable for negligence, where the sudden starting of a street car was to avoid a collision which seemed imminent, and for which the company was not to blame.

Upon the question of negligence in starting street car before passenger is seated, see note to Louisville & N. R. Co. v. Hale, 42 L.R.A. 294.

As to the applicability of the rule *res ipsa loquitur* to injuries to passengers on vehicles, caused by jolts or jerks, see case note to Foley v. Boston & M. R. Co. 7 L.R.A.(N.S.) 1076.

Upon the general question of presumption of negligence from injury to passenger, see subject note to McGinn v. New Orleans R. & Light Co. 13 L.R.A.(N.S.) 601.

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will not be thrown down; and if so thrown down, the very act of falling while he was in the exercise of due care, and while in an admittedly safe place, would in itself be some evidence of negligence in the start of the car.

Powelson v. United Traction Co. 204 Pa. 474, 54 Atl. 282; Bainbridge v. Union Traction Co. 206 Pa. 71, 55 Atl. 836; Lacour v. Springfield Street R. Co. 200 Mass. 34, 85 N. E. 868; Dougherty v. Missouri P. R. Co. 9 Mo. App. 478; Cohen v. West Chicago Street R. Co. 9 C. C. A. 229, 238, 18 U. S. App. 593, 60 Fed. 698.

That plaintiff was a large, heavy woman and moved slowly, that she was encumbered at the time of the accident with a hand bag and umbrella in one hand and her skirts in the other, that she was in full view of the conductor throughout, and that he had had but five and a half weeks' experience, were circumstances proper for a jury to consider on the question of negligence in starting the car before she reached a seat.

Hamilton v. Boston & N. Street R. Co. 193 Mass. 324, 79 N. E. 734; Gordon v. West End Street R. Co. 175 Mass. 181, 55 N. E. 990; Steeg v. St. Paul City R. Co. 50 Minn. 149, 16 L.R.A. 379, 52 N. W. 393; Holmes v. Allegheny Traction Co. 153 Pa. 152, 25 Atl. 640.

Colt, Circuit Judge delivered the opinion of the court:

This in an action of tort to recover damages for personal injuries. The plaintiff was a passenger on an electric street car operated by the defendant. She had just boarded the car, when, upon the sudden movement of the car in starting, she fell upon the floor, inflicting the injuries complained of. The jury returned a verdict for the plaintiff.

At the close of the evidence the defendant requested the court to rule as follows: "(1) Upon all the evidence in the case the plaintiff is not entitled to recover. (2) There is no evidence in this case sufficient to warrant the jury in finding that the plaintiff's injuries were due to the negligence or carelessness of the motorman in the way and manner in which he started the car. (3) Nor is there sufficient evidence to warrant the jury in finding that the conductor was negligent or careless in giving the signal to start the car when he did, under all the circumstances in this case." These rulings the court declined to make, and the defendant duly excepted. There were also other requests for rulings, which we find it unnecessary to consider.

The material facts are as follows:

On November 15, 1906, about 8 o'clock in the evening, when returning home from her work, the plaintiff boarded one of the defendant's inward-bound cars at the corner of P. and Third streets, South Boston. She was carrying in her hand at the time an umbrella and a small hand bag. The night was stormy. The car had just left the car house, and the only other persons on the car, except the motorman and conductor of the car, were three conductors employed by the defendant, who were returning home after their day's work. The car was a vestibuled closed car, and the threshold of the door leading into the car was 6½ inches above the floor of the platform, and on this threshold were two small projections on which the door runs.

The plaintiff was a German woman, fifty-two years of age, 5 feet 5 inches in height, and weighed about 198 pounds. She was a stout woman in appearance, and she was slow in her movements. She was accustomed to riding on electric cars. According to her story, she had mounted the platform, and was about to enter the car door, with her umbrella and bag in one hand, and holding her dress in the other, when the car was started with a sudden jerk, which threw her to the floor, injuring her leg, abdomen, and arm.

In her testimony the plaintiff says: I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started with a sudden jerk, unusually quick. I was slightly thrown back and forward before I had a chance to put my foot on the threshold of the door. I came down on my shin on the threshold with my knee. I fell on my shin, and with my left leg I went down on my knee, and I tried to reach forward to catch the door or something to hold myself, but I couldn't. I was thrown forward, and my arm came under me. One of the employees assisted me up. I had my bag and umbrella, which flew halfway in the car.

I was seated on the corner seat on the right-hand side after the accident. One of the car men came and asked my name and asked me if I was badly hurt and I said, "Yes." I could scarcely speak, but I managed to get home, but it was very hard, and I tried to go to work the next morning, but I was unable to work. I went home and sent for the doctor. I stayed home between five and six weeks, and I have not fully recovered to-day. I was out of work between five and six weeks. I was obliged to go to work in order to support myself and my aged sister. There was no trouble about finding a seat in the car. There were five car men inside the car. They sat one near each door and two on each side up above. I had an umbrella and bag in one hand, and lifted up my skirt in order to avoid stepping on it. It was

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raining; it was snowing; it was a very stormy night. The car windows were covered with snow. I was thrown back a little first, and then forward. When I fell I hit both my shins, both my knees, and landed very heavily on the lower part of my stomach and my arm. The car was on a straight track. My experience is that if a car is on a straight track and starts with a sudden jerk, it will throw a person backward.

Q. You did step on your skirt when you were entering?

A. I did not step on it.

Q. You say that you had got on the platform of the car, and were going inside and putting your foot on the step of the floor of the car, and that is the time the car started?

A. Yes.

Q. Which foot did you put upon the floor?

A. Right foot.

Q. You say that you were thrown back a little?

A Thrown back a little, and then forward.

Q. How was it you were thrown forward if you didn't step on your dress?

A. The sudden jerk of the car.

Q. Sudden jerk of the car forward you mean?

A. The car started suddenly.

Q. With a jerk?

A. With a jerk, before I had a chance to get inside.

In addition to her own evidence, the plaintiff called as witnesses two physicians, who testified as to her injuries. Dr. Hayes, her attending physician, said that he called on the plaintiff on November 15, 1906; that he found, among other injuries, transverse abrasions of the right shin, about junction of the middle and lower third, with indentation of bone at that site; just above these were two smaller abrasions, similar, but not so pronounced; that the indentation was still to be found at the time of the trial. The plaintiff also called, as a witness, John W. Sullivan, an expert in the operation of electric cars, who testified as to the manner of starting cars gradually and slowly, or with a jerk. This comprises the entire evidence of the plaintiff.

The defendant called as witnesses the conductor and motorman of the car, and the three other conductors who were aboard at the time. All these witnesses testified that the car started in the ordinary way, or with no unusual jerk; and they all, except the motorman, further testified that the plaintiff was inside the car door about 2 feet when the car started, and she fell upon the floor, and that she seemed to fall by reason of tripping on her skirt.

Upon the foregoing facts the question of the defendant's negligence involves two inquiries:

(1) Was there any evidence sufficient to warrant the jury in finding that the motorman started the car with an unusually sudden jerk?

(2) Was there any evidence sufficient to warrant the jury in finding that the conductor was guilty of negligence in giving the starting signal too soon?

1. While the evidence shows that the plaintiff's fall and consequent injuries were caused by the movement of the car in starting, there is no substantial evidence that the car was started with any unusual jerk. The statement of the plaintiff in her declaration, that she "was violently thrown down . . . in starting the car," is not supported by the proofs. While she testifies that the car was "started with a sudden jerk, unusually quick," this is immediately qualified by the statement that she "was slightly thrown back and forward;" and this statement is repeated with a slight change in form: "I was thrown back a little first, and then forward;" and in her cross-examination, although she says "the car started suddenly," this is again qualified by the statement that she "was thrown back a little, and then forward." This evidence is consistent with the ordinary jerk of the car in starting, and is inconsistent with any sudden or violent jerk. Again, according to her own story, her position was such, as she was about stepping from the platform upon the threshold of the car, with her umbrella and bag in one hand and holding her dress in the other, that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door.

There is also the evidence that her "bag and umbrella flew halfway in the car," and that there was an indentation in the shin bone caused by her fall. While this evidence has a bearing on the degree of suddenness with which the car started, we do not think it is sufficient to make out a case of negligence, in the absence of other clear evidence that the start was unusually sudden or violent. The bag and umbrella would naturally be thrown from her hand in trying to save herself from falling, while the indentation might be caused by the simple fall of a heavy woman in striking her shin against the projections on the threshold of the car door.

It is well understood by persons accustomed to ride on electric cars, that the cars are liable to start with more or less of a sudden movement or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the ordinary passenger may be said to assume this

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will not be thrown down; and if so thrown down, the very act of falling while he was in the exercise of due care, and while in an admittedly safe place, would in itself be some evidence of negligence in the start of the car.

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At the close of the evidence the defendant requested the court to rule as follows: "(1) Upon all the evidence in the case the plaintiff is not entitled to recover. (2) There is no evidence in this case sufficient to warrant the jury in finding that the plaintiff's injuries were due to the negligence or carelessness of the motorman in the way and manner in which he started the car. (3) Nor is there sufficient evidence to warrant the jury in finding that the conductor was negligent or careless in giving the signal to start the car when he did, under all the circumstances in this case." These rulings the court declined to make, and the defendant duly excepted. There were also other requests for rulings, which we find it unnecessary to consider.

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The plaintiff was a German woman, fifty-two years of age, 5 feet 5 inches in height, and weighed about 198 pounds. She was a stout woman in appearance, and she was slow in her movements. She was accustomed to riding on electric cars. According to her story, she had mounted the platform, and was about to enter the car door, with her umbrella and bag in one hand, and holding her dress in the other, when the car was started with a sudden jerk, which threw her to the floor, injuring her leg, abdomen, and arm.

In her testimony the plaintiff says: I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started with a sudden jerk, unusually quick. I was slightly thrown back and forward before I had a chance to put my foot on the threshold of the door. I came down on my shin on the threshold with my knee. I fell on my shin, and with my left leg I went down on my knee, and I tried to reach forward to catch the door or something to hold myself, but I couldn't. I was thrown forward, and my arm came under me. One of the employees assisted me up. I had my bag and umbrella, which flew halfway in the car.

I was seated on the corner seat on the right-hand side after the accident. One of the car men came and asked my name and asked me if I was badly hurt and I said, "Yes." I could scarcely speak, but I managed to get home, but it was very hard, and I tried to go to work the next morning, but I was unable to work. I went home and sent for the doctor. I stayed home between five and six weeks, and I have not fully recovered to-day. I was out of work between five and six weeks. I was obliged to go to work in order to support myself and my aged sister. There was no trouble about finding a seat in the car. There were five car men inside the car. They sat one near each door and two on each side up above. I had an umbrella and bag in one hand, and lifted up my skirt in order to avoid stepping on it. It was

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raining; it was snowing; it was a very stormy night. The car windows were covered with snow. I was thrown back a little first, and then forward. When I fell I hit both my shins, both my knees, and landed very heavily on the lower part of my stomach and my arm. The car was on a straight track. My experience is that if a car is on a straight track and starts with a sudden jerk, it will throw a person backward.

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Q. Which foot did you put upon the floor?

A. Right foot.

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Q. How was it you were thrown forward if you didn't step on your dress?

A. The sudden jerk of the car.

Q. Sudden jerk of the car forward you mean?

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A. With a jerk, before I had a chance to get inside.

In addition to her own evidence, the plaintiff called as witnesses two physicians, who testified as to her injuries. Dr. Hayes, her attending physician, said that he called on the plaintiff on November 15, 1906; that he found, among other injuries, transverse abrasions of the right shin, about junction of the middle and lower third, with indentation of bone at that site; just above these were two smaller abrasions, similar, but not so pronounced; that the indentation was still to be found at the time of the trial. The plaintiff also called, as a witness, John W. Sullivan, an expert in the operation of electric cars, who testified as to the manner of starting cars gradually and slowly, or with a jerk. This comprises the entire evidence of the plaintiff.

The defendant called as witnesses the conductor and motorman of the car, and the three other conductors who were aboard at the time. All these witnesses testified that the car started in the ordinary way, or with no unusual jerk; and they all, except the motorman, further testified that the plaintiff was inside the car door about 2 feet when the car started, and she fell upon the floor, and that she seemed to fall by reason of tripping on her skirt.

Upon the foregoing facts the question of the defendant's negligence involves two inquiries:

(1) Was there any evidence sufficient to warrant the jury in finding that the motorman started the car with an unusually sudden jerk?

(2) Was there any evidence sufficient to warrant the jury in finding that the conductor was guilty of negligence in giving the starting signal too soon?

1. While the evidence shows that the plaintiff's fall and consequent injuries were caused by the movement of the car in starting, there is no substantial evidence that the car was started with any unusual jerk. The statement of the plaintiff in her declaration, that she "was violently thrown down . . . in starting the car," is not supported by the proofs. While she testifies that the car was "started with a sudden jerk, unusually quick," this is immediately qualified by the statement that she "was slightly thrown back and forward;" and this statement is repeated with a slight change in form: "I was thrown back a little first, and then forward;" and in her cross-examination, although she says "the car started suddenly," this is again qualified by the statement that she "was thrown back a little, and then forward." This evidence is consistent with the ordinary jerk of the car in starting, and is inconsistent with any sudden or violent jerk. Again, according to her own story, her position was such, as she was about stepping from the platform upon the threshold of the car, with her umbrella and bag in one hand and holding her dress in the other, that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door.

There is also the evidence that her "bag and umbrella flew halfway in the car," and that there was an indentation in the shin bone caused by her fall. While this evidence has a bearing on the degree of suddenness with which the car started, we do not think it is sufficient to make out a case of negligence, in the absence of other clear evidence that the start was unusually sudden or violent. The bag and umbrella would naturally be thrown from her hand in trying to save herself from falling, while the indentation might be caused by the simple fall of a heavy woman in striking her shin against the projections on the threshold of the car door.

It is well understood by persons accustomed to ride on electric cars, that the cars are liable to start with more or less of a sudden movement or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the ordinary passenger may be said to assume this

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risk. He expects that the car may start with a greater or less degree of jerk, and he realizes that he must exercise due care to protect himself against such a movement. The mere fact, therefore, that the car started with a sudden movement or jerk, and that the plaintiff was hurt, does not make out a case of negligence in the manner of starting the car, but the proof must go further, and show that the start was unusually sudden or violent.

In McGann v. Boston Elev. R. Co. 199 Mass. 446, 18 L.R.A.(N.S.) 506, 127 Am. St. Rep. 509, 85 N. E. 570, the plaintiff was thrown from the defendant's car and injured, and the court below refused to direct a verdict for the defendant, or to rule that there was no evidence of negligence on the part of the motorman or on the part of the conductor; and the exceptions to these rulings were sustained by the supreme court. There was evidence in that case that the car "made a sudden jump," that the car "gave a jerk," and that the car "started with a sudden jerk or jump." The court in its opinion, which was drawn by Mr. Justice Loring, said: "A plaintiff does not make out a case by proving that an electric car gave a jerk or similar motion, and that he was hurt. . . . The possibility of an electric car giving a jerk is an incident of travel which every passenger must expect. To make out a case of negligence on the part of a defendant railway company in such a case, the plaintiff must go further, and introduce evidence that the jerk in question was due to a defect in the track or to negligence in the operation of the car."

In the earlier and leading case of Byron v. Lynn & B. R. Co. 177 Mass. 303, 305, 58 N. E. 1015, the plaintiff's intestate was on the rear platform of the car when the car, on passing over a switch, gave a sudden swing or jerk, which threw him from the car. In the opinion Mr. Justice Barker, speaking for the court, said: "Upon full consideration of the evidence, we are of opinion that it would not justify a finding that the defendant was negligent. . . . The plaintiff's intestate was thrown to the ground by a swaying, or jolt, or lurch of the car, as it returned to the main track from a siding. Such motions of street cars are of common and frequent occurrence, and are to be expected to a greater or lesser degree whenever the car passes from one track to another, and so are of the class of usual and unavoidable incidents in the use of cars upon the streets. . . . Unless they are unusual in degree, and caused by some defect in the car or the track, or by some unusual or dangerous rate of speed, they furnish no evidence of negligence on the part of the carrier or of its servants. . . . There was no evidence that the jolt was due to any defect in the car or in the track, or that the car was proceeding at an extraordinary speed. . . . The jar felt by the different witnesses was not so great as to be unusual, or as to justify a finding that it was due to negligence of the defendant or of its servants."

In Jameson v. Boston Elev. R. Co. 193 Mass. 560, 562, 79 N. E. 750, 751, there was testimony that the plaintiff's intestate had boarded the car, and that "it started suddenly and threw him his length, and he put his hand in a woman's bandbox up to his elbow." In the opinion in that case the court said: "These statements did not go far enough to show that he was in the exercise of due care, or that the defendant s servants were negligent. All that the plaintiff proved was that in some way her testator, who was feeble on his legs, fell on the defendant's car starting, apparently in the usual way, with something of a jerk."

In Timms v. Old Colony Street R. Co. 183 Mass. 193, 66 N. E. 797, where the plaintiff was standing near the edge of the platform, and was thrown off the car and injured, the court uses the following language: "There is nothing in the evidence to show that there was any defect in the car or in the condition of the rails, and jerks in the motion of street cars are not unusual."

In Sanderson v. Boston Elev. R. Co. 194 Mass. 337, 341, 80 N. E. 515, 517, the plaintiff was thrown off the car and injured, and there was evidence that the car made a "plunge," a "kind of a lurch," a "jar ahead to a considerable extent," a "movement such as you feel when the power is applied." In the opinion Mr. Justice Hammond, speaking for the court, said: "Even if the plaintiff's theory of the accident be adopted, the evidence discloses no negligence of the defendant. There does not appear to have been any evidence of defect in the car or tracks, or of incompetency of the defendant's servants. . . . There may be movements of a car so severe that a mere description of them and their results may justify the inference that they were attributable to some negligence on the part of the carrier, but the movement described in this case is not of that character. It was not due to any defect, and the possibility of such a movement is a thing which everyone who gets upon a street car must be taken to contemplate."

Under these decisions the plaintiff's evidence in the case at bar is clearly insufficient to warrant the finding that the motorman was negligent in the way in which he started the car.

2. The remaining question is whether

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there was any evidence sufficient to justify a finding that the conductor was negligent in giving the starting signal too soon.

It is settled law in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly upon the car. Sauvan v. Citizens' Electric Street R. Co. 197 Mass. 176, 177, 83 N. E. 405. The practical reasons underlying this rule are obvious. The public demands as rapid transportation on street cars as conditions will permit. To this end it is necessary that there should be as little delay as possible in the frequent stopping of the cars to take on passengers. If, therefore, it were the duty of the conductor to wait until each passenger is seated before giving the starting signal, it would result in much delay, and consequently the running time would be much slower; and hence it has become the common practice, under ordinary circumstances, for the conductor to ring the starting bell as soon as the passenger is fully on the car; and it may be said that the ordinary passenger anticipates this as one of the usual incidents in the operation of street cars, and is accordingly on the lookout to protect himself from any serious consequences resulting therefrom.

In the case at bar the plaintiff was fully upon the car when the conductor gave the starting signal. She says: "I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started . . . before I had a chance to put my foot on the threshold of the door." The conductor must have given the signal to start a moment before this, and therefore the plaintiff had fully boarded the vestibule of the car at the time the signal was given. Nor does it appear that there were any extraordinary or exceptional circumstances in this case, such as might be held to take it out of the general rule laid down in Sauvan v. Citizens' Electric Street R. Co. The plaintiff was a woman of mature years and apparently in good health, and she had had experience in riding upon electric cars. That she was a stout woman, slow in her movements, and carrying a small bag and an umbrella in one hand, does not, in our opinion, take her out of the class of ordinary persons who travel on electric cars. In other words, there was nothing in her appearance of such an unusual or exceptional character as to make it the duty of the conductor to exercise special care in her case by waiting until she was seated in the car before giving the starting signal.

The facts in the Sauvan Case very closely resemble those in the case at bar. In that case the plaintiff was "a large robust woman weighing about 170 pounds," who "looked and was in perfect health:" She got upon the car at a regular stopping place, when the car was standing still. She was proceeding to her seat when the car started, causing her to fall against the woodwork inside the car. According to her evidence, she had stepped up over the steps into the vestibule, and was fully and fairly on the floor of the vestibule of the car before the conductor rang the starting bell. Her complaint was that the starting bell was rung when she had put one foot on the floor of the car, had thrown her weight onto that foot, and was in the act of bringing the other foot forward; and she contended that on this evidence the jury could have found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers. In the opinion of the court Mr. Justice Loring said: "If the starting signal was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor, or, at any rate, it might well be contended that the conductor could not have anticipated such an instantaneous response to his signal. But apart from that, it is settled in this commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car." We think the case at bar comes clearly within the Massachusetts rule laid down in the Sauvan Case; and it follows that, the plaintiff being fully and fairly upon the car, the conductor was not guilty of negligence in giving the starting signal.

The judgment of the Circuit Court is reversed, the verdict set aside, and the case remanded to that court, with directions to order a new trial; and the plaintiff in error recovers costs in this court.

MISSISSIPPI SUPREME COURT.

W. M. BALL, Appt.,
v.
WILLIAM HUNT PHELAN et al.

(— Miss. —, 49 So. 956.)

Will — implication — construction.

1. A devise by implication in fee in favor of the grandchild, but not in favor of the daughter, exists in a will in which testator creates an estate in favor of his daughter for life, free from the control or debts of her husband, he to have no interest at her death, or by inheritance through their chil-

Note. — As to devise or bequest by implication, see case note to Conner v. Gardner, 15 L.R.A.(N.S.) 73.

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dren, and provides that in case the daughter should die without children, or a child should die before marrying or becoming of age, then the property should go to other persons mentioned.

Same — void interest.

2. A devise by implication to children on arriving at age or marriage may be maintained, although there is nothing in the will to show any present interest devised to them during minority.

Same — foreign will — construction.

3. The courts of the state where the property is situated, in construing a will made at testator's domicil, in another state, will adopt a settled judicial meaning which the courts of the state of domicil have given to technical words therein so that such meaning has become a rule of property in that state, but otherwise the testator's intention as ascertained by the court giving construction to the will, will govern.

(June 21, 1909.)

APPEAL by defendant from a decree of the Chancery Court for Tunica County overruling a demurrer to a bill filed to cancel certain conveyances of land alleged to constitute a cloud on complainants' title thereto. Affirmed.

The facts are stated in the opinion.

Messrs. **J. C. Wilson** and **W. A. Percy** for appellant.

Messrs. **L. B. McFarland** and **Tim E. Cooper**, for appellees:

The fee was limited over to the child or children of Julia A. Phelan, after her death, by necessary implication.

Cropton v. Davies, L. R. 4 C. P. 159; Kinsella v. Caffrey, 11 Ir. Ch. Rep. 154; 1 Jarman, Wills, p. 557; Theobald, Wills, p. 738; Tomkins v. Tomkins, cited in 1 Burr. 234; Gardiner v. Stevens, 30 L. J. Ch. N. S. 199; Wilks v. Williams, 2 Johns. & H. 125; Goodright v. Hoskins, 9 East, 306; Thorp v. Owen, 2 Hare, 607; Sweeting v. Prideaux, L. R. 2 Ch. Div. 413; Luxford v. Cheeke, 3 Lev. 125; Gordon v. Adolphus, 3 Bro. P. C. 306; Eaton v. Hewitt, 2 Drew. & S. 184; Underhill v. Roden, L. R. 2 Ch. Div. 494; Re Vowers, 113 N. Y. 569, 21 N. E. 690; Abbott v. Middleton, 21 Beav. 143; Aspy v. Lewis, 152 Ind. 494, 52 N. E. 756; Metcalf v. Framingham, 128 Mass. 375; Marsh v. Hague, 1 Edw. Ch. 174; Owen v. Hancock, 1 Head, 506; Re Rawlins, L. R. 45 Ch. Div. 299; Den ex dem. White v. Holton, 23 N. J. L. 425; Ferrand v. Jones, 37 N. C. (3 Ired. Eq.) 633; Read v. Snell, 2 Atk. 643; Re Blake, 36 L. J. Ch. N. S. 747, L. R. 3 Eq. 799; Jordan v. Fortescue, 10 Beav. 259.

Whitfield, Ch. J., delivered the opinion of the court:

The bill of complaint in this cause was exhibited by the appellees herein against W. M. Ball for the purpose of canceling, as a cloud upon their title, certain conveyances under which Ball claims to be the owner of lands described in the bill. The bill avers that the appellees are the grandchildren of one Wm. R. Hunt, who died the owner of the lands situated in Mississippi described in the bill, testate. That the said Wm. R. Hunt was a resident of the state of Tennessee, and his will was duly admitted to probate in the probate court of Shelby county, Tennessee, and afterwards by the chancery court of Tunica county, Mississippi, some thirty-six years later. That the will was a holographic will. That the said testator left as his widow Sarah Hunt, and as his only heir at law, Julia A. Phelan. That the appellees are the children of Julia A. Phelan, who died on the 13th day of February, 1906. That they are the only children of the said Julia A. Phelan, and the only lineal descendants of Wm. R. Hunt. That after the death of the said Wm. R. Hunt the defendant, Ball, or those under whom he claims, bought from the said Sarah Hunt and Julia A. Phelan the land described, and claims the same adversely to complainants. The bill sets out *in hæc verba* the will of Wm. R. Hunt, under which the appellees claim that an ulterior limitation to them in fee after the death of their grandmother and mother was devised by implication. The defendant demurred to the bill. All the grounds of the demurrer present practically the same question, which is that complainants have no title or interest in the land under the will of Wm. R. Hunt. The demurrer was overruled, and an appeal granted by the chancellor.

The whole case made by the bill, and the whole defense relied upon by the defendant, is presented by the demurrer. If that is sustained, complainants have no standing in the court. If it is overruled, the relief prayed by the bill follows as a matter of course, and nothing is left except an accounting.

The will of Wm. R. Hunt is as follows:

In the name of God, Amen.

I, William R. Hunt, being of sound mind, but feeble in body, do make and declare this my last will and testament hereby revoking all wills and testaments heretofore made.

Item 1st: I will unto my wife, Sarah E. Hunt, for the time of her natural life, one half of my property, both real and personal, to be hers during her natural life, then to go to my daughter, Julia T. Hunt.

Item 2d: I will and bequeath to my daughter, Julia T. Hunt, during the time of her natural life, the other half of my

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property, both real and personal, to be hers, free from the control of any future husband, and also free from the debts of any future husband, he is to have no title by courtesy, or any other title by reason of her death, or is to inherit it through the death of any child or children they may have or in any other manner whatever.

Item 3d: In case my daughter Julia should die without child, or in case the child or children should die before marrying or become of age, then the whole property given to my daughter Julia, all for her life, should go to Bettie Hunt Selden, and should she die before she marries or becomes of age, then one half should be the property of Julia Moore Driver, and other one half shall be divided between the children of my sisters, Maria L. Joiner and my sister, Leona E. Thompson, and the said Julia Moore Driver shall receive the property only for her natural life, free from the debts and contracts of any present or future husband, and should at her death follow the same line of descent as the first-mentioned half of the property.

Item 4th: It is my will that the whole of my insurance on my life, amounting to $40,000, be put into the hands of my executor to pay my debts with, and he is directed so to use it, and if there be a surplus pay it into the general mass of my estate.

Item 5th: I appoint Wm. Joiner my executor of this my last will and testament, and desire that no security be required of him.

For witness whereof, I have hereunto set my hand and seal this 26th day of January, A. D. 1872.

[Signed] Wm. R. Hunt.

Signed by us in the presence and by the direction of the testator, January 26th, 1872.

[Signed] J. W. Clapp.
J. P. Meux.

There is to be paid all mother's money except $7,000, my share of her property, which is to be kept as mine.

Proven at the June term, 1872, of the probate court, and ordered to be recorded.

Recorded June 26th, 1872.

James Rulby, Clerk.
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It will thus be seen that the exact question presented for decision upon the consideration of this will, especially the third clause of said will, supra, is this: Is there an implied limitation of a remainder in fee to the children of Julia Phelan, after her death, by said will? There is, of course, no express limitation, and these complainants, if they take at all by purchase, must take by virtue of such implied limitation. The one fundamental rule governing the construction of all wills is to ascertain what the intent of the testator was. This intent must be gathered, it is true, from the language used in the will, and by this is meant that such intention shall be gathered from the four corners of the instrument; that is to say, from the whole will,—the whole frame of the will, the whole scheme of the testator manifested by the will, taking into consideration and giving due weight to every word in the will; and, when once the actual intent of the testator at the time of the making of the will has been in this way ascertained, all minor, subordinate, and technical rules of construction must yield to this paramount intent thus ascertained. As well said in Re Donges, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 787: "The comprehensive and all-dominating rule in construing wills is that the intention of the testator must be ascertained from the words thereof, in the light of all surrounding circumstances, and that intention be given effect. To accomplish this, multitudinous minor rules have been announced, more or less technical, which, however, serve not so much to restrict or constrain the judicial mind as simply to guide and to indicate probabilities in the absence of countervailing considerations. None of them are to be followed blindly if they lead to subversion of what was clearly the intention of the testator." It is also, of course, true that there must be no implication where that implication violates public policy or the settled rules of positive law. Extreme language is sometimes used by the courts as to how strong this implication must be. We think about the best statement on this point we have found is that of Judge Finch in Re Vowers, 113 N. Y. 569, 21 N. E. 690, where he says: "The rule of construction which seems to have prevailed is that the inference . . . need not be irresistible or such as to exclude all doubts possible to be raised, but must, nevertheless, be such as to leave no hesitation in the mind of the court, and must rest not upon mere conjecture. The intention must be clear so that no other reasonable inference can be made." Another quotation we make on this point, because of the strong, common-sense grip it manifests upon this precise point, and that is what was said by Strong, J., in Still v. Spear, 3 Grant, Cas. 306, in a case not cited by counsel on either side, where he said: "The construction given by the court below to the will of Charles Still, Sr., plainly defeats the general intentions of the testator, and this without any necessity, for those intentions are not in conflict with any rule of law, or with any policy which the law does not

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It will thus be seen that the exact question presented for decision upon the consideration of this will, especially the third clause of said will, supra, is this: Is there an implied limitation of a remainder in fee to the children of Julia Phelan, after her death, by said will? There is, of course, no express limitation, and these complainants, if they take at all by purchase, must take by virtue of such implied limitation. The one fundamental rule governing the construction of all wills is to ascertain what the intent of the testator was. This intent must be gathered, it is true, from the language used in the will, and by this is meant that such intention shall be gathered from the four corners of the instrument; that is to say, from the whole will,—the whole frame of the will, the whole scheme of the testator manifested by the will, taking into consideration and giving due weight to every word in the will; and, when once the actual intent of the testator at the time of the making of the will has been in this way ascertained, all minor, subordinate, and technical rules of construction must yield to this paramount intent thus ascertained. As well said in Re Donges, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 787: "The comprehensive and all-dominating rule in construing wills is that the intention of the testator must be ascertained from the words thereof, in the light of all surrounding circumstances, and that intention be given effect. To accomplish this, multitudinous minor rules have been announced, more or less technical, which, however, serve not so much to restrict or constrain the judicial mind as simply to guide and to indicate probabilities in the absence of countervailing considerations. None of them are to be followed blindly if they lead to subversion of what was clearly the intention of the testator." It is also, of course, true that there must be no implication where that implication violates public policy or the settled rules of positive law. Extreme language is sometimes used by the courts as to how strong this implication must be. We think about the best statement on this point we have found is that of Judge Finch in Re Vowers, 113 N. Y. 569, 21 N. E. 690, where he says: "The rule of construction which seems to have prevailed is that the inference . . . need not be irresistible or such as to exclude all doubts possible to be raised, but must, nevertheless, be such as to leave no hesitation in the mind of the court, and must rest not upon mere conjecture. The intention must be clear so that no other reasonable inference can be made." Another quotation we make on this point, because of the strong, common-sense grip it manifests upon this precise point, and that is what was said by Strong, J., in Still v. Spear, 3 Grant, Cas. 306, in a case not cited by counsel on either side, where he said: "The construction given by the court below to the will of Charles Still, Sr., plainly defeats the general intentions of the testator, and this without any necessity, for those intentions are not in conflict with any rule of law, or with any policy which the law does not

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tolerate. There are certain principles, it is admitted, which are intended to assist in ascertaining a testator's intention, and which are controlling when that intention is doubtful. They have been invoked to sustain this judgment. Among them are the maxims that the first taker of a legacy is presumed to be the chief object of a testator's bounty; that in doubtful cases legacies are to be held vested rather than contingent, absolute rather than defeasible; that the law favors such a construction as will render estates alienable; and that the primary intent is to be regarded rather than the secondary, if both cannot prevail. But these principles shed no light upon the will now before us. They are only applicable in cases of doubtful construction. They are never allowed to defeat a plain intent expressed. The purposes of the testator in this will are not obscure. That he did not intend Levi Still to have any share of his estate absolutely, that he did not intend to expose any part of it to seizure at the suit of Levi's creditors, and that he did intend a benefit to the children of Charles Still, on the happening of an anticipated contingency, would be very plain to every common mind. It is only when refinement commences that doubts arise."

Lord St. Leonards said very strongly in the profoundly considered case of Abbott v. Middleton, 7 H. L. Cas. 68: "I deny that you are not at liberty to look at the whole frame of the will in order to collect the general intention." And in the same case he says again, speaking of a construction in the case of R. v. Melling, 1 Ventr. 230: "Now look at that: Lord Hale tells you that he could not be thought to prefer the youngest son before the issue of the eldest;" and, in his most masterly exposition in that case, he finally says: "I endeavor, and always have endeavored, to keep within those rules; but while I have endeavored to keep within those rules, I have also endeavored, where I could, to make them bend so as properly to meet the justice of the case."

Van Vleet, Vice Chancellor, put it very well in Bishop v. McClelland, 44 N. J. Eq. 250, 1 L.R.A. 551, 16 Atl. 2, 3, where he said: "A bequest may undoubtedly arise from implication, but, to warrant the court in so declaring, there must be something more than conjecture to support its declaration. The implication must be a necessary one. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind. A construction in favor of a gift by implication should never be adopted, except in cases where, after a careful and full consideration of the whole will, the mind of the judge is convinced that the testator intended to make the gift."

Let us now, in the light of these general principles, come to a particular consideration of the authorities relied upon on both sides, and, first, as to the authorities which support the contention that there is here remainder in fee to Julia's children by implication. In Frogmorton ex dem. Bramstone v. Holyday, 3 Burr. 1618, the testator, after giving, devising, and bequeathing unto his son David Hasselwood or his heirs forever certain property, devised to his other son, John Hasselwood, a certain piece of real estate, and added: "And if the said John Hasselwood shall happen to die in his minority or before he comes to age, then I give, devise . . . the said . . . [property] unto my three daughters . . . equally, share and share alike." John was of the age of seven years at the time of the making of this will. John entered upon and was seised of the property until the time of his death, which happened in 1762. In the lifetime of John, David died intestate, leaving issue, to wit, David, his eldest son, who, by deed of bargain and sale conveyed the premises away to Stephen Bramstone. It was held that John did not take a mere estate for life, but that the limitation over, only upon the contingency of his dying in his minority, shows that it was intended to give him an absolute estate in fee, which he might dispose of if he came of age, and that unless he lived to be of age, when he might dispose of it, it was meant that it should go over to the daughters named in the will, and the conclusion was that John should have the estate unless he died in his minority, although there were no words about John's leaving issue.

In Newland v. Shepherd, 2 P. Wms. 193, Sir George Newland, whose daughter had married Shepherd and had three children, after making some other dispositions, "devised the residue of his real and personal estate unto trustees . . . to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren by his said daughter . . . as should be living at the time of his decease, until his said grandchildren should come to the age of twenty-one years, or be married; and he went no further nor made any other disposition of his estate." It was held that the grandchildren on arriving at age were entitled to the entire surplus, both of the real and personal estate.

In Goodtitle ex dem. Hayward v. Whitby, 1 Burr. 228, R. P., one devised his property to trustees in the following language: "In trust that they . . . should lay out . . . and bestow the rents and profits

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. . . for the maintenance, etc., of Thomas and John Hayward, sons of the testator's sister Elizabeth Hayward, during their minorities, and when and as they should respectively attain their ages of twenty-one, then to the use and behoof of the said sons of his sister Hayward . . . and their heirs equally." Thomas Hayward, the eldest of the testator's two nephews, died under the age of twenty-one without issue. Upon his death, his brother John being then under age, Thomas Whitby, the testator's heir at law, was let into the moiety of the deceased's nephew Thomas Hayward by the trustees. John, the surviving brother, brings the ejectment, and claimed the moiety of his deceased brother, as well as his own proper moiety, and the question was whether this moiety of Thomas, the deceased brother, belonged to John Hayward, either as heir to his brother or as surviving joint tenant, or whether it belonged to Thomas Whitby as his heir at law as an undevised estate; and Lord Mansfield held as follows: "Here, upon the reasoning of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it in any event. Now, suppose that this object of the testator's bounty marries and dies before his age of twenty-one, leaving children, could the testator intend in such an event to disinherit him? Certainly he could not." And let it be borne in mind that Julia Phelan, in this case, had children who came of age and married. Lord Mansfield said in the case supra that it was "so plain that it was a shame to cite cases upon it," but he did cite a devise (Tomkins v. Tomkins), where the devise was to his brother in trust for his eldest son, B, until he should attain twenty-one years, and if he should die before twenty-one, then a devise over, in which case the court held the age of twenty-one to be no limitation of B's interest, but only a limitation of the trust during his minority, and that B took the whole by implication; and Lord Mansfield added, "So, here, the property is absolutely given, and the limitation is one of a trust."

In the case of Crowder v. Clowes, 2 Ves. Jr. 449, the testator devised to his niece, Letitia Dawson, the sum of £1,000, to be paid to her immediately after his decease if she should happen to be then married; and then added: "But if my said niece should happen not to be married at the time of my decease, then I direct the interest for her said legacy of £1,000 to be paid to her . . . during . . . her natural life, to be calculated and paid to the day of her death, or till she should be married, . . . and if she should die unmarried, then the principal of the legacy . . . to lapse for the benefit of the person who may be entitled to my real estate." The legatee was unmarried at the time of the testator's death, but married soon afterwards. The bill was filed by her with her husband claiming this legacy, and the master of the rolls said: "There is no doubt that if there are not express words or necessary, and I will say unavoidable, implication from his having given it over if she dies unmarried, I cannot supply it. I cannot dive into his intention, unless it is so expressed as to satisfy me he did mean it. The only question is, whether, upon reading this legacy and coupling it with a codicil [giving £200 more to Letitia] which may have effect upon the word 'addition,' it is not clear he meant to give her this when she married. Is it not the same as to say it shall not lapse if she does marry? I am clearly of opinion it must be raised." And so Letitia took the legacy when she married, though she married after the testator's death.

In Wainewright v. Wainewright, 3 Ves. Jr. 558, the devise was in these words, after giving to his four nephews and his niece each the sum of £300: All the rest of my personal estate not hereinbefore disposed, I give unto my said nephews Robert Wainewright and John Seagrave upon trust that they should convert the property into money and lay it out toward the maintenance of his great-nephew Thomas Wainewright, now placed with my nephew Robert Seagrave, in Nottingham, until he shall attain his age twenty-one years; and added, and in case my said great-nephew shall happen to die before he attains his age twenty-one years, then my trustees shall pay the whole of said surplus of my personal estate, etc., unto and for the benefit of my said nephew Thomas Wainewright. The testator died soon after the execution of this will. His great-nephew Thomas Wainewright, having attained the age of twenty-one, filed a bill praying that he might be declared entitled to the residue of the testator's personal estate, and the master of the rolls held that there was a necessary implication that, if the plaintiff Thomas did live and attain the age of twenty-one, he should have the residue of the personal estate, and significantly said: "Can anyone doubt about it? His death under the age of twenty-one is to give it over to his father; but if he lives to attain that age, then the testator dies intestate—that is impossible. Is it not a necessary inference exactly like that in the case I have cited?"—to wit, the case of Crowder v. Clowes, supra.

In Paylor v. Pegg, 24 Beav. 105, the will was construed as if it read as follows: "'And if my son should happen to die before he attains his age of twenty-one years, then

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in that case I do hereby empower my wife to hold my whole estate during her natural life if she continues my widow. Likewise, I do hereby empower my trustee, at the decease of my wife, to sell my estates, both real and personal,' and out of the money I direct them to pay two legacies, and the residue to go amongst my nephews and nieces." The testator died in 1809. His son John attained twenty-one in 1823, and was let into possession. The testator's widow died in 1841, and the testator's son John died in 1856, having devised the estate to Mrs. Pegg. It is true this was not a case of implication, but I cite it to show that the court in holding that the son took the estates upon death of his father, by descent, worked that result out by finding it to be the purpose of the father not to disinherit his son, the court saying: "It is impossible to understand why the testator should have given the property to his son until he was twenty-one, and then take it all away from him and give it to his nephews."

A striking case is Hoskins v. Hoskins, 9 East, 305. There the devise was: "I likewise give and bequeath unto my said son Richard the leasehold premises of Roskief, in St. Allen aforesaid, to hold the same unto my said son Richard until his son Thomas shall attain his age of twenty-one years, and no longer, but in case the said Thomas Hoskins shall die in minority, then my will is and I do hereby give and bequeath the said leasehold premises of Roskief unto John or Richard, sons of the said Richard Hoskins or either of them surviving or attaining the age of twenty-one years as aforesaid. And I desire the said premises of Roskief may be quitted and delivered up, as aforesaid, by my said son Richard Hoskins accordingly." It was held that there was an implication from the words of the will that Thomas should take Roskief in fee when he came of age. Emphasis was laid, it is true, upon the last clause quoted, but the construction was upon the whole frame and scheme of the will.

In Re Donges, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786, the devise was: "I give and bequeath to my wife, Clara Donges, all the real estate of which I may die seised, to have and to hold the same until the youngest of my children, if any be born to me, shall attain the age of twenty-one years. In case there are no children living at the time of my decease, my said wife shall be the sole owner of my real estate." The question was what was the intention of the testator if children were born to him and living at the time of his decease after the youngest attained twenty-one years of age. After an elaborate examination of authorities, in the course of a very able opinion, it was held that it was clearly the testator's intention to devise the property to the children on the majority of the youngest, they taking by implication.

Another instance of devise by implication may be profitably studied in the case of Masterson v. Townshend, 123 N. Y. 458, 10 L.R.A. 816, 25 N. E. 928. The case of Clopton v. Davies, L. R. 4 C. P. 159, is very much in point here. There was a devise to trustees to apply the rents to the benefit of the testator's granddaughter, Mary Annie Clark, until she attained the age of twenty-one, and if she should die under that age, then over. It was held that there was a devise of the fee by implication to his granddaughter, Mary Annie Clark, the court saying that to deny the implication would involve the strange consequence that, if the granddaughter die after twenty-one, the estate would go over to the two daughters named, whereas, if the granddaughter attained twenty-one, it would go over to the residuary legatees, who were other persons. The intention, the court said, was not to be imputed to the testator.

One of the strongest cases for the complainant is that of Kinsella v. Caffrey, 11 Ir. Ch. Rep. 154. There the testator gave £50 a year each to L. and T. for their lives, and on the death of either, leaving children, his annuity to go to such children, but if L. or T. should die leaving no children at his death, his annuity was to go to the survivor for his life, and, if both should die leaving no children, or, leaving children, the said children should die under twenty-one, both annuities were to sink into residue. T. died unmarried, and afterward L. died, leaving children. It was held that L.'s children were entitled by implication to T.'s annuity, the court asking, "Why was the event of their attaining twenty-one introduced, . . . if they were intended to take nothing prior to their attaining twenty-one?" This case squarely decides that where the limitation over to the third person is not only upon the default of children, but upon the event that such child shall die under twenty-one years of age, this last circumstance is sufficient to raise an estate by implication. The decision did not go—that is to say, the devise was not implied—upon the ground that it increased an estate already given, but because the limitation over was upon the death of a child before coming of age. Mr. Jarman prints in his valuable work, Jarman on Wills, vol. I, p. 557, the inquiry, "Why was the event of their attaining twenty-one introduced if they were entitled to take nothing prior to their attaining twenty-one?" in italics, for the ex

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press purpose of showing that this thought was a controlling one.

In Aspy v. Lewis, 152 Ind. 494, 52 N. E. 758, an estate in remainder by implication was held to have been given to the daughter, Maria Louisa, under this provision: "And I direct further that the . . . estate [that is to say, a widowhood estate in his wife, Elizabeth] that is bequeathed to my wife shall be in the full possession of my only daughter, Maria Louisa, at the death or marriage of my wife, provided she shall be living; and if she is not living at the death or marriage of my wife, then the estate to go to the use of my brothers and sisters or their heirs." The controlling thought was that no construction of a will should be accepted unless the purpose was manifest, if that purpose resulted in the disinheritance of a child, and the construction was had so as to vest this remainder in fee by implication in Maria Louisa as carrying out the intent of the testator, although there was an express provision in the will that if Maria Louisa was not living at the death of the widow the estate should go over to the brothers and sisters.

A very important case in considering the construction of this will, not referred to by counsel on either side, is the case of Bentley v. Kaufman, 12 Phila. 435. The testatrix directed all her estate, real and personal, to be sold and the proceeds to be invested by her executors in the best securities, the interest to be paid to her son during his natural life. If her son should die without issue, then the whole investment to be given to the Lincoln Institute. It was held, first, that the words "die without issue" meant a definite failure of issue, and that, consequently, the son did not take an absolute interest in the fund, but only a life interest in the income; and, secondly, that there was a gift by implication of the corpus of the legacy to the son's issue, if he should leave any at his death. Thayer, J., made the following exceedingly strong observations on this case: "The real question, therefore, which is now to be determined is, What interest did Leon Kaufman take under his mother's will? Did he take an absolute estate, or only a life estate? And, as regards the answer to this question, no difference is to be made between that portion of Mrs. Kaufman's estate which was of her own acquisition, and that portion which she derived from her father by her survivorship of her sister Sarah and her brother Joseph; for over both portions alike she had an absolute right of control and disposition, and both alike passed under her will. Now, it must be quite plain to the common understanding that Mrs. Kaufman did not intend to give her son an absolute estate in her property, but only the interest of the proceeds, when invested, during his natural life. In the first place, she said so explicitly in her will. The gift to her son is a gift 'of the interest of my estate,' and it is 'to be paid to my son during his natural life, in half-yearly payments,' and she gives him nothing more. In the second place, she directs that if her son, Leon Kaufman, should die without issue, that the whole of her estate should go to the Lincoln Institute. What is this but a gift of the interest to the son for life, with a remainder (if one may, for convenience, speak of a remainder with reference to personalty), by necessary implication, to his children, and, in default of children, a gift over to the objects of her charitable bounty? But, although this may be never so plain to the common understanding, it is asserted by the plaintiff's counsel that the intention is defeated by the application of the rule that when there is a gift of personalty for life, followed by a gift over in default of issue, there being no immediate gift to the issue, the gift over is void, and the first taker takes absolutely,—a proposition entirely correct in its terms where there is no intermediate gift to the issue, either expressly or by implication, and where the gift over is dependent upon an indefinite failure of issue. But it has no application whatever in a case where the limitation over is on failure of children only, or on failure of issue within a given time, or where there is an intermediate gift by necessary implication to the issue of the first taker."

In the case of Ranelagh v. Ranelagh, 12 Beav. 200, the devise construed there was this: After giving to his two daughters during their natural lives £4,000, and to his two sons £2,000 each, during their natural lives: "In case of the decease of any of the above parties without issue, their, his or her, proportions to be divided equally amongst the survivors." It was held that "dying without issue" meant issue living at the date of the death of the legatee,—definite failure of issue. It was held further that the issue of the legatee were named in the codicil, only as a description of the contingency on which the legacy was to be given over, and that no express interest was given to the children. The master of the rolls went so far as to say that he thought it extremely probable that the testator did mean a benefit to the children, but "*si voluit non dixit*," and he denied the implication. He referred expressly to the distinction that might exist between the case where the first devisee took for life only, and where he took the fee as to which later.

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Another strong case against implication in the case of Den ex dem. Franklin v. Trout, 15 East, 394, decided in 1812 by Lord Ellenborough. Still another very striking case against implication is the case of Dowling v. Dowling, L. R. 1 Eq. 442. The case was first decided by Sir John Stuart, V. C., who held that there was an implied devise, but afterwards it was reversed. See L. R. 1 Ch. 612, decided in 1866, Dowling v. Dowling, and the devise by implication was denied. In this case the testator, R. H. Dowling, after various devises to his daughter, and to his daughter's husband, and his two sons-in-law, finally added this devise: "I also bequeath . . . to each of my sons as follows: [four in number] as also the remainder of my household furniture, and all things appertaining to my household effects, to be equally divided. That my freehold estates and all other property shall be disposed of as my executors may think best, and be added to and invested with my other personal property . . . the interest therefrom to be divided half yearly between my four sons, above named, and at the decease of either without lawful issue, such share to revert to the remainder then living, their child or children." Lord Justice Turner, construing this last provision, said: "The gift to the sons was an unlimited gift of the interest passing the capital. The expression is, 'the interest to be divided half yearly between my four sons, and at the decease of either without lawful issue, such share to revert to the remainder,' which seems to assume that the share of each was considered by the testator to have become vested in the original persons to whom he had given it. There is, therefore, in my opinion an absolute gift to the sons; but this absolute gift is subject to this condition,—that, upon the death of either of them without issue, the share is to revert to the remainder then living, or their child or children. It appears to me, upon the construction of the whole will, that the children are not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place; but so long as there are parents the children are to take nothing. The testator thought that in that case he had done enough for them, for the parents might provide for their own children." This case is exactly on all fours, in principle, with the case of Halsey v. Gee, 79 Miss. 193, 30 So. 604. That case went upon the ground that the two devisees there took the absolute interest, not a life estate,—an absolute interest, determinable, it is true, upon the contingency named, but nevertheless an absolute interest as distinguished from a life estate.

In the case of Scale v. Rawlings [1892] A. C. 342, the provision was that the testator gave three freehold houses to his nephews, S. and W., upon trust to pay the rents and interest to his niece during her life, for her separate use, and after her death, she leaving no child, he gave one of the houses to S. and the two others to W. After making other bequests, he gave the residue of his whole estate to S. and W. equally. The niece died leaving children, and it was held that the niece took a life interest only, and no estate by implication was allowed to her children. Lord Halsbury said: "The difficulty which I have here is not speculating upon what peradventure may, at some time or other, have been in the testator's mind, but I must find words which are absolute and express. I may be perfectly satisfied that he intended that this lady should have an estate of inheritance in this property. I might be satisfied that that was his intention otherwise than by the words of the will, but I should be compelled to come to the same conclusion as I do now, *viz.*, that that intention is not sufficiently expressed. . . . It is said that he intended to make a gift to the children. . . . I cannot say that he had not the intention, but all I can say is that he has not expressed it, and your lordships cannot put it in words simply because you may have some suspicion that in making his testamentary disposition that was the intention in his mind." This is perhaps as strong a statement as can be found against devise by implication, unless perhaps,—and we close quotation on this topic with the language in this case,—it is the language of Sir H. Cotton, referred to in 1 Jarman on Wills [5th ed. pp. 535, 536], where Mr. Jarman says: "Sir H. Cotton pointed out the fallacy of a proposition urged at the bar in this case, and which sometimes of late has been heard even from the bench,—that, subject to the established rules, the duty of the court was to construe the will as a person of ordinary intelligence would do, and that no such person would doubt that in this case the testator intended the widow to have a life estate. 'Of course,' said the L. J., 'we are bound by the rules which have been established by the courts to enable us to say what the words used do mean. Subject to that, we are bound to construe the will as trained legal minds. And that differs from the mind of an ordinary person in this way, that even persons of ordinary intelligence not so trained are accustomed to jump at the conclusion as to what a person means by the words he uses, by fancying he must have

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done what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances; because, although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known to the testator are in their minds, or in evidence before them, or that the testator's mind was in any way constituted as regards the attention he paid to the rights and claims of the different parties dependent on him as their minds are constituted, or that he would have acted in the same way as they. Therefore, as lawyers, we must construe the will like any other document,' with one difference only, namely, that technical words are unnecessary in a will."

These cases have been selected as the clearest statements of the law for and against devises by implication. A multitude of other cases have been cited by learned counsel on both sides, every one of which has not only been read, but carefully studied. Out of all this mass of learning, the true purpose should be to derive some general principles supported by settled authorities for our guidance in the construction of this will. If any one thing can be evident, after the review of the authorities, it is what Sir William Jones said more than two hundred years ago, that "no will has a brother." Every will must be determined upon considerations pertaining to its own peculiar facts and terms alone. One of the propositions most earnestly insisted on by the appellant is that, where there is a bequest to a person, and if he shall die without having children living at his death, then over, this does not raise an implied gift in the children, but that the parent takes an absolute interest defeasible on his dying without having had, or without leaving, a child, as the case may be. This is quoted from Jarman on Wills, 6th Am. ed. vol. 1, 555, 556. Mr. Jarman states that the reason of this construction is that the rejection of the implication in such a case is not productive of any absurdity, for, says he, "It supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children he shall have the means of providing for them," and this rule is thus stated in all the text writers; but that is the case of the first taker taking the absolute interest, and not any less interest. It is like the case Dowling v. Dowling, supra, and it is also like the case of Boling v. Miller, 133 Ind. 602, 33 N. E. 354, and the very important case of Baker v. McLeod, 79 Wis. 534, 48 N. W. 657, the opinion being by the very learned Judge Cassoday, in the course of which Judge Cassoday gives approval to the following quotation from the opinion of Judge Andrews in Vanderzee v. Slingerland, 103 N. Y. 54, 57 Am. Rep. 701, 8 N. E. 249, which we also heartily indorse, to this effect: "It may be safely assumed that, where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate for the benefit of collateral objects." We think this announcement of Judge Andrews is the announcement of a great and correct legal principle, to which too much heed cannot be given; and in the case of Re New York, L. & W. R. C. 105 N. Y. 89, 59 Am. Rep. 478, 11 N. E. 492, the provision of the will was this: "I direct that in case my daughter Minnie should die without issue, that my real and personal property should be possessed and enjoyed by my husband . . . and my sister . . . during their natural lives, and after their death, the said real and personal property to be divided equally between my [four] brothers [naming them] . . . share and share alike. The devise over to my husband, sister, and brothers to depend upon the contingency of my daughter Minnie dying without issue." The court held that Minnie Van Zandt took under her mother's will a base or conditional fee, defeasible on her dying without leaving issue living at the time of her death; that her issue, should she leave any, would take by inheritance from her, but that a conveyance by her in her lifetime would be effectual as against her children. We call especial attention to this case as being also identical with Halsey v. Gee, 79 Miss. 193, 30 So. 604. Minnie took an absolute interest, defeasible upon the contingency named, not a life estate. In the case of Cassell v. Cooke, 8 Serg. & R. 268, 11 Am. Dec. 610, the testator devised to his son, George Stuart, a plantation as soon as he arrived at the age of twenty-one, not saying what interest he gave, but giving generally, and then adding, "If my son George Stuart be removed by death before he be of age, his part to fall to my two daughters." It was held that George took an absolute interest defeasible upon his dying under twenty-one, and this strong language is used in the opinion of the court: "The whole doctrine of the effect of the words, 'If he should die under twenty-one,' is fully stated." In Frogmorton ex dem. Bramston v. Holyday, 1 W. Bl. 535, 3 Burr. 1618, it clearly appears that the giving over on a dying before twenty-one shows an intention that, if the party attain twenty-one, he shall have a fee simple, and this

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case is approved in Busby v. Busby, 1 Dall. 226, 1 L. ed. 111, as a leading one, on the general doctrine of a devise by necessary implication: "Let any man ask himself this question: 'What did the testator mean when he said if my son George be removed by death before he be of age, his part to fall to my two daughters?' His answer most assuredly would be, he intended by these words that if he arrived at that age he should have the power of disposing of it as he pleased, and, if he died without disposition, leaving heirs, it should descend to them; that the limitation over depended on one contingency,—his death within age. This is not a construction by conjecture, but one arising from the words themselves on the most necessary implication." The last four cases are of very great importance as settling the point as stated, where the first taker takes an absolute interest; and it is upon the principle announced in these four, supra, that Halsey v. Gee, supra, rests. The interest there given to the first takers was general and absolute, defeasible, however, upon the happening of the contingency named. There was not there any life estate, or any less estate than an absolute one, defeasible, however, as stated. Halsey v. Gee is perfectly sound on that principle, but it is not a case proceeding at all upon the line of decision with the two Tennessee cases, so much relied on by appellant, of Nott v. Fitzgibbon, 107 Tenn. 54, 64 S. W. 26, and Owen v. Hancock, 1 Head, 563.

But in this will, the one thing that stands out clear and distinct and unmistakable—the mountain in the landscape of the will, so to speak,—is the express and positive direction, thrice repeated in the will, that Julia shall not have anything beyond a life estate, either in the half first devised to her, or the half she was subsequently to take from her mother; that one paramount purpose dominates the whole structure of this will, and to that purpose all else must be made to bend, so that it is idle to cite authorities as to what would be the construction had Julia taken an absolute interest. It is perfectly clear that she cannot take under this will, either by descent or by purchase, any fee of any kind. It was the clear purpose of the testator to limit her, at all events, to a life estate. The very reasons urged with so much ingenuity and force by the learned counsel for appellant to show that the testator had an overshadowing fear of Julia's husband ever becoming possessed, in any manner whatever, of any interest whatever in the estate devised to Julia, furnish, themselves, the strongest ground for holding that Julia should have only a life estate, should never take a fee either by descent or by purchase, and should never have the life estate that she had, enlarged by construction into a fee upon the birth of issue. So to hold would be absolutely to nullify the paramount provision of the will limiting Julia strictly to a life estate. What, then, is the law where the first taker, like Julia, gets only a life estate? Mr. Jarman says, in the passage above quoted, on page 556, in the first volume of his great work, as follows: "And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication; it is extremely probable that the testator intended a benefit to them; but *si voluit non dixit*. But it seems that in such a case the court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent. Thus, where a testator, having by his will bequeathed £1,000 to his niece A by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said £1,000 independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, and at her decease, without child or children, the principal and interest to be divided among such of her sisters as should be then living. Sir T. Plumer, V. C., was of the opinion that by the combined effect of the will and codicil he was justified in saying that the children took the legacy by necessary implication." And this rule has been steadily followed in many cases of great consideration; as, for example, in the case of Sturges v. Cargill, 1 Sandf. Ch. 318, where the court held that there the language of the will necessarily confined the interest of the parent to his life. The courts, in construing wills, will lay hold of slight circumstances to raise a gift in the children to avoid imputing to the testator the extraordinary intention of giving the property to the devisee over, and leaving the issue of the tenant for life unprovided for. In that case Cargill, by his will, after providing for his wife, divided his real estate into five equal parts. He gave one of these five parts to his executors in trust for the use of the wife of his son Henry during her life, and on her death the estate was to descend to Henry's children. The other four portions were given for the use of four other children. Now, it

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happened that Jane, at the date of the will, the wife of Henry Sturges, the son, had a large family of children, and because the will clearly showed the intention to be to deal with all alike, and there was an absence of any reason for cutting off Jane and Henry's children, it was held that the trustees took in trust for Jane for life, with remainder to her children; the court working this intention out of nothing but the mere environment of the parties and the general frame and scheme of the will. This case does not seem to be referred to by either side of the briefs.

The case of Kinsella v. Caffrey, 11 Ir. Ch. Rep. 154, is exceedingly strong for the devise by implication, as is the case of Re Vowers, 113 N. Y. 569, 21 N. E. 690, and Aspy v. Lewis, 152 Ind. 594, 52 N. E. 756. The case of Langston v. Langston, 2 Clark & F. 194, is also a case of the strongest sort for the devise by implication.

What, now, are the considerations or circumstances which the court in this case should look to as showing, since Julia's estate was limited strictly to life, a remainder in fee by implication in the children of Julia? Some of them are as follows: First and chiefly, that Julia's interest was limited strictly to her life. This we regard as controlling in the construction of this will. Second, there was an exclusion, by the terms of this will, of all the marital rights of any husband that Julia might have, and especially an exclusion of any right he might have to inherit through the death of any child of his and Julia's. It would have been far more likely, on the doctrine of probabilities, that such husband might inherit from such child if Julia should be held to take a fee in any view, than if she should be limited strictly to a life estate, and the children should only take the fee absolutely after they became of age or married. The father would be much more likely to have died when this latter period came around than while Julia herself might live. Again, the fact that Hunt, by his will, provided that Bettie Hunt Selden, if Julia died without child, or if such child died before marriage or before coming of age, should take the limitation over; and he made the same sort of ulterior limitation as regards Julia Moore Driver, the other ulterior limitee. The carefulness and solicitude and anxiety manifested by Hunt to dispose of his estate, not only for life to Julia, but to provide three ulterior destinations in certain contingencies named, signalize his set purpose not to die intestate as to any part of his estate, and, consequently, his necessarily involved purpose that Julia should never take a fee of any sort of inheritance or purchase from him. And unless there was a limitation by implication to the children of Julia, then upon the coming of age or marrying of any such child, which would cut off the ulterior limitation to others, there would result necessarily an intestacy as to the remainder in fee, and Julia would, of course, take that by descent, and not as a purchaser under the will. This cannot possibly be the proper construction of this will; for in that case there would be nothing to prevent the husband from inheriting from Julia, which was most sedulously and stringently guarded against by this testator. It is said by the learned counsel for appellant that this will must have been drawn by a skilful lawyer, learned in the law of wills. We confess that a most careful study of this will has brought us to the exactly opposite conclusion. We think it is manifest that this testator thought when he wrote the will—it is a holographic will—that Julia's husband would have curtesy somehow or other in the estate she took. He could not have had any curtesy in a life estate, of course, and yet he certainly thought so, and attempted to provide against it. Nor could he have had any curtesy in a determinable fee.

The very essential nature of an estate by curtesy forbids any such view of the law. Again, it is manifest that it was the testator's thought that he could limit the right of the father of the children to take by inheritance from them. This is a thoroughly erroneous view, and yet he entertained it, as witness the provision that he should not inherit through the death of any child, etc. Again, it is impossible to read this will without seeing that it was the manifest purpose of the testator to dispose of his whole estate, and not die intestate as to any part thereof. He did not intend that Julia should take anything by inheritance from him arising out of any partial intestacy. It is to be remembered that the rule laid down by Judge Andrews in 113 N. Y. 569, supra, is strong to show that, where the limitation is over to a third person not related to the testator in blood, it is safely to be assumed that he did intend to preserve his bounty for his own blood, if that construction can reasonably be indulged. If the children of Julia were not intended to take a fee in remainder by implication, manifestly this estate went to strangers to the blood of Hunt, the testator. It must also be kept carefully in mind here that the limitation is not simply over to third persons on the default of children, but on that default plus the other contingency, that such children should die under twenty-one years of age or before they marry,—two contingencies in fact. Less than this was

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held in Kinsella v. Caffrey to raise the estate by implication.

It is earnestly argued by learned counsel for appellant that under the decisions of the supreme court of Tennessee, to be noted later, there was a devise here by implication, but that that implied devise is not of the remainder in fee to the children, but of a fee to Julia; that is to say, that, upon the birth of issue, Julia's life estate was, by implication, enlarged into a devise in fee. And it is urged, which is true, that the courts will go further in implying a devise of an added interest to one to whom some interest has already been devised, than they will to imply a devise, or, as it is said, create a devise in one to whom nothing had been previously devised. This abstract legal proposition may be conceded, but the complete answer to this line of argument is that if the court is driven, in this case, to imply some devise to Julia, it should most assuredly imply a devise in harmony with the perfectly plain, paramount purpose of limiting Julia strictly to a life estate, which devise would necessarily then be a devise of the remainder to the children of Julia. Assuredly, in the face of the thrice-repeated purpose to limit Julia to a life estate, and in the face of the most anxious purpose to exclude the husband from any possible interest in his estate through the children or through Julia in any manner whatever, it would be a most extraordinary construction, and a most flagrant perversion of the purpose of the testator, to hold that there is an implied devise here to Julia of a fee upon the birth of issue. It must be kept in mind that this will does not stop with giving the estate to Julia for life, and, if she dies without issue, over to Bettie Hunt Selden, but it was essential that the children should die under age, or not marry.

It is earnestly insisted by the learned counsel for appellant that the only mention of Julia's children in this will is by way of prevention of inheritance by Julia's husband of property, either through them or lack of them; and counsel stresses as the great controlling purpose of this will the idea that the husband was never, under any circumstances, to take any interest in any way. It is undoubtedly true that this was a leading purpose of the will, but it is just as clear that the testator's mode of effecting this was to limit Julia's estate to life, and leave the children to take the remainder in fee by implication. The one dominant thought in the will is the limiting of the estate Julia takes to her life strictly. If she should die without children, the husband could not then take, because the fee went over to ulterior limitees most carefully provided for. If Julia had children who arived at age or married, which was the event which took place in this case, while no express gift is made to these children, it is incredible that the father should intend to strip them of any interest as soon as they should marry or come of age. This cannot be a sound construction. We think the learned counsel for appellant has too much stressed the anxiety of the testator to cut the husband out, in what they have to say about his curtesy in his wife's estate, and about inheriting from his children. These are mere blunders as to what the law was on the part of this testator.

There is a principle of law, as correctly stated by learned counsel for appellant, that the courts will more readily sustain a devise by implication to children upon arriving at age or marriage, where some beneficial interest had been given them during minority, than where no interest of any kind has been given them. Authorities are cited to this principle, and it is a sound principle within proper limitations, but it must be carefully guarded in its application to the terms of each particular will considered. It is very likely to be overstressed in the case of a will where it is plain that the children are mentioned in merely stating a contingency, upon the happening of which the devise over will take effect. Of course, wherever this last sort of provision clearly appears, there cannot possibly be any devise by implication; but where the devise by implication is to be maintained, or not, upon nothing but the naked test whether any interest is express and given to the children during minority. it is a test of exceedingly dangerous and delicate application; and it will be found, on a careful examination of authorities, that a devise by implication to children on arriving at age or marriage is maintained in many cases where there is nothing in the will to show any present interest devised to them, equitable or legal, during minority, such implication in such cases being worked out by the court as the plain result of the whole scheme or frame of the will of the testator.

We have most carefully and anxiously weighed the three expressions in the will from which learned counsel for appellant argue the implication must be derived, if it is derived at all, and, whilst the reasoning is exceedingly ingenious and well supported as to the abstract principles announced, it is clear that, looking to the frame of this will, its manifest scheme and design and purpose as a whole, there is discoverable upon its face the purpose to benefit these children, and there does arise a necessary implication of a remainder in fee in these children. Finally, the learned

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counsel for appellant most earnestly insist that the intention of this testator must be ascertained from the decisions of the supreme court of Tennessee, the state of the testator's domicil, and the learned counsel for appellees apparently concede this contention in its entirety. The rules of construction and interpretation are very accurately set forth in volume 22 of Am. & Eng. Enc. Law, 2d ed. at pages 1366 et seq. The land in this case is in the state of Mississippi. Nothing can be better settled than that the title to real estate is governed solely by the law of the place where the property is situated, but it is said correctly on page 1367 (b), as follows, touching the particular rule involved: "Where the inquiry is directed solely to the ascertainment of the meaning and intention of the testator from the language employed by him in the will," the *lex domicilii* controls. In note 3 to this section it is said, referring to the principle that the title to real estate given by will is governed by the law of the place of the situs, that a different rule seems to obtain in Mississippi, since there it was held in Cruso v. Butler, 36 Miss. 173, that "the nature, obligation, and interpretation of the instrument, and the rights and powers arising under it," must be determined by the law of the domicil. This is a just criticism of this case, in so far as the words "rights and powers arising under the will" are concerned, for the court evidently mixed the two rules of construction in that inaccurate language. In volume 30 of Am. & Eng. Enc. Law, 2d ed. at page 662, it is said: "It is also the legal, not necessarily the actual, intention, which governs." This is a confusing and misleading statement, as the authorities cited show. The principal case referred to under this citation is the case of Martindale v. Warner, 15 Pa. 471. That case was just this: The testator made a will by which he devised the remainder of his estate to two brothers as residuary legatees, and they both died before he did, leaving children. At the time of the making of this will the law was that these residuary legacies lapsed, and did not go to the children of the residuary legatees. But the legislature passed an act, after the will was made, on May 6, 1844, changing the rule so that the children would take. The testator lived long after this law was passed. This law on its face provided that it should apply only to wills made after its passage, and the court held, of course, that the law in force at the time of the making of the will governed. The court said, on page 480: "I do not put the case on the actual intention of the testator, but on his legal intention, which is the only safe rule. That the testator permitted his will to stand without alteration for several years, or that he may have known of the act of 1844, is nothing. It is a question of construction, depending on certain fixed principles, which ought not to be varied by fancied speculations as to the knowledge or ignorance of testators, some of whom may, or others may not, know of the statute and its legal construction." It is perfectly obvious that all that the court meant in this case, and that all that the court meant in the Crusoe Case, and in the other three Mississippi cases cited, and in all cases announcing this particular principle about the difference between legal intent and actual intent, is, as stated in the passage above cited from volume 22 of Am. & Eng. Enc. Law, that where the inquiry is solely to ascertain the intention of the testator from the language employed by him in the will, what the courts of the state of his domicil have said those words will mean will control. What the courts will concern themselves about, wherever a will is under review, is the ascertainment of the testator's actual intention; what he himself meant, not what the law presumes him to have meant. In strict reasoning, a testator can have but one intent,—his own actual intent. To speak of a testator's legal intent is strictly a solecism; there is no such thing. So that, when it is said that a testator's legal intent is to be gathered from the decisions of the court of his domicil, nothing more is meant than that whatever his actual intent may have been, if he has used in his will certain technical terms to which the courts of his domicil have attached a crystalized and settled judicial meaning which has become a rule of property in that state, then such will, wherever it comes under construction in other states, will have the same meaning given to those technical words which the courts of his domicil gave them. That is absolutely what this phrase "legal intent" means, and this rule about the legal intent being governed by the courts of his domicil means. In truth, we should not speak of anything but the testator's actual intent, for that is all the testator ever had, so far as he is concerned. If that intent violates no law, it stands; if it violates the law, the will fails; unless the legislature has arbitrarily said, or the courts have by long construction said, notwithstanding his actual intent, a certain meaning shall be given to certain technical terms which he has used, which meaning shall save the will, although it may result in a different disposition from that which he intended. This principle finds no better illustration than in the now long-settled rule of construction, flowing from

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legislative enactment, that the words "children," "heirs," etc., which import at common law an indefinite failure of issue, shall not import an indefinite, but a definite, failure of issue, etc., making the words "issue," etc., mean issue, etc., living at the time of his death. In all such cases the actual intent was to create an estate tail, but the law, to save the purpose of the testator as far as possible, makes the failure of issue definite, and thus prevents an estate tail arising by construction. Now, this legislative declaration, followed by judicial construction, is what all these books mean by the legal intent, but it is plain that the phrase "legal intent" is a misuse of words, and that what is meant by the legal intent of the testator is simply the intent of the law; that is to say, the meaning the law imputes, whether the legislature or the courts, to the technical terms he has used in his will, not knowing their legal effect. In other words, where the testator has an actual intent that the law cannot effectuate, the law, in order to effectuate it as far as possible, gives to technical terms in his will a meaning that should save it so far as possible; but to call this construction of the law a legal intent of the testator is, as stated, purely and simply a solecism. There is no such thing as the testator's legal intent in this sense; so that the rule invoked by learned counsel for appellant means nothing more than that where, in a will, a testator has used certain technical terms, which terms have acquired, in the domicil of the testator, a fixed and unchangeable meaning, thus becoming a rule of property, these terms in such will, in whatever state the will is up for construction, shall be given, in the interpretation of the will, the meaning that would be given them by the courts of his domicil. The United States Supreme Court well said in Smith v. Bell, 6 Pet. 68, 8 L. ed. 322: "The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly 'that cases on wills may guide us as to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always looks upon the intention of the testator, as the Polar Star, to direct them in the construction of wills.'"

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Now, the two cases cited from Tennessee, Owen v. Hancock, 1 Head, 563, and Nott v. Fitzgibbon, 107 Tenn. 54, 64 S. W. 26, do not construe wills at all identical in their terms with the will under review here. What are those cases? Owen v. Hancock was this: A testator devised to his daughter, Mary Cooper, a negro named Celia during her lifetime, and, if she should die without any heirs born of her body, the said negro girl and her increase should return to his estate and be equally divided among the rest of his children. The first thing to be noted is that the words "heirs born of her body" are strictly words of entail, which would, under the old construction, create an estate tail; whereas, the words "children" in this will plainly seem the direct descendants; that is to say, the children only of Julia, and import a definite failure of issue. Second, in that case there was no ulterior limitation over to strangers to the blood of the testator; here, there is. Again, the court in that case expressly held that there was no difference as to raising the implication between the case where the first taker took an absolute interest, and where he took only a life estate. We have shown that this is not sound. The court reached the curious result in that case of first denying that there was any devise by implication of the remainder to the children of Mary Cooper, and yet, in the face of a positive provision that her interest was limited to her life, did raise a devise by implication of the fee to Mary Cooper, in the very face of the express declaration that she was to take only a life estate. However correct the result reached in that case, it seems to us it would have been far sounder, since an implication was to be raised, that there should have been an implication in favor of the children. In the case of Nott v. Fitzgibbon, while following the case of Owen v. Hancock, in another case where the estate was directly given to James Fitzgibbon for his life only, holding that this life estate in the son was enlarged by implication into a fee in the son, the court also proceeded to rest its judgment upon another line, which was this: It quoted from Machell v. Weeding, 8 Sim. 4, a devise to a son for life, and if the son should die without issue, then over, and approved an announcement from that case to this effect: "That whether an estate be given in fee, or for life, or generally without any particular limit as to duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail;" and the court actually held, as we understand it, that because the devise to James Fitzgibbon provided for a devise over in case he should die without issue, that, therefore,

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that was the devise of an estate tail, and so it was converted under their statute into an estate in fee in the first taker, James, who might therefore lawfully alien the property, and this, too, although there was at the time a statute in the state of Tennessee like our statute construed in Middlesex Bkg. Co. v. Field, 84 Miss. 646, 37 So. 139, providing that the words "without issue" in such connection would mean without issue living at the time of his death, which legislative construction, of course, prevented the arising of an estate tail under the old rule. It is obvious that this decision, resting upon the old construction and ignoring the statute, can have no influence upon this will, where the limitation over is upon the death of the life tenant "without children, or if the children die unmarried and before the age of twenty-one," which expressions clearly import a definite failure of issue. They are words of purchase, and not of descent. They are not used interchangeably with the word "issue," as was the case in Jordan v. Roach, 32 Miss. 481. It is obvious that in both Owen v. Hancock and Nott v. Fitzgibbon, the Tennessee court held there was no intestacy, and did raise a devise by implication of enlarging the life estate into a fee. In this case it is clear that there is no intestacy from the whole frame of the will, but the implication from all the language in this will is as clear as can be of a remainder in fee by implication to the children. To hold here, on the terms of this will, that the life estate of Julia was enlarged into a fee, is to fly in the face of the positive declaration, thrice iterated by the testator, that Julia was to have only the life estate, and thus to make for the testator a will, instead of construing one that he did make.

One other observation is due to be made about the case of Nott v. Fitzgibbon, supra, which is that that case was not decided until years and years after the death of this testator, and could not possibly have been in his mind at the time of the making of his will; and with respect to Owen v. Hancock, supra, there are one or two very important things to be further said: First, the case of Owen v. Hancock cites 2 Powell on Devises, 602, 12 Law Library, 321. The whole context of this citation has reference to the subject of estate for life, where enlarged into an estate by implication. The author says: "It has long been settled that a devise to a person with a limitation over, in case he die without issue, confers an estate tail. But, according to some early cases, an express estate for life cannot be so enlarged into an estate tail by implication, on the ground that implication can only be admitted in the absence of, but never in contradiction to, an express limitation." Again the author says, to which we call special attention: "It is to be observed that where the terms of the devise over refer to issue living at the death, it has no effect in enlarging a prior estate for life to an estate tail. The only question in such a case would be whether they would raise an estate by implication in the issue living at the death." Now, this is the emphatic declaration of Powell in his work on Devises, in the very sections quoted by the supreme court of Tennessee in the case of Owen v. Hancock. It must be perfectly obvious, therefore, that the supreme court of Tennessee could not have meant to hold that where in a will the failure of issue is definite, and where the first taker is thrice limited to a life estate, such life estate in the first taker is by implication enlarged into a fee. The supreme court of Tennessee never has yet held that, and we do not think ever would. Indeed, in this very case of Owen v. Hancock, the supreme court says, 1 Head, 566: "A devise over after the death of the wife, or the arrival at age of a child, without expressly giving them any estate, would confer, by necessary implication, an estate for life or during minority." It seems clear, therefore, that the Tennessee authorities never have held what learned counsel for appellant claim, where the will made the failure of issue definite. For that reason, and two other reasons, they do not bind us: First, because the terms of the wills construed there are not identical or substantially like the terms of the will here, taking all its terms into view as we must; second, because the only effect of the rule in construing a will made by one domiciled in Tennessee, that we are bound as to the intent of the testator by what the courts of his domicil say, is that we are so bound not as to his actual intent, but as to what the technical terms he may have used in his will mean, where that meaning has been crystallized into a rule of property; whereas, here in this will, taking it as a whole, there is no room for the play of this doctrine of construction of the will from the meaning of technical terms. The actual intent of the testator here is plain that Julia shall take an estate for life only. There is here a manifest definite failure of issue, and there are other provisions of the will, to wit, the ulterior limitations over to strangers to the blood of the testator, and the provision seeking to cut out the husband, which are decisive against the view which is urged by the counsel for appellant.

On the whole case, it is clear from the entire frame of this will, looking at all its parts and giving every word its due force, that this testator intended these children

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of Julia to take a remainder in fee. The implication is necessary from the whole scheme of the will; no other rational purpose can be assigned to the testator; and this opinion is closed with the exceedingly striking and forcible and apt language of Lord Brougham in Langston v. Langston, 2 Clark & F. 194. In that case the scrivener had, by accident, omitted a line in the will providing an estate for the first son. It was conceded that no estate whatever was given by the terms of the will, and that the court could not reinstate the omitted clause. Lord Brougham, in delivering his opinion giving the eldest son an estate by implication from the construction of the whole will, among other things, said: "The third of the reasons is one which I cannot help feeling to be exceedingly powerful, and which, upon all the views I can take of this subject, presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artifically, and anxiously by the persons who penned this instrument; and yet that son, whose existence is to produce such an effect, to create such destruction, to deal about such havoc upon the whole of this will, is not, according to the construction set up by the King's bench and by the appellant, to benefit under it in the slightest degree. My lords, it is monstrous to suppose that any rational person could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was to be of no force, of no effect, of no value in his eyes, except to be used as an instrument of destruction; that he was only to be considered as the means of taking away the benefit of other parts of this instrument, and yet was himself to benefit nothing by that destruction."

This case has been argued with the most consummate ability by learned counsel on both sides. We acknowledge ourselves greatly indebted to them. The result is that, since the action of the court below in overruling the demurrer is in accord with the views herein expressed, the decree of the court below is hereby affirmed, and the cause remanded for an accounting.

OHIO SUPREME COURT.

WILLIAM HENRY BELL, Plff. in Err.,
v.
CITY OF CINCINNATI.

(80 Ohio St. 1, 88 N. E. 128.)

Municipal workhouse — management — governmental function.

1. By ¶ 20, § 1536-100, Rev. Stat. 1908 (§ 7, Municipal Code), a municipal corporation is authorized to establish, maintain, and regulate a workhouse therein; and by § 1536-677, Rev. Stat. (§ 141, Municipal Code), the directors of public service are invested with the management and control of such workhouse in behalf of the corporation, and in so managing and controlling said workhouse, the municipal corporation, through its directors of public service, acts in a governmental capacity, and not in a proprietary or business relation, to the inmates or persons in its employ.

Same — control of prisoners.

2. A person sentenced to the workhouse shall be kept and confined at hard labor therein, or if such labor cannot be furnished therein, such person may be employed elsewhere within the corporate limits, if so authorized by ordinance, and shall there be subject to the rules, regulations, and discipline of the workhouse until discharged, as provided in § 1536-370, Rev. Stat. 1908; and the performance of hard labor in a stone quarry under control of the corporation, within its limits, as an adjunct to the workhouse, is within the provisions of said section.

Same — guards — powers and duties.

3. Under the provisions of § 1536-375, Rev. Stat. 1908, the workhouse guards have such powers of policemen as may be necessary for the proper performance of the duties of their position, and while in the discharge of such duties are performing service to the public in aid of the enforcement of law and order.

Case Note. — Liability of county or municipal corporation for injury to one employed in or about a jail, prison, or other house of detention maintained by it.

The specific question here offered for discussion is confined to the liability of a municipality for injury to an employee, and does not include the question of liability for injury to an inmate of a jail or prison, whether or not such inmate is also compelled by law to engage in labor (upon that question, see note to Carty v. Winooski, 2 L.R.A.(N.S.) 95). Upon the precise question presented in this note there is but little authority, but that little is in accord with the conclusion reached in BELL v. CINCINNATI.

Thus, in Hughes v. Monroe County, 147 N. Y. 49, 39 L.R.A. 33, 41 N. E. 407, a county was held not to be liable for injuries received by an employee from a defective machine in an asylum which was maintained by the county in discharge of its duty as a political division of the state to care for its insane.

So, in Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695, recovery was refused for the death of an employee of a city, due to smallpox, which he had contracted while engaged in the work of tearing down an old pesthouse and erecting a new one in its place, upon the same site.

Headnotes by the COURT.
23 L.R.A.(N.S.)

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Same — revenue from labor — effect.

4. Such workhouse is not established, nor can it be legally managed and maintained, merely for profit, but as an agency of the state for the enforcement of its laws and the ordinances of the municipality; and it does not cease to be a public or governmental agency because some revenue is derived from the labor of the inmates, where the revenue is applied, in most part, in payment of the expenses of its maintenance and operation. In such case the revenue is incidental to the main purpose.

Municipal corporation — workhouse — injury to guard — liability.

5. One employed and acting at the time as a guard of prisoners working in a stone quarry within the corporation, and who is injured by explosion while attempting to remove the lid of a box of percussion caps to be used in setting off a blast in the quarry, cannot recover damages of the municipal corporation for injuries sustained by the explosion.

(March 9, 1909.)

ERROR to the General Term of the Superior Court of Cincinnati to review a judgment reversing a judgment of a Special Term in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by **Price, J.:**

The plaintiff in the trial court, who is now plaintiff in error, alleges in his amended petition that on the 22d day of September, 1905, and for a considerable period before that, to wit, since July 6, 1903, he was in the employ of the city of Cincinnati as a guard at its city workhouse, on Colerain avenue, in the city, where he was employed to guard the prisoners that were incarcerated in said workhouse; that the city, through its duly authorized officers and agents, his superiors in command, on the 22d of September, required the plaintiff, as it had previously done, to assist in the employment of explosives at a certain stone quarry owned and worked by the city for profit, near said workhouse, and for some weeks prior to said date required the plaintiff to undertake the care, management, and conduct of explosives in said quarry, about which he had no knowledge or experience as to their composition or use, force, or dangerous qualities, nor did he realize the danger connected therewith, or in the handling or using the same in connection with the blasting of said quarry, where he was placed by the city.

He further complains that, without realizing or knowing the danger connected therewith, and without knowing the manner in which such explosives acted at different times and on different occasions, and without having acquired any knowledge with reference to the same, the plaintiff did as was directed by the defendant, and was present and undertook to comply with the orders of the city in working in said quarry up to, and at the time of, the injuries received, on September 22, 1905; and that the city, through its said officers and agents, had knowledge of the ignorance and inexperience of the plaintiff, and, further, that those whose orders he was bound to obey knew that plaintiff was ignorant of the danger in the use of said explosives, and that they did not warn or advise or instruct the plaintiff as to said dangers, nor did they instruct him how to handle or use the same, although they were well informed on the subject, having previously for a long time had charge of said quarry in excavating stone by blasting and other means, which stone the city sold to dealers and consumers for profit.

He further states that about half-past 1 of September 22, 1905, the plaintiff went down to the house where the city was in the habit of keeping its explosives, and there obtained from the powder house, so called, a box of caps that were used in the causing of explosions in the quarry; "that taking this box of caps, without knowledge as to how they were made, of what they were composed, or how they would act or explode, and in fact being ignorant altogether of the dangerous character of same, this plaintiff, in undertaking to do the work assigned to him to be done by the defendant city, took said box of caps in his hands, and attempted to open it for the purpose of getting therefrom caps to be furnished to the men who were so engaged in said blasting, and thereupon, as he removed the lid, or undertook to remove the lid, from said box of caps, the same exploded in his hands, without any fault or negligence on part of this plaintiff, who tried to remove the cover or lid as he had supposed was the right way to do the same, when said box of caps exploded, there being one hundred caps in said box, and the same exploded simultaneously." The plaintiff then avers the caps were put in the said powder house by the city for the purpose of blasting in the quarry; that plaintiff's duty required of him to go to the power house to get such box of caps, and remove the lid, and give the caps to those engaged in blasting in the quarry.

The explosion of the caps blew off one hand, lacerated the other, put out one eye, and inflicted other terrible injuries described in the petition, which caused permanent disability and great bodily suffering, for all of which he prays damages in the

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sum of $25,000. During the progress of the trial, an amendment to amended petition was filed by leave of court, setting up that plaintiff was totally disabled, and always would be, that he had earned $1,000 a year prior to the injury, and that he will never be able to earn anything hereafter. A demurrer to the amended petition as amended was filed and overruled. The city excepted. The defendant refiled its answer, in which it admits its character as a municipal corporation, that when the plaintiff was injured, he was employed by the city, and that he sustained some injuries. All other allegations are denied.

The balance of the answer being of vital importance, it is here copied in part: "For a further defense this defendant says that under the laws of Ohio it maintains a workhouse in said city for the imprisonment at hard labor there, or elsewhere in said city, of those prisoners duly sentenced by the courts to perform hard labor as punishment for offenses committed against the laws of the state and the ordinances of municipalities. Said hard labor as punishment for said offenses is provided by said city in various forms and places; some of said prisoners being required to labor in factories in the workhouse, others in general labor about the workhouse, and others working at hard labor in the quarrying and blasting of stone in the workhouse quarry near said workhouse, which is provided by the city as a place where said prisoners may work. That in performing the work of quarrying in said quarry, and as part of the said hard labor of said prisoners, blasting operations are necessary in which explosives and dynamite and powder, together with caps, fuses, etc., to explode the same, are used. This defendant provides said place of quarrying and blasting for the labor of said prisoners in the workhouse, and the explosives, caps, fuses, etc., incidental to said labor, and maintains the said institution, and the labor of all prisoners committed thereto, under the authority of the laws of Ohio, and in the exercise of this defendant's public and governmental powers and duties as a municipal corporation and agency of the state of Ohio, which are conferred upon this defendant by the laws of said state. This defendant, in providing said form of labor for said prisoners, employs guards and attendants to supervise and control said labor, quarrying operations, and the explosives needed in blasting; and prior to the time of the plaintiff's injury this defendant employed the plaintiff as a quarry sergeant, whose duty was to command the squad of prisoners and the guards connected with them, while said prisoners were engaged in the operations of quarrying and blasting, and whose duty was also to take charge of, at said quarry, and regulate the use of, all explosives, caps, fuses, etc., used in the performance of said labor by said prisoners. At the time plaintiff was injured he was the quarry sergeant or guard in charge of the prisoners at said workhouse quarry, who were being required to perform hard labor therein by this defendant; and the work of the plaintiff in handling explosives, caps, fuses, etc., and supervising said prisoners in quarrying blasting operations, was being performed, at the time of the plaintiff's accident, as a part of the duties and powers of this defendant of a governmental and public nature, conferred upon this defendant as an agency of the state by the laws of the state of Ohio."

For further defense the city alleges, in substance, that plaintiff was guilty of contributory negligence which caused his injuries, in that, at the time he was injured, plaintiff was a quarry sergeant or guard, duly appointed as such by the board of public service of the city, which had charge of the workhouse, and his duties required him to take to the workhouse quarry, on Clifton avenue, a squad of prisoners who worked in the quarry, to supervise them during their work, and to take charge and supervise and handle the explosives, caps, fuses, etc., which were used in said quarry in blasting operations; that when he was injured he was, in the course of his duties, in the act of opening a box of caps which were used in exploding blasts, and that well knowing their explosive nature, and that they needed careful handling, did not use due care for his safety, but attempted to remove the lid of said box by severe blows of a hammer, or other instrument, with unnecessary force and violence, which caused the explosion. It is further alleged that it was one of the terms of his contract of employment as quarry sergeant that he take care of the prisoners at work, but to have control and charge of the explosives and caps, etc., which were to be used in quarry operations, and that plaintiff, well knowing the danger incurred in handling the same, assumed the risk of injury incident to the handling thereof. The reply denied all allegations in the answer, save the admissions therein made. On these issues the case was tried to a jury, and at the close of plaintiff's evidence the city moved the court to direct a verdict in its favor, which motion was overruled. The defendant introduced its evidence and rested. There was some evidence in rebuttal. The defendant thereupon again moved the court to direct a verdict in its favor, which was overruled. Exceptions were saved as to the ruling on each

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motion. The court refused to give some of the special charges submitted by defendant, to which exception was taken. The defendant also excepted to certain parts of the general charge. The jury found for the plaintiff, and assessed his damages at $12,500. Motion for new trial was overruled, and judgment rendered on the verdict.

The case was taken on error to the general term, and the judgment of special term reversed, for the following reasons, among others, shown by the record: (1) The court below should have granted the motion of defendant, made at the close of the evidence offered by plaintiff, to direct a verdict for defendant, and should also have granted the motion of defendant below, at the close of all the evidence, to direct a verdict for defendant. (2) The court erred in its general charge, in leaving to the jury as a question of fact whether the act of the city was in the exercise of a governmental or ministerial duty, and in failing to lay down a rule to guide the jury in determining the quality of the act of the city. Having so found, the court not only reversed the judgment of the special term, but rendered judgment for the defendant, dismissing the petition of the plaintiff as amended. The case is here on error, to reverse the judgment of the general term.

Messrs. Charles W. Baker and Thorne Baker for plaintiff in error:

Messrs. Edward M. Ballard and **Dudley V. Sutphin**, for defendant in error:

The city, in managing and operating the workhouse, was in the exercise of a governmental function, and the rule of *respondeat superior* does not apply.

Clodfelter v. State, 86 N. C. 51, 41 Am. Rep. 440; Alamango v. Albany County, 25 Hun, 551; Bourn v. Hart, 93 Cal. 321, 15 L.R.A. 431, 27 Am. St. Rep. 203, 28 Pac. 951; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607; Nisbet v. Atlanta, 97 Ga. 650, 25 S. E. 173; Hughes v. Monroe County, 147 N. Y. 49, 39 L.R.A. 33, 41 N. E. 407; Moody v. State Prison, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131; Western College v. Cleveland, 12 Ohio St. 377; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Cincinnati v. Cameron, 33 Ohio St. 336; Robinson v. Greenville, 42 Ohio St. 628, 51 Am. Rep. 857; Frederick v. Columbus, 58 Ohio St. 547, 51 N. E. 35; Rose v. Toledo, 24 Ohio C. C. 540; Green v. Muskingum County, 23 Ohio C. C. 43; Alvord v. Richmond, 3 Ohio N. P. 136; Conner v. Cleveland, 4 Ohio Dec. Reprint, 302; Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Mc-Elroy v. Albany, 65 Ga. 387, 38 Am. Rep. 791; Culver v. Streator, 130 Ill. 238, 6 L.R.A. 270, 22 N. E. 810; Craig v. Charleston, 180 Ill. 154, 54 N. E. 184; Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; Worley v. Columbia, 88 Mo. 106; Woodhull v. New York, 150 N. Y. 450, 44 N. E. 1038; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Cunningham v. Seattle, 40 Wash. 59, 4 L.R.A. (N.S.) 629, 82 Pac. 143; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Brown v. Guyandotte, 34 W. Va. 299, 11 L.R.A. 121, 12 S. E. 707; Carty v. Winooski, 78 Vt. 104, 2 L.R.A.(N.S.) 95, 62 Atl. 45, 6 A. & E. Ann. Cas. 436; Gray v. Griffin, 111 Ga. 361, 51 L.R.A. 131, 36 S. E. 792; Eddy v. Ellicottville, 35 App. Div. 256, 54 N. Y. Supp. 800.

The workhouse was not conducted by the city as a private proprietor and for profit, as the element of gain from disposal of the products of labor was but an incident to the general power which was being exercised by the corporation.

Hughes v. Monroe County and Curran v. Boston, supra; Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; Frederick v. Columbus, 58 Ohio St. 538, 51 N. E. 35; Ulrich v. St. Louis, 112 Mo. 138, 34 Am. St. Rep. 372, 20 S. W. 466; Cunningham v. Seattle, 40 Wash. 59, 4 L.R.A. (N.S.) 629, 82 Pac. 143; Howard v. Worcester, 153 Mass. 426, 12 L.R.A. 161, 25 Am. St. Rep. 651, 27 N. E. 11; Western College v. Cleveland and Coldfelter v. State, supra.

Price, J., delivered the opinion of the court:

The trial court refused to direct a verdict for the defendant at the close of plaintiff's evidence, and also refused to direct such a verdict at the end of all the evidence introduced by the parties. The overruling of these motions for a verdict was held at general term to be error, and such error was one of the grounds for reversing the judgment rendered at special term. The plaintiff in error, Bell, complains of the holding at general term on this subject, and this condition of the record has imposed upon us the duty of considering the nature and effect of the evidence submitted to the jury. Did the court err in declining to direct a verdict when plaintiff rested his case? If not then, did it err in not sustaining the motion for the same purpose, made at the end of all the evidence? A proper determination of these questions does not involve

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the discussion and weighing of all kinds of testimony found in the record, such as goes to the character and extent of the very serious injuries received by the plaintiff when the box of caps exploded in his hand, the history of his connection with the Cincinnati workhouse, the duties cast upon its different officers and employees, and the subsequent history of plaintiff's wounds. We have not disregarded such evidence, but it is not necessary to a decision that it be made the subject of comment in this opinion. The important question raised in the record is, Who is responsible for the great injuries admittedly sustained? The solution of the question depends on the conduct and acts of Bell himself, attending the explosion, and also upon the capacity in which the city was acting in employing him and assigning to him his duties, in the discharge of which he claims he was injured.

On or about the 6th of July, 1903, he was made a guard in one of the shops of the Cincinnati workhouse. The workhouse is on Colerain avenue. There were various shops connected with it and inside the walls of the workhouse grounds. It was his duty to have charge and control of prisoners placed under his care, and to oversee their conduct at work, report misconduct to the foreman, and perform other duties incident to the position of a workhouse guard. In addition to these workhouse shops the city had control of a stone quarry on Clifton avenue, near Burnet Woods park, and about 2 miles from the city workhouse, but inside the corporate limits of Cincinnati. In about two years after Bell had been made a workhouse guard, and after having served that long in that capacity, he was made sergeant at the stone quarry, and entered upon the discharge of the duties of that office. The keys of the shed, called the powder house, were turned over to him, and he was in charge of the taking of prisoners from the workhouse quarters to the quarry, see that none escaped, and that they performed the tasks set before them, and returned them to prison in the evening.

In order to facilitate the work of quarrying stone, drilling and blasting were resorted to, and this work was under the supervision of Bell, and in the shed for which he held the keys, the powder, dynamite, and other high explosives for use in blasting, were stored. On the 22d of September, 1905, over two months after beginning service as quarry sergeant, he received the injuries complained of, while attempting to open a box of caps at the shed. These caps were to be used in making a blast in the quarry. The plaintiff asserts that he had received no instructions or warnings as to the dangerous and explosive character of these caps, and had no knowledge or experience on the subject prior to his injury, although the officers of the workhouse over him had such knowledge, which they should have imparted to him.

For the present we will not further consider the position and conduct of the plaintiff, and pass to a consideration of the capacity in which the city acted in employing this sergeant of the quarry, and the legal relation which the city sustained to the workhouse, and of course the quarry which was being used as a part of the workhouse. When plaintiff was employed as quarry sergeant and assigned to duty, was the city acting in a governmental or proprietary capacity? Was the workhouse—its various shops and the quarry on the hills,—being operated by the city government as a part of its governmental work under the statutes of the state—attempting to discharge duties to the public, made so by positive law? Or was it conducting a business for profit, making use of the workshops and the quarry to that end as an ordinary proprietor would do for personal or private gain? If the relation the city bore to the workhouse and quarry was governmental, and their operation and control were the exercise of governmental power, the city is not liable to plaintiff, even if he was injured through the neglect and want of care of some other or superior officer of the institution, where the statute creates no such liability. This has been held in numerous cases, such as Western College v. Cleveland, 12 Ohio St. 375; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Cincinnati v. Cameron, 33 Ohio St. 336; Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Frederick v. Columbus, 58 Ohio St. 538, 51 N. E. 35. We therefore proceed to learn the legal attitude of the city towards its workhouse and its prisoners, and this we gather from several sections of the Revised Statutes. Paragraph 20, § 7, Municipal Code (Rev. Stat. 1908, § 1536-100), invests municipal corporations with authority "to establish, erect, maintain, and regulate jails, morgues, houses of refuge and correction, workhouses, station houses, prisons, and farm schools," and the last clause of § 7 provides: "All municipal corporations shall have the following general powers (those named in ¶ 20 included), and council may provide, by ordinance or resolution, for the exercise and enforcement of the same."

The maintenance and control of workhouses devolve upon the directors of public service, as provided in § 141, Municipal Code, or Rev. Stat. 1908, § 1536-677. Section 1536-369 defines the persons who may be committed to a workhouse, and the following section provides that a person so

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sentenced "shall be received into the workhouse, and kept at hard labor therein, or if such labor cannot be furnished therein, then such person may be employed at hard labor elsewhere within the limits of the corporation where such employment shall be authorized by ordinance, and shall be subject to the rules, regulations, and discipline thereof, until the expiration of his sentence, when such person shall be discharged. . . ." Section 1536-371 provides for a cumulative sentence for second offenses by one having served a workhouse sentence, and § 1536-373 authorizes the board of public service to discharge a prisoner for good and sufficient cause. It also authorizes the board to establish rules and regulations as to parole of prisoners, their recapture and return to workhouse, etc. The next section prescribes the punishment for escape, or attempt to escape. There are other provisions of the statute directing the management and control of such institutions, but they are not essential to a decision of our question. Section 1536-375 provides that "the superintendent, assistant superintendent, and guards of the workhouse shall have such powers of policemen as may be necessary for the proper performance of the duties of their position."

These workhouse institutions, being under the control and management of the board of public service, are public institutions of the city; for the board of service is a branch of the municipal government, whose powers and functions are defined by the same sovereign legislative power that creates and limits the authority of the executive and legislative departments of a city government. In the execution of the powers conferred as to workhouses, and the performance of the duties imposed in caring for persons sentenced to perform labor therein, the municipal corporation is an agency of the sovereign state, in aid of the preservation of order and the punishment of offenders against the laws of the state and the ordinances of the corporation. Through such agency and others the state seeks to carry on its system of government, and enforce the laws, and to this end it has liberally parceled out its powers to municipal corporations as the most successful means of securing good government to the people. Applying these statutory provisions, and keeping in view their evident purpose, how stands the case at bar? The workhouse is one of the penal institutions of the state, and subject to its laws. The plaintiff, Bell, was an officer of that institution; and while he, as sergeant of the quarry, was there injured 2 miles from the workhouse proper, yet he was injured in the scope of the workhouse, for the quarry was being used for workhouse purposes. His claim is not stronger than it would be had he been injured in opening a box of caps within the walls of the institution down in the city. On this ground the city defends.

However, plaintiff in error would take this case out of the above rule and parry the force of such defense by the claim, as he asserts, that the quarrying of stone was a commercial or business enterprise; that the city owned and operated the quarry for profit; sold stone for macadam to contractors for building purposes in competition with other quarrymen, putting the profits in the city treasury, and for that purpose availed itself of the labor of workhouse prisoners in blasting and getting out the stone. The brief for plaintiff in error makes the very broad statement that "in operating this quarry, the city of Cincinnati not only provided work for inmates of the workhouse, but it sold the product of the quarry, namely, building stone that was gotten out, and also broken stone of various sizes, and all sold by the city to contractors for building and macadam, and, as to the smaller product, for surfacing streets. At the same time the city was leveling off some of its rough, hilly ground adjacent to one of its parks," etc. In support of such sweeping statement we would expect the facts to appear in the record with reasonable clearness; for the city denies ownership of the quarry, and the nature and extent of its title thereto we are unable to find in the evidence. The brief cites but two pages of the record as containing the facts on the subject,—pages 51 and 52. We have diligently searched the record for additional evidence to support the claim, and have failed to find any.

Turning to those pages, we find the examination of Mr. Bell, the plaintiff below, as follows:

Q. Mr. Bell, at this quarry, from the time you went there on the 5th of July, I wish you would tell these gentlemen what it was they got out of that quarry.

A. The quarried rock and the building rock was sold to the various builders, and the small rock was hauled down to the prison sheds, and the prisoners that was unable to walk to the hill, such as cripples, one-legged fellows, and one-armed fellows,—they were broken,—they hauled the rock down there for them.

Q. Broken up into what?

A. Broken up into four different sizes, very small size, little larger,—there was four different sizes of them. The largest size was rock macadam; were sold to people for driveways, and the smaller lots were pads—I don't know what they could use them for—driveways?

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It is upon this evidence that plaintiff relies to establish his claim that the city was acting in a commercial or proprietary sense, and not in a governmental capacity. We are not directed to any other evidence on the subject, and we find no other in the record.

We think this falls far short of sustaining the contention of plaintiff in error. There is no proof that the city owned the quarry; no proof as to the nature of its title, further than that it was in the management and operation of the quarry as a part of the workhouse. There is no evidence that one penny of profit was realized on the disposition it made of stone, if that be a matter of concern. In so far as the facts inform us, or fail to inform us, the receipts for stone sold would only part pay the expenses of keeping and guarding the prisoners while engaged in the quarry, and we will hesitate to believe that the city was engaged in a commercial enterprise, while it may have been endeavoring, so far as possible, to make the workhouse self-sustaining. All prison labor, including that performed in the state penitentiary, is utilized to pay the cost of maintenance, and in so doing, the institution—the state—is not engaged in a commercial enterprise for profit. We do not take issue with the cases cited by plaintiff in error as to the law, but he fails to furnish the facts to bring his case within any rule they lay down.

Great confidence is expressed in Toledo v. Cone, 41 Ohio St. 149, as sustaining plaintiff's contention, but it can be so distinguished from the case at bar that it is not a controlling authority here. That case, as submitted to this court and as reported, involved the sufficiency of the petition in stating a cause of action. There was no bill of exceptions brought up as part of the record; and as there was a verdict for the plaintiff in the trial court, the only question that could be reviewed in this court was whether the petition stated a cause of action that would support the verdict. This court held that a cause of action was stated. The petition, at length, appears in the statement of the cause, and it presents a cause of action signally different from the one relied upon in this case. While we do not question the soundness of the judgment of this court in that case, we are quite sure that it does not rule as the law in the instant case. A careful reading of the allegations of the petition is sufficient to mark the distinction we suggest. Here we have a case where the city, through one of its departments of municipal government, is enforcing or carrying out the sentences to the workhouse of not only persons convicted by its own police court and other local magistrates, but sentences of courts outside of Hamilton county, whose prisoners were sent to the Cincinnati workhouse to be punished. Surely, in enforcing judgments of such courts, the city acts in a governmental capacity, and in no sense in a private or proprietary relation. It was discharging public governmental functions, and the plaintiff, when he was injured, was a part of that government. In the brief of the city is a collection of many cases where the doctrine above announced is fully discussed. In general terms it is sufficient now to say that the sale of some of the products of the quarry was merely incidental to the main purpose of conducting the workhouse as a penal institution. The law in such case may be found in Hughes v. Monroe County, 147 N. Y. 49, 39 L.R.A. 33, 41 N. E. 407; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; Haley v. Boston, 191 Mass. 291, 5 L.R.A. (N.S.) 1005, 77 N. E. 888; Clodfelter v. State, 86 N. C. 51, 41 Am. Rep. 440. These cases cite many others of like force and character.

There is another view of this case that compels our attention. Aside from legal considerations in which we have indulged, has the plaintiff made out a case on his own evidence, and which was challenged as insufficient by the motion to direct a verdict? His counsel, in the brief, states the case as follows: "Just prior to the time Bell sustained the injuries complained of, . . . Wood (who was the regular man to handle the caps) left the quarry. It became necessary on this date to open a box of powerful percussion caps to fire a blast, and Bell in the discharge of his duty, attempted to do this. The box containing caps was like a blacking box, and the lid became wedged as it was half off. Bell, in his ignorance, inserted a thin strip of sheet iron under the raised edge of the lid to pull it off, and the explosion occurred, and Bell was horribly mutilated. . . ."

This statement is based on the testimony of the plaintiff, where he describes what he was doing when injured, as on pages 39 and 40 of the printed record.

When I took charge of the hill, this colored man found a box had a few caps in it; just how many I don't know. It was the first caps I ever saw; the first box I ever saw. And the day I went down to get this material to make that blast there were no more caps in the box, but the institution had bought a box of caps a few days before, and had put them in this magazine; and this was a round box, something similar to a 10-cent blacking box, as near as I can remember. I took it out, and tried to re-

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move the lid by twisting and pulling. The lid was very tight.

Q. Had you ever before that time opened a box like that?

A. I had never seen a box.

Q. Had you ever seen a box like that? When you went up there you found a box that had been opened with these few caps?

A. Few caps.

Q. But at this time had they been used?

A. They had all been used up.

Q. Tell the jury just exactly what you did.

A. Well, I tried to remove the lid, twisting it around that way, and the lid fit down to the shoulder, probably a half inch on the box, making it very hard to remove. I twisted the lid around until it got up to the top of the box on one side, and on the other side to the shoulder, in a way that I could neither push it back on or pull it off. So I reached over to the tool bench, picks up a little piece of—I couldn't say exactly what it was; it was a piece of sheet iron or something, a very light piece of material, and gets under the edge of this lid and pulled the lid off, and whatever caused the explosion I will never be able to tell you, but I made a pull or two at the lid, and the explosion came. Whatever caused it I will never be able to tell.

This is plaintiff's account of the transaction. Two or three witnesses testified that Bell picked up a small tack hammer and pounded the lid. But we accept his own version as the most favorable to his claim. He was a man of mature age, and had been at the quarry as guard for about two months, and knew that drilling for blasts and blasting the rock were common occurrences, and that in blasting high explosives were used, and knew that the caps like those he exploded were in common use to set off the blasts. On this occasion he was aware that some of these caps were needed to set off the blast, and he surely knew that the caps themselves were of an explosive character in order to be of practical use in making a blast. He says he knew nothing about the caps; that no one warned or instructed him in reference to the dangers of handling the caps, or in the way of removing the lids from the boxes. On the other hand, no one ordered or directed him to open the box. It was his own voluntary act, and he selected the manner of removing the lid. The method was entirely his own. While, perhaps, he did not know the danger of a mistaken method, it is evident that he did know that such percussion caps contain elements of danger, and he thought his course of removing the lid was a proper one. As no superior seems to have been present, and no one suggested his method of performance, it was of his own selection.

It seems to us that he failed to make a case on the facts, and therefore there was nothing to submit to the jury, and the trial court should, for this reason, as well as the first, have directed a verdict. Entertaining these views, it is not necessary to consider the charge of the court, or its refusal to charge, and the judgment of the court below is affirmed.

Crew, Ch. J., and Summers, Spear, and Shauck, JJ., concur.

OKLAHOMA SUPREME COURT.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN, Plff. in Err.,
v.
WILLIAM H. PRATER.

(— Okla. —, 103 Pac. 558.)

Life insurance — "serious illness."

1. The term "serious illness," as used in an application for a life insurance policy, means such an illness as permanently or materially impairs, or is likely permanently or materially to impair, the health of the applicant.

Same — application — warranties.

2. An applicant for a life insurance policy warranted in her application that her answers to the medical examiner, on the reverse side of her application, were "true and accurate," and that they should constitute the basis for the covenant. The policy recited that it was executed in consideration of the warranties made in the application, and that the application should be made a part of the covenant. Held, that the answers of the insured to the medical examiner were her warranties, and that a false statement made therein by her rendered the policy void.

Same — "spitting or coughing of blood."

3. The phrase "spitting or coughing of blood," as used in a question propounded by a medical examiner to an applicant for a life insurance policy, as to whether she had ever had "spitting or coughing of blood," means the disorder so called, whether the blood comes from the lungs or from the stomach.

(July 13, 1909.)

Headnotes by HAYES, J.

Case Note. — What constitutes "spitting or coughing blood."

The general rule to be drawn from the authorities would appear to be that the question as to spitting of blood, contained in applications for insurance, is intended to elicit information in regard to the health of the

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ERROR to the District Court for Love County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. **Smith & Hastings**, for plaintiff in error:

Where the application warrants the statements therein to be full, complete, and true, and the policy recites that it is issued in consideration of the warranties in the application, which is referred to and made a part of the contract, such statements and agreements become warranties.

3 Cooley, Briefs on Insurance, pp. 1935, 1936; Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401; Hoffman v. Supreme Council, A. L. H. 35 Fed. 252; Brady v. United L. Ins. Asso. 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727; Kelley v. Mutual L. Ins. Co. 75 Fed. 637; Hubbard v. Mutual Reserve Fund Life Asso. 40 C. C. A. 665, 100 Fed. 719; Mutual L. Ins. Co. v. Kelly, 52 C. C. A. 154, 114 Fed. 268; Standard Life & Acci. Ins. Co. v. Sale, 61 L.R.A. 337, 57 C. C. A. 418, 121 Fed. 664; Foley v. Royal Arcanum, 78 Hun, 222, 28 N. Y. Supp. 952, affirmed in 151 N. Y. 198, 56 Am. St. Rep. 621, 45 N. E. 456; Commercial Mut. Acci. Co. v. Bates, 176 Ill. 194, 52 N. E. 49, affirming 74 Ill. App. 335; Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230.

If a matter is specifically inquired about in an application for life insurance, the answers of the insured thereto are generally regarded as equivalent to an agreement that the matter is material; and a misrepresentation in such answers will avoid the policy, though they may not have been, in fact, material to the risk in that particular case.

3 Cooley, Briefs on Insurance, p. 1953; May, Ins. ¶ 185; Brignac v. Pacific Mut. L. Ins. Co. 112 La. 574, 66 L.R.A. 322, 36 So. 595; Cuthbertson v. North Carolina

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applicant as affecting his desirability as a risk, and is not meant to include mere trivial ailments not affecting his general health.

Thus, in Rupert v. Supreme Court U. O. F. 94 Minn. 293, 102 N. W. 715, the charge of the trial court was upheld, which in reference to the spitting of blood and other interrogatories as to disease, stated that when the questions propounded to an applicant as to her physical condition were in such terms as to include trivial ailments and injuries unconnected with any specific disease they should be interpreted as referring only to such ailments and injuries as affect the risk, unless they were in words to preclude such interpretation. "The presumption is that trivial ailments and injuries are not within the contemplation of the parties, and the words directing attention to them are not asked with a view or purpose of ascertaining the existence of the same, but what is the general condition of the health of the applicant." The defendant contended that the words should be given their broadest import, which the supreme court said led to folly and demanded the impossible, adding that under such a construction of the question as to spitting blood there could be no recovery, unless the applicant had enumerated the number of teeth she had had pulled.

And in Dreier v. Continental L. Ins. Co. 24 Fed. 670, in which it appeared that the applicant stated that he had never had the complaint of spitting or raising of blood, it was held that there was no warranty that he never had spitting or raising of blood, but only that he had not had the complaint of spitting or raising of blood; that is, a warranty that he had not had blood spitting in such form as to be called a disease, disorder, or constitutional vice.

And in Peterson v. Des Moines Life Asso. 115 Iowa, 668, 87 N. W. 397, it was held that the question whether the applicant had had any spitting or coughing of blood must be given a reasonable construction, which would limit it to such spitting or coughing of blood as a reasonable person might suppose to indicate some ill health or physical condition affecting the desirability of the applicant to the risk. "It would surely not be expected that the applicant should answer as to spitting of blood by reason of the extraction of a tooth or accidental biting of the tongue."

So, in Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381, the court said that the mere raising of a small quantity of blood with a cough in a single instance was not necessarily an indication of disease or a material circumstance, so that such an occurrence, however slight, during the previous life of the applicant, would make his negative answer a misrepresentation as a matter of law.

And in Singleton v. St. Louis Mut. Ins. Co. 66 Mo. 63, 27 Am. Rep. 321, the court said that there was something ambiguous in the term "spitting of blood," as used in applications for insurance, and therefore there was room for interpretation. "Literally, the meaning is spitting blood, whether from the teeth, gums, or lungs, but it would be absurd to hold that it was used in that sense in the application."—and added that no court would hold that spitting of blood in consequence of a drawn tooth or a cut on the gums was contemplated.

In Pudritzky v. Supreme Lodge K. H. 76 Mich. 428, 43 N. W. 373, the court did not think the defense well taken that the assured represented that he had never spit blood, when it was shown that, some eleven years before he applied for the insurance, he had had lung trouble, and had then spit

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Home Ins. Co. 96 N. C. 480, 2 S. E. 258; Fame Ins. Co. v. Thomas, 10 Ill. App. 545.

Mr. Robert E. Lee also for plaintiff in error.

Messrs. **H. C. Potterf** and **E. A. Walker**, for defendant in error:

The answers merely constitute representations which are no part of the contract of insurance.

Home L. Ins. Co. v. Fisher, 188 U. S. 726, 47 L. ed. 667, 23 Sup. Ct. Rep. 380; Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Washington L. Ins. Co. v. Haney, 10 Kan. 525; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; 25 Cyc. Law & Proc. p. 798; Higbee v. Guardian Mut. L. Ins. Co. 66 Barb. 463; Boehm v. Commercial L. Ins. Co. 70 N. Y. S. R. 881, 35 N. Y. Supp. 1103.

Warranties are statements in the policy, which, if untrue, will prevent the policy from attaching as the contract of the insurer. A representation is an oral or written statement, made by the insured to the insurer, of certain facts or conditions tending to induce the insurer to assume the risk by diminishing the estimate he would otherwise have formed of it. Warranties are always a part of the completed contract, while representations precede, are collateral to, and are not necessarily a part of, the contract.

Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Indiana Farmers' Live Stock Ins. Co. v. Byrkett, 9 Ind. App. 443, 36 N. E. 779; Commonwealth Ins. Co. v. Monninger, 18 Ind. 352; Hearn v. Equitable Safety Ins. Co. 4 Cliff. 192, Fed. Cas. No. 6,300; Hazard v. New England M. Ins. Co. 8 Pet. 557, 8 L. ed. 1043.

A misrepresentation operates merely on the ground of fraud; and if the representations are substantially true, it is sufficient. Statements made without intent to deceive will not, though false, avoid the policy.

Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am. Dec. 567; Wheaton v. North British & M. Ins. Co. 76 Cal. 415, 9 Am. St. Rep.

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blood. The authority of this case upon this point, however, is weakened by the fact that the medical examiner of the defendant was also the assured's family physician, and knew of the assured's condition, and assumed to write out the answer to the question upon his own knowledge of the facts, which the court held placed the defendant in such a position that it could not claim that the assured's answers were untrue.

But in Smith v. Ætna L. Ins. Co. 49 N. Y. 215, it was held that where it appeared that the assured had, some two years before making application for insurance, raised blood and consulted a physician about it, the fact that he answered "no" as to the question as to spitting of blood was a good defense to an action on the policy.

And in Foot v. Ætna L. Ins. Co. 4 Daly, 285, reversed on other grounds in 61 N. Y. 571, a policy of insurance was held to be avoided where the assured stated that he had never had spitting of blood, and it appeared that, about thirteen months before he applied for the insurance, he had had a slight hemorrhage which lasted, on and off, for two days, and that, four months thereafter, he had another hemorrhage, which lasted nearly ten days, during which he raised blood twice a day.

In Smith v. Northwestern Mut. L. Ins. Co. 196 Pa. 314, 46 Atl. 426, the question was, "Have you had the disease or disorder of spitting or raising blood?" and it appeared that a year prior to his application the assured had had a hemorrhage which caused him to consult a physician. It was held that, though he may have really believed that he had not had the disease or disorder, and that it might not have been at the time a disease with him as popularly understood, it was at least a disorder, and he was bound to give a full, true, and complete answer to the question.

And in Arnold v. Metropolitan L. Ins. Co. 20 Pa. Super. Ct. 61, a policy of insurance was held to be avoided by the representations that the assured never had spitting or raising of blood, where it appeared that, shortly before the policy was issued, he consulted a physician about spitting blood, though the spitting of blood may have resulted from the breaking of his ribs.

And in Geach v. Ingall, 14 Mees. & W. 95, one of the judges said that by the expression "spitting of blood" was no doubt meant the disorder so called, whether proceeding from the lungs, stomach, or any other part of the body, and that one single act of spitting of blood would be sufficient to put one on inquiry as to the cause of it. Another judge said that by "spitting of blood" must be understood a spitting of blood as a symptom of disease tending to shorten life, adding that "the mere fact is nothing,—a man could not have a tooth pulled out without spitting blood;" while the third judge said that if a man had spit blood from his lungs, no matter how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it.

This language from the case just cited was approved in Mutual Ben. L. Ins. Co. v. Miller, 39 Ind. 475, and it was held that, whether the hemorrhage proceeded from one cause or another, the applicant was bound to disclose it.

In March v. Metropolitan L. Ins. Co. 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100, it was held that an expectoration of blood which was so great as to amount to a hemorrhage could not be properly excluded from the meaning and operation of the general question, "Have you ever had spitting of blood?"

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216, 18 Pac. 758; Hazard v. New England M. Ins. Co. supra; Gardner v. Columbian Ins. Co. 2 Cranch, C. C. 473, Fed. Cas. No. 5,224; Behrens v. Germania F. Ins. Co. 64 Iowa, 19, 19 N. W. 838.

Hayes, J., delivered the opinion of the court:

This is an action on a policy of life insurance, in which defendant in error, plaintiff below, is the beneficiary. From a judgment in favor of plaintiff for the amount of the policy, plaintiff in error, defendant below, brings this proceeding in error. The policy was taken out by Elizabeth Prater, plaintiff's mother, on the 19th day of December, 1905, who died on the 17th day of February, 1906. The insurance order by its answer admits the execution and delivery of the policy and the death of the insured, but denies liability under the policy upon several grounds. Under the state of the record in this case it will only be necessary to mention and consider two of the questions raised in defendant's answer as defenses. It alleges, first, that Mrs. Prater, in her application for the policy, had stated that she had never had hemorrhage or inflammation of the lungs, spitting of blood, and had never been seriously sick, nor attended by any physician during any such serious sickness; that such statements were, by her application and the contract of insurance, made her warranties upon which the policy was issued; and that such statements were untrue. Second. That she had made the misrepresentations aforesaid, knowing them to be untrue; that they were material, and were relied upon by defendant when it issued the policy. The trial was to the court without a jury, who made a general finding for plaintiff. Under our view of this case it will be necessary for us to investigate the facts and the law to determine only whether there was a breach of warranty by the insured.

Some of the alleged misrepresentations complained of by defendant are in the application of the insured; others are in her answers to questions in the worthy physician's report on the reverse side of the application. There is no contention by plaintiff that the statements made in the application are not, by the provisions of the application and the policy, made warranties of the applicant; and we shall first ascertain whether there was any breach of warranty by reason of false statements made in the application. The following questions and answers occur in the application: "Q. Give date of last serious illness, month and year. A. Was never seriously ill. Q. What was it? A. Nothing. Q. Name and address of attending physician. A. None." In the month of August, 1904, deceased became ill one afternoon, and suffered from hemorrhage. She spit up much blood. A physician was called, and the physician who attended her testified at the trial that deceased was at that time very sick; that she bled profusely from the lungs; that her pulse ceased beating, and that she became cold and clammy; that life was almost gone; and that she coughed up blood at almost every breath. Other witnesses corroborate the attending physician's statement that decedent had a profuse hemorrhage at that time, and that her condition was alarming, and there is evidence that she continued in a state of impaired health from that date up till the time of her death, and that, subsequent to this illness, she was under the treatment of a Christian Scientist; but the evidence as to the severity of this illness is conflicting. Plaintiff testified that his mother recovered immediately and entirely after this illness. There is also evidence from other witnesses who lived at that time as neighbors of the deceased, who did not see her when she had the hemorrhage, but who saw her within a day or to thereafter, to the effect that she appeared to be in good health, and that in her appearance she bore no evidence of having suffered from a serious illness. There is further evidence to the effect that her health after this illness was better than usual until she was attacked by her last illness. On the other hand, there is evidence that, at the time of the hemorrhage, deceased was afflicted with consumption; that she continued to be so afflicted until her death; that her death was due to this disease; but this evidence is controverted.

On the conflicting state of the evidence as to whether the illness of the deceased during August, 1904, was a serious illness, it was for the jury or court to whom the case was submitted to decide. The question propounded to applicant did not require her to give information as to the last illness she had suffered, but the last serious illness. Not every illness is serious. An illness may be alarming at the time, or thought to be serious by the one afflicted, and yet not be serious in the sense of that term as used in insurance contracts. An illness that is temporary in its duration, and entirely passes away, and is not attended, nor likely to be attended, by a permanent or material impairment of the health or constitution, is not a serious illness. It is not sufficient that the illness was thought serious at the time it occurred, or that it might have resulted in permanently impairing the health. Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617. A cold may be, and sometimes is, followed by pneumonia, pleurisy, abcess of the lungs, and consumption; to to hold that, because a cold may

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be attended or followed by such consequences, it is a serious illness, and that a failure to mention such in response to an inquiry in an application for insurance as to the nature and character of any serious illness the applicant has suffered is a misrepresentation, would result in invalidating almost all contracts of insurance, the covenants of which are based upon the statements in the application as warranties; for, if a careful investigation should be made in the lives of persons insured, in almost every life there would be found some incident of illness of such ordinary occurrence and insignificance in its effect, yet of possible seriousness, which the applicant, without careful scrutiny and accurate recollections of his past life, has overlooked to mention. "A serious illness is a grave, important, weighty trouble." Brown v. Metropolitan L. Ins. Co. 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610. In the Century Dictionary it is defined to be "an illness attended by danger, giving rise to apprehension." In Caruthers v. Kansas Mut. L. Ins. Co. (C. C.) 108 Fed. 487 a negative answer of the applicant to the question as to whether he had ever had "any serious illness, constitutional disease or surgical operation" was held not a false representation which would avoid the policy as a breach of warranty because applicant once broke his leg, which was set and attended by a physician. "A sickness may be very bad and very sad, and yet not serious. Any permanent or material impairment of health" is a serious illness. Drakeford v. Supreme Conclave K. D. 61 S. C. 338, 39 S. E. 523; Illinois Masons' Benev. Soc. v. Winthrop, 85 Ill. 537. Upon the conflicting evidence as to deceased's condition within a day or two after the hemorrhage, and as to the condition of her health thereafter until her last illness, and the entire absence of any evidence that such loss of blood as occurred to her on that day was likely to result in permanent or material impairment of her health, the general finding of the trial court in favor of the plaintiff is conclusive against defendant as to the nature of that illness. Union Mut. L. Ins. Co. v. Wilkinson, supra; Hockaday v. Jones, 8 Okla. 156, 56 Pac. 1054.

The insured's answer that she was not attended by any physician was not false, for this question had reference to the physician who attended her during a serious illness, and was not intended to elicit from her information as to the name and address of the attending physician at the time of any other illness than inquired about by the preceding questions. That such was the intention of the parties is indicated by a subsequent question in the application, which reads as follows: "When did you last consult a physician, and for what?" On the reverse side of the application were the statements of the worthy physician who made the examination of the insured for the company, together with certain questions propounded by him to the insured, and her answers thereto. Among such questions and answers are the following: "Q. Have you ever had spitting or coughing of blood? A. No." That the answer to this question is untrue and inaccurate is shown by preceding statements herein as to the evidence in this case. Plaintiff, who testified in his own behalf, has not denied, but admits, that in August, 1904, a little more than a year before the application was made for the policy of insurance, his mother suffered from an attack of illness during which she spit up blood. Nor is there any controversy in the evidence that her coughing of blood at that time was in considerable quantity. The attending physician described her condition resulting from the hemorrhage as being dangerous and without hope of recovery; that the loss of blood "was sufficient to render the vessels of the extremity without any current," and "life was almost gone, and blood was being coughed up with every breath." This testimony of the physician is corroborated by other witnesses who were present, and plaintiff admits the coughing of blood, and that it was in sufficient quantity that he and the members of the family and the neighbors were greatly excited; that a physician was called; but, when asked as to the exhausted and weakened condition his mother was reduced to by the loss of blood, he stated that he did not remember. Counsel for plaintiff insists that the insured made said answer to the physician without intent to deceive, and that since the court, by a general finding, has found that the insured, at the time of her application and the issuance of the policy, was in sound, insurable health, the untruthfulness of this answer, if it is untruthful, is only immaterial misrepresentation. Plaintiff cites and relies principally upon the following cases to support his contention: Home L. Ins. Co. v. Fisher, 188 U. S. 726, 47 L. ed. 667, 23 Sup. Ct. Rep. 380; Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Washington L. Ins. Co. v. Haney, 10 Kan. 525. An examination of the facts upon which those cases are based will clearly distinguish them from the case at bar, and will show that they are not in point.

In Home L. Ins. Co. v. Fisher the statements to the medical examiner were not

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216, 18 Pac. 758; Hazard v. New England M. Ins. Co. supra; Gardner v. Columbian Ins. Co. 2 Cranch, C. C. 473, Fed. Cas. No. 5,224; Behrens v. Germania F. Ins. Co. 64 Iowa, 19, 19 N. W. 838.

Hayes, J., delivered the opinion of the court:

This is an action on a policy of life insurance, in which defendant in error, plaintiff below, is the beneficiary. From a judgment in favor of plaintiff for the amount of the policy, plaintiff in error, defendant below, brings this proceeding in error. The policy was taken out by Elizabeth Prater, plaintiff's mother, on the 19th day of December, 1905, who died on the 17th day of February, 1906. The insurance order by its answer admits the execution and delivery of the policy and the death of the insured, but denies liability under the policy upon several grounds. Under the state of the record in this case it will only be necessary to mention and consider two of the questions raised in defendant's answer as defenses. It alleges, first, that Mrs. Prater, in her application for the policy, had stated that she had never had hemorrhage or inflammation of the lungs, spitting of blood, and had never been seriously sick, nor attended by any physician during any such serious sickness; that such statements were, by her application and the contract of insurance, made her warranties upon which the policy was issued; and that such statements were untrue. Second. That she had made the misrepresentations aforesaid, knowing them to be untrue; that they were material, and were relied upon by defendant when it issued the policy. The trial was to the court without a jury, who made a general finding for plaintiff. Under our view of this case it will be necessary for us to investigate the facts and the law to determine only whether there was a breach of warranty by the insured.

Some of the alleged misrepresentations complained of by defendant are in the application of the insured; others are in her answers to questions in the worthy physician's report on the reverse side of the application. There is no contention by plaintiff that the statements made in the application are not, by the provisions of the application and the policy, made warranties of the applicant; and we shall first ascertain whether there was any breach of warranty by reason of false statements made in the application. The following questions and answers occur in the application: "Q. Give date of last serious illness, month and year. A. Was never seriously ill. Q. What was it? A. Nothing. Q. Name and address of attending physician. A. None." In the month of August, 1904, deceased became ill one afternoon, and suffered from hemorrhage. She spit up much blood. A physician was called, and the physician who attended her testified at the trial that deceased was at that time very sick; that she bled profusely from the lungs; that her pulse ceased beating, and that she became cold and clammy; that life was almost gone; and that she coughed up blood at almost every breath. Other witnesses corroborate the attending physician's statement that decedent had a profuse hemorrhage at that time, and that her condition was alarming, and there is evidence that she continued in a state of impaired health from that date up till the time of her death, and that, subsequent to this illness, she was under the treatment of a Christian Scientist; but the evidence as to the severity of this illness is conflicting. Plaintiff testified that his mother recovered immediately and entirely after this illness. There is also evidence from other witnesses who lived at that time as neighbors of the deceased, who did not see her when she had the hemorrhage, but who saw her within a day or to thereafter, to the effect that she appeared to be in good health, and that in her appearance she bore no evidence of having suffered from a serious illness. There is further evidence to the effect that her health after this illness was better than usual until she was attacked by her last illness. On the other hand, there is evidence that at the time of the hemorrhage, deceased was afflicted with consumption; that she continued to be so afflicted until her death that her death was due to this disease; but this evidence is controverted.

On the conflicting state of the evidence as to whether the illness of the deceased during August, 1904, was a serious illness, it was for the jury or court to whom the case was submitted to decide. The question propounded to applicant did not require her to give information as to the last illness she had suffered, but the last serious illness. Not every illness is serious. An illness may be alarming at the time, or thought to be serious by the one afflicted, and yet not be serious in the sense of that term as used in insurance contracts. An illness that is temporary in its duration, and entirely passes away, and is not attended, nor likely to be attended, by a permanent or material impairment of the health or constitution, is not a serious illness. It is not sufficient that the illness was thought serious at the time it occurred, or that it might have resulted in permanently impairing the health. Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617. A cold may be, and sometimes is, followed by pneumonia, pleurisy, abcess of the lungs, and consumption; to to hold that, because a cold may

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be attended or followed by such consequences, it is a serious illness, and that a failure to mention such in response to an inquiry in an application for insurance as to the nature and character of any serious illness the applicant has suffered is a misrepresentation, would result in invalidating almost all contracts of insurance, the covenants of which are based upon the statements in the application as warranties; for, if a careful investigation should be made in the lives of persons insured, in almost every life there would be found some incident of illness of such ordinary occurrence and insignificance in its effect, yet of possible seriousness, which the applicant, without careful scrutiny and accurate recollections of his past life, has overlooked to mention. "A serious illness is a grave, important, weighty trouble." Brown v. Metropolitan L. Ins. Co. 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610. In the Century Dictionary it is defined to be "an illness attended by danger, giving rise to apprehension." In Caruthers v. Kansas Mut. L. Ins. Co. (C. C.) 108 Fed. 487 a negative answer of the applicant to the question as to whether he had ever had "any serious illness, constitutional disease or surgical operation" was held not a false representation which would avoid the policy as a breach of warranty because applicant once broke his leg, which was set and attended by a physician. "A sickness may be very bad and very sad, and yet not serious. Any permanent or material impairment of health" is a serious illness. Drakeford v. Supreme Conclave K. D. 61 S. C. 338, 39 S. E. 523; Illinois Masons' Benev. Soc. v. Winthrop, 85 Ill. 537. Upon the conflicting evidence as to deceased's condition within a day or two after the hemorrhage, and as to the condition of her health thereafter until her last illness, and the entire absence of any evidence that such loss of blood as occurred to her on that day was likely to result in permanent or material impairment of her health, the general finding of the trial court in favor of the plaintiff is conclusive against defendant as to the nature of that illness. Union Mut. L. Ins. Co. v. Wilkinson, supra; Hockaday v. Jones, 8 Okla. 156, 56 Pac. 1054.

The insured's answer that she was not attended by any physician was not false, for this question had reference to the physician who attended her during a serious illness, and was not intended to elicit from her information as to the name and address of the attending physician at the time of any other illness than inquired about by the preceding questions. That such was the intention of the parties is indicated by a subsequent question in the application, which reads as follows: "When did you last consult a physician, and for what?" On the reverse side of the application were the statements of the worthy physician who made the examination of the insured for the company, together with certain questions propounded by him to the insured, and her answers thereto. Among such questions and answers are the following: "Q. Have you ever had spitting or coughing of blood? A. No." That the answer to this question is untrue and inaccurate is shown by preceding statements herein as to the evidence in this case. Plaintiff, who testified in his own behalf, has not denied, but admits, that in August, 1904, a little more than a year before the application was made for the policy of insurance, his mother suffered from an attack of illness during which she spit up blood. Nor is there any controversy in the evidence that her coughing of blood at that time was in considerable quantity. The attending physician described her condition resulting from the hemorrhage as being dangerous and without hope of recovery; that the loss of blood "was sufficient to render the vessels of the extremity without any current," and "life was almost gone, and blood was being coughed up with every breath." This testimony of the physician is corroborated by other witnesses who were present, and plaintiff admits the coughing of blood, and that it was in sufficient quantity that he and the members of the family and the neighbors were greatly excited; that a physician was called; but, when asked as to the exhausted and weakened condition his mother was reduced to by the loss of blood, he stated that he did not remember. Counsel for plaintiff insists that the insured made said answer to the physician without intent to deceive, and that since the court, by a general finding, has found that the insured, at the time of her application and the issuance of the policy, was in sound, insurable health, the untruthfulness of this answer, if it is untruthful, is only immaterial misrepresentation. Plaintiff cites and relies principally upon the following cases to support his contention: Home L. Ins. Co. v. Fisher, 188 U. S. 726, 47 L. ed. 667, 23 Sup. Ct. Rep. 380; Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Washington L. Ins. Co. v. Haney, 10 Kan. 525. An examination of the facts upon which those cases are based will clearly distinguish them from the case at bar, and will show that they are not in point.

In Home L. Ins. Co. v. Fisher the statements to the medical examiner were not

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made a part of the application, and the warranties of the application and the policy did not extend to them, but the trial court instructed the jury in language which was equivalent to holding that such statements in the medical examination were the warranties of the insured, and the jury found against the company upon the alleged breach of warranties. The following language is used by Mr. Justice Holmes: "The jury were instructed that, if they found 'either one to be true that, before Maclean made application, he drank liquors either freely or to excess, or at the time that he made the application he had a habit of drinking liquor,' they were to find for the defendant; the declaration to the medical examiner thus being put upon the same footing as the application. The jury found for the plaintiff. Therefore they must be taken to have found categorically that no one of the supposed facts was true; or, in other words, that all of the above-recited answers were correct. If so, it does not matter whether they were warranties or not. There is a suggestion, to be sure, that in the latter case the defendant would have had to prove only the 'literal' falsity of the statement, whereas, in the other, proof of its substantial falsity was required. . . . But the plain question of fact was put to the jury with no such niceties of discrimination. They found a plain answer, and the distinction comes too late now."

In Moulor v. American L. Ins. Co. the company defended against the policy on the ground that the insured had in his application stated that he had never been afflicted with scrofula, asthma, or consumption prior to the making thereof. There was evidence tending to show that the insured had been afflicted with those diseases, or some of them, prior to that time; but there was also evidence showing that he did not know or believe that he had ever been afflicted with them in a sensible or appreciable form. The application contains a stipulation that the insured declared and warranted that his answers therein were fair and true, and acknowledged and agreed that the application should form a part of the contract of insurance, and, if there was any answer therein made by him untrue or evasive, or any misrepresentation or concealment of fact therein, the policy granted upon the application should be null and void. The policy of insurance purported to have been issued upon the basis of the representations and answers in the application. The two instruments of writing, to wit, the application and the policy, did not treat the statements of the insured in the applications in the same manner. In the application they were treated as warranties; in the policy they were treated as his representations, and the court, discussing this condition of the contract, used the following language: "It is true that the word 'warranted' is in the application; and, although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the terms of which control when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt as to the intention of the parties must, according to the settled doctrines of the law of insurance recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must therefore prevail which protects the insured against the obligations arising from a strict warranty."

In Washington L. Ins. Co. v. Haney the insured was relieved from the strict warranties of his application by language in the application which fixed the measure of truthfulness required. The application in that case required the applicant to answer such questions only "to the best of his knowledge and belief," briefly and explicitly, and provided "that any wilfully untrue or fraudulent answer" shall avoid the policy. No such expressions are to be found either in the policy or in the application involved in this case. The court said in that case: "If the application propounds certain questions, and indicates in what manner they must be answered, it is enough that they are answered in that manner; and when the policy is based upon the statements and declarations of the application, it is based upon them made in the manner and under the rules laid down by the company in the application."

Warranties in insurance policies are not favored in law; and where the language used by the parties to an insurance contract prepared by the insurance company is susceptible of two constructions, the courts favor that construction which makes a given statement a representation rather than a warranty, and strictly construes the policy against the company. Warranties will not be made by construction, and statements of the insured will be held warranties only when they necessarily result from the nature of the contract, or appear on the face of the policy or in its body. Declarations

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made by the insured to the medical examiner of an insurance company are not made warranties by the provision of the application, which warrants these statements in the application to be true, full, and complete, where such medical examination is not part of the application, either by being embodied therein, or by reference thereto. Higbee v. Guardian Mut. L. Ins. Co. 66 Barb. 462. But in the case at bar the application begins with the following sentence. "I hereby make application for beneficial membership, and warrant the following statements and the answers to the 'Worthy Physician' on the reverse side hereof to be true and accurate, and agree that they shall constitute the basis for the covenants." The answer of the applicant to the worthy physician, which defendant claims to be false, was among her answers to the physician, and contained on the reverse side of the application. The policy of insurance provides: "This covenant is executed in consideration of the warranties made in the application of this guest, and of compliance on the part of this guest with the constitution and by-laws of this fraternity, now existing or as hereafter legally amended, all of which and the application of this guest are a part of this covenant."

What were the warranties made by the applicant in her application? They were, first, that the statements therein made were true and accurate; second, that her answers to the worthy physician were true and accurate. These are the warranties made by the insured which it is stipulated in the policy is the consideration of the covenant. If no reference had been made in the application to her answers to the worthy physician, or no stipulation had been placed therein by which such answers were warranted to be true and correct, and were to be the basis of the covenant, the medical examination having been separate from the application, the case would then have fallen within the rule of Higbee v. Guardian Mut. L. Ins. Co. supra. But the parties to this contract have, by specific stipulation which is not ambiguous, agreed in the application that applicant's answers to the worthy physician, as well as her statements in the application, should be her warranties, and should be the basis of the covenant; and the policy expressly stipulates, in language that is unequivocal and requires no construction, that the consideration of the execution of the covenant is the warranties made by the applicant in her application, and that the application is a part of the contract. The insured stipulates in the application that both the statements in the application and her answers in the worthy physician's report on the reverse side thereof are true and accurate, and shall be her warranties, and shall form the basis of the covenant.

By reference in her application to answers made on the reverse side thereof to the worthy physician, and by agreeing in the application that such answers should constitute the basis of the covenant, insured made them a part of her application; and by the terms of the policy, and the acceptance thereof by her, they become part of the contract of insurance, and she thereby warranted that her answer to the question whether she had ever spit or coughed up blood was "true and accurate." In Cooley's Briefs on Insurance (vol. 3, p. 1935) the general rule is said to be: "It has been the generally accepted doctrine that, where the application warrants the answers and statements therein to be full, complete, and true, and the policy recites that it is issued in consideration of the statements, agreements, and warranties in the application, which is referred to and made a part of the contract, such statements and agreements become warranties." In 25 Cyc. Law & Proc. p. 798, the same rule is expressed in somewhat similar language, as follows: "To create a warranty or condition precedent, the statement relied on must be made a part of the contract by incorporating into the policy either the statement itself or an appropriate reference thereto. If the application is not made a part of the contract by reference in the policy, a warranty in the application alone, as to the truth of the statements made therein, is not a part of the contract in such sense that error or mistake in such statements will avoid the policy without regard to their materiality as representations."

The application specifically warrants the answers of applicant to the physician, and specifically agrees that such answers shall form the basis of the covenant, and the policy makes the application a part thereof. It is unnecessary for us to discuss whether the untrue answers to the questions of the worthy physician in controversy are material or immaterial, for the contract had made the applicant's answers her warranties. A statement warranted to be "true and accurate," if untrue, will prevent the policy from attaching as a contract of insurance, without regard to whether the statement is material or immaterial; and where there has been a breach of a warranty, the policy is void, though the statement upon which the breach of a warranty is predicated is in no way material to the risk. Cooley, Briefs on Insurance, p. 1950; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595;

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Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361. That which might have been immaterial has been made material; that which might have been unimportant has by stipulation of the parties been raised to importance. It has not been left to the jury or to the court to determine whether the insured's answers to the physician were material, and became the basis of the insurance company's contract, for the parties have settled this question by stipulation in the contract.

Plaintiff insists that there is some controversy in the evidence as to whether deceased had ever had spitting of blood in the sense that he contends it was used in the worthy physician's report. He contends that these terms have reference only to hemorrhage from the lungs, and there is some conflict in the evidence as to whether the spitting of blood that occurred in August, 1904, was from the lungs or from the stomach. We do not think that the language used in the contract can be limited to mean only blood from the lungs. The exact language is "spitting or coughing of blood." It is unnecessary for us to determine whether this language would include any spitting of blood, however small in quantity and unimportant, such as might come from a wound of the gums, or the removal of a tooth, or the biting of the tongue, for that question is not involved under the facts in this case, but it would include the disorder by that name called, whether the blood came from the stomach or from the lungs, when it had assumed such proportions as to be a disease. There is evidence that the insured coughed and spit up blood at other times before the issuance of the policy than at the time during the month of August, 1904, and such evidence is not controverted. There is evidence on the part of some of the witnesses who testified that they never knew of her having done so, but such evidence is rather as to the negative knowledge of the witnesses than a denial that such fact existed. It is unnecessary for us to consider the intentions of applicant in giving an untrue answer to the question, for whether it was intentional or an oversight is immaterial so far as it affects the contract. The falsity of the answer, irrespective of her intention in giving it, avoided the policy, since, by her warranty, the truthfulness and accuracy of her answers were made prerequisite to the existence of the contract.

The judgment of the lower court is reversed, and the cause remanded.

23 L.R.A. (N.S.)

UNITED STATES SUPREME COURT.

SARAH S. FALL, Plff. in Err.,
v.
ELIZABETH EASTIN.

(215 U. S. 1, 54 L. ed. —, 30 Sup. Ct. Rep. 3.)

Courts — chancery power to affect foreign property — full faith and credit.

A deed to land situated in Nebraska, made by a commissioner under a decree of a court of another state in an action of divorce, in which, in determining the equities of the parties conformably to the practice in that state, the land was set apart to the wife as her own separate property, need not be recognized in Nebraska, under the full faith and credit clause of the Federal Constitution.

(Mr. Justice Harlan and Mr. Justice Brewer, dissent.)

(November 1, 1909.)

Case Note. — Jurisdiction of equity over suits affecting real property in another state or country.

This subject was treated exhaustively in a note to Proctor v. Proctor, 69 L.R.A. 673. The present note includes only the cases since the preparation of that note. The present note is confined, as was the earlier one, to cases involving the jurisdiction of equity over suits the avowed purpose of which is to affect real property beyond the territorial jurisdiction, either directly by a decree *in rem*, or indirectly by a decree *in personam*. It will be observed that this limitation excludes from the note cases involving the effect of a decree establishing one's status, upon real property in another state, *e. g.*, the effect of a divorce rendered in one state upon the right of dower in real property in another (see note to Benton's Succession, 59 L.R.A. 181), or the effect of a decree rendered in one state removing the disability of infancy, upon a conveyance of real property in another (see Beauchamp v. Bertig [Ark.] ante, 659, 119 S. W. 75). For similar reasons, cases dealing with the effect of a decree rendered in one state admitting a will to probate, revoking probate, or construing or determining the validity of a will, are also omitted.

The general principle formulated at page 674 of the earlier note, that, when a case otherwise properly cognizable in equity is presented, a court of equity having personal jurisdiction of the parties may, in the exercise of its discretion, assume jurisdiction although land in another state may be affected, if it can grant effective relief by a decree acting solely upon the person whose title or interest in the land is to be affected, as distinguished from a decree acting directly upon the land,—is sustained by the later cases, as well as by the cases cited in that note.

Thus, the court in Steele v. Bryant (Ky.)

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ERROR to the Nebraska Supreme Court to review a decree reversing a decree of the District Court for Hamilton County quieting title to certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles J. Greene, Ralph W. Breckenridge,** and **Thomas H. Matters,** for plaintiff in error:

The suggestion of the Nebraska supreme court, that the full faith and credit provision of the Federal Constitution establishes a rule of evidence, rather than of jurisdiction, did not give the Nebraska court the right to disregard the evidence of the wife's equities in the land, established by the decree of the Washington court.

Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

When judgments of one state are duly pleaded and proved in the courts of another, they have the effect of being not merely prima facie evidence, but conclusive proof of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States.

Huntington v. Attrill, 146 U. S. 684, 36 L. ed. 1133, 13 Sup. Ct. Rep. 224; Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604.

Where a court of equity, clothed with full power not only to dissolve the marriage, but to dissolve the property interest, however in-

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116 S. W. 755, while conceding that the courts of Illinois cannot affect by their judgment the title to land in Kentucky, nevertheless held that a deed to land in Kentucky executed by the trustee in whom the legal title was vested pursuant to a decree of a court of Illinois having personal jurisdiction of the parties was effectual to pass the title to the Kentucky land.

In Grant v. Cobre Grande Copper Co. 193 N. Y. 306, 86 N. E. 34, holding that the allegations of a complaint in an action seeking to have a foreign corporation adjudged to be the holder of certain mining property in Mexico in trust and to compel it and others to account for the income and proceeds arising from the working of said mines, were sufficient to sustain an order for the publication of process,—it seems to have been assumed that the court of New York would have jurisdiction, notwithstanding the property was located beyond the territorial jurisdiction.

See earlier note, page 678, for other cases as to enforcement of trusts with respect to lands in other states.

So, the power of a court having personal jurisdiction of the parties to grant a decree for the specific performance of a contract in relation to real property in another state is sustained in Wilhite v. Skelton, 78 C. C. A. 635, 149 Fed. 67.

And upon the same principle the court in White Star Min. Co. v. Hultberg, 220 Ill. 578, 77 N. E. 327, upheld the jurisdiction of a court of equity of Illinois having personal jurisdiction of the parties to enforce specific performance of an award with reference to land in another state.

For other cases sustaining such jurisdiction in respect to specific performance, see earlier note, page 681.

Of course, the fact that a suit in one state for an accounting has reference to the profits derived from the purchase and resale of land in another state does not defeat the jurisdiction. MacDonald v. Dexter, 234 Ill. 517, 85 N. E. 209.

So, a court of the District of Columbia having personal jurisdiction of the parties may entertain a suit for a partnership accounting in respect of land in another jurisdiction, and may, as a part of the relief, require the defendant to convey to the plaintiff, by a proper deed of conveyance, an undivided interest in such land. Stone v. Fowlkes, 29 App. D. C. 379.

For other cases as to such jurisdiction with respect to accounting, and incidental relief by requisition of conveyance, see earlier note, page 691.

In Deschamps v. Miller [1908] 1 Ch. 856, Parker, J., however, held that an English court, although having personal jurisdiction of the necessary parties, should not take jurisdiction of a suit the purpose of which was to establish, in favor of a wife's estate, and by virtue of her marital rights, an interest in land in India which the husband had acquired subsequently to the marriage, and had conveyed to trustees upon a trust for his life, with remainder over to a third person. The decision is upon the ground that the determination of the rights of the parties would involve an examination of the law of India as to the right of the wife to assert a title or interest in land acquired in that country by the husband subsequently to the marriage. The learned justice remarked that the general rule is that the court will not adjudicate on questions relating to the title to or the right to possession of immovable property out of the jurisdiction; that the exceptions to the rule depend on the existence between the parties of some personal obligation arising out of contract or implied contract, fiduciary relationship, or other conduct which, in the view of an English court of equity, would be unconscionable, and do not depend for their existence on the law of the *locus* as to the immovable property; and that in the case at bar the whole question was whether or not, according to the law of the *locus*, the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party.

As pointed out in the earlier note (69 L.R.A. 678) to warrant the exercise of the peculiar jurisdiction here under considera-

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volved or wherever located, makes a decree based upon the application of both parties, separating their joint rights and equities in their property, such decree should, by every rule and principle, receive full faith and credit in the courts of this country.

Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Shanks v. Klein, 104 U. S. 19, 26 L. ed. 635; Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737.

No appearance for defendant in error.

Mr. Justice McKenna, delivered the opinion of the court:

The question in this case is whether a deed to land situate in Nebraska, made by a commissioner under the decree of a court of the state of Washington in an action for divorce, must be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States.

The action was begun in Hamilton county, Nebraska, in 1897, to quiet title to the land and to cancel a certain mortgage thereon, given by E. W. Fall to W. H. Fall, and to cancel a deed executed therefor to defendant in error, Elizabeth Eastin.

Plaintiff alleged the following facts: She and E. W. Fall, who was a defendant in the trial court, were married in Indiana in 1876. Subsequently they went to Nebraska, and, while living there, "by their joint efforts, accumulations, and earnings, acquired jointly and by the same conveyance" the land in controversy. In 1889 they removed to the state of Washington, and continued to reside there as husband and wife until January, 1895, when they separated. On the 27th of February, 1895, her husband, she and he then being residents of King county, Washington, brought suit against her for divorce in the superior court of that county. He alleged in his complaint that he and plaintiff were bona fide residents of King county, and that he was the owner of the land in controversy, it being, as he alleged, "his separate property, purchased by money received from his parents." He prayed for a divorce and "for a just and equitable division of the property."

Plaintiff appeared in the action by answer and cross complaint, in which she denied the allegations of the complaint, and alleged that the property was community property, and "was purchased by and with the money and proceeds of the joint labor" of herself and husband after their marriage. She prayed that a divorce be denied him, and that the property be set apart to her as separate property, subject only to a mortgage of $1,000, which she alleged was given

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tion, the case must be one which, even apart from the location of the property beyond the equitable jurisdiction, is a proper one for equitable intervention; and the jurisdiction does not extend to a suit which involves merely the title to or possession of land beyond the territorial jurisdiction.

So, in Sutton v. Archer (Miss.) 46 So. 705, the court said that if the decree of dismissal entered by the court below in the suit (which was in form a bill to cancel the defendant's claim of title to land) was based on a finding that the land contended for was in Arkansas the decision was correct, since in that event the court of Mississippi was without jurisdiction. The court said that the case was merely one of a contested title, the parties fighting at arms length, and that if the Mississippi courts may take jurisdiction in such a case they may in any case involving a controversy as to the right to land in any other state, when they have the parties before them; and that there was in this case no question of specific performance of contract, enforcement of trust, fraud, accounting, or the doing of any acts which from previous dealings are binding on the conscience of the party.

And, apparently for a similar reason, the court in Higgins v. Vandeveer (Neb.) 122 N. W. 843, held that a decree rendered by a court of Nebraska having jurisdiction of the parties, purporting to revoke the probate of a will, and to decree that the husband of the decedent was seised of an estate of curtesy in a tract of land part of which was in Nebraska and part in South Dakota, was beyond the jurisdiction of the court, and an absolute nullity so far as is related to the South Dakota land.

So, in Columbia Nat. Sand Dredging Co. v. Morton, 28 App. D. C. 288, 7 L.R.A.(N.S.) 114, it was held that equity had no jurisdiction of a suit to enjoin acts of trespass on lands in another state, where the principal fact involved, and upon which the right to exercise the restraint depended, was that of title to the land, even though the necessary parties were properly before the court. See note to this case (7 L.R.A. (N.S.) 114), as to the jurisdiction to enjoin acts with respect to real property in another state.

It will be observed that the ground of the decision rendered by the Nebraska supreme court on the rehearing in Fall v. Fall, 75 Neb. 120, 121 Am. St. Rep. 767, 113 N. W. 175, as well as the ground on which that decision was affirmed by the United States Supreme Court in FALL v. EASTIN, was not that the Washington court did not have jurisdiction to render the decree in question, but that that decree was ineffectual without a conveyance by the holder of the title pursuant to the requisition of the decree; and that the conveyance by the commissioner appointed by the Washington court was ineffectual. This position is sustained by the weight of authority, as shown in the earlier note (69 L.R.A. page 694).

In McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997, however, the Missouri court

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by him and her. In a reply to her answer and cross complaint, he denied that she was the "owner as a member of the community in conjunction" with him of the property, and repeated the prayer of his complaint.

Plaintiff also alleges that the Code of Washington contained the following provision:

"Sec. 2007. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

She further alleges that that provision had been construed by the supreme court of the state, requiring of the parties to an action for divorce to bring into court all of "'their property, and a complete showing must be made,'" and that it was decided that § 2007 conferred upon the court "'the power, in its discretion, to make a division of the separate property of the wife or husband.'"

She further alleges that a decree was entered, granting her a divorce, and setting apart to her the land in controversy as her own separate property forever, free and unencumbered from any claim of the plaintiff thereto, and that he was ordered and directed by the court to convey all his right, title, and interest in and to the land within five days from the date of the decree.

She also alleges the execution of the deed to her by the commissioner appointed by the court, the execution and recording of the mortgage to W. H. Fall, and the deed to defendant; that the deed and mortgage were each made without consideration, and for the purpose of defrauding her, and that they cast a cloud upon her title derived by her under the decree of divorce and the commissioner's deed. She prays that her title be quieted, and that the deed and mortgage be declared null and void.

W. H. Fall disclaimed any interest in the premises, and executed a release of the mortgage made to him by E. W. Fall. Defendant answered, putting in issue the legal sufficiency of the complaint, and, in addition, set forth the fact of the loan of $1,000 to E. W. Fall, the taking of a note therefor signed by him and William H. Fall, the giving of an indemnity mortgage to the latter, and the execution subsequently of a deed by E.

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held that a decree rendered by a court of Ohio having personal jurisdiction of the parties, setting aside a deed to land in Missouri from testatrix to her daughter, and directing the minor son of the grantee (the grantee having died) to execute a reconveyance to the devisees in the will as soon as he attained his majority, while it could not directly affect the bare legal title to the land yet could and did conclude all the parties on every issue in that case, and could and did bind the conscience of the minor to reconvey when he attained his majority. The grantee's son does not appear to have executed a formal conveyance pursuant to the Ohio decree, but he did participate in a domestic partition among the heirs and devisees of the testatrix by which the parties accepted deeds in severalty. The court said that any contention that the son was a minor and was not bound by those conveyances was without avail, because he purged his conscience by adopting and ratifying the partition conveyances when he attained his majority, and thereby became bound.

See also in this connection the case of Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 624, which is set out at p. 695 of the earlier note and also discussed in the opinion in FALL v. EASTIN.

In Byrne v. Jones, 90 C. C. A. 101, 159 Fed. 321, it was held that a Federal court sitting in Arkansas having jurisdiction of the person of a trustee appointed by a contract made in Arkansas concerning a tract of land in Arkansas and Texas might lawfully require him to make a sale and conveyance as trustee, or appoint its master in his place who should be trustee *pro hac vice*. The fact that the holder of the legal title in this case was the trustee, and not the beneficial owner, is doubtless sufficient to distinguish this case from FALL v. EASTIN, and most of the other cases holding that the deed in order to be effectual must be executed by the very person whose title or interest is to be affected, and not by a person appointed by the court for that purpose.

In Roller v. Murray, 107 Va. 527, 59 S. E. 421 (an action primarily relating to land in Virginia), the court in answer to a contention that, as there had been a conveyance of a certain portion of the lands lying in West Virginia, the deed for which was afterwards returned, the court should retain jurisdiction and grant relief as to that portion of the land, said that the court could not decree the sale of land lying in West Virginia, even if such relief would be proper under the other facts of the case. It is apparent that this statement is in accord with the authorities, so far as it holds that the court of Virginia could not render a decree for the sale of land in West Virginia, which, *ex proprio vigore*, would affect the title to such land, and it is not clear from the opinion whether the proper parties were before the court so that it could have worked out substantially the same result by a decree *in personam* requiring a conveyance, if such relief had otherwise been proper.

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W. Fall in satisfaction of the debt. No personal service was had upon E. W. Fall, and he did not appear. A decree was passed in favor of plaintiff, which was affirmed by the supreme court. 75 Neb. 104, 106 N. W. 412. A rehearing was granted and the decree was reversed [75 Neb. 120, 121 Am. St. Rep. 767, 113 N. W. 175], Judge Sedgwick, who delivered the first opinion, dissenting.

There is no brief for defendant in this court, but the contentions of the parties and the argument by which they are supported are exhibited in the opinions of the supreme court.

The question is in narrow compass. The full faith and credit clause of the Constitution of the United States is invoked by plaintiff to sustain the deed executed under the decree of the court of the state of Washington. The argument in support of this is that the Washington court, having had jurisdiction of the parties and the subject-matter, in determination of the equities between the parties to the lands in controversy, decreed a conveyance to be made to her. This conveyance, it is contended, was decreed upon equities, and was as effectual as though her "husband and she had been strangers, and she had bought the land from him and paid for it, and he had then refused to convey it to her." In other words, that the decree of divorce in the state of Washington, which was made in consummation of equities which arose between the parties under the law of Washington, was "evidence of her right to the legal title of at least as much weight and value as a contract in writing, reciting the payment of the consideration for the land, would be."

The defendant, on the other hand, contends, as we gather from his petition for a rehearing in the supreme court of the state, and from the opinions of the court, that "the Washington court had neither power nor jurisdiction to affect in the least, either legally or equitably," lands situated in Nebraska. And contends further that, by the provision of chap. 25, p. 276, Comp. Stat. (Neb.) 1901, a court had no jurisdiction to award the real estate of the husband to the wife in fee as alimony, and a decree, in so far as it attempts to do so, is void and subject to collateral attack. For this view are cited Cizek v. Cizek, 69 Neb. 800, 96 N. W. 657, 99 N. W. 28; 5 A. & E. Ann. Cas. 464; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 312.

The contentions of the parties, it will be observed, put in prominence and as controlling, different propositions. Plaintiff urges the equities which arose between her and her husband, on account of their relation as husband and wife, in the state of Washington, and under the laws of that state. The defendant urges the policy of the state of Nebraska, and the inability of the court of Washington, by its decree alone or the deed executed through the commissioners, to convey the land situate in Nebraska. To the defendant's view the supreme court of the state finally gave its assent, as we have seen.

In considering these propositions, we must start with a concession of jurisdiction in the Washington court over both the parties and the subject-matter. Jurisdiction in that court is the first essential, but the ultimate question is, What is the effect of the decree upon the land, and of the deed executed under it? The supreme court of the state concedes, as we understand its opinion, the jurisdiction in the Washington court to render the decree. The court said:

"We think there can be no doubt, where a court of chancery has, by its decree, ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court, and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed."

But Fall, not having executed a deed, the court's conclusion was, to quote its language, that "neither the decree nor the commissioner's deed conferred any right or title upon her." This conclusion was deduced, not only from the absence of power generally of the courts of one state over lands situate in another, but also from the laws of Nebraska providing for the disposition of real estate in divorce proceedings. The court said:

"Under the laws of this state, the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and, in such an action, have no power or jurisdiction to divide or apportion the real estate of the parties. Nygren v. Nygren, 42 Neb. 408, 60 N. W. 885; Brotherton v. Brotherton, 14 Neb. 186, 15 N. W. 347; Cizek v. Cizek, supra; Aldrich v. Steen, 71 Neb. 33, 57, 98 N. W. 445, 100 N. W. 311. In the Cizek Case, Cizek brought an action for divorce, and his wife filed a cross bill, and asked for alimony. The court dismissed the husband's bill, found in favor of the wife, and, by stipulation of the parties, set off to the wife

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the homestead, and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property. Afterwards, in a contest arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife, but it was held that that portion of the decree which set off the homestead to the wife was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the district court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this state, in divorce proceedings, must look for their authority to the statute; and so far as they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void.

. . . . . .

"The decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect so far as the courts of this state are concerned, by the provisions of the Constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land, it remained in E. W. Fall until devested by operations of law or by his voluntary act. He has parted with it to Elizabeth Eastin; and whether any consideration was ever paid for it or not is immaterial so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do."

It is somewhat difficult to state precisely and succinctly wherein plaintiff disagrees with the conclusions of the supreme court. Counsel says:

"It is not claimed that the Washington court could create an equity in lands in Nebraska by any finding or decree it might make, and thus bind the courts of a sister state; but it is claimed that, where rights and equities already exist, the parties being within the jurisdiction of the court, it can divide them and apportion them by a judgment or decree which would be conclusive upon the parties in any subsequent proceeding in a court having jurisdiction of the lands, for the purpose of quieting the title in the equitable owner."

If we may regard this as not expressing a complete opposition to the views of the supreme court, we must at least treat it as contradicting their fundamental principle, that is, that the decree, as such, has no extraterritorial operation.

The territorial limitation of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever it may do through the party, it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to affect it with liens or burdens. Story, Confl. L. § 544. In French v. Hay (French v. Stewart), 22 Wall. 250–252, 22 L. ed. 857, 858, this court said that a court of equity, having jurisdiction *in personam*, has power to require a defendant "to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory." The extent of this power this court has also defined. Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437, has features like the case at bar. The suit was for the specific performance of a contract for the conveyance of land. It became necessary to pass upon the effect of a decree requiring the conveyance of the lands concerned. The decree appointed a commissioner under a statute of the state to make the conveyance in case the defendants or any of them failed to make the conveyance. This court said: "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt." In reply to the contention that the deed of the commissioner was a legal conveyance, it was said: "The deed executed by the commissioner in this case must be considered as forming a part of the proceedings in the court of chancery, and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky as it does in Ohio."

In Watkins v. Holman, 16 Pet. 25, 57, 10 L. ed. 873, 886, passing on a decree made by the supreme court in Massachusetts by virtue of a statute of that state, it was said:

"No principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated."

And further:

"A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself nor any conveyance

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under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

See also Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181, and Miller v. Sherry, 2 Wall. 237, 248, 249, 17 L. ed. 827, 829, 830.

In Corbett v. Nutt, 10 Wall. 464, 475, 19 L. ed. 976, 979, the doctrine was repeated that a court of equity, acting upon the person of the defendant, may decree a conveyance of land situated in another jurisdiction, and even in a foreign country, and enforce the execution of the decree by process against the defendant; but, it was said: "Neither its decree nor any conveyance under it, except by the party to whom the title is vested, is of any efficacy beyond the jurisdiction of the court." This, the court declared, was familiar law, citing Watkins v. Holman, supra. See also Brine v. Hartford F. Ins. Co. 96 U. S. 627, 635, 24 L. ed. 858, 861; Phelps v. McDonald, 99 U. S. at page 308, 25 L. ed. at page 476.

In Boone v. Chiles, 10 Pet. 177, 245, 9 L. ed. 388, 412, it is said that a commissioner is in no sense an agent of the party, but is an officer of the court, and acts strictly under its authority.

Later cases assert the same doctrine. In Carpenter v. Strange, 141 U. S. 87, 105, 35 L. ed. 640, 647, 11 Sup. Ct. Rep. 960, 966, a court of New York had declared a deed for real estate situate in Tennessee null and void. This court said to concede such power would be "to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*." And, explaining the power of a court of equity, said that, "by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction; its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court 'has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.' Hart v. Sansom, 110 U. S. 151, 155, 28 L. ed. 101, 103, 3 Sup. Ct. Rep. 586."

Whether the doctrine that a decree of a court rendered in consummation of equities, or the deed of a master under it, will not convey title, and that the deed of a party coerced by the decree will have such effect, is illogical or inconsequent, we need not inquire, nor consider whether the other view would not more completely fulfil the Constitution of the United States, and that whatever may be done between the parties in one state may be adjudged to be done by the courts of another, and that the decree might be regarded to have the same legal effect as the act of the party which was ordered to be done. The policy of a state would not be violated. Besides, this court found no impediment in the policy of a state in the way of enforcing, under the due faith and credit clause of the Constitution of the United States, a judgment obtained in Missouri, sued upon in Mississippi. The defense was that the cause of action arose in Mississippi, and was one that the courts of the state, under its laws, were forbidden to enforce. The defense was adjudged good by the supreme court of Mississippi, and its judgment was reversed by this court. Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

In Hart v. Sansom, supra, it was directly recognized that it was within the power of the state in which the land lies to provide, by statute, that, if the defendant is not found within the jurisdiction, or refuses to perform, performance in his behalf may be had by a trustee appointed by the court for that purpose.

In Dull v. Blackman, 169 U. S. 243, 246, 247, 42 L. ed. 733, 734, 18 Sup. Ct. Rep. 333, 334, while recognizing that litigation in regard to the title of land belongs to the courts of the state where the land is so located, it was said: "Although, if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title."

But, however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. The embarrassment which sometimes results from it has been obviated by legislation in many states. In some states the decree is made to operate *per se* as a source of title. This operation is given a decree in Nebraska. In other states, power is given to certain officers to carry the decree into effect. Such power is given in Washington to commissioners appointed by the court. It was in pursuance of this power that the deed in the suit at bar was executed. But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or

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refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such case, the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment, or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pom. Eq. Jur. §§ 1317, 1318, and notes.

This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. "It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit." M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177.

Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply. The case of Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621, in a sense sustains her. The action was brought in one of the courts of Ohio for the recovery of the possession of certain lands. The defendant set up in defense a conveyance of the same lands, made by a master commissioner, in accordance with a decree of a court in Kentucky, in a suit for specific performance of a contract concerning the lands. The defendant in Burnley v. Stevenson claimed title under the master's deed. The court declared the principle that a court of equity, having the parties before it, could enforce specific performance of a contract for lands situate in another jurisdiction by compelling the parties to make a conveyance of them, but said that it did not follow that the court could "make its own decree operate as such conveyance." And it was decided that the decree could not have such effect, and, as it could not, it was "clear that a deed executed by a master, under the direction of the court," could "have no greater effect." Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437, and Page v. McKee, 3 Bush, 135, 96 Am. Dec. 201, were cited, and the master's deed, the court said, "must, therefore, be regarded as a nullity." But the court decided that the "decree was *in personam*, and bound the consciences of those against whom it was rendered." It became, it was in effect said, a record of the equities which preceded it, and of the fact that it had become, and it was, the duty of the defendants in the suit to convey the legal title to the plaintiff. This duty, it was further said, could have been enforced "by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order does not affect the validity of the decree, in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby."

The court proceeded to say that it might be admitted that the decree would not constitute a good defense at law, but that it was a good defense in equity, as, under the Code of Ohio, equitable as well as legal defenses might be set up in an action for the recovery of land, and from this, and the other propositions that were expressed, concluded that, as the decree had the effect in Kentucky of determining the equities of the parties to the land in Ohio, the courts of the latter state "must accord to it the same effect," in obedience to the due faith and credit clause of the Constitution of the United States. "True," the court observed, "the courts of this state cannot enforce the performance of that decree, by compelling the conveyance through its process of attachment; but, when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases supra; also Davis v. Headley, 22 N. J. Eq. 115; Brown v. Lexington & D. R. Co. 13 N. J. Eq. 191; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Bank of United States v. Merchants' Bank, 7 Gill, 415."

It may be doubted if the cases cited by the learned court sustain its conclusion. But we will not stop to review them, or to trace their accordance with or their distinction from the cases which we have cited. The latter certainly accord with the weight of authority. There is, however, much temptation in the facts of this case to follow the ruling of the supreme court of Ohio. As we have seen, the husband of the plaintiff brought suit against her in Washington for divorce, and, attempting to avail himself of the laws of Washington, prayed also that the land now in controversy be awarded to him. She appeared in the action, and, sub-

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W. Fall in satisfaction of the debt. No personal service was had upon E. W. Fall, and he did not appear. A decree was passed in favor of plaintiff, which was affirmed by the supreme court. 75 Neb. 104, 106 N. W. 412. A rehearing was granted and the decree was reversed [75 Neb. 120, 121 Am. St. Rep. 767, 113 N. W. 175], Judge Sedgwick, who delivered the first opinion, dissenting.

There is no brief for defendant in this court, but the contentions of the parties and the argument by which they are supported are exhibited in the opinions of the supreme court.

The question is in narrow compass. The full faith and credit clause of the Constitution of the United States is invoked by plaintiff to sustain the deed executed under the decree of the court of the state of Washington. The argument in support of this is that the Washington court, having had jurisdiction of the parties and the subject-matter, in determination of the equities between the parties to the lands in controversy, decreed a conveyance to be made to her. This conveyance, it is contended, was decreed upon equities, and was as effectual as though her "husband and she had been strangers, and she had bought the land from him and paid for it, and he had then refused to convey it to her." In other words, that the decree of divorce in the state of Washington, which was made in consummation of equities which arose between the parties under the law of Washington, was "evidence of her right to the legal title of at least as much weight and value as a contract in writing, reciting the payment of the consideration for the land, would be."

The defendant, on the other hand, contends, as we gather from his petition for a rehearing in the supreme court of the state, and from the opinions of the court, that "the Washington court had neither power nor jurisdiction to affect in the least, either legally or equitably," lands situated in Nebraska. And contends further that, by the provision of chap. 25, p. 276, Comp. Stat. (Neb.) 1901, a court had no jurisdiction to award the real estate of the husband to the wife in fee as alimony, and a decree, in so far as it attempts to do so, is void and subject to collateral attack. For this view are cited Cizek v. Cizek, 69 Neb. 800, 96 N. W. 657, 99 N. W. 28; 5 A. & E. Ann. Cas. 464; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 312.

The contentions of the parties, it will be observed, put in prominence and as controlling, different propositions. Plaintiff urges the equities which arose between her and her husband, on account of their relation as husband and wife, in the state of Washington, and under the laws of that state. The defendant urges the policy of the state of Nebraska, and the inability of the court of Washington, by its decree alone or the deed executed through the commissioners, to convey the land situate in Nebraska. To the defendant's view the supreme court of the state finally gave its assent, as we have seen.

In considering these propositions, we must start with a concession of jurisdiction in the Washington court over both the parties and the subject-matter. Jurisdiction in that court is the first essential, but the ultimate question is, What is the effect of the decree upon the land, and of the deed executed under it? The supreme court of the state concedes, as we understand its opinion, the jurisdiction in the Washington court to render the decree. The court said:

"We think there can be no doubt, where a court of chancery has, by its decree, ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court, and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed."

But Fall, not having executed a deed, the court's conclusion was, to quote its language, that "neither the decree nor the commissioner's deed conferred any right or title upon her." This conclusion was deduced, not only from the absence of power generally of the courts of one state over lands situate in another, but also from the laws of Nebraska providing for the disposition of real estate in divorce proceedings. The court said:

"Under the laws of this state, the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and, in such an action, have no power or jurisdiction to divide or apportion the real estate of the parties. Nygren v. Nygren, 42 Neb. 408, 60 N. W. 885; Brotherton v. Brotherton, 14 Neb. 186, 15 N. W. 347; Cizek v. Cizek, supra; Aldrich v. Steen, 71 Neb. 33, 57, 98 N. W. 445, 100 N. W. 311. In the Cizek Case, Cizek brought an action for divorce, and his wife filed a cross bill, and asked for alimony. The court dismissed the husband's bill, found in favor of the wife, and, by stipulation of the parties, set off to the wife

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the homestead, and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property. Afterwards, in a contest arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife, but it was held that that portion of the decree which set off the homestead to the wife was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the district court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this state, in divorce proceedings, must look for their authority to the statute; and so far as they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void.

. . . . . .

"The decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect so far as the courts of this state are concerned, by the provisions of the Constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land, it remained in E. W. Fall until devested by operations of law or by his voluntary act. He has parted with it to Elizabeth Eastin; and whether any consideration was ever paid for it or not is immaterial so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do."

It is somewhat difficult to state precisely and succinctly wherein plaintiff disagrees with the conclusions of the supreme court. Counsel says:

"It is not claimed that the Washington court could create an equity in lands in Nebraska by any finding or decree it might make, and thus bind the courts of a sister state; but it is claimed that, where rights and equities already exist, the parties being within the jurisdiction of the court, it can divide them and apportion them by a judgment or decree which would be conclusive upon the parties in any subsequent proceeding in a court having jurisdiction of the lands, for the purpose of quieting the title in the equitable owner."

If we may regard this as not expressing a complete opposition to the views of the supreme court, we must at least treat it as contradicting their fundamental principle, that is, that the decree, as such, has no extraterritorial operation.

The territorial limitation of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever it may do through the party, it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to affect it with liens or burdens. Story, Confl. L. § 544. In French v. Hay (French v. Stewart), 22 Wall. 250–252, 22 L. ed. 857, 858, this court said that a court of equity, having jurisdiction *in personam*, has power to require a defendant "to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory." The extent of this power this court has also defined. Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437, has features like the case at bar. The suit was for the specific performance of a contract for the conveyance of land. It became necessary to pass upon the effect of a decree requiring the conveyance of the lands concerned. The decree appointed a commissioner under a statute of the state to make the conveyance in case the defendants or any of them failed to make the conveyance. This court said: "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt." In reply to the contention that the deed of the commissioner was a legal conveyance, it was said: "The deed executed by the commissioner in this case must be considered as forming a part of the proceedings in the court of chancery, and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky as it does in Ohio."

In Watkins v. Holman, 16 Pet. 25, 57, 10 L. ed. 873, 886, passing on a decree made by the supreme court in Massachusetts by virtue of a statute of that state, it was said:

"No principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated."

And further:

"A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself nor any conveyance

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under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

See also Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181, and Miller v. Sherry, 2 Wall. 237, 248, 249, 17 L. ed. 827, 829, 830.

In Corbett v. Nutt, 10 Wall. 464, 475, 19 L. ed. 976, 979, the doctrine was repeated that a court of equity, acting upon the person of the defendant, may decree a conveyance of land situated in another jurisdiction, and even in a foreign country, and enforce the execution of the decree by process against the defendant; but, it was said: "Neither its decree nor any conveyance under it, except by the party to whom the title is vested, is of any efficacy beyond the jurisdiction of the court." This, the court declared, was familiar law, citing Watkins v. Holman, supra. See also Brine v. Hartford F. Ins. Co. 96 U. S. 627, 635, 24 L. ed. 858, 861; Phelps v. McDonald, 99 U. S. at page 308, 25 L. ed. at page 476.

In Boone v. Chiles, 10 Pet. 177, 245, 9 L. ed. 388, 412, it is said that a commissioner is in no sense an agent of the party, but is an officer of the court, and acts strictly under its authority.

Later cases assert the same doctrine. In Carpenter v. Strange, 141 U. S. 87, 105, 35 L. ed. 640, 647, 11 Sup. Ct. Rep. 960, 966, a court of New York had declared a deed for real estate situate in Tennessee null and void. This court said to concede such power would be "to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*." And, explaining the power of a court of equity, said that, "by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction; its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court 'has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.' Hart v. Sansom, 110 U. S. 151, 155, 28 L. ed. 101, 103, 3 Sup. Ct. Rep. 586."

Whether the doctrine that a decree of a court rendered in consummation of equities, or the deed of a master under it, will not convey title, and that the deed of a party coerced by the decree will have such effect, is illogical or inconsequent, we need not inquire, nor consider whether the other view would not more completely fulfil the Constitution of the United States, and that whatever may be done between the parties in one state may be adjudged to be done by the courts of another, and that the decree might be regarded to have the same legal effect as the act of the party which was ordered to be done. The policy of a state would not be violated. Besides, this court found no impediment in the policy of a state in the way of enforcing, under the due faith and credit clause of the Constitution of the United States, a judgment obtained in Missouri, sued upon in Mississippi. The defense was that the cause of action arose in Mississippi, and was one that the courts of the state, under its laws, were forbidden to enforce. The defense was adjudged good by the supreme court of Mississippi, and its judgment was reversed by this court. Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

In Hart v. Sansom, supra, it was directly recognized that it was within the power of the state in which the land lies to provide, by statute, that, if the defendant is not found within the jurisdiction, or refuses to perform, performance in his behalf may be had by a trustee appointed by the court for that purpose.

In Dull v. Blackman, 169 U. S. 243, 246, 247, 42 L. ed. 733, 734, 18 Sup. Ct. Rep. 333, 334, while recognizing that litigation in regard to the title of land belongs to the courts of the state where the land is so located, it was said: "Although, if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title."

But, however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. The embarrassment which sometimes results from it has been obviated by legislation in many states. In some states the decree is made to operate *per se* as a source of title. This operation is given a decree in Nebraska. In other states, power is given to certain officers to carry the decree into effect. Such power is given in Washington to commissioners appointed by the court. It was in pursuance of this power that the deed in the suit at bar was executed. But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or

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refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such case, the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment, or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pom. Eq. Jur. §§ 1317, 1318, and notes.

This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. "It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit." M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177.

Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply. The case of Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621, in a sense sustains her. The action was brought in one of the courts of Ohio for the recovery of the possession of certain lands. The defendant set up in defense a conveyance of the same lands, made by a master commissioner, in accordance with a decree of a court in Kentucky, in a suit for specific performance of a contract concerning the lands. The defendant in Burnley v. Stevenson claimed title under the master's deed. The court declared the principle that a court of equity, having the parties before it, could enforce specific performance of a contract for lands situate in another jurisdiction by compelling the parties to make a conveyance of them, but said that it did not follow that the court could "make its own decree operate as such conveyance." And it was decided that the decree could not have such effect, and, as it could not, it was "clear that a deed executed by a master, under the direction of the court," could "have no greater effect." Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437, and Page v. McKee, 3 Bush, 135, 96 Am. Dec. 201, were cited, and the master's deed, the court said, "must, therefore, be regarded as a nullity." But the court decided that the "decree was *in personam*, and bound the consciences of those against whom it was rendered." It became, it was in effect said, a record of the equities which preceded it, and of the fact that it had become, and it was, the duty of the defendants in the suit to convey the legal title to the plaintiff. This duty, it was further said, could have been enforced "by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order does not affect the validity of the decree, in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby."

The court proceeded to say that it might be admitted that the decree would not constitute a good defense at law, but that it was a good defense in equity, as, under the Code of Ohio, equitable as well as legal defenses might be set up in an action for the recovery of land, and from this, and the other propositions that were expressed, concluded that, as the decree had the effect in Kentucky of determining the equities of the parties to the land in Ohio, the courts of the latter state "must accord to it the same effect," in obedience to the due faith and credit clause of the Constitution of the United States. "True," the court observed, "the courts of this state cannot enforce the performance of that decree, by compelling the conveyance through its process of attachment; but, when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases supra; also Davis v. Headley, 22 N. J. Eq. 115; Brown v. Lexington & D. R. Co. 13 N. J. Eq. 191; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Bank of United States v. Merchants' Bank, 7 Gill, 415."

It may be doubted if the cases cited by the learned court sustain its conclusion. But we will not stop to review them, or to trace their accordance with or their distinction from the cases which we have cited. The latter certainly accord with the weight of authority. There is, however, much temptation in the facts of this case to follow the ruling of the supreme court of Ohio. As we have seen, the husband of the plaintiff brought suit against her in Washington for divorce, and, attempting to avail himself of the laws of Washington, prayed also that the land now in controversy be awarded to him. She appeared in the action, and, sub-

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mitting to the jurisdiction which he had invoked, made counter charges and prayers for relief. She established her charges, she was granted a divorce, and the land decreed to her. He, then, to defeat the decree, and in fraud of her rights, conveyed the land to the defendant in this suit. This is the finding of the trial court. It is not questioned by the supreme court; but, as the ruling of the latter court, that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title, does not offend the Constitution of the United States, we are constrained to affirm its judgment.

So ordered.

Mr. Justice **Holmes**, concurring specially:

I am not prepared to dissent from the judgment of the court, but my reasons are different from those that have been stated.

The real question concerns the effect of the Washington decree. As between the parties to it, that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. Ex parte Pollard, 4 Deacon, Bankr. 27, 40; Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737. So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska. But it does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else. Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641. (In this case it may have been that the wife contributed equally to the accumulation of the property, and so had an equitable claim.) A personal decree is equally within the jurisdiction of a court having the person within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree was entitled to full faith and credit in Nebraska.

But the Nebraska court carefully avoids saying that the decree would not be binding between the original parties, had the husband been before the court. The ground on which it goes is that to allow the judgment to affect the conscience of purchasers would be giving it an effect *in rem*. It treats the case as standing on the same footing as that of an innocent purchaser. Now, if the court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong. I do not see why it is not within the power of the state to do away with equity or with the equitable doctrine as to purchasers with notice if it sees fit. Still less do I see how a mistake as to notice could give us jurisdiction. If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by the obligation imposed by equity upon a purchaser with notice. The ground of decision below was that there was no such obligation. The decision, even if wrong, did not deny to the Washington decree its full effect. Bagley v. General Fire Extinguisher Co. 212 U. S 477, 480, 53 L. ed. 605, 613, 29 Sup. Ct Rep. 341.

Harlan and Brewer, Justices, dissent.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Respt.,
v.
HEZEKIAH W. BARNES, Appt.

(— Wash. —, 103 Pac. 792.)

Former jeopardy — discharge of jury.

1. The discharge of the jury in a criminal case without the consent of accused, after they had deliberated more than forty-three hours and announced that they were not able to agree unless given an instruction as to the possible future disposition of accused, to which they were not entitled, is not an acquittal, which will prevent his retrial on the same charge.

Trial — instructions — disposition of accused.

2. To aid the jury in reaching a conclusion in a murder case, the judge cannot instruct them as to the disposition which will be made of accused if he is found to be insane.

Jury — competence — statutory requirements.

3. Where a competent, impartial, and honest jury is secured in a murder case, a conviction will not be reversed because of some inadvertent failure to comply with every directory provision of the jury law, in the absence of any showing of prejudice against accused.

Same — challenge.

4. A challenge to the array is not necessary to secure the retirement, at a second trial of an accused, of jurors who served at the first trial.

(August 25, 1909.)

Note. — Upon the question, How long shall a jury be permitted to deliberate before a mistrial may be ordered in a criminal case, see case note to **State v. Harris**, 11 L.R.A.(N.S.) 178.

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APPEAL by defendant from a judgment of the Superior Court for Walla Walla County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. **E. F. Barker, Oscar Cain, and E. C. Mills**, for appellant:

The discharge of a jury in a criminal case upon a valid indictment, not called for by imperious necessity and without the consent of the defendant, operates as an acquittal, and bars further trial.

McCorckle v. State, 14 Ind. 40; State v. Wamire, 16 Ind. 357; Com. v. Fitzpatrick, 121 Pa. 109, 1 L.R.A. 451, 6 Am. St. Rep. 757, 15 Atl. 466; State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499; Conklin v. State, 25 Neb. 784, 41 N. W. 788; People v. Parker, 145 Mich. 488, 108 N. W. 999; Hines v. State, 24 Ohio St. 134; State v. Klauer, 70 Kan. 384, 78 Pac. 802; State v. Allen, 59 Kan. 758, 54 Pac. 1060; State v. Reed, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174.

Messrs. **Otto B. Rupp, Herbert C. Bryson, and Thomas Phelps Gose**, for respondent:

The discharge of the jury where, after full consideration, they fail to agree, is not a bar to another trial, on the ground that such condition of affairs constitutes absolute and urgent necessity, and justifies the court in discharging them.

12 Cyc. Law & Proc. p. 273; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; Simmons v. United States, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; Winsor v. R. L. R. 1 Q. B. 289, 390, 6 Best & S. 143, 7 Best & S. 490; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Thompson v. United States, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73; Dreyer v. People, 188 Ill. 40, 58 L.R.A. 869, 58 N. E. 622, 59 N. E. 424, affirmed in 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28; 2 Graham & W. New Trials, p. 122; United States v. Jim Lee, 123 Fed. 741; State v. Costello, 29 Wash. 366, 69 Pac. 1099; State v. Harris, 119 La. 297, 11 L.R.A. (N.S.) 178, 44 So. 22; Penn v. State, 36 Tex. Crim. Rep. 140, 35 S. W. 973; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272; Com. v. Purchase, 2 Pick. 521, 13 Am. Dec. 452; State v. Stephenson, 54 S. C. 234, 32 S. E. 305; State v. Keerl, 33 Mont. 501, 85 Pac. 862; State v. Trueman, 34 Mont. 249, 85 Pac. 1024; State v. Crump, 5 Idaho, 166, 47 Pac. 814; State v. Nelson, 26 Ind. 366; State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719; State v. Leach, 120 Ind. 124, 22 N. E. 111; Varnes v. State, 20 Tex. App. 109; Schindler v. State, 17 Tex. App. 412; Brady v. State, 21 Tex. App. 659, 1 S. W. 462; Smith v. State, 22 Tex. App. 196, 2 S. W. 542; Com. v. Townsend, 5 Allen, 216; Re Allison, 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820; Whitten v. State, 61 Miss. 717; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; Helm v. State, 66 Miss. 537, 6 So. 322; Hoffman v. State, 20 Md. 432; Anderson v. State, 86 Md. 479, 38 Atl. 937; Yarbrough v. Com. 89 Ky. 151, 25 Am. St. Rep. 524, 12 S. W. 143.

The plea of jeopardy is a special defense, and the burden of establishing it clearly and satisfactorily rests upon the defendant, and, in the absence of any objection or exception to a discharge of the jury, defendant must be held to have consented thereto.

O'Connor v. State, 28 Tex. App. 288, 13 S. W. 14; Kingen v. State, 46 Ind. 132; People v. Gardner, 62 Mich. 307, 29 N. W. 19; State v. Ellsworth, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; Penn v. State, supra; State v. Greer, 11 Wash. 244, 39 Pac. 874.

Crow, J., delivered the opinion of the court:

The defendant, Hezekiah W. Barnes, having been charged with the crime of murder in the first degree and convicted, judgment and sentence were entered, and he has appealed.

By his first assignment of error appellant contends that his plea of former acquittal should have been sustained, and that he should have been discharged by the trial court. The record shows that on May 22, 1908, an information was filed charging him with the crime of murder in the first degree; that the case was first called for trial in June, 1908; that on June 13th it was submitted to the jury; that, about 10 o'clock A. M. on June 15th, the jury were called into court, when the following proceedings were had:

The court: Gentlemen, have you agreed upon a verdict?

Foreman: Your honor, we fail to agree.

The court: What appears to be the difficulty?

Foreman: The gentlemen appear to have a difference of opinion.

The court: Do your difficulties arise with regard to the whole case or to some particular branch of it?

Foreman: The insanity part.

The court: Do you find beyond a reasonable doubt that the crime was committed by the defendant?

Foreman: The crime has been committed.

The court: The question with you is whether the defendant—

Foreman: —was sane or insane.

The court: At the time of its commission?

Foreman: Yes, sir. . . .

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mitting to the jurisdiction which he had invoked, made counter charges and prayers for relief. She established her charges, she was granted a divorce, and the land decreed to her. He, then, to defeat the decree, and in fraud of her rights, conveyed the land to the defendant in this suit. This is the finding of the trial court. It is not questioned by the supreme court; but, as the ruling of the latter court, that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title, does not offend the Constitution of the United States, we are constrained to affirm its judgment.

So ordered.

Mr. Justice **Holmes**, concurring specially:

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The real question concerns the effect of the Washington decree. As between the parties to it, that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. Ex parte Pollard, 4 Deacon, Bankr. 27, 40; Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737. So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska. But it does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else. Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641. (In this case it may have been that the wife contributed equally to the accumulation of the property, and so had an equitable claim.) A personal decree is equally within the jurisdiction of a court having the person within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree was entitled to full faith and credit in Nebraska.

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APPEAL by defendant from a judgment of the Superior Court for Walla Walla County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. **E. F. Barker, Oscar Cain, and E. C. Mills**, for appellant:

The discharge of a jury in a criminal case upon a valid indictment, not called for by imperious necessity and without the consent of the defendant, operates as an acquittal, and bars further trial.

McCorckle v. State, 14 Ind. 40; State v. Wamire, 16 Ind. 357; Com. v. Fitzpatrick, 121 Pa. 109, 1 L.R.A. 451, 6 Am. St. Rep. 757, 15 Atl. 466; State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499; Conklin v. State, 25 Neb. 784, 41 N. W. 788; People v. Parker, 145 Mich. 488, 108 N. W. 999; Hines v. State, 24 Ohio St. 134; State v. Klauer, 70 Kan. 384, 78 Pac. 802; State v. Allen, 59 Kan. 758, 54 Pac. 1060; State v. Reed, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174.

Messrs. **Otto B. Rupp, Herbert C. Bryson, and Thomas Phelps Gose**, for respondent:

The discharge of the jury where, after full consideration, they fail to agree, is not a bar to another trial, on the ground that such condition of affairs constitutes absolute and urgent necessity, and justifies the court in discharging them.

12 Cyc. Law & Proc. p. 273; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; Simmons v. United States, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; Winsor v. R. L. R. 1 Q. B. 289, 390, 6 Best & S. 143, 7 Best & S. 490; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Thompson v. United States, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73; Dreyer v. People, 188 Ill. 40, 58 L.R.A. 869, 58 N. E. 622, 59 N. E. 424, affirmed in 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28; 2 Graham & W. New Trials, p. 122; United States v. Jim Lee, 123 Fed. 741; State v. Costello, 29 Wash. 366, 69 Pac. 1099; State v. Harris, 119 La. 297, 11 L.R.A. (N.S.) 178, 44 So. 22; Penn v. State, 36 Tex. Crim. Rep. 140, 35 S. W. 973; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272; Com. v. Purchase, 2 Pick. 521, 13 Am. Dec. 452; State v. Stephenson, 54 S. C. 234, 32 S. E. 305; State v. Keerl, 33 Mont. 501, 85 Pac. 862; State v. Trueman, 34 Mont. 249, 85 Pac. 1024; State v. Crump, 5 Idaho, 166, 47 Pac. 814; State v. Nelson, 26 Ind. 366; State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719; State v. Leach, 120 Ind. 124, 22 N. E. 111; Varnes v. State, 20 Tex. App. 109; Schindler v. State, 17 Tex. App. 412; Brady v. State, 21 Tex. App. 659, 1 S. W. 462; Smith v. State, 22 Tex. App. 196, 2 S. W. 542; Com. v. Townsend, 5 Allen, 216; Re Allison, 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820; Whitten v. State, 61 Miss. 717; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; Helm v. State, 66 Miss. 537, 6 So. 322; Hoffman v. State, 20 Md. 432; Anderson v. State, 86 Md. 479, 38 Atl. 937; Yarbrough v. Com. 89 Ky. 151, 25 Am. St. Rep. 524, 12 S. W. 143.

The plea of jeopardy is a special defense, and the burden of establishing it clearly and satisfactorily rests upon the defendant, and, in the absence of any objection or exception to a discharge of the jury, defendant must be held to have consented thereto.

O'Connor v. State, 28 Tex. App. 288, 13 S. W. 14; Kingen v. State, 46 Ind. 132; People v. Gardner, 62 Mich. 307, 29 N. W. 19; State v. Ellsworth, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; Penn v. State, supra; State v. Greer, 11 Wash. 244, 39 Pac. 874.

Crow, J., delivered the opinion of the court:

The defendant, Hezekiah W. Barnes, having been charged with the crime of murder in the first degree and convicted, judgment and sentence were entered, and he has appealed.

By his first assignment of error appellant contends that his plea of former acquittal should have been sustained, and that he should have been discharged by the trial court. The record shows that on May 22, 1908, an information was filed charging him with the crime of murder in the first degree; that the case was first called for trial in June, 1908; that on June 13th it was submitted to the jury; that, about 10 o'clock A. M. on June 15th, the jury were called into court, when the following proceedings were had:

The court: Gentlemen, have you agreed upon a verdict?

Foreman: Your honor, we fail to agree.

The court: What appears to be the difficulty?

Foreman: The gentlemen appear to have a difference of opinion.

The court: Do your difficulties arise with regard to the whole case or to some particular branch of it?

Foreman: The insanity part.

The court: Do you find beyond a reasonable doubt that the crime was committed by the defendant?

Foreman: The crime has been committed.

The court: The question with you is whether the defendant—

Foreman: —was sane or insane.

The court: At the time of its commission?

Foreman: Yes, sir. . . .

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The court: Gentlemen, you may retire, and I will formulate some further instructions in regard to that branch of the case, and try to explain to you what I think possibly you may have overlooked, and will call you in again later. (The jury retire.)

Mr. Garrecht (attorney for appellant): We will ask for an objection to any further instructions, where the jury has not asked for any further instructions.

The court: Call in the jury. (The jury return to the court room.)

The court: Gentlemen of the jury, I will ask you whether you wish me to instruct you any further. If not, if you fully understand my former instructions, I will not instruct you any further.

The foreman: I will state, Judge, that the difference of opinion comes up in regard to the incarceration of the prisoner, in the case of insanity, for life,—life punishment; whether there's any chance of him being restored to liberty after he is incarcerated for a short time, or whether the committing of the crime will carry with it the life sentence.

The court: I cannot give you what the law is in regard to it now. I have got to give it to you in writing. That is the only point upon which you wish me to instruct you?

Foreman: I think, that being solved, we can come to an agreement. With those instructions we are perfectly willing to retire and wait.

Mr. Cain (attorney for appellant): We have no objections to the court's instructing them on that point orally. You can read to them the section of the statute that covers it.

The court: I won't unless I am given full liberty, because I might say something that you might construe into something else.

Foreman: We would rather have them in writing.

The court: I can't give them to you to read. I will have to read them to you. (Jury retire. Jury are recalled.)

The court: Gentlemen, as I understand your foreman, you have agreed that the defendant committed the crime charged in the information, but you have not agreed as to whether he was sane or insane at the time of its commission; and I further understand from him that your finding upon that question depends upon whether the defendant can be imprisoned for life or whether he can be discharged at any time. Is that the state of the case?

Foreman: That is the case.

The court: And without that knowledge, as to whether he can be incarcerated for life or whether he can be discharged at any time, you think that you are unable to agree upon a verdict, and will be unable to agree? You think that there will be no reasonable prospect of an agreement?

Foreman: No, sir.

The court: I feel constrained, in view of these statements of yours, to discharge you from further consideration of the case. The fact that you are making your verdict in this case dependent upon the punishment, or what might be done with this defendant after this trial, satisfies me that you should not consider this case at all. It is not a matter for your consideration whether he would be discharged or not discharged. The law is, however, that he, upon certain contingencies, may be discharged at any time after he is restored to sanity, if you should find him to be insane,—upon doing certain things or upon certain things happening, that he could be restored to his liberty. But that ought not to enter into your consideration at all. It has nothing to do with the question of whether he was sane or insane at the time he committed this act. It goes to his punishment; and, in other words, to be plain and curt with you, it is none of your business. It is the business of the law. And I, therefore, seeing that you cannot agree without taking that matter into consideration (which is entirely improper to take into consideration), feel that I would be doing the prisoner and the public both a great injustice to allow you to determine his guilt or innocence upon a question of that kind; and I therefore discharge you from further consideration of the case.

The case was again called for trial on June 24, 1908. The appellant then filed a plea of former jeopardy, in which he claimed that the discharge of the jury amounted to an acquittal. The state answered, the appellant demurred, the demurrer was overruled, and the appellant replied. Upon the second trial it was agreed that the plea of former jeopardy should be submitted to the jury. Two verdicts were returned,—one finding the appellant guilty of murder in the first degree, and the other finding that he had not been placed in jeopardy or acquitted.

Appellant concedes that in a criminal case a trial court may, when necessary, discharge a jury that has failed to agree, without effecting an acquittal. He contends, however, that no such necessity arose in this cause, that the discharge was not demanded by imperious necessity, that it was made without his consent, and that it operated as an acquittal, barring further trial. To support this contention he cites the following authorities: McCorkle v. State, 14 Ind. 39; State v. Wamire, 16 Ind. 357; Com. v.

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Fitzpatrick, 121 Pa. 109, 1 L.R.A. 451, 6 Am. St. Rep. 757, 15 Atl. 466; State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499; Conklin v. State, 25 Neb. 784, 41 N. W. 788; People v. Parker, 145 Mich. 488, 108 N. W. 999; Hines v. State, 24 Ohio St. 134; State v. Klauer, 70 Kan. 384, 78 Pac. 802; State v. Allen, 59 Kan. 758, 54 Pac. 1060; State v. Reed, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174. These authorities, in so far as they tend to support the appellant's contention, are the outgrowth of the rule adopted in criminal cases by the early English courts, to the effect that a jury sworn and charged in a case of life or member cannot be discharged by the court or any other, but that they ought to give a verdict. At an early date the courts of this country refused to adopt or follow this rule, but held that, when the jury could not agree on a verdict, the court had discretionary power to discharge them, and that the prisoner might be put on his trial before another jury. Com. v. Purchase, 2 Pick. 521, 13 Am. Dec. 452. There is, however, some conflict of authority in American courts on the question as to whether, on their failure to agree, the discharge of the jury without the consent of the defendant will, in a criminal case, bar another trial. The courts of a few states hold that a bar will result, and the most pertinent cases cited by the appellant are from such courts. Most of the American authorities have announced the rule that the power to discharge the jury is within the sound discretion of the trial judge, and that his exercise of such discretion will not be reviewed by the appellate courts, unless its clear abuse appears. State v. Costello, 29 Wash. 366, 69 Pac. 1099; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; Re Allison, 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820; State v. Harris, 11 L.R.A.(N.S.) 178, and note (119 La. 297, 44 So. 22); Simmons v. United States, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; Thompson v. United States, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73; Dreyer v. People, 188 Ill. 40, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424; Penn v. State, 36 Tex. Crim. Rep. 140, 35 S. W. 973; Anderson v. State, 86 Md. 479, 38 Atl. 937; State v. Crump, 5 Idaho, 166, 47 Pac. 814; United States v. Jim Lee (D. C.) 123 Fed. 741; State v. Keerl, 33 Mont. 501, 85 Pac. 862. In State v. Costello, supra, the jury had deliberated from 1:40 P. M. on Tuesday until 9:30 A. M. on Wednesday, when they were called into court, reported they had not agreed, that there seemed to be no prospect of agreement, and were discharged. This court, in discussing the plea of former jeopardy interposed on a subsequent trial, said: "The statute provides (Ballinger's Anno. Codes & Statutes, § 5006 [Pierce's Code, § 620]): 'The jury may be discharged by the court . . . by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.' By this section the lower court is invested with a discretion to discharge a jury after it has been kept together until it satisfactorily appears that there is no probability of their agreeing. This discretion must be based upon substantial grounds and is subject to review like any other legal discretion. It appears here that the jury had been considering the case for more than nineteen hours, and that, when asked by the court if there was any prospect for an agreement, answered, 'It seems not,' and stated, 'We have stood one way for twelve hours.' While in the question put by the court the word 'probability' is not used, still we think the question and the answer clearly indicate that there was no reasonable probability of an agreement, and that, under the conditions existing, the court did not abuse his discretion in discharging the jury." In Simmons v. United States, supra, the court said: "The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: 'We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this

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discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office.' United States v. Perez, supra."

The appellant most strenuously insists that, in this case, no necessity appeared for the discharge of the jury, which was arbitrarily ordered without his consent. He further insists that a reasonable inference from all the proceedings would be that, had the jury been instructed to the effect that the question of punishment could not enter into their consideration, they would, on further deliberation, have been able to reach a verdict, and that their discharge violated his rights and constituted an acquittal. The record indicates that, on first impulse, the trial judge did contemplate preparing and giving written instructions as to the disposition of the appellant in the event of his being found insane, and advising the jury whether he would thereafter be permanently deprived of his liberty. It is evident, however, that upon reflection he reached the conclusion that the question involved in such an instruction was not proper for their consideration, and should in no way influence or control their verdict. He then recalled the jury, and was informed by them that, without any knowledge as to whether the appellant would be imprisoned for life or discharged if found insane, they would be unable to agree. Thereupon, in the exercise of his sound discretion, based on these substantial grounds, he discharged the jury. They had already deliberated for more than forty-three hours, and announced that they could not agree unless given an instruction to which they were not entitled. Under these circumstances, we would not be justified in holding that the trial judge erred, or that he abused his discretion.

Nor should we order the discharge of the appellant, who was convicted on his second trial. The trial judge was familiar with the trial, its proceedings, the evidence, and the personality of the jurors. He had opportunities for understanding the situation, not afforded this court, and was in a better position to determine whether the jury might agree. The foreman's first statement was that they had failed to agree. He further stated that they had no doubt the crime had been committed, and that their differences arose on the issue of appellant's sanity, because they did not know what punishment would be inflicted if they found him insane. The reasonable inference was that, if they were advised what that punishment would be, they might be able to determine appellant's sanity or insanity, but that without such knowledge they would be unable to do so. It certainly would have been improper for the trial court to have aided them in reaching a verdict by any such method, or to have instructed them as requested, with that object in view. The trial judge exercised his discretion in discharging the jury. There is no showing of any abuse of such discretion, and his action must be sustained.

The appellant interposed the following objections and challenges to the panel of jurors: (1) That the lists of jurors drawn on May 7, June 5, and June 17, 1908, were not compared and checked in open court with the list previously prepared by the jury commissioners, and that they were not entered upon the journal or certified by the clerk. (2) That the names of E. F. Cormick and W. Castell were drawn from the jury box, although the recorded list of jurors previously selected by the commissioners did not include their names. (3) That on June 15, 1908, the court finally discharged the jury. (4) That the names of Leo Ferguson, Frank J. Kent, and Woodson Cummings were drawn in a list of 100 names ordered by the trial court; that each of their names had been previously drawn on May 9, 1908; that Leo Ferguson and Frank J. Kent had each served as a juror on appellant's former trial; and that Woodson Cummings was examined on the former trial, and excused for cause. No question is raised as to the regularity or validity of the acts and proceedings of the jury commissioners in selecting and placing names in the jury box, or in the discharge of their duties. It is not suggested that the jurors who tried and convicted the appellant were not competent and qualified; that any of their names had not been originally and properly selected by the commissioners, and placed in the jury box; or that they were not afterwards drawn therefrom in obedience to the order of the trial judge. Appellant's objections to the panel appear to be purely technical, reaching only the manner and form of drawing the array. After presenting and reading his written challenge, the appellant offered to introduce proof in its support. The trial judge, in denying the challenge and excluding the proof, said: "There is some of this incorrect, probably; but there are some of your points that I think are not well taken. We might as well abolish our courts entirely, and give up the trial of cases, if we are to literally follow everything in that jury law, and it is almost an impossibility, and we have complied with it as nearly as practicable, and you get a fair jury, and, if you do, I think that the purpose of the law has been carried out as far as it is practicable."

Appellant contends these irregularities in the drawing of names were fatal, being in

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violation of the act relating to the selection of jurors. Sess. Laws 1905, chap. 146, p. 270. We make reference to the act mentioned, but shall not enter upon a detailed statement of its provisions. While they should be observed as closely as practicable, so that a competent, impartial, and honest jury may be secured, it does not follow that an inadvertent failure to comply with every directory provision will vitiate a panel, unless it is made manifest that some omission prejudicial to the appellant has occurred. "The manner in which the jury panel shall be drawn is regulated in the different jurisdictions by statutory provisions, which are in most respects merely directory, but which as to their material provisions, designed for securing a fair and impartial jury, must be substantially complied with. . . . The most important requirement is that the panel shall be drawn, and not arbitrarily selected, and any act of this character on the part of the clerk or other officers is ground for challenge to the array." 24 Cyc. Law & Proc. pp. 218, 219, and cases cited. "In some of the states there are decisions to the effect that statutes which prescribe the powers and duties of jury commissioners and corresponding officers to whom is intrusted the selection or drawing of suitable persons as jurors, and which prescribe the time and manner of exercising such powers and performing such duties, are mandatory, and that strict adherence to the statutory requirements is essential to support the regularity and validity of the proceedings. But, notwithstanding these decisions, the great weight of authority is to the effect that the mere fact that officers intrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced, or that injury has been sustained by reason of neglect or omissions charged. In brief, courts will not sanction a palpable disregard of essential statutory provisions, nor overlook material departures therefrom; but, if there is a substantial compliance with the statutes, mere irregularities in the procedure or mere informalities on the part of the officers charged with the selection and drawing will be deemed unimportant." 12 Enc. Pl. & Pr. pp. 276–278.

There is nothing in the record to show any prejudice against the appellant in the selection of the jury. If the statute had been strictly complied with, the indications are that the identical jurors before whom the appellant was tried would have been chosen, and it has not been made apparent that any of his rights were injuriously affected by the form or manner in which they were actually selected. The record fails to show that any jurors other than those who served on the first trial were discharged. It does show that, after the appellant had exhausted all peremptory challenges to which he was entitled, the trial judge accorded him an additional one, which he used; that a further one was tendered him; that he declined to use it; and that he accepted the jury. These additional peremptory challenges accorded him privileges to which he was not entitled under the statute, and, in the absence of any showing of prejudice, the action of the trial court denying his challenge to the entire panel must be sustained. 1 Thomp. Trials, §§ 33, 34. No palpable abuse of appellant's rights, nor improper conduct of those participating in the trial or of any other person, has been shown. Nothing in the record warrants any inference of fraud or attempted fraud. The three jurors who had been called for the first trial were subject to challenge for cause, and could have been thus reached without the necessity of a challenge to the array. State v. Straub, 16 Wash. 111, 47 Pac. 227; State v. Krug, 12 Wash. 288, 41 Pac. 126; State v. Vance, 29 Wash. 435, 70 Pac. 34; State v. Croney, 31 Wash. 122, 71 Pac. 783; Sharp v. United States, 13 Okla. 522, 76 Pac. 177; People v. Sowell, 145 Cal. 292, 78 Pac. 717; People v. Richards, 1 Cal. App. 566, 82 Pac. 691; State v. Ju Nun (Or.) 97 Pac. 97.

The appellant has assigned error on a portion of the instructions given by the trial judge on the defense of insanity. The evidence on this defense has not been included in the statement of facts or made a part of the record, as it should have been to aid us in reaching a correct conclusion on this assignment. We will say, however, that we find no error in the court's instructions on the issue of insanity, as the entire body of the instructions given show that it was fairly and properly submitted to the jury.

The judgment is affirmed.

Rudkin, Ch. J., and **Mount**, **Fullerton**, and **Chadwick**, JJ., concur. **Dunbar**, **Gose**, **Parker**, and **Morris**, JJ., took no part.

ARKANSAS SUPREME COURT.

J. R. B. MOORE, Appt.,
v.
ALBERTA J. SHARPE et al.

(— Ark. —, 121 S. W. 341.)

Deed — condition — forfeiture.

Neither re-entry nor declaration of forfeiture is necessary to terminate a con-

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ditional estate, where the common-law doctrine of livery of seisin is abolished by a statute authorizing the conveyance of land whether held in possession or not, and such conditional estate may therefore be terminated by a subsequent deed to a stranger executed by the conditional grantor.

(Hart, J., dissents.)

(July 12, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Phillips County in plaintiffs' favor in an action brought to recover possession of certain lands. Affirmed.

The facts are stated in the opinion.

Mr. John I. Moore for appellant.

Messrs. W. H. H. Miller and **Augustin Boice**, with Messrs. **Rose, Hemingway, Cantrell, & Loughborough** for appellees.

Messrs. **Julian Laughlin, Murphy, Coleman, & Lewis, and John B. Jones,** *amici curiæ.*

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by plaintiffs, Alberta J. Sharpe and Augustine Boice, against J. R. B. Moore in the circuit court of Phillips county, to recover possession of 40 acres of land situated in that county. The plaintiffs recovered judgment below, and the defendant appealed.

Each party deraigns title from the same source, *viz.*, from Edmund McGehee, who owned the land at the time of his death, during the year 1865, under a patent from the state of Arkansas. The plaintiff's claim title to the lands under a deed executed in 1881 by the widow and devisees of Edmund McGehee. The defendant claims title under a deed executed in 1873 by the executors, including the widow, of Edmund McGehee, to the St. Louis & Memphis Railroad Company. This deed purported to convey a large body of land including the tract in controversy, all of which was wild, timbered land, without any clearing or habitation on it. The will of Edmund McGehee conferred no power upon the executors to execute the deed, and it was executed pursuant to an order of a Mississippi court, and no order was made by the Arkansas probate court. It is conceded that on this account the deed was ineffectual as a conveyance of the testator's title, and conveyed nothing except the undivided interest of the widow as one of the devisees under the will.

The deed was executed on the condition, expressed therein, that the grantee should build and complete a railroad within three years from the date thereof. Whether this was a condition precedent or subsequent we need not now decide, since conceding it to have been a condition subsequent, which is essential to the strength of defendant's claim of title under the deed, the conclusion we have reached on another controlling

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Case Note.—Necessity of entry or formal declaration of forfeiture as a condition of maintaining action, other than for damages based on breach of condition subsequent in a conveyance of freehold.

This subject is fully considered in the case note to Mash v. Bloom, 14 L.R.A.(N.S.) 1189, where many cases are collected, this note being intended as merely supplemental thereto.

The following cases hold that the breach of a condition subsequent in a conveyance does not *ipso facto* revest the estate, that being accomplished only by a re-entry on the part of the grantor or of those entitled to assert a forfeiture. Lewis v. Lewis, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S. E. 836; Bonniwell v. Madison, 107 Iowa, 85, 77 N. W. 530; Griffith v. Owensboro & N. R. Co. 15 Ky. L. Rep. 271; Rannels v. Rowe, 74 C. C. A. 376, 145 Fed. 296.

It was held in Strothers v. Woodcox (Iowa) 121 N. W. 51, that upon a breach of a condition subsequent a grantor could not maintain an action of ejectment to recover the possession of the property without a re-entry for the breach, or that which would be an equivalent thereto.

It was said in Rannels v. Rowe, supra, that upon the breach of a condition subsequent the estate continues in the grantee until the proper step has been taken to consummate a forfeiture, which requires a re-entry or some act that may be considered as a lawful substitute therefor. This is not a mere matter of form which may be dispensed with, but is regarded as being of substance because intended to destroy an estate; and, whenever acts or words are relied upon as a substitute for a re-entry upon land, they must be of such a character as distinctly to admonish the grantee that thenceforth there is no waiver of his breach of the condition, and that his title is at an end; and an intention to forfeit formed in the mind but undeclared is ineffectual.

It was held in Rannels v. Rowe, supra, that the statute under consideration in MOORE v. SHARPE was not intended to change the rule requiring re-entry or an equivalent act in order to forfeit an estate upon the breach of a condition subsequent. The court said that such provisions are common in the legislation of the states, and their purpose is to abrogate an ancient rule of the common law which has no relevancy to the subject under consideration.

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question is adverse to the defendant. The condition of the deed, treating it as a condition subsequent, was not performed. No considerable amount of work in building the railroad was done, and, after the condition was broken, the grantor, without reentering upon the land or by any other overt act declaring a forfeiture, subsequently executed the deed under which plaintiffs claim title. The question we propose to decide is, then, whether or not re-entry upon the land, suit, or declaration of forfeiture by the grantor, before conveying the land to a third party, was essential in order to effect a forfeiture, and whether any interest or estate was conveyed by the subsequent deed, under which the plaintiffs claim title. We pretermit a discussion of the numerous other questions presented and argued in the case.

The doctrine of estates upon condition is of feudal origin, of which system the doctrine of title by livery of seisin formed an essential part, on account of the condition of real property at that time, and the only practical method of conveying it. This was, then, a doctrine of necessity, for in that day no system of registration of conveyance existed. Indeed, lands were not generally conveyed by writings, and the only practical method of giving notice of a change of title was either by actual delivery of possession or by symbolic delivery in sight of the land. At common law, the only method whereby a forfeiture could be effected for breach of condition was by reentry upon the premises or by a public attempt to re-enter, with a declaration of forfeiture. This, too, grew out of the doctrine of livery of seisin, the reason being that the forfeiture for condition broken must be accomplished by acts of equal dignity and notoriety with those which created the condition, *viz.*, delivery, either actual or symbolic. "As by the old common law a freehold could be created only by the ceremony of livery of seisin, the corresponding ceremony of re-entry was necessary in order to determine it, or, as Coke has it, 'an estate of freehold cannot begin nor end without ceremony.'" 1 Jones, Real Prop. in Conveyancing, § 715. "The entry, moreover, in the language of the Touchstone, should be 'an open and notorious act, equivalent to investiture of land by livery of seisin, that notoriety might be gvien to the change of title.' It is not necessary, however, that the party entering should declare at the time for what purpose he enters. The act speaks for itself." Id. § 716. In his recent work on Real Property, Professor Minor (vol. 1, p. 532) says: "It is an established rule of the common law that, if the conditional estate be a freehold, the mere occurrence of the event which constitutes the violation of the condition does not defeat the estate, because as a freehold can at common law only be created by livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor or his heirs. . . . No actual reentry is necessary to determine an estate for years on condition; 'for, as a term of years may begin without ceremony, so it may end without ceremony.'"

It must also be conceded that at common law the right of re-entry for condition broken was not assignable, and could only be exercised by the grantor who created the condition, or by his privies in blood. It could not be exercised by one who was only the grantor's privy in estate. This, under the maxim that, in order to discourage maintenance, "nothing which lies in action, entry, or re-entry can be granted." The same rule prohibited the conveyance of lands held adversely, or any interest therein. This rule was created under the English statute (Stat. 32 Hen. VIII. chap. 9) against selling pretended titles, and Sir Edward Coke states the reason therefor as follows: "[To prevent] maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entrie, or re-entrie can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth." 2 Co. Litt. 214-a. In many of the states of the American Union, this English statute against the sale of pretended titles to lands not in possession has been re-enacted, and in a few states the doctrine has been recognized and enforced as a part of the common law. But this court in Lytle v. State, 17 Ark. 674, held that "the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been re-enacted in this state, have been met here by directly conflicting legislation in the several provisions touching the sale of real estate held in adverse possession, whereby the right of 'alienation and purchase' of every interest, title, and estate therein 'has been enlarged almost to an unlimited extent.'"

This rule has long since been changed in England by statute. By the wills act of 1837 (Stat. 1 Vict. chap. 26, § 3) all rights of entry for condition broken were made devisable, and in 1844 another statute (Stat. 7 & 8 Vict. chap. 76, § 5) made them assignable. At common law there was a distinctive reason for the rule of inhibition against the assignment of a grantor's rights before and after breach of condition. Judge

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ditional estate, where the common-law doctrine of livery of seisin is abolished by a statute authorizing the conveyance of land whether held in possession or not, and such conditional estate may therefore be terminated by a subsequent deed to a stranger executed by the conditional grantor.

(Hart, J., dissents.)

(July 12, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Phillips County in plaintiffs' favor in an action brought to recover possession of certain lands. Affirmed.

The facts are stated in the opinion.

Mr. John I. Moore for appellant.

Messrs. W. H. H. Miller and Augustin Boice, with Messrs. Rose, Hemingway, Cantrell, & Loughborough for appellees.

Messrs. Julian Laughlin, Murphy, Coleman, & Lewis, and John B. Jones, *amici curiæ*.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by plaintiffs, Alberta J. Sharpe and Augustine Boice, against J. R. B. Moore in the circuit court of Phillips county, to recover possession of 40 acres of land situated in that county. The plaintiffs recovered judgment below, and the defendant appealed.

Each party deraigns title from the same source, *viz.*, from Edmund McGehee, who owned the land at the time of his death, during the year 1865, under a patent from the state of Arkansas. The plaintiff's claim title to the lands under a deed executed in 1881 by the widow and devisees of Edmund McGehee. The defendant claims title under a deed executed in 1873 by the executors, including the widow, of Edmund McGehee, to the St. Louis & Memphis Railroad Company. This deed purported to convey a large body of land including the tract in controversy, all of which was wild, timbered land, without any clearing or habitation on it. The will of Edmund McGehee conferred no power upon the executors to execute the deed, and it was executed pursuant to an order of a Mississippi court, and no order was made by the Arkansas probate court. It is conceded that on this account the deed was ineffectual as a conveyance of the testator's title, and conveyed nothing except the undivided interest of the widow as one of the devisees under the will.

The deed was executed on the condition, expressed therein, that the grantee should build and complete a railroad within three years from the date thereof. Whether this was a condition precedent or subsequent we need not now decide, since conceding it to have been a condition subsequent, which is essential to the strength of defendant's claim of title under the deed, the conclusion we have reached on another controlling

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Case Note.—Necessity of entry or formal declaration of forfeiture as a condition of maintaining action, other than for damages based on breach of condition subsequent in a conveyance of freehold.

This subject is fully considered in the case note to Mash v. Bloom, 14 L.R.A.(N.S.) 1189, where many cases are collected, this note being intended as merely supplemental thereto.

The following cases hold that the breach of a condition subsequent in a conveyance does not *ipso facto* revest the estate, that being accomplished only by a reentry on the part of the grantor or of those entitled to assert a forfeiture. Lewis v. Lewis, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; Wadley Lumber Co. v. Lott, 130 Ga. 135, 60 S. E. 836; Bonniwell v. Madison, 107 Iowa, 85, 77 N. W. 530; Griffith v. Owensboro & N. R. Co. 15 Ky. L. Rep. 271; Rannels v. Rowe, 74 C. C. A. 376, 145 Fed. 296.

It was held in Strothers v. Woodcox (Iowa) 121 N. W. 51, that upon a breach of a condition subsequent a grantor could not maintain an action of ejectment to recover the possession of the property without a re-entry for the breach, or that which would be an equivalent thereto.

It was said in Rannels v. Rowe, supra, that upon the breach of a condition subsequent the estate continues in the grantee until the proper step has been taken to consummate a forfeiture, which requires a reentry or some act that may be considered as a lawful substitute therefor. This is not a mere matter of form which may be dispensed with, but is regarded as being of substance because intended to destroy an estate; and, whenever acts or words are relied upon as a substitute for a re-entry upon land, they must be of such a character as distinctly to admonish the grantee that thenceforth there is no waiver of his breach of the condition, and that his title is at an end; and an intention to forfeit formed in the mind but undeclared is ineffectual.

It was held in Rannels v. Rowe, supra, that the statute under consideration in MOORE v. SHARPE was not intended to change the rule requiring re-entry or an equivalent act in order to forfeit an estate upon the breach of a condition subsequent. The court said that such provisions are common in the legislation of the states, and their purpose is to abrogate an ancient rule of the common law which has no relevancy to the subject under consideration.

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question is adverse to the defendant. The condition of the deed, treating it as a condition subsequent, was not performed. No considerable amount of work in building the railroad was done, and, after the condition was broken, the grantor, without re-entering upon the land or by any other overt act declaring a forfeiture, subsequently executed the deed under which plaintiffs claim title. The question we propose to decide is, then, whether or not re-entry upon the land, suit, or declaration of forfeiture by the grantor, before conveying the land to a third party, was essential in order to effect a forfeiture, and whether any interest or estate was conveyed by the subsequent deed, under which the plaintiffs claim title. We pretermit a discussion of the numerous other questions presented and argued in the case.

The doctrine of estates upon condition is of feudal origin, of which system the doctrine of title by livery of seisin formed an essential part, on account of the condition of real property at that time, and the only practical method of conveying it. This was, then, a doctrine of necessity, for in that day no system of registration of conveyance existed. Indeed, lands were not generally conveyed by writings, and the only practical method of giving notice of a change of title was either by actual delivery of possession or by symbolic delivery in sight of the land. At common law, the only method whereby a forfeiture could be effected for breach of condition was by re-entry upon the premises or by a public attempt to re-enter, with a declaration of forfeiture. This, too, grew out of the doctrine of livery of seisin, the reason being that the forfeiture for condition broken must be accomplished by acts of equal dignity and notoriety with those which created the condition, *viz.*, delivery, either actual or symbolic. "As by the old common law a freehold could be created only by the ceremony of livery of seisin, the corresponding ceremony of re-entry was necessary in order to determine it, or, as Coke has it, 'an estate of freehold cannot begin nor end without ceremony.'" 1 Jones, Real Prop. in Conveyancing, § 715. "The entry, moreover, in the language of the Touchstone, should be 'an open and notorious act, equivalent to investiture of land by livery of seisin, that notoriety might be gvien to the change of title.' It is not necessary, however, that the party entering should declare at the time for what purpose he enters. The act speaks for itself." Id. § 716. In his recent work on Real Property, Professor Minor (vol. 1, p. 532) says: "It is an established rule of the common law that, if the conditional estate be a freehold, the mere occurrence of the event which constitutes the violation of the condition does not defeat the estate, because as a freehold can at common law only be created by livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor or his heirs. . . . No actual re-entry is necessary to determine an estate for years on condition; 'for, as a term of years may begin without ceremony, so it may end without ceremony.'"

It must also be conceded that at common law the right of re-entry for condition broken was not assignable, and could only be exercised by the grantor who created the condition, or by his privies in blood. It could not be exercised by one who was only the grantor's privy in estate. This, under the maxim that, in order to discourage maintenance, "nothing which lies in action, entry, or re-entry can be granted." The same rule prohibited the conveyance of lands held adversely, or any interest therein. This rule was created under the English statute (Stat. 32 Hen. VIII. chap. 9) against selling pretended titles, and Sir Edward Coke states the reason therefor as follows: "[To prevent] maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entrie, or re-entrie can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth." 2 Co. Litt. 214-a. In many of the states of the American Union, this English statute against the sale of pretended titles to lands not in possession has been re-enacted, and in a few states the doctrine has been recognized and enforced as a part of the common law. But this court in Lytle v. State, 17 Ark. 674, held that "the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been re-enacted in this state, have been met here by directly conflicting legislation in the several provisions touching the sale of real estate held in adverse possession, whereby the right of 'alienation and purchase' of every interest, title, and estate therein 'has been enlarged almost to an unlimited extent.'"

This rule has long since been changed in England by statute. By the wills act of 1837 (Stat. 1 Vict. chap. 26, § 3) all rights of entry for condition broken were made devisable, and in 1844 another statute (Stat. 7 & 8 Vict. chap. 76, § 5) made them assignable. At common law there was a distinctive reason for the rule of inhibition against the assignment of a grantor's rights before and after breach of condition. Judge

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Hare, in his note to Dumpor's Case, 1 Smith, Lead. Cas. 8th ed. p. 140, says: "When it is said, in general terms, that a condition cannot be taken advantage of, save by the grantor and his heirs, and is consequently insusceptible of assignment, two distinct points of law, resting on different reasons, are involved in the assertion. Before breach, the reason why an assignee cannot take advantage of a condition really depends upon the inherent incapacity of the condition itself. But after breach the condition itself is gone, and there arises in its stead, whatever may be its terms, in the case of freehold estates, at all events when created by a common-law conveyance, a right or title of entry, which is as little capable of assignment as the condition, although the obstacle to its assignment is of a different nature, arising out of the policy of the common law and the provisions of the statute of maintenance, which forbade the sale or transfer of claims or demands unsustained by possession, and resting solely in entry or action." However, the same learned author states his opinion to be that the abrogation of the rule or statute against maintenance does not alter the rule as to the nonassignability of the grantor's right before re-entry. On that subject he says: "It does not necessarily follow that the right to enforce the forfeiture of a condition is equally susceptible of assignment. The right to enter for a breach of condition is a bare right or remedy, which differs essentially from the right to clothe the title to land with possession by expelling a disseisor or intruder; for, while the right of property and right of possession belong in the one case to the person who enters, they are vested in the other, in him on whom the entry is made, and continue in full force, although liable to be defeated, down to the last moment before that at which the grantor . . . [enters]."

The contrary view was expressed by the New Jersey court of errors and appeals, in a learned and exhaustive opinion in which all the judges concurred. Bouvier v. Baltimore & N. Y. R. Co. 67 N. J. L. 281, 60 L.R.A. 750, 51 Atl. 781. In the opinion in that case it was said: "A distinction not always clearly made, should, however, be borne in mind. Before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter. 4 Kent. Com. 11n; Nicoll v. New York & E. R. Co. 12 N. Y. 121. After breach there is a vested right." At another place in the opinion, after referring to the statute of that state declaring the assignability of estates in expectancy, it is said: "It is suggested, also, that the proviso in the act that no chose in action shall thereby be made assignable at law excepts rights of entry after breach, from its operation; but I do not take that view. Some judges have spoken of the right after breach as a mere chose in action, but the designation is inaccurate. A right of entry is an interest in land. . . . But, although it may be that the statute only authorizes a transfer before breach, I think a transfer after breach is also valid, for the reason that moved the superior court of Pennsylvania to a like decision. I would not say, as did that court, that a right of entry can be levied on and sold in execution, but I think that in this state it may be transferred at the will of the holder."

The Pennsylvania supreme court in McKissick v. Pickle, 16 Pa. 140, where, under a deed which created a condition subsequent, and the grantor reserved therein for himself, his heirs, and assigns, the right of re-entry, the question was whether or not a purchaser of the grantor's interest at execution sale could exercise the right, said: "The law against maintenance has never been adopted in this state. The reason assigned why a condition in England could not be assigned is because no title could be made to land held by another adversely, as that was against the law, which forbids maintenance. And hence the rule that none but the grantor or his heirs can enter for condition broken. This reason does not apply here, where the grantor expressly reserves the right (citing authorities). In the last case Chief Justice Gibson says none but the feoffer or his heirs can enter, and the reason why a right of entry cannot be assigned is that a contrary doctrine would favor maintenance and promote litigation. This is a fair case for the application of the maxim, *Cessante ratione cessat ipsa lex.*"

We perceive no distinction by reason of the grantor having expressly reserved the right of re-entry to his assignee. The common-law doctrine of livery of seisin, and the law against maintenance or the sale of pretended titles, have never found lodgment in this state. The former is contrary to our whole scheme of laws, and especially the system of registration of land titles, which has existed in this state from the beginning. Before the statute was passed (December 9, 1837) putting in force in this state the common law of England so far as applicable to our form of government, the following statute was passed, which undoubtedly worked an entire change and swept away every vestige of the feudal doctrine concerning alienation of real estate and interests therein: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same

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manner and with like effect as if he was in the actual possession thereof. The term 'real estate' as used in this act, shall be construed as coextensive in meaning with 'lands, tenements, and hereditaments,' and as embracing all chattels real." Kirby's Dig. §§ 736, 737. Of this statute the court, in Cloyes v. Beebe, 14 Ark. 489, said: "It is true that at common law, if a man had in him only the right of possession of property, he could not convey it to another, lest, in the language of the ancient law, 'pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed.' But this was for the feudal reason that possession was an indispensable element of alienation. . . . But every vestige of this feudal doctrine, which thus restrained the alienation of real estate, has been swept off by our statute, which enacts that 'any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof.'"

It is insisted by learned counsel for appellant that the statute accomplished no more than an abrogation of the rule against maintenance, and that, notwithstanding the statute, the title does not revert to the grantor nor his heirs until after re-entry, and that without entry neither he nor they have anything to convey. Conceding, as they contend, that the statute only abrogates the rule against maintenance, that, in our opinion, is sufficient. For we conceive the rule, stated by the New Jersey and Pennsylvania courts, to be correct that, after condition broken, the grantor or his heirs have a vested right or interest, which is assignable. But the statute accomplishes more than a mere abrogation of the rule against maintenance. It declares that the grantor, notwithstanding an adverse possession, may sell his interest in the real estate, and gives the broadest definition to the term "real estate." Of this part of the statute our court has said, quoting from Sir Edward Coke, that the word "hereditaments" "is by far the largest and most comprehensive expression, because it included not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed." Proceeding further, the court said: "And thus it appears that, although at common law there were certain rights to, and interests in, real estate, that for want of possession, either actual or constructive, could not be alienated to a stranger, although they could be released or devised by will, or would pass to the heir or executor as contingencies and mere possibilities, such is the comperhensiveness of our statute in embracing hereditaments in the term 'real estate' that that distinction is also annihilated, and therefore in this state whatever interest in real estate may be inherited may be bargained, sold, and conveyed." Cloyes v. Beebe, supra.

There is very little conflict, if any, among the text writers and lexicographers as to the meaning of the word "hereditaments." It is "anything that may be inherited, be it corporeal or incorporeal, real, personal, or mixed. The word is almost as comprehensive as 'property.'" Anderson's Law Dict.; 1 Coke, Inst. 6; 3 Kent, Com. 401. "Whatsoever may be inherited is an hereditament. . . . In other words, when a right is of such a nature that on the death of its owner intestate it descends to his heir, it is a hereditament. The term includes a few rights unconnected with land, but it is generally used as the widest expression for real property of all kinds." Rapalje & L. Law Dict. We do not deem it necessary, however, to resort to any technical meaning of the word "hereditaments," for it is obvious that the legislature, by the first section quoted above, intended to make interests of every kind whatever in lands alienable. This court has placed the same construction on the statute in another class of cases not differing, we think, in principle from the present case. Bagley v. Fletcher, 44 Ark. 153. In that case the question was as to the right of a minor to disaffirm by the execution of a quitclaim deed, without having re-entered or manifested a disaffirmance by any other overt act. The court held that the infant's deed vested in the grantee a defeasible estate in fee, subject to be defeated by disaffirmance, and that the execution of the quitclaim deed was effectual for the purpose of conveying the minor's interest, and was of such a hostile character to the original deed as amounted to a revocation of the former grant. That decision was rendered by a divided court, but there was no disagreement among the judges on the point which is pertinent here. Judge Eakin, dissenting, conceded that a deed with covenants of warranty, executed by a quondam infant, would operate as a disaffirmance and revocation of the former deed; but he held that a similar effect should not be given to a quitclaim deed. In his dissenting opinion he said: "In other states, as here, where lands adversely held may be transferred by the owners, the entry is dispensed with as an overt and solemn act of disaffirmance, and the deed, if incompatible with any supposed recognition of the outstanding title, is taken as a manifestation of an intention to do what would under the common law have been actually necessary." The decision in Bagley v. Fletcher

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was recently followed in the case of Beauchamp v. Bertig (Ark.) ante, 659, 119 S. W. 75, where the land conveyed by the minor was held adversely by his original grantee. So it may be said here with equal force, as in the case just cited, that the grantor in a conditional deed, by the execution of another deed to a third person after breach of the condition, manifests, in the most unmistakable manner, his intention of declaring a forfeiture. It is equivalent to an actual re-entry or a declaration of forfeiture. The execution of his subsequent deed, being in hostility to his former grant, necessarily works a forfeiture. The executed registration of the deed is an act of the highest degree of hostility, and one which the original grantee on condition must take notice of, because it is in the line of his title. The statement of a condition in the deed puts the grantee and those in privity with him on notice as to any subsequent deed executed by the grantor in hostility to the title thereby conveyed.

The Virginia statute (Code 1904, § 2418) declares that "any interest in or claim to real estate may be disposed of by deed or will." It was held under this provision that a right of action for land in the adverse possession of another, or a right of entry thereon after condition broken, by analogy to contingent remainders and conditional limitations, which are also mere possibilities, may be assigned by deed or will. Carrington v. Goddin, 13 Gratt. 587; Young v. Young, 89 Va. 675, 23 L.R.A. 642, 17 S. E. 470; Wilson v. Langhorne, 102 Va. 659, 47 S. E. 872. In Wilson v. Langhorne, supra, the court, referring to a former decision construing the statute, said: "The court in that case indulges in no refinement of construction. It is content to give to plain words their usual and everyday meaning, and the interpretation there placed upon the statute did away forever with the niceties by which the devolution of property had theretofore been embarrassed and hindered, and made capable of disposition by deed or will any interest in or claim to real estate." Kentucky has a statute identical in language with the Virginia statute, and the court of appeals of Kentucky in construing it said: "The effect of this enactment is to obviate at once all the difficulties growing out of the distinctions which had been established by judicial construction between such estates as were alienable and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in, or claim to, real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by deed or will." Nutter v. Russell, 3 Met. (Ky.) 163. In Kenner v. American Contr. Co. 9 Bush, 202, the Kentucky court held that the right to enter for condition broken could be devised. The Supreme Court of the United States in Schlesinger v. Kansas City & S. R. Co. 152 U. S. 453, 38 L. ed. 510, 14 Sup. Ct. Rep. 651, said: "In the case of a private grant an entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent and to reclaim the estate forfeited by such breach, is all that is required." In that case the forfeiture was declared in a subsequent conveyance to another grantee, and the court said that the grantor had manifested his intention to forfeit the former grant. Reliance is placed by learned counsel on New York cases, principally Upington v. Corrigan, 79 Hun, 488, 29 N. Y. Supp. 1002, a decision by the appellate division of the supreme court of that state. That decision leaves out of account the distinction between the rights of a grantor before and after condition broken. But in that case (which was one concerning the effect of a devise of lands previously granted away by deed on condition subsequent) the devise was made before breach of the condition. The effect of that decision was merely to hold that before condition broken the grantor had no interest which could be devised by will.

We think it clear, both upon reason and authority, that where, as in this state, the common-law doctrine of livery of seisin is abolished by a statute authorizing a conveyance of land whether held in possession or not, a subsequent deed executed by an original grantor on condition is equivalent to re-entry, and is effectual for the purpose of declaring a forfeiture, and vesting the title in the subsequent grantee. A hostile deed after condition broken serves to devest the defeasible title out of the grantee on condition, and to convey the title. This is, as said by the Pennsylvania court, a proper application of the maxim that, the reason of the law ceasing, the law itself ceases.

The judgment of the Circuit Court is therefore affirmed.

Hart, J., dissenting:

I dissent in this case. For the reason that a dissenting opinion is of little or no practical value, I shall not attempt an exhaustive discussion and review of the numerous adjudicated cases bearing upon the principles involved in the action. Suffice it to say that I have read and considered the cases cited by the able attorneys who have filed briefs in behalf of all parties interested in the decision, and their briefs, as I believe, exhaust the subject.

The opinion of the court does not decide

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whether the condition of the deed in question is precedent or subsequent; I think it a condition subsequent. It is necessary for me to state my conclusion on this point. If I thought it was a condition precedent, I would concur in the judgment, and not dissent. "Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged; while conditions subsequent are such as, when they do happen, defeat an estate already vested." Cooper v. Green, 28 Ark. at page 54. This is but a reiteration of the rule announced by Washburn, Blackstone, and Coke. It will be borne in mind that the opinion of the court has treated the condition in the deed as a condition subsequent. That is to hold that the estate was vested in the railway company by the execution of the deed. It is a rule of the common law that none may take advantage of a condition but grantors and their privies in blood, or, in the case of corporations, their successors. The right to forfeit an estate for breach of condition subsequent is confined to the grantor and his heirs, and cannot be transferred by alienation. 4 Am. Dig. Century ed. p. 1142; Note to Cross v. Carson, 44 Am. Dec. 742; authorities cited in the brief of Murphy, Coleman, & Lewis, *amici curiæ*. This proposition has been so long established, both by the text writers and by adjudicated cases, that there is no quarrel or dispute between my brother judges and myself as to it. They have decided that this rule has been changed by our statute, and that our former decisions have recognized the change. I maintain the contrary view. They declare that §§ 736 and 737 change the common-law rule.

Section 736 reads as follows: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof." At common law the owner of land could not convey it unless it was in his possession. To obviate this difficulty the statute in question was passed. The statute simply means that, if A and B both claim title to land, and B is in possession thereof, A may convey his claim of title, and his grantee may bring suit to recover the land. I think that was the only issue involved in the case of Cloyes v. Beebe, 14 Ark. 493, cited by the court to maintain its position that the statute has changed the rule of the common law on the subject. I think the court has confused the right of entry, or bringing suit for possession, of one who has been unlawfully dispossessed of his real estate, with the right of entry, or taking advantage of a condition in a deed which has been broken. The statute was enacted for the purpose of enabling the claimant of real estate who has been unlawfully deprived of his possession to convey it. It is essentially different from the right to take advantage of a forfeiture or breach of a condition. In the latter case the title is vested in the grantee, and the grantor has no claim of title, but only the right to claim a forfeiture or breach of condition. This is not a claim of title, but only a right or personal privilege which the grantor may either waive or assert. As we have already seen by the rules of the common law, in a condition subsequent the title is vested in the grantee by the execution of the deed. This is the difference between a condition precedent and a condition subsequent. See Cooper v. Green, supra. It is plain that if the title is vested by the execution of the deed, it must be revested in the grantor in some way before he can be one "claiming title," as expressed in §§ 736 and 737 of Kirby's Dig. supra. If I am correct in the views I have expressed, the case of Lytle v. State, 17 Ark. 608, only holds that the common-law doctrine of maintenance is not in force in this state as applied to the case of one "claiming title to any real estate," and that such person may convey whatever title thereto he may possess.

I think a careful reading of the opinion in the case will show that this was the only issue raised by the pleadings and the evidence, and, if so, it is all that was decided. Section 737 reads as follows: "The term 'real estate' as used in this act shall be construed as coextensive in meaning with 'lands, tenements, and hereditaments,' and as embracing all chattels real." Obviously this refers to the preceding section; and, if my construction of the preceding section is right, § 737 only means that one claiming title to a hereditament which is held adversely by another may convey it. In short, if § 736 has no reference to a conveyance of right to reenter or take advantage of a breach of a condition, the word "hereditament" as used in § 737 has no reference thereto. The difference between a right of entry of one unlawfully dispossessed of his real estate and the right of entry for breach of condition is clearly explained in the case of Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657, and the distinction is recognized in the case of Hooper v. Cummings, 45 Me. 359. In the state of New Jersey previous to the passage of the act of March 14, 1851 (P. L. p. 282), a right for a condition broken was not assignable, and the condition of a deed could only be taken advantage of by a party to the deed, or by his privies in blood, or by his personal representatives. The case of Den ex dem Southard v. Central R. Co. 26 N. J. L. 13, holds that it takes an express statutory en-

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actment to make so important a change in the common law.

The court has sought to strengthen its opinion by citing the case of Bagley v. Fletcher, 44 Ark. 153, and Beauchamp v. Bertig (Ark.) ante, 659, 119 S. W. 75, to the effect that a deed executed by an infant may be avoided by him after becoming of age by any act unequivocally manifesting an intention to avoid it, and that a reconveyance to a third person constituted such an act. I can see no analogy between the two questions. Nothing is said in the cases mentioned about the doctrine of re-entry, the assignability of a right to re-enter. It is well settled at common law that a conveyance by the grantor of his right to avail himself of a breach of a condition in a deed operates as a discharge of the condition. Such conveyance constitutes a waiver of the condition by the grantor, and does not transfer it to his grantee. There is no room for dispute about the common law on the subject. The sole question is, Has the statute changed it? It is conceded that the legislature has the power to change the rule. If it has done so, that settles the matter. If it has not, courts have no right to encroach upon the common law, for this would be judicial legislation.

To continue the discussion would be fruitless. As above stated, my only purpose is to enter my protest against what I conceive to be a marked encroachment by the judiciary upon a long-established and well-defined rule of the common law. In 1816, while Arkansas was a part of the Missouri territory, a statute was passed, adopting and recognizing the common law as a part of its system of laws. This statute remained to govern the subsequently formed territory of Arkansas, and, with some change of phraseology, was re-enacted as a part of the laws of this state, and remains in our statutes to-day. Horsley v. Hilburn, 44 Ark. 458; Kirby's Dig. § 623.

CALIFORNIA SUPREME COURT.

JONATHAN W. FANCHER, JR., Appt.,
v.
LEE R. FANCHER et al., Exrs., etc., of George H. Fancher, Deceased, Respts.

(— Cal. —, 103 Pac. 206.)

Will — monument — building.

1. Money set apart by testator for a monument to his memory cannot be expended by the executors in the construction of a memorial building to be devoted to the purpose of a free public library.

Executors — discretion — erection of monument.

2. In case a testator sets apart a certain sum for the erection of a suitable monument to his memory, the executors may spend all or any part of the sum for a monument in their discretion.

(Beatty, Ch. J., dissents.)

(June 30, 1909.)

APPEAL by plaintiff from a judgment of the Superior Court for Merced County in defendants' favor in a suit to restrain them, as executors of George H. Fancher, deceased, from making an improper use of a fund set apart by testator for the erection of a monument to his memory. Reversed.

The facts are stated in the opinion.

Mr. Ben Berry for appellant.

Mr. J. K. Law, for respondents:

The monument could take the form of a public charity at the discretion of the executors.

Ford v. Ford, 91 Ky. 572, 16 S. W. 451; Hood v. Pennsylvania Soc. 221 Pa. 474, 70 Atl. 845; Re Fair, 132 Cal. 533, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; Malcolm v. Malcolm, 3 Cush. 474; Welch v. Huse, 49 Cal. 506; Re Rodgers, 94 Cal. 526, 29 Pac. 962.

Henshaw, J., delivered the opinion of the court:

This cause was formerly heard and decided in department. A rehearing having been granted, and the cause having been heard by the court in bank, the department opinion is hereby reaffirmed and adopted. That opinion is as follows:

"The complaint charged that the executors, as trustees of a fund under the will of the deceased, purposed to make an improper use of the fund, and prayed the court to restrain them from so doing, and to direct the proper distribution of the moneys of the trust. The controversy grew out of the following undisputed facts: George Hicks Fancher died testate, leaving an estate of the value of about $500,000. Clauses 14 and 15 of his will are as follows: 'I set apart from my estate for my funeral expenses and proper interment of my remains and a suitable monument to my memory $25,000. It is my request to have my remains buried on my Bear Creek ranch, in township seven south, range fifteen east, Mount Diablo meridian.' The body of the deceased was buried

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Note. — The question presented for decision in FANCHER v. FANCHER seems to have been before the courts in but one other instance, for a careful search has disclosed no other authority upon the question as to what use may be made of funds set aside by a testator for the erection of a monument, in addition to Ogden's Petition, 25 R. I. 373, 55 Atl. 933, and that is cited and sufficiently commented upon in the above opinion.

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upon his ranch as requested. The executors proposed to expend the sum of about $2,000 in the erection of a granite monument at his tomb, and to use the remainder of the fund, about $20,000, in the construction of a buiding in the city of Merced, which building was to be dedicated to the purposes of a public library. Upon a tablet appropriately placed in said building was to be inscribed 'George H. Fancher Memorial Free Library.' The trial court held that the devotion of the funds to this purpose was within the purview of the trust created by the will, and gave judgment accordingly.

"Appellant contends that the will discloses that the testator's intent was that the monument to his memory should take the form of a memorial shaft, column, or similar structure marking the grave of the deceased, and that the devotion of any of the funds to the purpose of a library building, or for the erection of any other memorial building, was a use wholly beside the testator's intent. In this, as in all other matters pertaining to the construction of a will, the testator's intent is to be derived from his language, and the words employed are to be given their natural significance, unless it be made to appear that they were employed with some other meaning. Looking to the terms of this will, the testator desired that his remains should be buried upon his ranch, and his request that this should be done has been complied with. He left the fund of $25,000 to be used by his executors for funeral expenses, for the proper interment of his remains, and for a suitable monument to his memory. There is nothing in this language to indicate that the testator used the word 'monument' in any other than its natural and specific meaning, which is that of 'a pillar, statue, shaft, or any structure placed over a tomb or at a grave.' Standard Dict. In its applied sense, a monument, being 'a reminder,' may take any form. Napoleon's battles are a monument to his memory. Horace, by his poetry, 'built himself a monument more enduring than brass,' and Sir Christopher Wren in his oft-quoted epitaph, *Si Monumentum Requiris, Circumspice*, declares St. Paul's cathedral to be his monument. Yet, as suggested by the supreme court of Rhode Island in Ogden's Petition, 25 R. I. 373, 55 Atl. 933, if one were to say that he had seen Napoleon's or Horace's or Wren's monument, the mind would call up some memorial shaft or column, and not the victories of one, the poetry of another, or the cathedral of which the third was the architect. So it is said in Society of the Cincinnati's Appeal, 154 Pa. 621, 20 L.R.A. 323, 26 Atl. 647, a monument may take the shape of a memorial hall or other building, but that is not the general sense of the word, and will not be presumed to be its meaning.

"In Ogden's Petition, supra, the testator left to the town of North Providence $5,000, 'to erect a monument to the memory of the soldiers and sailors who fell or died in the late war, enlisting from this part of the town, . . . and my desire is that the monument be erected at the junction of Olmey and Fruit Hill avenues in said town, on a triangular piece of land thereat located.' It was proposed there to use the money for the erection of a memorial building. The court held that such a structure was not permissible; that it was not within the natural meaning of the bequest, and involved a strained and forced construction of the language, saying: 'To ascertain the written expression a court does not look so much to the etymological scope of a word as to its common meaning and particular use. The word "monument" in common usage, when it relates to a memorial for the dead, means a shaft, column, or some structure more imposing than a mere gravestone. If it were said that a monument had been erected to the memory of one who had died, the natural and immediate conception would be that which we have just stated. . . . It may be said that the names and services of soldiers can be as well preserved on the walls of a building as on the sides of a monument. This is true, but would one naturally think that a building was intended by a provision for a monument?' In the case at bar there is nothing to indicate that the testator used the word in any applied or figurative sense, and there is much to indicate that he did not. The juxtaposition of the phrase, the devotion of the single sum of money to the threefold purposes of paying funeral expenses, of proper interment of his remains, and of erecting a suitable monument to his memory, indicate that the monument which he contemplated was one to mark the site of his tomb. He did not design that it should take the form of a charity to be named after him. A public hall, library, hospital, may all be memorials, and a memorial may be a monument, but, saving in a figurative sense, the converse is not true. By a monument is not understood a memorial building. 'Suitable' as here used gives play to discretion upon the part of the executors in the selection of the monument, its form and style, with reference to the amount of money set apart for the purpose. Bainbridge's Appeal, 97 Pa. 482. In thus deciding as we do, that a memorial building is without the purview of the testator's bequest, it is not intended that this discretion so vested in the executors is in any other way limited. The full amount of the fund devoted to the purpose or such part

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as they deem fit may be expended in the erection of a monument to the memory of the deceased. It is held merely that the erection of a public building is not within the intent of the testator as expressed in his will."

For the aforesaid reasons, the judgment is reversed, with directions to the trial court to enter its judgment in accordance with the foregoing.

We concur: Lorigan, J.; Angellotti, J.; Melvin, J.

I dissent: Beatty, Ch. J.

INDIANA SUPREME COURT.

FORT WAYNE COOPERAGE COMPANY, Appt.,
v.
CHARLES PAGE.

(170 Ind. 585, 84 N. E. 145.)

Nuisance — frightening horse.

1. The owner of a factory who on his own land discharges waste steam in large quantities and with a puffing noise, at a point located near the highway and at about the height from the ground of a horse's head, in such manner as to be calculated to frighten horses of ordinary gentleness, without regard to the presence upon the highway of horses which might be frightened thereby, may be held liable for injury to a traveler whose horse is so frightened.

Pleading — nuisance — facts.

2. One who states in his complaint against a person operating a nuisance near a highway, for injuries caused by the frightening of his horse thereby, facts showing defendant's omission of duty to him, is not bound to characterize the thing causing the injury as a public nuisance, to render his complaint good.

Highway — negligence of driver.

3. That one driving a horse along a highway knew of the existence of a pipe near it from which steam might be discharged in such manner as to frighten a horse does not render him negligent in attempting to drive past it, if, as he approaches it, he sees no steam escaping.

Trial — interrogatories — definite answers — materiality.

4. Refusal by the court to require, in an action by one injured while driving along a highway, against a factory owner who discharged steam from a vent in such manner as to frighten the horse, a definite answer to an interrogatory as to whether or not a passenger offered to help hold the

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Case Note. — Liability for discharge of steam near street or highway so as to frighten horses.

This note is expressly confined to the question of liability where a horse takes fright at steam emitted from a steam engine or locomotive located or standing near, but not upon, a public street or highway, or a railway crossing.

As to the liability of a railroad company where a horse takes fright at a locomotive or cars standing on a highway, see the case note to Norfolk & W. R. Co. v. Gee, 3 L.R.A.(N.S.) 111.

It must be borne in mind that, in order that one may recover for injuries received in consequence of a horse becoming frightened at escaping steam, he must be free from contributory negligence. This rule is common to all the cases herein cited.

The emission of steam from a mill situated near a public highway, in a manner calculated to frighten horses of ordinary gentleness, is such a public nuisance as will render the owner liable for an injury sustained by one whose horse is frightened by it. Crocker v. McGregor, 76 Me. 282, 49 Am. Rep. 611.

So, negligence may be found by the jury where a load of stone was dumped upon the wooden platform of a stone crusher and at the same moment steam was let off from the boiler thereof by the employees of a city, frightening a horse that was being driven along a roadway 25 feet distant and which was within their sight. Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401.

The questions of negligence and contributory negligence are for the jury where the evidence tends to show that a horse was frightened at the escape of steam from a heating apparatus for passenger cars situated at or near a street crossing, the steam from which, by reason of the damp and foggy atmosphere, hung about that point in a greater degree than usual. Mendenhall v. Philadelphia, W. & B. R. Co. 202 Pa. 427, 51 Atl. 1028.

A city will be liable where steam from the cylinder cocks of the engine of a municipal lighting plant, which is blown into a pipe passing under a street, arises upon both sides thereof, and frightens a horse being driven in the nighttime by one, unfamiliar with the street, so that, by reason of the lack of a guard rail, it backs off the road. Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143.

But it was said in Curry v. Luzerne, 24 Pa. Super. Ct. 514, that a municipality will not be liable for an injury due to the fright of a horse at escaping steam from an engine located near a street, as it has no power to compel the removal of the engine far enough from the street to prevent frightening horses.

Steam from locomotives; in general.

The use of steam by a railway company is lawful, and there is no liability for frightening horses by the necessary and

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horse, is not error, since that fact is immaterial to plaintiff's right to recover.

Same — effect on general verdict.

5. There is no error in refusing to compel a definite answer to an interrogatory, if the answer most favorable to the losing party that could have been returned would not have controlled the general verdict.

Same — refusal — evidence.

6. Interrogatories to the jury which call for evidence, and not material facts, are properly refused.

(April 3, 1908.)

APPEAL by defendant from a judgment of the Appellate Court affirming a judgment of the Circuit Court for Miami County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Vesey & Vesey, Loveland & Loveland, and Barrett & Morris for appellant.

Messrs. **J. S. Branyan, Milo Feightner, Lesh & Lesh, and Bailey & Cole** for appellee.

Hadley, J., delivered the opinion of the court:

About 1 mile east of the town of Roanoke, at the south side of a public highway running east and west, and about 200 feet east of a point where the Wabash Railroad, running north and south, crosses said highway,

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usual escape of steam from a locomotive if used in the usual and ordinary manner, any damage resulting therefrom being *damnum absque injuria.* Coleman v. Wrightsville & T. R. Co. 114 Ga. 386, 40 S. E. 247; Billman v. Indianapolis, C. & L. R. Co. 76 Ind. 174, 40 Am. Rep. 230; Cincinnati, I. St. L. & C. R. Co. v. Gaines, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; Indianapolis Union R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551; Louisville, N. A. & C. R. Co. v. Schmidt, 147 Ind. 638, 46 N. E. 344; Vandalia R. Co. v. McMains (Ind. App.) 85 N. E. 1038; Culp v. Atchison & N. R. Co. 17 Kan. 475; Boothby v. Boston & M. R. Co. 90 Me. 313, 38 Atl. 155; Duvall v. Baltimore & O. R. Co. 73 Md. 516, 21 Atl. 496; Philadelphia, W. & B. R. Co. v. Burkhardt, 83 Md. 516, 34 Atl. 1010; Riley v. New York, P. & N. R. Co. 90 Md. 53, 44 Atl. 994; Lindem v. Northern P. R. Co. 85 Minn. 391, 89 N. W. 64; Brown v. Missouri P. R. Co. 89 Mo. App. 192; Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 504, 53 N. W. 970, s. c. on second appeal, 39 Neb. 65, 23 L.R.A. 507, 57 N. W. 545; Omaha & R. Valley R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Adams v. International & G. N. R. Co. (Tex. Civ. App.) 122 S. W. 895; Petersburg R. Co. v. Hite, 81 Va. 767; Cahoon v. Chicago & N. W. R. Co. 85 Wis. 570, 55 N. W. 900; Crowley v. Chicago, St. P. M. & O. R. Co. 122 Wis. 287, 99 N. W. 1016.

Whether the escape of steam from a locomotive is the result of a prudent operation of a railroad or its appliances is to be determined from the circumstances and facts of the case. Omaha & R. Valley R. Co. v. Brady, supra.

—where street or highway parallels railway track.

It was said in Culp v. Atchison & N. R. Co. supra, that the letting off of steam from a locomotive with its attendant noises is not *per se* an act of negligence or evidence of wrongful conduct; but that, where one is driving a horse along a public road near a railway track, the railway company and the traveler are each rightfully thereon, and the former must not heedlessly or negligently, or with a wanton or criminal intent to do wrong, allow the escape of steam without necessity therefor. To the same effect, see Brown v. Missouri P. R. Co. 89 Mo. App. 192, and St. Louis, I. M. & S. R. Co. v. Lewis, 60 Ark. 409, 30 S. W. 765, 1135.

But a railway company will not be liable for causing the fright of a mule by steam necessarily permitted to escape from a locomotive, when rounding a sharp curve, in order to slacken the speed of a train, providing it was not greater than was usual, and was reasonably incident to the control of the engine at the time, or was not recklessly or wantonly permitted to escape. Oxford Lake Lime Co. v. Stedham, 101 Ala. 376, 13 So. 553.

And it was held in Proctor v. Southern R. Co. 61 S. C. 170, 39 S. E. 351, that a recovery based upon ordinary negligence would not be permitted under a complaint alleging in substance that an injury was due to steam "wilfully, wantonly, and recklessly" emitted from a locomotive and to the blowing of the whistle thereof, with intent to frighten a mule which the plaintiff was driving upon an adjoining highway.

But the unnecessary escape of steam from a locomotive when being operated on a track parallel with and adjacent to a street or highway constitutes such negligence as will render a railway company liable for an injury caused by a horse of ordinary gentleness taking fright therefrom, and which was seen or might have been seen by those in charge of the locomotive. This doctrine has been applied under such circumstances where an engineer unnecessarily opened the cylinder cocks of a locomotive (Texas & P. R. Co. v. Kennedy, 29 Tex. Civ. App. 94, 69 S. W. 227; Adams v. International & G. N. R. Co. [Tex. Civ. App.] 122 S. W. 895; St. Louis, I. M. & S. R. Co. v. Lewis, supra); where steam was permitted to escape in a careless, negligent, or heedless manner without necessity therefor (Culp v. Atchison & N. R. Co. supra; Texas & N. O. R. Co. v. Syfan [Tex. Civ. App.] 43 S.

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appellant, in August, 1904, maintained a stave and heading factory, operated by steam power. As a part of its plant, and as constituting the eastern structure thereof, was a steaming house, 67 feet long, 10 feet high, and 10 feet wide, parallel with, and 9 feet south of the highway, in which house were located nine vats for the steaming of the timber, preparatory to its being manufactured. The power and machinery house was located a few feet west and south of the steaming house. The vats were supplied from the waste steam of the engine, which was conveyed from the latter by a 4-inch iron pipe laid on the ground parallel with, and within a foot of, the north line of the steaming house to the northeast corner of said house, at which point it terminated in an upright stem 7 inches in diameter, standing 6 feet above the ground, and within 8 feet of the public highway, from the top of which stem the exhaust steam from the pipe escaped at all times when not being used for the filling of the steam vats. The escape of the steam was in large volumes, and was attended with a loud puffing noise, and when the wind was in a southerly direction would float in clouds across the highway, frequently totally obstructing vision along the road. In August, 1904, appellee, having in the buggy with him one Druley, was driving eastward on said highway by said heading factory. The horse was three and one-half years old, ordinarily gentle and well broke for driving on the public highways, though he had not been driven in the presence of engines or by

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W. 551), where a locomotive was negligently started, accompanied by a sudden escape of steam (Houston & T. C. R. Co. v. Taylor, 20 Tex. Civ. App. 654, 49 S. W. 1055); where a horse was suddenly enveloped in a cloud of steam permitted to escape with extraordinary noise from a locomotive which apparently was lifeless (Brown v. Missouri P. R. Co. supra); where there was an unnecessary emission of a loud blast of steam, which was not the usual noise made by "popping" off steam (Chicago, R. I. & T. R. Co. v. Jones [Tex. Civ. App.] 88 S. W. 445); where it was alleged that an engineer might have checked the unnecessary discharge of steam from a new locomotive which he was running back and forth for the purpose of "limbering" (Terre Haute & I. R. Co. v. Doyle, 56 Ill. App. 78); where, after the usual station signals had been given, an engineer saw the plaintiff, and gave ten or twelve quite sharp blasts of the whistle and let off a large volume of steam (Texas & P. R. Co. v. Hamilton [Tex. Civ. App.] 66 S. W. 797); where it was alleged that the whistle was sounded and steam was negligently and wilfully permitted to escape from a locomotive, purposely and deliberately, in order to frighten a horse (Earl v. St. Louis, I. M. & S. R. Co. 84 Ark. 507, 106 S. W. 675).

It was said in Chicago, R. I. & T. R. Co. v. Jones, supra, that the unnecessary emission of a loud blast of steam would constitute negligence where those in charge of a locomotive must have known that the adjoining highway was frequently used by the public.

It was held in Chicago, R. I. & P. R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602, to be a question for the jury whether it was negligence to blow the whistle and permit the escape of steam from the cylinder cocks of a locomotive, which noises frightened a horse upon an adjoining city street, when forbidden by ordinance except for three revolutions of the driving wheels in starting a locomotive.

It is not contributory negligence, as a matter of law, for the rider of a mule of average docility and gentleness not to dismount upon observing the approach of a train upon a near-by track, where he controlled the mule's signs of uneasiness until the emission from the locomotive, when opposite him, of a large quantity of steam which was accompanied by unusual and extraordinary noises. Texas & P. R. Co. v. Hamilton, supra.

So, it is not contributory negligence for the rider of a horse not to dismount upon the approach of a train, where the animal did not exhibit signs of fright until the unnecessary escape of steam from the cylinder cocks of the locomotive. Texas & P. R. Co. v. Kennedy, supra.

And where steam from a locomotive is intentionally thrown upon the animal one is riding, he cannot be charged with contributory negligence because he acted imprudently in riding in a private lane where he knew a locomotive might be encountered. Texas & N. O. R. Co. v. Syfan, supra.

—where locomotive stands near public crossing.

Attention is called to the fact that cases where a horse is frightened by the escape of steam from a locomotive which is standing in a public street or upon a highway crossing are excluded from this note.

It is the duty of a railway company to anticipate that travelers with horses may, at any time, approach a crossing leading over the railway company's property, which it permits the public to use, and be mindful of the danger to such travelers from the sudden escape of steam at high pressure from a locomotive standing near the crossing. Boothby v. Boston & M. R. Co. 90 Me. 313, 38 Atl. 155.

And it is the duty of those in charge of a locomotive standing near a highway crossing, when aware of the presence of one driving a horse, to exercise ordinary care to prevent any unusual, extraordinary, or sudden noises or movements which would appear to a man of ordinary prudence to be likely to frighten the horse and cause injury to the driver. San Antonio & A. P. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59

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the heading factory before. After crossing the railroad, he trotted along at the rate of 7 miles an hour. When he arrived opposite the west end of the mill, he became somewhat frightened by the noise of the saws and other machinery, shied to the north side of the road, but was pulled back into the road and urged along; and when he had gone 25 or 30 feet farther east, a cloud of steam suddenly burst from the top of said stem and floated across the road. At this the horse instantly became frightened and unmanageable, and broke away to the side of the road, inflicting severe injuries upon appellee.

In addition to the foregoing facts, it is charged in the first paragraph of the complaint that said clouds of escaping steam and said great noise were calculated to frighten horses of ordinary gentleness driven by persons along the highway, which fact was well known to the defendant; that the defendant wrongfully, unlawfully, and negligently maintained said steaming house and steam pipe "at the place and in the manner before set forth." It is further alleged in this paragraph that the plaintiff was driving a quiet and gentle horse along the highway, and driving in a careful and prudent manner, and without knowing of or apprehending any danger, and when within 30 feet of said upright steam pipe a large cloud of steam suddenly burst forth from said pipe with a loud and frightful noise, and floated over the highway immediately in front of plain-

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S. W. 607, s. c. first appeal (Tex. Civ. App.) 37 S. W. 362.

In order to render a railway company liable for injuries caused by a horse taking fright at the escape of steam from the valves of a locomotive standing near a public crossing, it must appear not only that escape of steam was unnecessary, but also that it was permitted under such circumstances and surroundings, as to time, place, and the situation of the parties, as to imply neglect to exercise that degree of care which a reasonable man would have exercised under the circumstances. Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 504, 53 N. W. 970, s. c. on second appeal, 39 Neb. 65, 23 L.R.A. 507, 57 N. W. 545.

A complaint is sufficient which alleges in substance that those in charge of a locomotive which stood near a public crossing carelessly and negligently managed it by blowing its whistle and causing or suffering the blowing off of steam so as to make a loud and unusual noise, with knowledge of the plaintiff's presence, which so frightened his horse that it ran away and inflicted an injury. Indianapolis Union R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551.

Negligence is shown where a horse, when upon a public crossing, is frightened by the starting of a locomotive, accompanied by the sudden emission of a cloud of steam with unusual, unnecessary, and unreasonable noises, calculated to frighten horses. Crowder v. St. Louis Southwestern R. Co. 39 Tex. Civ. App. 314, 87 S. W. 166.

Likewise, negligence is shown where the engineer of a locomotive which was standing near a crossing observed the plaintiff's approach, and that his horse was restless and afraid of the engine, and, when upon the track, it was frightened by the negligent and malicious escape of steam therefrom, as it was the engineer's duty, under such circumstances, to use all necessary precaution to prevent such an accident. Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489.

So, there is evidence of negligence sufficient to sustain a verdict for plaintiff, where a locomotive which has been stopped 25 or 30 feet from a crossing, in order to let several vehicles pass, is suddenly started, and the ringing of the bell and the escape of steam frightens a horse when upon the track. St. Louis Southwestern R. Co. v. Moore (Tex. Civ. App.) 107 S. W. 658.

And a railway company will be liable where a horse, when upon the track, is frightened by the sudden and unexpected starting of a locomotive, which is accompanied by unnecessary noise caused by escaping steam. San Antonio & A. P. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

It was held in Rademacher v. Detroit, G. H. & M. R. Co. (Mich.) 123 N. W. 45, to be a question for the jury whether it was negligence to start a locomotive which stood some distance from a public crossing with the gates open, and to permit the escape of steam from the cylinder cocks just as a horse was driven upon the crossing, with nothing in the situation to appraise the driver of the fact that the locomotive was about to move.

As it is the duty of a railway company to use reasonable care to prevent injury from the noises made by escaping steam, if sufficient to frighten a horse of ordinary gentleness, the question whether it is negligence to permit the escape of steam from a locomotive standing near a public highway, as well as whether reasonable care required that warning thereof should be given one who approaches the crossing driving a horse of ordinary gentleness, is for the jury. Lewis v. Eastern R. Co. 60 N. H. 187.

So, a railway company will be liable for causing the fright of a team by the escape of steam from a locomotive standing near a highway, if due and proper care in the management thereof is not exercised and the noise thereby made is liable to frighten horses, both of which questions are to be determined by the jury. Gordon v Boston & M. R. Co. 58 N. H. 396.

And it was held in Presby v Grand Trunk R. Co. 66 N. H. 615, 22 Atl. 554, that a case should be submitted to the jury where a horse was frightened by the noise of steam escaping from the safety valve of

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tiff's horse, whereby said horse became frightened and beyond the plaintiff's control.

In addition to the facts averred in the first paragraph, it is alleged in the second paragraph that, "when 30 feet west of said steam pipe, a great quantity of steam was, by the defendant, suddenly, carelessly, and negligently emitted from said pipe with a puling sound, and formed a dense cloud of steam which was carried over said highway by the wind immediately in front of the plaintiff's horse, which caused the horse to take fright." It is averred in this paragraph that the facts alleged constitute a public nuisance.

The first paragraph seems to be based on the negligent construction and maintenance of the steam pipe adjacent to the public highway, and the second on the theory that the construction, maintenance, and operation of the steam pipe in the position and manner set forth constituted a public nuisance, from which the plaintiff had suffered special damages. The two theories being ruled, in the main, by the same general principles, we have deemed it proper to consider the paragraphs together. The chief objection presented is that there is no averment that either the location or manner of operation of the upright steam pipe constituted a nuisance, and no averments from which a nuisance can be inferred. This position is not maintainable. It is true that the business described is a proper and lawful business, and, being located on appellant's own premises, its operation cannot be a

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a locomotive which stood near a crossing, at a point where the driver's view of the track was obstructed, and he had no notice of the close proximity of the engine.

So, a case should be submitted to the jury where the evidence tends to prove negligence not only in causing or permitting the escape of steam from a locomotive, but also from keeping it for more than eight hours during the business portion of the day, upon a side track immediately adjoining a public street. Dunn v. Wilmington & W. R. Co. 124 N. C. 252, 32 S. E. 711.

And it is immaterial whether steam escapes through an automatic safety valve or is blown off by those in charge of the locomotive, as either might constitute negligence. Dunn v. Wilmington & W. R. Co. supra, reversed, however, upon another point upon second appeal, in 126 N. C. 343, 35 S. E. 606.

And this is true notwithstanding the use of a safety valve was necessary in order to prevent an explosion of the boiler, as it might not be necessary to keep up, for so long a time, a head of steam sufficient to operate the valve. Dunn v. Wilmington & W. R. Co. supra; Vandalia R. Co. v. McMains (Ind. App.) 85 N. E. 1038.

And this doctrine was applied in Boothby v. Boston & M. R. Co. 90 Me. 313, 38 Atl. 155, where it appeared that the escape of steam from the safety valve could have been prevented by watchfulness upon the part of those in charge of the locomotive, and it appeared it was unnecessary to maintain a high pressure of steam at the time.

And this doctrine was applied in Missouri, K. & T. R. Co. v. Traub (Tex. Civ. App.) 47 S. W. 282, where a railway company had instructed its employees not to permit the unnecessary escape of steam from the safety valve when standing near stations or public crossings, and it also appeared that, at the time, the escape of steam was not necessary in the operation of the locomotive.

And it is immaterial that those in charge of the locomotive had no control over the pop or safety valve, which was set to relieve the pressure at a given point, where it appeared that the quantity of steam might be controlled by regulating the fire. Presby v. Grand Trunk R. Co. supra.

In Vandalia R. Co. v. McMains, supra, it appeared that the pressure of steam might have been reduced by three methods other than the use of the safety valve, through which it escaped.

See also Keech v. Rome, W. & O. R. Co. 35 N. Y. S. R. 902, 13 N. Y. Supp. 149, infra, cited in the following subdivision, holding that a railway company will be liable where an engineer informs one that it is safe to drive across the track, and his horse is frightened by the sudden escape of steam from the safety valve, over which the engineer had no control.

But it has been held that there will be no liability where a horse takes fright at the escape of steam from the automatic safety valve of a locomotive, over which those in charge thereof have no control, and it appears that a full pressure of steam was necessary in order that the engine might perform its duty. Duvall v. Baltimore & O. R. Co. 73 Md. 516, 21 Atl. 496; Omaha & R. Valley R. Co. v. Clarke, 39 Neb. 65, 23 L.R.A. 507, 57 N. W. 545.

So, negligence cannot be predicated because the safety valve of a locomotive performs its proper function of permitting steam to escape in order to prevent a dangerous pressure. Omaha & R. Valley R. Co. v. Clarke, supra.

And this doctrine is not affected by the fact that, at the time of the accident, there was no one upon the locomotive. Duvall v. Baltimore & O. R. Co. supra.

And it cannot be shown that there are appliances in general use on railroads which, to a certain extent, suppress the noise caused by the escape of steam through the safety valve, which were not used by the defendant. Ibid.

And it was held in Philadelphia, W. & B. R. Co. v. Burkhardt, 83 Md. 516, 34 Atl. 1010, that a verdict should be directed for the defendant where the noise caused by the escape of steam from a locomotive standing near a street crossing was not unusual or unnecessary, nor due to any neglect

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source of damages to a traveler on the highway, unless it is shown that the structures or business, or some part of one or the other, was being maintained in an improper place or conducted in an improper manner. One may not always conduct a lawful business on his own premises as he pleases. The law requires that everyone, in the use and enjoyment of his property, shall have regard for the rights of others, and will not allow him to set up or prosecute a business on his own land in a way that is calculated to, or in fact does, materially or injuriously affect the rights of adjoining owners, or that substantially or harmfully interferes with or injures those rightfully traveling on an adjoining highway. Wright v. Compton, 53 Ind. 337; Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38. In the Wright-Compton Case appellant was engaged in quarrying stone near the highway by the use of gunpowder. Compton, in passing by on the highway at the time a blast was exploded, was hit by flying rock and injured. In upholding Compton's recovery of damages this court said: "Every person must so use his property and exercise his rights as not to injure the property or restrict the rights of others. In this case the defendants could not lawfully so use their stone quarry as to embarrass the rights of travelers along the public highway. The public travel must not be endangered to accommodate the private rights of an individual." The principle here involved is also well illustrated by the facts and ruling in the Coal Company-Clemmitt

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of duty in the position or management thereof.

And under similar circumstances this doctrine was applied in Powers v. Grand Trunk R. Co. 78 Vt. 436, 63 Atl. 139, where it did not appear that the escape of steam which frightened plaintiff's horse was unnecessary, nor that the engineer did not see the horse and stop the escape of steam, as soon as he should have done.

But it was said in Omaha & R. Valley R. Co. v. Clarke, supra, that if it appeared that an engine has been permitted to stand for a long time near a crossing with an unnecessarily high pressure of steam, it might be that such facts, followed by an escape of steam from the pop valve, would justify an inference of negligence.

There will be no liability where, after one has driven over a railway crossing, his horse, while standing at a near-by watering trough, was frightened at a locomotive whistle and the escape of steam from its cylinder cocks, necessarily emitted in starting its train, where the engineer did not see the plaintiff or his horse. St. John v. St. Louis Southwestern R. Co. (Tex. Civ. App.) 79 S. W. 603.

It cannot be said that the driver of a horse is guilty of contributory negligence as a matter of law, where, upon approaching a railway track in a city, the gates were open with an engine standing some distance from the crossing, with nothing in the situation to give warning of danger of the emission of steam therefrom, or that the locomotive would be suddenly started. Rademacher v. Detroit, G. H. & N. R. Co. (Mich.) 123 N. W. 45.

So, it is not negligence *per se* to drive a horse of ordinary gentleness, which will not take fright at the usual noises made by a locomotive, across a railroad track at a much-frequented public crossing, near which an engine is standing, as the driver may rightfully assume that it will emit only the usual and necessary amount of steam with its attendant noises, against which he might be prepared to protect himself. San Antonio & A. P. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607, s. c. first appeal (Tex. Civ. App.) 37 S. W. 362.

When directed to cross track by railway employees.

Where a flagman invites a person to cross a track, the railway company will be liable where his team is frightened by the sudden escape of steam from a locomotive standing near the street, as under such circumstances he may rightfully assume that there will be no increase or dangerous change as to the quantity of steam being emitted, or noise being made, by the locomotive. Borst v. Lake Shore & M. S. R. Co. 4 Hun. 346, affirmed without opinion in 66 N. Y. 639.

So, where, upon a signal from a flagman at a public crossing, one attempts to drive across a track and his horse is frightened at the sudden escape of steam upon the starting of a locomotive, the railway company will be liable where it appears that the engineer, a few moments before, saw the plaintiff drive up near the crossing and his horse take fright at a similar escape of steam, as such facts would warrant an inference that the engineer knew that the animal was subject to fright from such cause, and therefore under the circumstances his conduct disclosed want of reasonable care. Houston & T. C. R. Co. v. Abrahams (Tex. Civ. App.) 40 S. W. 1034.

Where the plaintiff is assured by an engineer of a locomotive standing near a much-frequented public crossing that it is safe to cross, a railway company will be liable where the plaintiff's horse is frightened at the escape of steam therefrom, which could have been prevented by the exercise of due care. Louisville, N. A. & C. R. Co. v. Schmidt, 147 Ind. 638, 46 N. E. 344, s. c. on first appeal, 134 Ind. 16, 33 N. E. 774.

So, where one was informed by the engineer of a locomotive which stood near a public highway that he might cross, a railway company will be liable where his horse was frightened by the blowing of the whistle and the escape of steam from the pop safety valve, notwithstanding it worked

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Case, supra. In that case the company, in disposing of its slack and refuse from its mine, piled the same on its own premises, but adjoining a highway. The refuse took fire by spontaneous combustion, and, burning, slid down the heap and frightened the plaintiff's horse. In commenting upon the facts as constituting a cause of action for damages the court said: "The entire pleading shows that the appellant was negligent in producing a condition of things through which as a natural result the appellee suffered the injury charged. If the appellant's wrong which caused the particular injury which forms the basis of the action may not be called, strictly speaking, the maintenance of a nuisance, and if the cause of action should more properly be said to be based upon negligence, we think that, though the meaning is not made as clear as desirable, it is sufficiently shown that there was a want of due care for the safety of persons rightfully using the highway, and a negligent exposure of such persons to peril from the cause through which the appellee was injured."

To erect and maintain a pipe 7 inches in diameter in an upright position, standing 6 feet from the ground, out and apart from the building, and within 8 feet of a public highway, from the top of which to discharge a large volume of waste steam with a loud puffing noise to be wafted across the highway on about the level of the heads of passing horses, is an unusual and indiscreet construction and operation of the pipe to say the least of it, especially when it is obvious that, if the waste had been placed on the south side of the building, its escape would not only have been unobserved from the road, but its floating over the same on so low a level would have been effectually prevented. But it cannot be said that the construction and operation of the pipe in the particular place and manner alleged was necessarily of itself either a nuisance or negligence. If appellant had kept a watch over the highway, and, on the approach of driven animals, had stopped the operation of the mill until the danger of their taking fright had been passed, or if it had adopted any other means by which all appreciable danger of giving fright from escaping steam had passed, then there would appear no just or sufficient reason for disturbing appellant in the exercise and enjoyment of its property rights. In

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automatically and was not under the engineer's control; as the latter's assurance of safety was made without reservation and implied that it was safe to cross as he had control over his engine and its instruments of alarming sound. Keech v. Rome, W. & O. R. Co. 35 N. Y. S. R. 902, 13 N. Y. Supp. 149.

But it was held in Riley v. New York, P. & N. R. Co. 90 Md. 53, 44 Atl. 994, that there would be no liability where an engineer informed one that it was safe to cross a track, and his horse became frightened at the sudden discharge of steam from a locomotive, unless it appears that the escape thereof and its accompanying noise was unusual and unnecessary.

Necessity of knowledge of proximity of horse.

Where a horse is frightened by the unnecessary escape of steam from a locomotive, it is not necessary, in order to sustain a recovery by the plaintiff, that those in charge of the engine should have been aware of his close proximity. Boothby v. Boston & M. R. Co. 90 Me. 313, 38 Atl. 155; Brown v. Missouri P. R. Co. 89 Mo. App. 192; Missouri, K. & T. R. Co. v. Traub (Tex. Civ. App.) 47 S. W. 282; San Antonio & A. P. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Adams v. International & G. N. R. Co. (Tex. Civ. App.) 122 S. W. 895.

It was said in San Antonio & A. P. R. Co. v. Belt, supra, that where a locomotive stands near a much-frequented public crossing, it is the duty of the engineer, although he may not know of the close proximity of a person who is driving a horse, before suddenly putting the engine in motion, with its attendant noises and escape of steam, to look out for horses near or likely to be near the crossing, and to exercise ordinary care to avoid frightening them in such manner.

In order to charge a railway company with liability it is unnecessary that those in charge of a locomotive should be actually aware of the close proximity of a horse, where an engine from which steam is unnecessarily permitted to escape from the pop safety valve in a manner calculated to frighten horses not accustomed to it, where it appears that a railway company had issued instructions not to unnecessarily permit the escape of steam from the pop valve when standing near the depots or highway crossings. Missouri, K. & T. R. Co. v. Traub, supra.

In Texas & P. R. Co. v. Kennedy, 29 Tex. Civ. App. 94, 69 S. W. 227, the court observed that "it was not essential to plaintiff's right of recovery that defendant's employees should have seen his actual peril. If a reasonably prudent person would have anticipated that the opening of the cylinder cocks, thus causing volumes of steam to be thrown in the direction of plaintiff's horse, accompanied by loud and unusual noise, would have frightened the horse and probably have caused plaintiff to be injured, such acts on the part of the appellant's employees, being unnecessary in the proper operation of the engine, would constitute negligence and would render appellant liable for the injuries thereby caused."

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other words, it is not a nuisance to operate a stave factory and discharge waste steam in close proximity to a public highway, if done in such a careful manner that it will not interfere with travelers in the free and safe exercise of their rights to travel the highway. The law will not intervene if the operator so conducts his factory as to avoid the creation of new dangers or difficulties to travelers on the road. Wabash, St. L. & P. R. Co. v. Farver, 111 Ind. 195, 198, 60 Am. Rep. 696, 12 N. E. 296; Louisville, N. A. & C. R. Co. v. Schmidt, 147 Ind. 638, 46 N. E. 344.

Now let us apply these principles to the facts of this case. It is alleged that appellant knew that the discharge of the steam in the place and manner described was calculated to frighten horses of ordinary gentleness; that while carefully driving a gentle horse along the highway, when the horse had arrived at a point 25 or 30 feet from the waste pipe, the defendant suddenly let the steam go with a loud puffing noise, which steam formed a great cloud and floated across the road in front of the horse, causing him to take fright and inflict serious injury upon the plaintiff. These averments show that appellant operated on its own premises a structure which, from location or the manner in which it was conducted, imparted a new danger to those rightfully using the highway; and whether appellant at the time of appellee's accident was operating his factory with a degree of care for the safety of travelers commensurate with the danger it had created in the highway was a question very properly submitted to the jury. It would not have strengthened the complaint in terms to characterize the location or conduct of the factory as a public nuisance. It was sufficient for the plaintiff to show that he was injured by appellant's omission of a duty owing to him, namely, to protect him against injury from a peril the company had erected by the roadside in the prosecution of its own private business. We think it sufficiently appears that the highway was a public highway, and that each paragraph of the complaint states a cause of action.

It was not error to overrule appellant's motion for judgment in its favor on the answers to interrogatories, notwithstanding the general verdict. The answers referred to concerning the location and operation of appellant's factory establish the facts substantially as set forth in the introductory part of this opinion. Further, it is shown that appellee knew the location of the steam pipe, that steam at the time was floating across the highway, and, that when at a point 110 feet west of the pipe, the pipe was in the plain view of appellee from the center of the highway, and from that point he could have seen steam floating across the highway, if there was at that time any steam so floating. The horse did not become uneasy and nervous in approaching appellant's factory after crossing the railroad track, and appellee did not see any steam from the waste pipe floating across the highway after he crossed the railroad and before his horse shied at the sawmill. Both appellant and appellee at the time knew that such a horse as was being driven by appellee was likely to take fright at steam floating across the highway, so near the ground. In the large number of answers there is no fact found that is inconsistent with the general verdict that necessarily finds the existence of negligence on the part of appellant, and the nonexistence of contributory negligence on the part of appellee. The facts found, strengthened by the presumptions that may be invoked in support of the general verdict, very clearly bring the case within the oft-repeated rule of this court as defined in Jeffersonville v. Gray, 165 Ind. 26, 29, 74 N. E. 611, and cases cited.

In support of its motion for a new trial, appellant insists that the court erred in overruling its motion to require the jury to return more definite and certain answers to divers interrogatories. Under the statute (Burns's Anno. Stat. 1901, § 555) it is made the duty of the court, upon the request of either party, to instruct the jury to find specially upon any particular question of fact stated to them in an interrogatory on any issue in the case. The facts that must be found are such facts as are material to some issue in the case. The first answer assailed as too indefinite was to the following interrogatory: "No. 50. Did said Druley, while on or approaching said crossing, say to the plaintiff, in substance, 'You had better let me help you hold him?' Answer. Not definite." The court doubtless took the view that the question and answer were immaterial because, if answered positively, and either affirmatively or negatively, the answer would not have affected the general verdict. Druley was riding in the buggy with the plaintiff when the horse took fright. If he did offer to assist in holding the horse, a rejection of the proffered assistance might, under the circumstances shown, have been counted as due care on the part of the plaintiff. It is clear that no answer that might have been returned would have changed the result. Chicago & E. I. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801. Besides, the interrogatory called for a mere

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item of evidence, and not for a material fact, and should have been rejected. Louisville, N. A. & C. R. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611; Gates v. Scott, 123 Ind. 459, 24 N. E. 257. The answers to interrogatories 62 and 66 come within the same rule. No. 59 reads as follows: "Was the steam discharging from the mill onto and across the highway while the plaintiff was approaching from a point west of the railread?" Answer. "At the side of the highway. At times blew across." The evidence showed that the steam being discharged at a point 8 feet from the side of the highway responded to the shifting of the wind, and in one instant was carried across the road and in the next in another direction. It is not perceived how the jury, under the evidence, could have answered the interrogatory differently, and yet accurately. The court did not err in overruling the motion. Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 628, 50 N. E. 760. Interrogatory 63 was as follows: "Was there something in the actions of the horse while on or approaching the railroad tracks that would indicate to an ordinarily prudent person that said horse was nervous and excited at the time?" Answer. "I think not." Ninety-eight and one half falls within the same rule. If the most favorable answer possible for appellant had been returned to these interrogatories, they would not have controlled the general verdict, and the court did not err in overruling appellant's motion.

The refusal of the court to submit to the jury certain interrogatories is complained of. Interrogatory 41 reads thus: "Was it reasonably probable that a colt of ordinary gentleness, three and one half years old, which had never been driven near a steam engine, would become frightened when brought for the first time into proximity with a steam engine in operation?" This called for evidence, and not a material fact, and was properly refused. The same is true of interrogatories 64 and 76. Ninety-five inquired if an ordinarily prudent man would have known that such a horse three and one half years old, would be likely to become frightened when passing defendant's factory as it was being operated on that day. This might have been answered either way, and be entirely consistent with the general verdict. The same is true of 96, 97, and 98, and they were all rightly withheld from the jury.

There was sufficient evidence to warrant the jury in finding established the negligence averred in the complaint.

We find no error. Judgment affirmed.

Petition for rehearing denied.

23 L.R.A.(N.S.)

MINNESOTA SUPREME COURT.

HARRY THOMAS, Respt.,
v.
WISCONSIN CENTRAL RAILWAY COMPANY, Appt.,

(— Minn. —, 122 N. W. 456.)

Master — place of work — independent contractor.

1. Where a master places upon his premises, in the immediate vicinity where his servants are engaged at work, an independent contractor for a specific purpose, still retaining the general control of the premises, and continuing the conduct of his own business, his legal obligation to provide his servants with a safe place in which to perform their duties requires of him the exercise of reasonable care to protect them from the negligence of the independent contractor.

Same — bounds.

2. The obligation of the master to provide his servants a safe place extends to the portion of his premises on which they are required to work, and such other places thereon as they are expressly or impliedly invited and permitted to use.

Same — duty — noon hour.

3. The relation of master and servant, in so far as involves the obligation of the master to protect his servant while rightfully upon his premises, is not suspended during the noon hour, when the master expects, and expressly or by fair implication invites, the servant to remain upon the premises, in the immediate vicinity of the work.

(July 23, 1909.)

Headnotes by BROWN, J.

Case Note. — Does relationship of master and servant still exist where servant goes on master's premises before, after, or between hours of actual labor.

The earlier cases upon this subject are collected and discussed in a case note to Taylor v. Bush, 12 L.R.A.(N.S.) 853, and this note is merely supplementary thereto.

Riding to and from work.

The majority of the cases of this character involve the relationship existing between the employer and an employee while the latter is riding to or from his work, and there is a sharp conflict of authority as to what that relation is.

The following cases hold that while a servant is riding to or from his work, upon the master's trains or cars, the relationship of master and servant still exists, and the servant is entitled to all the duty from the master and must bear all of the obligations incident to that relationship: Louisville & N. R. Co. v. Stuber, 54 L.R.A. 696, 48 C. C. A. 149, 108 Fed. 934, writ of certiorari

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APPEAL by defendant from an order of the District Court for St. Louis County denying defendant's motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Crassweller & Crassweller**, for appellant:

The duty of the master to furnish his servant with a reasonably safe place in which to work is limited to the part of the premises where the employee is required to be for the purpose of his employment, and does not extend to his protection upon private excursions outside of those limits, taken solely upon his own account.

Labatt, Mast. & S. § 625, p. 1845; 3 Elliot, Railroads, §§ 1248-1250; 2 Jaggard, Torts, § 258, p. 890; Dresser, Employers' Liability, §§ 103, 104; Hyatt v. Murray, 101 Minn. 507, 112 N. W. 881; Schreiner v. Great Northern R. Co. 86 Minn. 245, 58 L.R.A. 75, 90 N. W. 400; Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965; Kennedy v. Chase, 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 33; Wright v. Rawson, 52 Iowa, 329, 35 Am. Rep. 275, 3 N. W. 106; Pioneer Min. & Mfg. Co. v. Talley, 152 Ala. 162, 12 L.R.A.(N.S.) 861, 43 So. 800; Shadoan v. Cincinnati, N. O. & T. P. R. Co. 26 Ky. L. Rep. 828, 82 S. W. 567; Belford v. Canada Shipping Co. 35 Hun, 347; Morrison v. Burgess Sulphite Fibre Co. 70 N. H. 406, 85 Am. St. Rep. 634, 47 Atl. 412; Lenk v.

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denied in 183 U. S. 698, 46 L. ed. 395, 22 Sup. Ct. Rep. 935; Birmingham R. Light & P. Co. v. Sawyer (Ala.) 19 L.R.A.(N.S.) 717, 47 So. 67; St. Louis, I. M. & S. R. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295; Self v. Adel Lumber Co. 5 Ga. App. 846, 64 S. E. 112; Southern Indiana R. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097; Dobson v. New Orleans & W. R. Co. 52 La. Ann. 1127, 27 So. 670; Kilduff v. Boston Elev. R. Co. 195 Mass. 307, 9 L.R.A.(N.S.) 873, 81 N. E. 191; Streets v. Grand Trunk R. Co. 76 App. Div. 480, 78 N. Y. Supp. 729, affirmed in 178 N. Y. 553, 70 N. E. 1109; Sanderson v. Panther Lumber Co. 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368.

So, in Riccio v. International R. Co. 63 Misc. 588, 117 N. Y. Supp. 720, it was held that where a person in the employ of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation, free of charge, constitutes part of the contract of service, while so traveling he is an employee, not a passenger; and for an injury to him through the negligence of a coemployee the company is not liable.

And in Tanner v. Frank Hitch Lumber Co. 140 N. C. 475, 53 S. E. 287, it was held that, inasmuch as it was the master's duty (he having undertaken it according to the plaintiff's contention) to furnish his laborers transportation on his log train to and from the "quarters," it was his further duty to see that such transportation was rendered as reasonably safe as the character of it would admit. While the plaintiff assumed the risks incident to riding on loaded log cars, he did not assume any risk resulting from a defective car.

So, in Alabama G. S. R. Co. v. Brock (Ala.) 49 So. 453, the court said: "The servant who is employed to go to a certain place and do a certain work, who is transferred to and from said place by the employer (his pay being continued all the time), is employed in and about that work from the time he leaves until he returns."

An employee is, while being moved from place to place in the work of his employment, in the car furnished by the company for him to live in, in the service of the master as much as when actively engaged in his work. Southern R. Co. v. West, 4 Ga. App. 672, 62 S. E. 141.

A pumper in the employ of the defendant, who was expected and required to ride between pumping stations on the trains of the defendant, and had a pass for that purpose, was held in Kunza v. Chicago & N. W. R. Co. (Wis.) 123 N. W. 403, to be serving the company as fully while riding from one station to the other as when he was actually operating the pumps.

A switch cleaner while riding on the defendant's cars to reach a switch, having given the conductor an employee's ticket, is an employee, rather than a passenger, and cannot recover if injured by the negligence of a fellow servant. Shannon v. Union R. Co. 27 R. I. 475, 63 Atl. 488.

Where a railroad company provides hand cars for the transportation of its employees from the place where they have been working to a point convenient to their homes, even if the journey is commenced after the usual work of the day has ceased, it was held in Cicalese v. Lehigh Valley R. Co. 75 N. J. L. 897, 69 Atl. 166, that the relation of master and servant continues until the employee has reached the destination to which he is being carried by or with the consent of the company, and the company is not relieved of its duty to furnish a reasonably safe machine and appliances for that purpose while such relation continues to exist.

On the contrary, it has been held in some cases that under such circumstances the employee is a passenger, or at least he is entitled to the same degree of care as a passenger. Carswell v. Macon, D. & S. R. Co. 118 Ga. 826, 45 S. E. 695; Indianapolis Traction & Terminal Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068; Simmons v. Oregon R. Co. 41 Or. 151, 69 Pac. 440, rehearing denied in 41 Or. 166, 69 Pac. 1022; Enos v. Rhode Island Suburban R. Co. 28 R. I. 291, 12 L.R.A.(N.S.) 244, 67 Atl. 5; Harris

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Kansas & T. Coal Co. 80 Mo. App. 374; Olson v. Minneapolis & St. L. R. Co. 76 Minn. 149, 48 L.R.A. 796, 78 N. W. 975; Smith v. Trimble, 111 Ky. 861, 64 S. W. 915; Glaser v. Rothschild, 106 Mo. App. 418, 80 S. W. 332; Barre v. Calvary Cemetery Asso. 106 Mo. App. 358, 80 S. W. 709; Shearm. Redf. Neg. 704; Kauffman v. Maier, 94 Cal. 269, 18 L.R.A. 124, 29 Pac. 481; Goff v. Chippewa River & M. R. Co. 86 Wis. 237, 56 N. W. 465; 26 Cyc. Law & Proc. p. 1224; 20 Am. & Eng. Enc. Law, pp. 57, 97, 131, 149; Peake v. Buell, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800.

The plaintiff was not in the line of his duty at the time of the accident, and has no cause of action against the defendant.

Ellsworth v. Metheney, 51 L.R.A. 389, 44 C. C. A. 485, 104 Fed. 119; Wright v. Rawson and Kennedy v. Chase, supra; 1 Shearm. & Redf. Neg. § 190; Benson v. Chicago, St. P. M. & O. R. Co. 78 Minn. 303, 80 N. W. 1050; Green v. Brainerd & N. M. R. Co. 85 Minn. 323, 88 N. W. 974.

There was no invitation, express or implied, from the defendant to plaintiff to go around the store house to the boiler, and the plaintiff was, as to that part of the property, a trespasser, or at best a mere licensee at sufferance; and the defendant owed him no duty at such time and place, except to refrain from wilfully or wantonly injuring him.

Muench v. Heinemann, supra; Elliott,

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v. Puget Sound Electric R. Co. 52 Wash. 289, 100 Pac. 838.

And in Haas v. St. Louis & Suburban R. Co. 111 Mo. App. 706, 90 S. W. 1155, it was held that a railroad trackman who was injured on one of the defendant's cars while traveling to his place of labor was a passenger on the car he was using, and not a coservant of the negligent crew of another car.

So, an employee riding to and from his work is a passenger when he rides not by direction of the company, but of his own volition, with coupons furnished by the company as part of his salary. Hebert v. Portland R. Co. 103 Me. 315, 125 Am. St. Rep. 297, 69 Atl. 266, 13 A. & E. Ann. Cas. 886.

And an employee of a railroad company taking a train pursuant to the directions of his employer is entitled to the same degree of care as any other passenger. Johnson v. Texas C. R. Co. 42 Tex. Civ. App. 604, 93 S. W. 433.

And in Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850, it was held that an employee of a railroad company riding on a pass, not in the course of his employment or in going to or from his work, but making a trip for his own convenience, but whose free transportation is given him under a stipulation in his contract of employment, sustains while so riding the relation of a passenger, and not of an employee, to the carrier.

Miscellaneous examples.

In a manufacturing establishment, where on account of the nature of their work it is impracticable for the employees to leave the building for their noonday meal, and the master allows but thirty minutes for their lunch, and it is contemplated by their contract of employment that they shall remain in the building where they work to eat their lunch, the relation of master and servant continues during the thirty minutes allowed for lunch. Riley v. Cudahy Packing Co. (Neb.) 117 N. W. 765.

And in Carnegie Steel Co. v. Rowan, 10 Ohio C. C. N. S. 329, it was held that an employer who permitted his employees to eat their lunch in a building on the premises owed to them the duty of exercising ordinary care, as they were there by his invitation, and were not licensees. The decision goes no further, as the question arose on the plaintiff's request for a charge to this effect.

Employees who had for a long time, with the knowledge of the employer, been in the habit of eating their noon lunch on a bench just outside of the building in which they were employed, and of washing their clothes in a large tank near by, were, while so engaged, still within the scope of their employment. Muller v. Oakes Mfg. Co. 113 App. Div. 689, 99 N. Y. Supp. 923. The court said: "Workmen in boiler rooms and dirty shops may step aside to a convenient place at hand in their working place, or so adjacent as to be of it or appurtenant to it, to eat or clean up, without getting outside the duty which their employer owes to them to take reasonable care of their safety."

In Force v. Standard Silk Co. 160 Fed. 992, affirmed in 170 Fed. 184, the master was held liable for injuries to an employee fourteen years of age who was injured during the noon hour by being caught in machinery against the dangers of which he had not been warned, but the question as to whether he was really in the employ of the master at the noon hour seems not to have been raised.

In Beck v. Southern R. Co. 146 N. C. 455, 59 S. E. 1015, it was held gross negligence on the part of a railroad company not to provide some safe mode for its employees who worked in the shops to cross its tracks in going to their work, where they had been in the habit for ten years of going through, under, or between the cars whenever they found the tracks blocked.

So, in Nelson v. R. J. Reynolds Tobacco Co. 144 N. C. 418, 57 S. E. 127, where an employee in defendant's factory was injured while passing along a passageway through the building after the day's work was done, the following charge to the jury was up-

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Railroads, §§ 1249, 1250; Pioneer Min. & Mfg. Co. v. Talley, supra.

The owner and operator of the boiler was an independent contractor, engaged in an independent work at a place where the defendant had no men employed, and was carrying on no work of its own; and under such circumstances the liability, if any, was the liability of the contractor, and not of the defendant.

1 Jaggard, Torts, p. 228; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957; Shute v. Princeton Twp. 58 Minn. 337, 59 N. W. 1050; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 729; Gahagan v. Aermotor Co. 67 Minn. 252, 69 N. W. 914; Aldritt v. Gillette-Herzog Mfg. Co. 85 Minn. 206, 88 N. W. 741; Klages v. Gillette-Herzog Mfg. Co. 86 Minn. 458, 90 N. W. 1116; Smith v. Milwaukee Builders' & T. Exchange, 91 Wis. 365, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; Carlson v. Stocking, 91 Wis. 434, 65 N. W. 58; Hackett v. Western U. Teleg. Co. 80 Wis. 192, 49 N. W. 822; Richmond v. Sitterding, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562; Central Coal & I. Co. v. Grider, 115 Ky. 745, 65 L.R.A. 455, 74 S. W. 1058; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378.

Messrs. **Samuel A. Anderson** and **Warner E. Whipple**, for respondent:

The plaintiff at the time of the accident was in the employ of the defendant.

26 Cyc. Law & Proc. p. 1086; Taylor v. George W. Bush & Sons Co. (Del.) 12 L.R.A.

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held: "An employer owes the employee a legal duty in the exercise of reasonable care to provide for him not only a reasonably safe place in which to work, but he also owes that employee a duty to provide a way of access and departure from that work, which is reasonably safe."

A railroad is liable to a yard brakeman who, having completed his day's work, was injured by the negligence of the railroad company while riding on his way home through the yard, in the cab of an engine, by direction of the yard master. Feneff v. Boston & M. R. Co. 196 Mass. 575, 82 N. E. 705. The court said: "It also is unnecessary to decide if the plaintiff had ceased to be a servant, and had become a passenger, as he was lawfully passing over the premises of his employer in its conveyance, which at the time had the exclusive use of the railroad. A servant entering upon his master's premises to begin the day's work, or upon leaving them at its close, is not, during the time of his entrance or exit, while using the ways provided, a licensee, but is there by the invitation of the master. The defendants accordingly owed to him the duty to refrain from acts of negligence which might cause personal injury while he was making his egress in the usual way."

The relation between an employer and the employees while the latter, with the former's permission, are riding upon a freight elevator in the employer's building to the floor of the building on which they work, is that of master and servant, and not carrier and passenger. The occasional use of the elevator to carry the employees does not make the employer a carrier of passengers. Kappes v. Brown Shoe Co. 116 Mo. App. 154, 90 S. W. 1158.

And a waitress in a hotel who has, according to custom, gone for a walk after her day's duties are done, is not, in attempting to use the elevator to return to her room, preparatory to resuming her duties in the morning, a passenger to whom the hotel keeper owes the duty of a common carrier. Walsh v. Cullen, 235 Ill. 91, 18 L.R.A.(N.S.) 911, 85 N. E. 223.

Where a bridge foreman rode upon a velocipede car to a place some distance from his place of work, either on personal business or on business for the master, but remained after any business for the master had been finished, and visited with his family for some hours, and then returned to his place of work, on a hand car, it was held in Russell v. Oregon Short Line R. Co. 83 C. C. A. 618, 155 Fed. 22, that while so returning he was not in his master's employ.

Where a brakeman was not subject to call during the day, his train having pulled out, it was held in Missouri, K. & T. R. Co. v. Hendricks (Tex. Civ. App.) 108 S. W. 745, that the relationship of master and servant did not exist between the company and him while he was going from the roundhouse to visit a friend.

Where an employee who had been sent for by telegraph by his employer to go to a certain place as soon as possible made use of the latter's tracks as a convenient way of reaching his destination, it was held in Byrket v. Lake Shore & M. S. R. Co. 29 Ohio C. C. 614, affirmed in 75 Ohio St. 625, 80 N. E. 1124, that he was not, while so on the tracks, about his master's business so that the railroad company owed him the special duties of a master to a servant.

A cook assisting the manager of outfit cars of a railroad company in which workmen are lodged and boarded, who lives upon the cars, but is furnished by the manager, and not employed by the company, bears such a relation to the company as to require it to exercise ordinary care to prevent injuring her. Pugmire v. Oregon Shore Line R. Co. 33 Utah, 27, 13 L.R.A.(N.S.) 565, 126 Am. St. Rep. 805, 92 Pac. 762, 14 A. & E. Ann. Cas. 384.

Upon the somewhat allied question of the liability of master for injuries to servant when he has left his own working place and gone to another portion of the plant for his own purposes, see case notes to Pioneer Min. & Mfg. Co. v. Talley, 12 L.R.A.(N.S.) 861, and Gooch v. Citizens' Electric Street R. Co. post, 960.

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(N.S.) 853, 66 Atl. 884; Pioneer Min. & Mfg. Co. v. Talley, 152 Ala. 162, 12 L.R.A. (N.S.) 863, 43 So. 800; Parkinson Sugar Co. v. Riley, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315.

Brown, J., delivered the opinion of the court:

Action to recover for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or a new trial. The trial court granted a new trial, but denied that part of the motion demanding a final judgment for defendant. The only question presented on this appeal is, therefore, whether in any view of the evidence plaintiff has a cause of action against defendant.

The facts are as follows: Defendant is a raidroad corporation organized under the laws of the state of Wisconsin, and as such operates a line of railroad from Chicago, through Wisconsin, to Duluth and other points in this state. At the time of the accident here complained of, it was engaged in constructing certain shops and yards at South Superior, in the state of Wisconsin. The buildings were located near the railway tracks, and were being constructed by a firm of independent contractors, who employed in and about the work some fifty or more men. Defendant in its own behalf was engaged in the same locality in grading and excavating for its roadbed, and also employed about fifty men. One Roberts was engaged, as an independent contractor, in sinking a well within one of the buildings, and employed in his work an old engine and boiler, which, as will presently be mentioned, exploded, killing several of defendant's employees. Plaintiff, with other of defendant's servants, was engaged in excavating a roadway immediately adjacent to the building in which the well was located, on the east side thereof, and by means of wheelbarrows conveyed the excavated material to a point northwest from the building, a distance of about 75 feet. The boiler used by Roberts in sinking the well was located on the west side of this building, and was under his exclusive control; at least, the evidence does not show that defendant exercised any supervision in respect to its operation. However, defendant had not surrendered control of its premises to Roberts, or the other contractors engaged in the construction of the buildings, but remained in possession thereof, and with its employees was engaged in the track work heretofore mentioned. Roberts was upon the premises solely for the purposes of the work intrusted to him. The railroad emloyees were under the control of a general foreman in charge of the track work, and were subject to his orders and directions. The men were given but a half hour for a midday intermission, and were expected to, and did, take their luncheon with them, and eat it upon the premises, in the immediate vicinity of their work. The ground upon which the work was being carried forward was swampy or marshy, and at the noon hour the employees found a convenient dry knoll or spot of ground upon which to kindle a small fire for the purpose of heating their coffee, and upon which to rest while partaking of their lunch. Though the foreman testified that a railroad car had been provided for this purpose, he also testified that it was not used by all the men, who, with his knowledge, were in the habit of going upon the premises wherever a dry place could be found, instead of going to the car. Plaintiff testified that he knew nothing about the car, and was not informed that it had been furnished for the convenience of the men. Roberts' boiler, used in the well-digging operations, was located upon the only dry spot of ground to the west of the building, and on the day of the injury to plaintiff he and other employees of defendant repaired to that place for lunch. Before they had finished, the boiler exploded, killing several of the men, and severely injuring plaintiff.

Plaintiff's theory of the action at the trial was that defendant was under legal obligations to provide its employees, including plaintiff, with a reasonably safe place in which to do their work, and to protect them from dangers unknown to them while rightly upon its premises, and that it failed in the performance of this duty, and is liable for all injuries sustained in consequence of its failure. The trial court sent the case to the jury upon this theory, and they found generally in plaintiff's favor. It is contended by defendant (1) that the evidence conclusively shows that Roberts, the well digger, was an independent contractor, over whom it had no control, either respecting the manner of doing his work or the instrumentalities used; and (2) that plaintiff, in going upon the spot of ground where the boiler was located, did so for his own convenience, without any express or implied invitation from defendant, and was not then a servant of defendant, but a mere licensee, and that defendant owed him no active vigilance for his protection.

1. We are unable to sustain either of these contentions. Defendant was under legal obligation to provide plaintiff, its servant, a reasonably safe place in which to do his work, or, as more accurately expressed, to exercise reasonable care to so provide. This necessarily included protection from un-

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known danger while rightfully upon defendant's premises, and such as reasonable prudence on defendant's part would have guarded against. It could not avoid the performance of that duty by delegating it to others, nor shield itself by sending upon its premises, still under its general control, and where its servants were employed, an independent contractor, with authority to set up and operate in the vicinity of its own workmen dangerous instrumentalities. In such case the performance of the master's obligations to his servants requires that he exercise reasonable care in reference to the work of the independent contractor, to the end that the place provided for his own servants may not become unsafe or dangerous. Akin v. Lake Superior Consol. Iron Mines, 103 Minn. 204, 114 N. W. 654, 837; Aldritt v. Gillette-Herzog Mfg. Co. 85 Minn. 206, 88 N. W. 741; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 729; Klages v. Gillette-Herzog Mfg. Co. 86 Minn. 458, 90 N. W. 1116; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396. As remarked by the court in The Magdaline (D. C.) 91 Fed. 798; "A master may not place his servant at work made dangerous by the work of other servants, or persons performing work under contract, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a coservant or third person employed on the premises, the injury would not have happened. A servant may expect that his master will not surround him with dangerous agencies, . . . whether they are in charge of the master's servants or of an independent contractor." See also Burnes v. Kansas City, Ft. S. & M. R. Co. 129 Mo. 41, 31 S. W. 347; Sackewitz v. American Biscuit Mfg. Co. 78 Mo. App. 144; Woodman v. Metropolitan R. Co. 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482. The duty to provide a safe place to work is absolute, non-delegable; and it is clear that in a case like that at bar the master cannot shield himself by the plea that the place provided by him was made dangerous and unsafe by his independent contractor. In a situation like the present, installing an independent contractor for a certain specific purpose to be performed in and about the place provided for his own servants, still retaining the general control over his premises, the master must either suspend his own work, or take active measures to protect his servants from the negligence of the independent contractor. In no other way can he perform his duty to his own servants respecting the obligation to furnish them a reasonably safe place to work. The authorities may be somewhat conflicting upon this proposition; but the views expressed are, it seems to us, sustained by the plainest principles of the law of master and servant.

It is further urged in this connection that there is no evidence that defendant knew or had reason to believe that the contractor's boiler was unsafe or defective. But this clearly is no answer to the charge of neglect of duty. Had this particular boiler been operated by defendant, its obligation to plaintiff would have required an inspection thereof, and an exercise of reasonable care to keep it in condition suitable for its work. 4 Thomp. Neg. 3296. Though the boiler was not an instrumentality furnished by defendant for use by its employees, it permitted it to be placed upon its premises, where its servants were at work, thus, in its defective condition, rendering the place of work unsafe, and the duty of inspection existed. The evidence shows that the boiler was old and out of repair, extremely dangerous to the life and limbs of those working in its vicinity, and that a casual inspection thereof would have disclosed this condition to defendant. There is no claim that defendant ever attempted to inspect it, or otherwise protect its servants from danger of injury from that source. The evidence made this a question for the jury.

2. But is is further claimed that plaintiff was not at the place provided for the performance of his work, but, on the contrary, was at the boiler for his own convenience; that he was not a servant of defendant at the time, but a mere licensee, and entitled to no protection as a servant. A large number of cases are cited in support of this contention, and, if sound, it disposes of the case adversely to plaintiff's right of action. The position, however, does not meet with our view of the law. The authorities are hopelessly at variance upon this point, though, as we believe, the weight of reason is opposed to the view of defendant. The authorities are collected in a note to Taylor v. George W. Bush & Sons Co. 12 L.R.A. (N.S.) 853. In the case at bar it appears that defendant's employees were given a half hour for the noon rest; that each employee brought his luncheon with him, and ate it upon defendant's premises, in the vicinity of the work; that the men were expected to remain upon the premises, and did so remain with the knowledge, consent, and upon the implied invitation of defendant, picking out such dry places upon the premises as could be found, lighting a small fire, heating their coffee, and partaking of their lunch. These facts appear not only from the testimony of plaintiff's witnesses, but also from the testimony of defendant's foreman in charge of this particular work. Under such circumstances a majority of the courts hold that

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the relation of master and servant remains intact, extending to the servants the same rights as when actually engaged in their work. Cleveland, C. C. & St. L. R. Co. v. Martin, 13 Ind. App. 485, 41 N. E. 1051; Blovelt v. Sawyer [1904] 1 K. B. 271; Heldmaier v. Cobbs, 195 Ill. 172, 62 N. E. 853; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90; Boldt v. New York C. R. Co. 18 N. Y. 432. Numerous other cases to the same effect are cited in the note referred to.

The case of Olson v. Minneapolis & St. L. R. Co. 76 Minn. 149, 48 L.R.A. 796, 78 N. W. 975, is different in its facts from that at bar, and is not in point. In that case plaintiff, a brakeman, left his caboose at the end of his journey, about 2:50 P. M., went to his boarding place, and at about 7 o'clock in the evening returned to the yards in search of the caboose, in which he had left his clothing, and he was injured. It was held properly that the relation of master and servant did not exist at the time he was looking for his clothing. There was neither express nor implied permission to go upon the defendant's premises for that purpose. Neither is the case of Benson v. Chicago, St. P. M. & O. R. Co. 78 Minn. 303, 80 N. W. 1050, in point. There the railroad employees had ceased their work and were returning to their boarding cars on hand cars furnished by the company, and plaintiff therein was injured by the reckless conduct of those in charge of one of the cars in propelling it violently against a preceding car. The court held that, during the time the men were proceeding to their boarding place on the hand cars, they were, "as between themselves," not servants of the company, and that there was no liability for the negligent conduct of those who caused the accident complained of. Such is not this case. Here the men were still upon the premises of defendant, at their place of work, with its knowledge, consent, and implied invitation, and, within the authorities cited, as well as upon principle, they were servants, and not licensees, in so far as involves defendant's obligation to protect them. Parkinson Sugar Co. v. Riley, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; Rosenbaum v. St. Paul & D. R. Co. 38 Minn. 173, 8 Am. St. Rep. 653, 36 N. W. 447.

We have examined the Wisconsin cases cited by defendant, and find none of them in their facts at all like the case at bar. A careful reading of the opinions of that court sustains the general view here expressed. The trouble with the particular cases was that there was no express or implied invitation to the servants to remain upon the master's premises, or to be thereon, at the time or place of injury. This disposes of the case.

Order affirmed.

Petition for rehearing denied August 6, 1909.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY A. GOOCH
v.
CITIZENS' ELECTRIC STREET RAILWAY COMPANY

(202 Mass. 254, 88 N. E. 591.)

Master — safe working place — telephone booth.

No liability under the employers' liability act arises for the death of a street car motorman who, having applied to be relieved from duty for the day and been told that he must be on duty during the afternoon, or find a substitute, is killed while in a telephone booth on the carrier's premises, whither he has gone for a purpose not disclosed.

(May 22, 1909.)

Case Note. — Liability of master for injury to servant who had left his working place and gone to another portion of the plant for his own purposes.

The earlier cases upon this subject are collected and discussed in a case note to Pioneer Min. & Mfg. Co. v. Talley, 12 L.R.A.(N.S.) 861, and this note is merely supplementary thereto.

The master has no duty imposed upon him to care for the safety of the servant who, of his own volition and without the knowledge of the master, has departed from his safe place and gone to a dangerous place for the purpose of obtaining a tool which the master was in the act of supplying in the customary method, when it does not appear that the master knew or ought to have known that his servants were accustomed to depart from the safe place for such purpose. When the servant has thus departed from the safe place furnished, the master owes the servant no duty of a higher degree than that which is due a licensee. Harris v. United S. S. Co. 75 N. J. L. 861, 70 Atl. 155.

Where an employee in a saw and planing mill is injured while operating, for his own purposes, a machine which does not constitute part of the machinery of the mill, but is under the control and subjected to the use of a third person who merely gets power from the mill, the proprietor of the mill is not liable for the damages resulting from such injury. Gross v. Fischer Lumber & Mfg. Co. 119 La. 201, 43 So. 1006.

So an employee who, for his own pur-

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EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for the death of plaintiff's husband for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff. Sustained.

Defendant's first, second, and eighth requests for instructions, referred to in the opinion, are as follows:

"First. On all the evidence the plaintiff is not entitled to recover on the first count.

"Second. On all the evidence the plaintiff is not entitled to recover on the second count.

"Eighth. On all the evidence the intestate was not, at the time the accident occurred, an employee of the defendant within the meaning of the employers' liability act."

Further facts appear in the opinion.

Messrs. **Peabody & Arnold**, for defendant:

In order to recover under the employers' liability act, it was incumbent upon the plaintiff to prove that the relationship of master and servant existed between the defendant and Gooch at the time of the accident.

1 Dresser, Employers' Liability, § 8; 2 Labatt, Mast. & S. § 720; Dane v. Cockrane Chemical Co. 164 Mass. 453, 41 N. E. 678; Boyle v. Columbian Fire Proofing Co. 182 Mass. 93, 64 N. E. 726; Saures v. Stevens Mfg. Co. 196 Mass. 543, 82 N. E. 694.

The relationship of master and servant did not exist between the defendant and Gooch at the time of the accident.

Dickinson v. West End Street R. Co. 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60; Doyle v. Fitchburg R. Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770; Baltimore & O. R. Co. v. State, 33 Md. 542; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Baird v. Pettit, 70 Pa. 477; Morier v. St. Paul, M. & M. R. Co. 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952.

Messrs. **J. P. Sweeney** and **L. S. Cox** for plaintiff.

Sheldon, J., delivered the opinion of the court:

In this action, brought under the employers' liability act (Rev. Laws, chap. 106, § 73), there can be no recovery unless the plaintiff's intestate, at the time of the injury which caused his death, was acting in the employ of the defendant. Dane v. Cochrane Chemical Co. 164 Mass. 453, 457, 41 N. E. 678. The first and most important question is, accordingly, whether at that time the relation of employer and employee existed between the defendant and the deceased.

He was in the general employ of the defendant as a regular motorman, paid, as the evidence indicates and as his counsel state in their brief, at a fixed rate per

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poses, attempts to make use of a machine in the shop in which he is working, which it is not part of his duty to use, assumes the risk of such action. Stodden v. Anderson & W. Mfg. Co. 138 Iowa, 398, 16 L.R.A. (N.S.) 614, 116 N. W. 116.

A servant, nineteen years old, who was injured by the negligent starting of certain negligently unguarded machinery by a boy employed under the statutory age, while he, having left his place of employment, was talking with another workman, cannot recover, under any theory of the master's liability, for he was not about the master's business at the time, nor could he have supposed he was. Schmnoske v. Asphalt Ready Roofing Co. 129 App. Div. 500, 114 N. Y. Supp. 87.

And in Wilson v. Chesapeake & O. R. Co. (Ky.) 113 S. W. 101, it was held that the master was under no obligation to watch over and guard a servant employed as night watchman as he was leaving the premises to go to a near-by restaurant.

Where a member of a wrecking crew left the train while it was standing on a siding, and stood on the track in front of the engine for his own convenience or pleasure, and it started, striking and killing him, it was held in Chesapeake & O. R. Co. v. Barnes (Ky.) 117 S. W. 261, that his administrator could not claim the benefit of a rule requiring signals to be given before the starting of a train, which rule was broken by the engineer in charge of the train.

And in Cincinnati, N. O. & T. P. R. Co. v. Reynolds, 31 Ky. L. Rep. 529, 102 S. W. 888, it was held that when an employee is not in the discharge of his duty, and goes to a place where he is not expected to be, he stands in the position of any other trespasser, and his employer is no more charged with a lookout duty to him than to one not in his employ.

But the relationship of master and servant continues while the servant leaves his place of employment to get a drink of water from the accustomed place. Woodward Iron Co. v. Curl, 153 Ala. 215, 44 So. 969.

And in Houston & T. C. R. Co. v. Turner, 99 Tex. 547, 91 S. W. 562, it was held that an employee is not a trespasser because, for the purpose of urinating, he goes a short distance from the place of his actual employment. The relationship of master and servant still exists.

Upon the somewhat allied question, whether relationship of master and servant exists where servant goes on master's premises before, after, or between hours of actual service, see case notes to Taylor v. George W. Bush & Sons Co. 12 L.R.A.(N.S.) 853, and Thomas v. Wisconsin C. R. Co. ante, 954.

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ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and Amidon, District Judge.

Messrs. **M. B. Webber** and **Edward Lees**, for plaintiff in error:

It is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was.

The Baron Innerdale, 93 Fed. 492; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737; Edgens v. Gaffney Mfg. Co. 69 S. C. 529, 48 S. E. 538; Davidson v. Davidson, 46 Minn. 117, 48 N. W. 560; Bowen v. Chicago, B. & K. C. R. Co. 95 Mo. 268, 8 S. W. 230; Breen v. St. Louis Cooperage Co. 50 Mo. App. 202; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Case v. Chicago, R. I. & P. R. Co. 64 Iowa, 762, 21 N. W. 30; Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038; Whittaker's Smith, Neg. pp. 419–421; Morrison v. Phillips & C. Constr. Co. 44 Wis. 405, 28 Am. Rep. 599; DeVau v. Pennsylvania & N. Y. Canal & R. Co. 130 N. Y. 632, 28 N. E. 532; Murphy v. Hays, 68 Hun, 450, 23 N. Y. Supp. 70; State use of Barnard v. Philadelphia, W. & B. R. Co. 60 Md. 555.

The jury should not have been permitted to indulge in speculation as to the adequacy of the machine or any parts thereof, no evidence having been given touching thereon.

Hart v. Hudson River Bridge Co. 84 N. Y. 56; Bellinger v. New York C. R. Co. 23 N. Y. 42; Sheldon v. Booth, 50 Iowa, 209; Scattergood v. Wood, 79 N. Y. 263, 35 Am. Rep. 515; James v. Hodsden, 47 Vt. 127; Chicago v. Greer, 9 Wall. 726, 19 L. ed. 769; Tinney v. New Jersey S. B. Co. 5 Lans. 507; Hussey v. Ryan, 64 Md. 426, 54 Am. Rep. 772, 2 Atl. 729; Bemis v. Central Vermont R. Co. 58 Vt. 636, 3 Atl. 531.

Messrs. **L. L. Brown**, **W. D. Abbott**, and **S. H. Somsen**, for defendant in error:

If the evidence relative to the material facts is contradictory, or if, from the admitted or established facts, the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury.

Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423; Grand Trunk R. Co. v. Ives, 144 U. S. 417, 36 L. ed. 489, 12 Sup. Ct. Rep. 679; Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 70; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 1, 19 U. S. App. 510, 60 Fed. 351; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 157; Chicago, St. P. M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437; Railway Officials' & Employes' Acci. Asso. v. Wilson, 40 C. C. A. 411, 100 Fed. 370; McCullen v. Chicago & N. W. R. Co. 49 L.R.A. 642, 41 C. C. A. 365, 101 Fed. 71; Clark v. Zarniko, 45 C. C. A. 494, 106 Fed. 607; Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 104; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 123; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529; Chicago G. W. R. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712; Waters-Pierce Oil Co. v. Van Elderen, 70 C. C. A. 255, 137 Fed. 569; Western U. Teleg. Co. v. Baker, 72 C. C. A. 870, 140 Fed. 319; Woodward v. Chicago, M. & St. P. R. Co. 75 C. C. A. 591, 145 Fed. 578; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 149 Fed. 685; St. Louis & S. F. R. Co. v. Dewees, 82 C. C. A. 190, 153 Fed. 56; Teis v. Smuggler Min. Co. 15 L.R.A. (N.S.) 893, 85 C. C. A. 478, 158 Fed. 269.

Note. — The question whether a master has discharged his duty by furnishing for his servant an appliance in general use will be found discussed in the case note to Wiita v. Interstate Iron Co. 16 L.R.A. (N.S.) 128.

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Case, supra. In that case the company, in disposing of its slack and refuse from its mine, piled the same on its own premises, but adjoining a highway. The refuse took fire by spontaneous combustion, and, burning, slid down the heap and frightened the plaintiff's horse. In commenting upon the facts as constituting a cause of action for damages the court said: "The entire pleading shows that the appellant was negligent in producing a condition of things through which as a natural result the appellee suffered the injury charged. If the appellant's wrong which caused the particular injury which forms the basis of the action may not be called, strictly speaking, the maintenance of a nuisance, and if the cause of action should more properly be said to be based upon negligence, we think that, though the meaning is not made as clear as desirable, it is sufficiently shown that there was a want of due care for the safety of persons rightfully using the highway, and a negligent exposure of such persons to peril from the cause through which the appellee was injured."

To erect and maintain a pipe 7 inches in diameter in an upright position, standing 6 feet from the ground, out and apart from the building, and within 8 feet of a public highway, from the top of which to discharge a large volume of waste steam with a loud puffing noise to be wafted across the highway on about the level of the heads of passing horses, is an unusual and indiscreet construction and operation of the pipe to say the least of it, especially when it is obvious that, if the waste had been placed on the south side of the building, its escape would not only have been unobserved from the road, but its floating over the same on so low a level would have been effectually prevented. But it cannot be said that the construction and operation of the pipe in the particular place and manner alleged was necessarily of itself either a nuisance or negligence. If appellant had kept a watch over the highway, and, on the approach of driven animals, had stopped the operation of the mill until the danger of their taking fright had been passed, or if it had adopted any other means by which all appreciable danger of giving fright from escaping steam had passed, then there would appear no just or sufficient reason for disturbing appellant in the exercise and enjoyment of its property rights. In

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automatically and was not under the engineer's control; as the latter's assurance of safety was made without reservation and implied that it was safe to cross as he had control over his engine and its instruments of alarming sound. Keech v. Rome, W. & O. R. Co. 35 N. Y. S. R. 902, 13 N. Y. Supp. 149.

But it was held in Riley v. New York, P. & N. R. Co. 90 Md. 53, 44 Atl. 994, that there would be no liability where an engineer informed one that it was safe to cross a track, and his horse became frightened at the sudden discharge of steam from a locomotive, unless it appears that the escape thereof and its accompanying noise was unusual and unnecessary.

Necessity of knowledge of proximity of horse.

Where a horse is frightened by the unnecessary escape of steam from a locomotive, it is not necessary, in order to sustain a recovery by the plaintiff, that those in charge of the engine should have been aware of his close proximity. Boothby v. Boston & M. R. Co. 90 Me. 313, 38 Atl. 155; Brown v. Missouri P. R. Co. 89 Mo. App. 192; Missouri, K. & T. R. Co. v. Traub (Tex. Civ. App.) 47 S. W. 282; San Antonio & A. P. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Adams v. International & G. N. R. Co. (Tex. Civ. App.) 122 S. W. 895.

It was said in San Antonio & A. P. R. Co. v. Belt, supra, that where a locomotive stands near a much-frequented public crossing, it is the duty of the engineer, although he may not know of the close proximity of a person who is driving a horse, before suddenly putting the engine in motion, with its attendant noises and escape of steam, to look out for horses near or likely to be near the crossing, and to exercise ordinary care to avoid frightening them in such manner.

In order to charge a railway company with liability it is unnecessary that those in charge of a locomotive should be actually aware of the close proximity of a horse, where an engine from which steam is unnecessarily permitted to escape from the pop safety valve in a manner calculated to frighten horses not accustomed to it, where it appears that a railway company had issued instructions not to unnecessarily permit the escape of steam from the pop valve when standing near the depots or highway crossings. Missouri, K. & T. R. Co. v. Traub, supra.

In Texas & P. R. Co. v. Kennedy, 29 Tex. Civ. App. 94, 69 S. W. 227, the court observed that "it was not essential to plaintiff's right of recovery that defendant's employees should have seen his actual peril. If a reasonably prudent person would have anticipated that the opening of the cylinder cocks, thus causing volumes of steam to be thrown in the direction of plaintiff's horse, accompanied by loud and unusual noise, would have frightened the horse and probably have caused plaintiff to be injured, such acts on the part of the appellant's employees, being unnecessary in the proper operation of the engine, would constitute negligence and would render appellant liable for the injuries thereby caused."

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other words, it is not a nuisance to operate a stave factory and discharge waste steam in close proximity to a public highway, if done in such a careful manner that it will not interfere with travelers in the free and safe exercise of their rights to travel the highway. The law will not intervene if the operator so conducts his factory as to avoid the creation of new dangers or difficulties to travelers on the road. Wabash, St. L. & P. R. Co. v. Farver, 111 Ind. 195, 198, 60 Am. Rep. 696, 12 N. E. 296; Louisville, N. A. & C. R. Co. v. Schmidt, 147 Ind. 638, 46 N. E. 344.

Now let us apply these principles to the facts of this case. It is alleged that appellant knew that the discharge of the steam in the place and manner described was calculated to frighten horses of ordinary gentleness; that while carefully driving a gentle horse along the highway, when the horse had arrived at a point 25 or 30 feet from the waste pipe, the defendant suddenly let the steam go with a loud puffing noise, which steam formed a great cloud and floated across the road in front of the horse, causing him to take fright and inflict serious injury upon the plaintiff. These averments show that appellant operated on its own premises a structure which, from location or the manner in which it was conducted, imparted a new danger to those rightfully using the highway; and whether appellant at the time of appellee's accident was operating his factory with a degree of care for the safety of travelers commensurate with the danger it had created in the highway was a question very properly submitted to the jury. It would not have strengthened the complaint in terms to characterize the location or conduct of the factory as a public nuisance. It was sufficient for the plaintiff to show that he was injured by appellant's omission of a duty owing to him, namely, to protect him against injury from a peril the company had erected by the roadside in the prosecution of its own private business. We think it sufficiently appears that the highway was a public highway, and that each paragraph of the complaint states a cause of action.

It was not error to overrule appellant's motion for judgment in its favor on the answers to interrogatories, notwithstanding the general verdict. The answers referred to concerning the location and operation of appellant's factory establish the facts substantially as set forth in the introductory part of this opinion. Further, it is shown that appellee knew the location of the steam pipe, that steam at the time was floating across the highway, and, that when at a point 110 feet west of the pipe, the pipe was in the plain view of appellee from the center of the highway, and from that point he could have seen steam floating across the highway, if there was at that time any steam so floating. The horse did not become uneasy and nervous in approaching appellant's factory after crossing the railroad track, and appellee did not see any steam from the waste pipe floating across the highway after he crossed the railroad and before his horse shied at the sawmill. Both appellant and appellee at the time knew that such a horse as was being driven by appellee was likely to take fright at steam floating across the highway, so near the ground. In the large number of answers there is no fact found that is inconsistent with the general verdict that necessarily finds the existence of negligence on the part of appellant, and the nonexistence of contributory negligence on the part of appellee. The facts found, strengthened by the presumptions that may be invoked in support of the general verdict, very clearly bring the case within the oft-repeated rule of this court as defined in Jeffersonville v. Gray, 165 Ind. 26, 29, 74 N. E. 611, and cases cited.

In support of its motion for a new trial, appellant insists that the court erred in overruling its motion to require the jury to return more definite and certain answers to divers interrogatories. Under the statute (Burns's Anno. Stat. 1901, § 555) it is made the duty of the court, upon the request of either party, to instruct the jury to find specially upon any particular question of fact stated to them in an interrogatory on any issue in the case. The facts that must be found are such facts as are material to some issue in the case. The first answer assailed as too indefinite was to the following interrogatory: "No. 50. Did said Druley, while on or approaching said crossing, say to the plaintiff, in substance, 'You had better let me help you hold him?' Answer. Not definite." The court doubtless took the view that the question and answer were immaterial because, if answered positively, and either affirmatively or negatively, the answer would not have affected the general verdict. Druley was riding in the buggy with the plaintiff when the horse took fright. If he did offer to assist in holding the horse, a rejection of the proffered assistance might, under the circumstances shown, have been counted as due care on the part of the plaintiff. It is clear that no answer that might have been returned would have changed the result. Chicago & E. I. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801. Besides, the interrogatory called for a mere

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item of evidence, and not for a material fact, and should have been rejected. Louisville, N. A. & C. R. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611; Gates v. Scott, 123 Ind. 459, 24 N. E. 257. The answers to interrogatories 62 and 66 come within the same rule. No. 59 reads as follows: "Was the steam discharging from the mill onto and across the highway while the plaintiff was approaching from a point west of the railroad?" Answer. "At the side of the highway. At times blew across." The evidence showed that the steam being discharged at a point 8 feet from the side of the highway responded to the shifting of the wind, and in one instant was carried across the road and in the next in another direction. It is not perceived how the jury, under the evidence, could have answered the interrogatory differently, and yet accurately. The court did not err in overruling the motion. Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 628, 50 N. E. 760. Interrogatory 63 was as follows: "Was there something in the actions of the horse while on or approaching the railroad tracks that would indicate to an ordinarily prudent person that said horse was nervous and excited at the time?" Answer. "I think not." Ninety-eight and one half falls within the same rule. If the most favorable answer possible for appellant had been returned to these interrogatories, they would not have controlled the general verdict, and the court did not err in overruling appellant's motion.

The refusal of the court to submit to the jury certain interrogatories is complained of. Interrogatory 41 reads thus: "Was it reasonably probable that a colt of ordinary gentleness, three and one half years old, which had never been driven near a steam engine, would become frightened when brought for the first time into proximity with a steam engine in operation?" This called for evidence, and not a material fact, and was properly refused. The same is true of interrogatories 64 and 76. Ninety-five inquired if an ordinarily prudent man would have known that such a horse three and one half years old, would be likely to become frightened when passing defendant's factory as it was being operated on that day. This might have been answered either way, and be entirely consistent with the general verdict. The same is true of 96, 97, and 98, and they were all rightly withheld from the jury.

There was sufficient evidence to warrant the jury in finding established the negligence averred in the complaint.

We find no error. Judgment affirmed.

Petition for rehearing denied.

23 L.R.A.(N.S.)

MINNESOTA SUPREME COURT.

HARRY THOMAS, Respt.,

v.

WISCONSIN CENTRAL RAILWAY COMPANY, Appt.,

(— Minn. —, 122 N. W. 456.)

Master — place of work — independent contractor.

1. Where a master places upon his premises, in the immediate vicinity where his servants are engaged at work, an independent contractor for a specific purpose, still retaining the general control of the premises, and continuing the conduct of his own business, his legal obligation to provide his servants with a safe place in which to perform their duties requires of him the exercise of reasonable care to protect them from the negligence of the independent contractor.

Same — bounds.

2. The obligation of the master to provide his servants a safe place extends to the portion of his premises on which they are required to work, and such other places thereon as they are expressly or impliedly invited and permitted to use.

Same — duty — noon hour.

3. The relation of master and servant, in so far as involves the obligation of the master to protect his servant while rightfully upon his premises, is not suspended during the noon hour, when the master expects, and expressly or by fair implication invites, the servant to remain upon the premises, in the immediate vicinity of the work.

(July 23, 1909.)

Headnotes by BROWN, J.

Case Note. — Does relationship of master and servant still exist where servant goes on master's premises before, after, or between hours of actual labor.

The earlier cases upon this subject are collected and discussed in a case note to Taylor v. Bush, 12 L.R.A.(N.S.) 853, and this note is merely supplementary thereto.

Riding to and from work.

The majority of the cases of this character involve the relationship existing between the employer and an employee while the latter is riding to or from his work, and there is a sharp conflict of authority as to what that relation is.

The following cases hold that while a servant is riding to or from his work, upon the master's trains or cars, the relationship of master and servant still exists, and the servant is entitled to all the duty from the master and must bear all of the obligations incident to that relationship: Louisville & N. R. Co. v. Stuber, 54 L.R.A. 696, 48 C. C. A. 149, 108 Fed. 934, writ of certiorari

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APPEAL by defendant from an order of the District Court for St. Louis County denying defendant's motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Crassweller & Crassweller**, for appellant:

The duty of the master to furnish his servant with a reasonably safe place in which to work is limited to the part of the premises where the employee is required to be for the purpose of his employment, and does not extend to his protection upon private excursions outside of those limits, taken solely upon his own account.

Labatt, Mast. & S. § 625, p. 1845; 3 Elliot, Railroads, §§ 1248-1250; 2 Jaggard, Torts, § 258, p. 890; Dresser, Employers' Liability, §§ 103, 104; Hyatt v. Murray, 101 Minn. 507, 112 N. W. 881; Schreiner v. Great Northern R. Co. 86 Minn. 245, 58 L.R.A. 75, 90 N. W. 400; Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965; Kennedy v. Chase, 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 33; Wright v. Rawson, 52 Iowa, 329, 35 Am. Rep. 275, 3 N. W. 106; Pioneer Min. & Mfg. Co. v. Talley, 152 Ala. 162, 12 L.R.A.(N.S.) 861, 43 So. 800; Shadoan v. Cincinnati, N. O. & T. P. R. Co. 26 Ky. L. Rep. 828, 82 S. W. 567; Belford v. Canada Shipping Co. 35 Hun, 347; Morrison v. Burgess Sulphite Fibre Co. 70 N. H. 406, 85 Am. St. Rep. 634, 47 Atl. 412; Lenk v.

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denied in 183 U. S. 698, 46 L. ed. 395, 22 Sup. Ct. Rep. 935; Birmingham R. Light & P. Co. v. Sawyer (Ala.) 19 L.R.A.(N.S.) 717, 47 So. 67; St. Louis, I. M. & S. R. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295; Self v. Adel Lumber Co. 5 Ga. App. 846, 64 S. E. 112; Southern Indiana R. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097; Dobson v. New Orleans & W. R. Co. 52 La. Ann. 1127, 27 So. 670; Kilduff v. Boston Elev. R. Co. 195 Mass. 307, 9 L.R.A.(N.S.) 873, 81 N. E. 191; Streets v. Grand Trunk R. Co. 76 App. Div. 480, 78 N. Y. Supp. 729, affirmed in 178 N. Y. 553, 70 N. E. 1109; Sanderson v. Panther Lumber Co. 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368.

So, in Riccio v. International R. Co. 63 Misc. 588, 117 N. Y. Supp. 720, it was held that where a person in the employ of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation, free of charge, constitutes part of the contract of service, while so traveling he is an employee, not a passenger; and for an injury to him through the negligence of a coemployee the company is not liable.

And in Tanner v. Frank Hitch Lumber Co. 140 N. C. 475, 53 S. E. 287, it was held that, inasmuch as it was the master's duty (he having undertaken it according to the plaintiff's contention) to furnish his laborers transportation on his log train to and from the "quarters," it was his further duty to see that such transportation was rendered as reasonably safe as the character of it would admit. While the plaintiff assumed the risks incident to riding on loaded log cars, he did not assume any risk resulting from a defective car.

So, in Alabama G. S. R. Co. v. Brock (Ala.) 49 So. 453, the court said: "The servant who is employed to go to a certain place and do a certain work, who is transferred to and from said place by the employer (his pay being continued all the time), is employed in and about that work from the time he leaves until he returns."

An employee is, while being moved from place to place in the work of his employment, in the car furnished by the company for him to live in, in the service of the master as much as when actively engaged in his work. Southern R. Co. v. West, 4 Ga. App. 672, 62 S. E. 141.

A pumper in the employ of the defendant, who was expected and required to ride between pumping stations on the trains of the defendant, and had a pass for that purpose, was held in Kunza v. Chicago & N. W. R. Co. (Wis.) 123 N. W. 403, to be serving the company as fully while riding from one station to the other as when he was actually operating the pumps.

A switch cleaner while riding on the defendant's cars to reach a switch, having given the conductor an employee's ticket, is an employee, rather than a passenger, and cannot recover if injured by the negligence of a fellow servant. Shannon v. Union R. Co. 27 R. I. 475, 63 Atl. 488.

Where a railroad company provides hand cars for the transportation of its employees from the place where they have been working to a point convenient to their homes, even if the journey is commenced after the usual work of the day has ceased, it was held in Cicalese v. Lehigh Valley R. Co. 75 N. J. L. 897, 69 Atl. 166, that the relation of master and servant continues until the employee has reached the destination to which he is being carried by or with the consent of the company, and the company is not relieved of its duty to furnish a reasonably safe machine and appliances for that purpose while such relation continues to exist.

On the contrary, it has been held in some cases that under such circumstances the employee is a passenger, or at least he is entitled to the same degree of care as a passenger. Carswell v. Macon, D. & S. R. Co. 118 Ga. 826, 45 S. E. 695; Indianapolis Traction & Terminal Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068; Simmons v. Oregon R. Co. 41 Or. 151, 69 Pac. 440, rehearing denied in 41 Or. 166, 69 Pac. 1022; Enos v. Rhode Island Suburban R. Co. 28 R. I. 291, 12 L.R.A.(N.S.) 244, 67 Atl. 5; Harris

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Kansas & T. Coal Co. 80 Mo. App. 374; Olson v. Minneapolis & St. L. R. Co. 76 Minn. 149, 48 L.R.A. 796, 78 N. W. 975; Smith v. Trimble, 111 Ky. 861, 64 S. W. 915; Glaser v. Rothschild, 106 Mo. App. 418, 80 S. W. 332; Barre v. Calvary Cemetery Asso. 106 Mo. App. 358, 80 S. W. 709; Shearm. Redf. Neg. 704; Kauffman v. Maier, 94 Cal. 269, 18 L.R.A. 124, 29 Pac. 481; Goff v. Chippewa River & M. R. Co. 86 Wis. 237, 56 N. W. 465; 26 Cyc. Law & Proc. p. 1224; 20 Am. & Eng. Enc. Law, pp. 57, 97, 131, 149; Peake v. Buell, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800.

The plaintiff was not in the line of his duty at the time of the accident, and has no cause of action against the defendant.

Ellsworth v. Metheney, 51 L.R.A. 389, 44 C. C. A. 485, 104 Fed. 119; Wright v. Rawson and Kennedy v. Chase, supra; 1 Shearm. & Redf. Neg. § 190; Benson v. Chicago, St. P. M. & O. R. Co. 78 Minn. 303, 80 N. W. 1050; Green v. Brainerd & N. M. R. Co. 85 Minn. 323, 88 N. W. 974.

There was no invitation, express or implied, from the defendant to plaintiff to go around the store house to the boiler, and the plaintiff was, as to that part of the property, a trespasser, or at best a mere licensee at sufferance; and the defendant owed him no duty at such time and place, except to refrain from wilfully or wantonly injuring him.

Muench v. Heinemann, supra; Elliott,

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v. Puget Sound Electric R. Co. 52 Wash. 289, 100 Pac. 838.

And in Haas v. St. Louis & Suburban R. Co. 111 Mo. App. 706, 90 S. W. 1155, it was held that a railroad trackman who was injured on one of the defendant's cars while traveling to his place of labor was a passenger on the car he was using, and not a coservant of the negligent crew of another car.

So, an employee riding to and from his work is a passenger when he rides not by direction of the company, but of his own volition, with coupons furnished by the company as part of his salary. Hebert v. Portland R. Co. 103 Me. 315, 125 Am. St. Rep. 297, 69 Atl. 266, 13 A. & E. Ann. Cas. 886.

And an employee of a railroad company taking a train pursuant to the directions of his employer is entitled to the same degree of care as any other passenger. Johnson v. Texas C. R. Co. 42 Tex. Civ. App. 604, 93 S. W. 433.

And in Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850, it was held that an employee of a railroad company riding on a pass, not in the course of his employment or in going to or from his work, but making a trip for his own convenience, but whose free transportation is given him under a stipulation in his contract of employment, sustains while so riding the relation of a passenger, and not of an employee, to the carrier.

Miscellaneous examples.

In a manufacturing establishment, where on account of the nature of their work it is impracticable for the employees to leave the building for their noonday meal, and the master allows but thirty minutes for their lunch, and it is contemplated by their contract of employment that they shall remain in the building where they work to eat their lunch, the relation of master and servant continues during the thirty minutes allowed for lunch. Riley v. Cudahy Packing Co. (Neb.) 117 N. W. 765.

And in Carnegie Steel Co. v. Rowan, 10 Ohio C. C. N. S. 329, it was held that an employer who permitted his employees to eat their lunch in a building on the premises owed to them the duty of exercising ordinary care, as they were there by his invitation, and were not licensees. The decision goes no further, as the question arose on the plaintiff's request for a charge to this effect.

Employees who had for a long time, with the knowledge of the employer, been in the habit of eating their noon lunch on a bench just outside of the building in which they were employed, and of washing their clothes in a large tank near by, were, while so engaged, still within the scope of their employment. Muller v. Oakes Mfg. Co. 113 App. Div. 689, 99 N. Y. Supp. 923. The court said: "Workmen in boiler rooms and dirty shops may step aside to a convenient place at hand in their working place, or so adjacent as to be of it or appurtenant to it, to eat or clean up, without getting outside the duty which their employer owes to them to take reasonable care of their safety."

In Force v. Standard Silk Co. 160 Fed. 992, affirmed in 170 Fed. 184, the master was held liable for injuries to an employee fourteen years of age who was injured during the noon hour by being caught in machinery against the dangers of which he had not been warned, but the question as to whether he was really in the employ of the master at the noon hour seems not to have been raised.

In Beck v. Southern R. Co. 146 N. C. 455, 59 S. E. 1015, it was held gross negligence on the part of a railroad company not to provide some safe mode for its employees who worked in the shops to cross its tracks in going to their work, where they had been in the habit for ten years of going through, under, or between the cars whenever they found the tracks blocked.

So, in Nelson v. R. J. Reynolds Tobacco Co. 144 N. C. 418, 57 S. E. 127, where an employee in defendant's factory was injured while passing along a passageway through the building after the day's work was done, the following charge to the jury was up-

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Railroads, §§ 1249, 1250; Pioneer Min. & Mfg. Co. v. Talley, supra.

The owner and operator of the boiler was an independent contractor, engaged in an independent work at a place where the defendant had no men employed, and was carrying on no work of its own; and under such circumstances the liability, if any, was the liability of the contractor, and not of the defendant.

1 Jaggard, Torts, p. 228; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957; Shute v. Princeton Twp. 58 Minn. 337, 59 N. W. 1050; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 729; Gahagan v. Aermotor Co. 67 Minn. 252, 69 N. W. 914; Aldritt v. Gillette-Herzog Mfg. Co. 85 Minn. 206, 88 N. W. 741; Klages v. Gillette-Herzog Mfg. Co. 86 Minn. 458, 90 N. W. 1116; Smith v. Milwaukee Builders' & T. Exchange, 91 Wis. 365, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; Carlson v. Stocking, 91 Wis. 434, 65 N. W. 58; Hackett v. Western U. Teleg. Co. 80 Wis. 192, 49 N. W. 822; Richmond v. Sitterding, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562; Central Coal & I. Co. v. Grider, 115 Ky. 745, 65 L.R.A. 455, 74 S. W. 1058; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378.

Messrs. **Samuel A. Anderson** and **Warner E. Whipple**, for respondent:

The plaintiff at the time of the accident was in the employ of the defendant.

26 Cyc. Law & Proc. p. 1086; Taylor v. George W. Bush & Sons Co. (Del.) 12 L.R.A.

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held: "An employer owes the employee a legal duty in the exercise of reasonable care to provide for him not only a reasonably safe place in which to work, but he also owes that employee a duty to provide a way of access and departure from that work, which is reasonably safe."

A railroad is liable to a yard brakeman who, having completed his day's work, was injured by the negligence of the railroad company while riding on his way home through the yard, in the cab of an engine, by direction of the yard master. Feneff v. Boston & M. R. Co. 196 Mass. 575, 82 N. E. 705. The court said: "It also is unnecessary to decide if the plaintiff had ceased to be a servant, and had become a passenger, as he was lawfully passing over the premises of his employer in its conveyance, which at the time had the exclusive use of the railroad. A servant entering upon his master's premises to begin the day's work, or upon leaving them at its close, is not, during the time of his entrance or exit, while using the ways provided, a licensee, but is there by the invitation of the master. The defendants accordingly owed to him the duty to refrain from acts of negligence which might cause personal injury while he was making his egress in the usual way."

The relation between an employer and the employees while the latter, with the former's permission, are riding upon a freight elevator in the employer's building to the floor of the building on which they work, is that of master and servant, and not carrier and passenger. The occasional use of the elevator to carry the employees does not make the employer a carrier of passengers. Kappes v. Brown Shoe Co. 116 Mo. App. 154, 90 S. W. 1158.

And a waitress in a hotel who has, according to custom, gone for a walk after her day's duties are done, is not, in attempting to use the elevator to return to her room, preparatory to resuming her duties in the morning, a passenger to whom the hotel keeper owes the duty of a common carrier. Walsh v. Cullen, 235 Ill. 91, 18 L.R.A.(N.S.) 911, 85 N. E. 223.

Where a bridge foreman rode upon a velocipede car to a place some distance from his place of work, either on personal business or on business for the master, but remained after any business for the master had been finished, and visited with his family for some hours, and then returned to his place of work, on a hand car, it was held in Russell v. Oregon Short Line R. Co. 83 C. C. A. 618, 155 Fed. 22, that while so returning he was not in his master's employ.

Where a brakeman was not subject to call during the day, his train having pulled out, it was held in Missouri, K. & T. R. Co. v. Hendricks (Tex. Civ. App.) 108 S. W. 745, that the relationship of master and servant did not exist between the company and him while he was going from the roundhouse to visit a friend.

Where an employee who had been sent for by telegraph by his employer to go to a certain place as soon as possible made use of the latter's tracks as a convenient way of reaching his destination, it was held in Byrket v. Lake Shore & M. S. R. Co. 29 Ohio C. C. 614, affirmed in 75 Ohio St. 625, 80 N. E. 1124, that he was not, while so on the tracks, about his master's business so that the railroad company owed him the special duties of a master to a servant.

A cook assisting the manager of outfit cars of a railroad company in which workmen are lodged and boarded, who lives upon the cars, but is furnished by the manager, and not employed by the company, bears such a relation to the company as to require it to exercise ordinary care to prevent injuring her. Pugmire v. Oregon Shore Line R. Co. 33 Utah, 27, 13 L.R.A.(N.S.) 565, 126 Am. St. Rep. 805, 92 Pac. 762, 14 A. & E. Ann. Cas. 384.

Upon the somewhat allied question of the liability of master for injuries to servant when he has left his own working place and gone to another portion of the plant for his own purposes, see case notes to Pioneer Min. & Mfg. Co. v. Talley, 12 L.R.A.(N.S.) 861, and Gooch v. Citizens' Electric Street R. Co. post, 960.

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(N.S.) 853, 66 Atl. 884; Pioneer Min. & Mfg. Co. v. Talley, 152 Ala. 162, 12 L.R.A. (N.S.) 863, 43 So. 800; Parkinson Sugar Co. v. Riley, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315.

Brown, J., delivered the opinion of the court:

Action to recover for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or a new trial. The trial court granted a new trial, but denied that part of the motion demanding a final judgment for defendant. The only question presented on this appeal is, therefore, whether in any view of the evidence plaintiff has a cause of action against defendant.

The facts are as follows: Defendant is a raidroad corporation organized under the laws of the state of Wisconsin, and as such operates a line of railroad from Chicago, through Wisconsin, to Duluth and other points in this state. At the time of the accident here complained of, it was engaged in constructing certain shops and yards at South Superior, in the state of Wisconsin. The buildings were located near the railway tracks, and were being constructed by a firm of independent contractors, who employed in and about the work some fifty or more men. Defendant in its own behalf was engaged in the same locality in grading and excavating for its roadbed, and also employed about fifty men. One Roberts was engaged, as an independent contractor, in sinking a well within one of the buildings, and employed in his work an old engine and boiler, which, as will presently be mentioned, exploded, killing several of defendant's employees. Plaintiff, with other of defendant's servants, was engaged in excavating a roadway immediately adjacent to the building in which the well was located, on the east side thereof, and by means of wheelbarrows conveyed the excavated material to a point northwest from the building, a distance of about 75 feet. The boiler used by Roberts in sinking the well was located on the west side of this building, and was under his exclusive control; at least, the evidence does not show that defendant exercised any supervision in respect to its operation. However, defendant had not surrendered control of its premises to Roberts, or the other contractors engaged in the construction of the buildings, but remained in possession thereof, and with its employees was engaged in the track work heretofore mentioned. Roberts was upon the premises solely for the purposes of the work intrusted to him. The railroad employees were under the control of a general foreman in charge of the track work, and were subject to his orders and directions. The men were given but a half hour for a midday intermission, and were expected to, and did, take their luncheon with them, and eat it upon the premises, in the immediate vicinity of their work. The ground upon which the work was being carried forward was swampy or marshy, and at the noon hour the employees found a convenient dry knoll or spot of ground upon which to kindle a small fire for the purpose of heating their coffee, and upon which to rest while partaking of their lunch. Though the foreman testified that a railroad car had been provided for this purpose, he also testified that it was not used by all the men, who, with his knowledge, were in the habit of going upon the premises wherever a dry place could be found, instead of going to the car. Plaintiff testified that he knew nothing about the car, and was not informed that it had been furnished for the convenience of the men. Roberts' boiler, used in the well-digging operations, was located upon the only dry spot of ground to the west of the building, and on the day of the injury to plaintiff he and other employees of defendant repaired to that place for lunch. Before they had finished, the boiler exploded, killing several of the men, and severely injuring plaintiff.

Plaintiff's theory of the action at the trial was that defendant was under legal obligations to provide its employees, including plaintiff, with a reasonably safe place in which to do their work, and to protect them from dangers unknown to them while rightly upon its premises, and that it failed in the performance of this duty, and is liable for all injuries sustained in consequence of its failure. The trial court sent the case to the jury upon this theory, and they found generally in plaintiff's favor. It is contended by defendant (1) that the evidence conclusively shows that Roberts, the well digger, was an independent contractor, over whom it had no control, either respecting the manner of doing his work or the instrumentalities used; and (2) that plaintiff, in going upon the spot of ground where the boiler was located, did so for his own convenience, without any express or implied invitation from defendant, and was not then a servant of defendant, but a mere licensee, and that defendant owed him no active vigilance for his protection.

1. We are unable to sustain either of these contentions. Defendant was under legal obligation to provide plaintiff, its servant, a reasonably safe place in which to do his work, or, as more accurately expressed, to exercise reasonable care to so provide. This necessarily included protection from un-

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known danger while rightfully upon defendant's premises, and such as reasonable prudence on defendant's part would have guarded against. It could not avoid the performance of that duty by delegating it to others, nor shield itself by sending upon its premises, still under its general control, and where its servants were employed, an independent contractor, with authority to set up and operate in the vicinity of its own workmen dangerous instrumentalities. In such case the performance of the master's obligations to his servants requires that he exercise reasonable care in reference to the work of the independent contractor, to the end that the place provided for his own servants may not become unsafe or dangerous. Akin v. Lake Superior Consol. Iron Mines, 103 Minn. 204, 114 N. W. 654, 837; Aldritt v. Gillette-Herzog Mfg. Co. 85 Minn. 206, 88 N. W. 741; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 729; Klages v. Gillette-Herzog Mfg. Co. 86 Minn. 458, 90 N. W. 1116; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396. As remarked by the court in The Magdaline (D. C.) 91 Fed. 798; "A master may not place his servant at work made dangerous by the work of other servants, or persons performing work under contract, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a coservant or third person employed on the premises, the injury would not have happened. A servant may expect that his master will not surround him with dangerous agencies, . . . whether they are in charge of the master's servants or of an independent contractor." See also Burnes v. Kansas City, Ft. S. & M. R. Co. 129 Mo. 41, 31 S. W. 347; Sackewitz v. American Biscuit Mfg. Co. 78 Mo. App. 144; Woodman v. Metropolitan R. Co. 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482. The duty to provide a safe place to work is absolute, non-delegable; and it is clear that in a case like that at bar the master cannot shield himself by the plea that the place provided by him was made dangerous and unsafe by his independent contractor. In a situation like the present, installing an independent contractor for a certain specific purpose to be performed in and about the place provided for his own servants, still retaining the general control over his premises, the master must either suspend his own work, or take active measures to protect his servants from the negligence of the independent contractor. In no other way can he perform his duty to his own servants respecting the obligation to furnish them a reasonably safe place to work. The authorities may be somewhat conflicting upon this proposition; but the views expressed are, it seems to us, sustained by the plainest principles of the law of master and servant.

It is further urged in this connection that there is no evidence that defendant knew or had reason to believe that the contractor's boiler was unsafe or defective. But this clearly is no answer to the charge of neglect of duty. Had this particular boiler been operated by defendant, its obligation to plaintiff would have required an inspection thereof, and an exercise of reasonable care to keep it in condition suitable for its work. 4 Thomp. Neg. 3296. Though the boiler was not an instrumentality furnished by defendant for use by its employees, it permitted it to be placed upon its premises, where its servants were at work, thus, in its defective condition, rendering the place of work unsafe, and the duty of inspection existed. The evidence shows that the boiler was old and out of repair, extremely dangerous to the life and limbs of those working in its vicinity, and that a casual inspection thereof would have disclosed this condition to defendant. There is no claim that defendant ever attempted to inspect it, or otherwise protect its servants from danger of injury from that source. The evidence made this a question for the jury.

2. But is is further claimed that plaintiff was not at the place provided for the performance of his work, but, on the contrary, was at the boiler for his own convenience; that he was not a servant of defendant at the time, but a mere licensee, and entitled to no protection as a servant. A large number of cases are cited in support of this contention, and, if sound, it disposes of the case adversely to plaintiff's right of action. The position, however, does not meet with our view of the law. The authorities are hopelessly at variance upon this point, though, as we believe, the weight of reason is opposed to the view of defendant. The authorities are collected in a note to Taylor v. George W. Bush & Sons Co. 12 L.R.A. (N.S.) 853. In the case at bar it appears that defendant's employees were given a half hour for the noon rest; that each employee brought his luncheon with him, and ate it upon defendant's premises, in the vicinity of the work; that the men were expected to remain upon the premises, and did so remain with the knowledge, consent, and upon the implied invitation of defendant, picking out such dry places upon the premises as could be found, lighting a small fire, heating their coffee, and partaking of their lunch. These facts appear not only from the testimony of plaintiff's witnesses, but also from the testimony of defendant's foreman in charge of this particular work. Under such circumstances a majority of the courts hold that

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the relation of master and servant remains intact, extending to the servants the same rights as when actually engaged in their work. Cleveland, C. C. & St. L. R. Co. v. Martin, 13 Ind. App. 485, 41 N. E. 1051; Blovelt v. Sawyer [1904] 1 K. B. 271; Heldmaier v. Cobbs, 195 Ill. 172, 62 N. E. 853; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90; Boldt v. New York C. R. Co. 18 N. Y. 432. Numerous other cases to the same effect are cited in the note referred to.

The case of Olson v. Minneapolis & St. L. R. Co. 76 Minn. 149, 48 L.R.A. 796, 78 N. W. 975, is different in its facts from that at bar, and is not in point. In that case plaintiff, a brakeman, left his caboose at the end of his journey, about 2:50 P. M., went to his boarding place, and at about 7 o'clock in the evening returned to the yards in search of the caboose, in which he had left his clothing, and he was injured. It was held properly that the relation of master and servant did not exist at the time he was looking for his clothing. There was neither express nor implied permission to go upon the defendant's premises for that purpose. Neither is the case of Benson v. Chicago, St. P. M. & O. R. Co. 78 Minn. 303, 80 N. W. 1050, in point. There the railroad employees had ceased their work and were returning to their boarding cars on hand cars furnished by the company, and plaintiff therein was injured by the reckless conduct of those in charge of one of the cars in propelling it violently against a preceding car. The court held that, during the time the men were proceeding to their boarding place on the hand cars, they were, "as between themselves," not servants of the company, and that there was no liability for the negligent conduct of those who caused the accident complained of. Such is not this case. Here the men were still upon the premises of defendant, at their place of work, with its knowledge, consent, and implied invitation, and, within the authorities cited, as well as upon principle, they were servants, and not licensees, in so far as involves defendant's obligation to protect them. Parkinson Sugar Co. v. Riley, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; Rosenbaum v. St. Paul & D. R. Co. 38 Minn. 173, 8 Am. St. Rep. 653, 36 N. W. 447.

We have examined the Wisconsin cases cited by defendant, and find none of them in their facts at all like the case at bar. A careful reading of the opinions of that court sustains the general view here expressed. The trouble with the particular cases was that there was no express or implied invitation to the servants to remain upon the master's premises, or to be thereon, 23 L.R.A.(N.S.) at the time or place of injury. This disposes of the case.

Order affirmed.

Petition for rehearing denied August 6, 1909.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY A. GOOCH
v.
CITIZENS' ELECTRIC STREET RAILWAY COMPANY

(202 Mass. 254, 88 N. E. 591.)

Master — safe working place — telephone booth.

No liability under the employers' liability act arises for the death of a street car motorman who, having applied to be relieved from duty for the day and been told that he must be on duty during the afternoon, or find a substitute, is killed while in a telephone booth on the carrier's premises, whither he has gone for a purpose not disclosed.

(May 22, 1909.)

Case Note. — Liability of master for injury to servant who had left his working place and gone to another portion of the plant for his own purposes.

The earlier cases upon this subject are collected and discussed in a case note to Pioneer Min. & Mfg. Co. v. Talley, 12 L.R.A.(N.S.) 861, and this note is merely supplementary thereto.

The master has no duty imposed upon him to care for the safety of the servant who, of his own volition and without the knowledge of the master, has departed from his safe place and gone to a dangerous place for the purpose of obtaining a tool which the master was in the act of supplying in the customary method, when it does not appear that the master knew or ought to have known that his servants were accustomed to depart from the safe place for such purpose. When the servant has thus departed from the safe place furnished, the master owes the servant no duty of a higher degree than that which is due a licensee. Harris v. United S. S. Co. 75 N. J. L. 861, 70 Atl. 155.

Where an employee in a saw and planing mill is injured while operating, for his own purposes, a machine which does not constitute part of the machinery of the mill, but is under the control and subjected to the use of a third person who merely gets power from the mill, the proprietor of the mill is not liable for the damages resulting from such injury. Gross v. Fischer Lumber & Mfg. Co. 119 La. 201, 43 So. 1006.

So an employee who, for his own pur-

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EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for the death of plaintiff's husband for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff. Sustained.

Defendant's first, second, and eighth requests for instructions, referred to in the opinion, are as follows:

"First. On all the evidence the plaintiff is not entitled to recover on the first count.

"Second. On all the evidence the plaintiff is not entitled to recover on the second count.

"Eighth. On all the evidence the intestate was not, at the time the accident occurred, an employee of the defendant within the meaning of the employers' liability act."

Further facts appear in the opinion.

Messrs. **Peabody & Arnold**, for defendant:

In order to recover under the employers' liability act, it was incumbent upon the plaintiff to prove that the relationship of master and servant existed between the defendant and Gooch at the time of the accident.

1 Dresser, Employers' Liability, § 8; 2 Labatt, Mast. & S. § 720; Dane v. Cockrane Chemical Co. 164 Mass. 453, 41 N. E. 678; Boyle v. Columbian Fire Proofing Co. 182 Mass. 93, 64 N. E. 726; Saures v. Stevens Mfg. Co. 196 Mass. 543, 82 N. E. 694.

The relationship of master and servant did not exist between the defendant and Gooch at the time of the accident.

Dickinson v. West End Street R. Co. 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60; Doyle v. Fitchburg R. Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770; Baltimore & O. R. Co. v. State, 33 Md. 542; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Baird v. Pettit, 70 Pa. 477; Morier v. St. Paul, M. & M. R. Co. 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952.

Messrs. **J. P. Sweeney** and **L. S. Cox** for plaintiff.

Sheldon, J., delivered the opinion of the court:

In this action, brought under the employers' liability act (Rev. Laws, chap. 106, § 73), there can be no recovery unless the plaintiff's intestate, at the time of the injury which caused his death, was acting in the employ of the defendant. Dane v. Cochrane Chemical Co. 164 Mass. 453, 457, 41 N. E. 678. The first and most important question is, accordingly, whether at that time the relation of employer and employee existed between the defendant and the deceased.

He was in the general employ of the defendant as a regular motorman, paid, as the evidence indicates and as his counsel state in their brief, at a fixed rate per

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poses, attempts to make use of a machine in the shop in which he is working, which it is not part of his duty to use, assumes the risk of such action. Stodden v. Anderson & W. Mfg. Co. 138 Iowa, 398, 16 L.R.A. (N.S.) 614, 116 N. W. 116.

A servant, nineteen years old, who was injured by the negligent starting of certain negligently unguarded machinery by a boy employed under the statutory age, while he, having left his place of employment, was talking with another workman, cannot recover, under any theory of the master's liability, for he was not about the master's business at the time, nor could he have supposed he was. Schmnoske v. Asphalt Ready Roofing Co. 129 App. Div. 500, 114 N. Y. Supp. 87.

And in Wilson v. Chesapeake & O. R. Co. (Ky.) 113 S. W. 101, it was held that the master was under no obligation to watch over and guard a servant employed as night watchman as he was leaving the premises to go to a near-by restaurant.

Where a member of a wrecking crew left the train while it was standing on a siding, and stood on the track in front of the engine for his own convenience or pleasure, and it started, striking and killing him, it was held in Chesapeake & O. R. Co. v. Barnes (Ky.) 117 S. W. 261, that his administrator could not claim the benefit of a rule requiring signals to be given before the starting of a train, which rule was broken by the engineer in charge of the train.

And in Cincinnati, N. O. & T. P. R. Co. v. Reynolds, 31 Ky. L. Rep. 529, 102 S. W. 888, it was held that when an employee is not in the discharge of his duty, and goes to a place where he is not expected to be, he stands in the position of any other trespasser, and his employer is no more charged with a lookout duty to him than to one not in his employ.

But the relationship of master and servant continues while the servant leaves his place of employment to get a drink of water from the accustomed place. Woodward Iron Co. v. Curl, 153 Ala. 215, 44 So. 969.

And in Houston & T. C. R. Co. v. Turner, 99 Tex. 547, 91 S. W. 562, it was held that an employee is not a trespasser because, for the purpose of urinating, he goes a short distance from the place of his actual employment. The relationship of master and servant still exists.

Upon the somewhat allied question, whether relationship of master and servant exists where servant goes on master's premises before, after, or between hours of actual service, see case notes to Taylor v. George W. Bush & Sons Co. 12 L.R.A.(N.S.) 853, and Thomas v. Wisconsin C. R. Co. ante, 954.

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hour. His hours were from 10:45 A. M. to 12:45 P. M., and from 5:15 P. M. to a late hour of the night. On the morning of the day of the accident he went to the defendant's car barn, and applied to Mr. Butterfield, who was there in charge, to be relieved from work on that day, and after some talk it was arranged between them that one Bushee, a spare man or substitute, should run the forenoon trips of Gooch, the deceased, and that Gooch should either run an extra car in the afternoon or himself find a substitute to do so. Gooch thereupon left the car barn, and rode on a car of the defendant to a waiting room at Market square. On the way thither, in conversation with the conductor of that car, he stated that he was not working, but would have to run an extra car "if he could not find a fellow named Follansbee." Then Gooch went into the telephone booth in the defendant's waiting room at Market square, and soon after was found there dead.

Upon these facts it is impossible to distinguish the case at bar from Dickinson v. West End Street R. Co. 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60. In that case a motorman in the general employ of the defendant, going home to dinner after his morning's work, was injured while riding on the front platform of one of the defendant's cars. He was being carried free of fare under a rule of the company allowing this privilege to its employees in uniform. His injury was due to negligence of the motorman who was operating the car; but it was held that he was not then in the employ of the defendant, and accordingly was not a fellow servant of the motorman of that car. Here, as in that case, the regular work assigned to Gooch consisted of a certain number of trips at fixed and regular times each day. Here, as there, he was not on actual duty. His time was his own, until some time in the afternoon. His pay had stopped. He was discharged until a fixed hour in the afternoon. He rode on the defendant's car to Market square, and went into the telephone booth at that station, not in the line of his duty in the course of his employment, but for his own purposes. See the cases cited in Dickinson v. West End Street R. Co. ubi supra, on page 368, 177 Mass.

The circumstances here are very different from those of Boyle v. Columbian Fire Proofing Co. 182 Mass. 93, 64 N. E. 726, or Northwestern Union Packet Co. v. McCue, 17 Wall. 508, 21 L. ed. 705. Gooch had left the defendant's premises and had become his own man. He was a passenger on the defendant's car, not a mere servant. For the same reasons, such cases as Walbert v. Trexler, 156 Pa. 112, 27 Atl. 65, 23 L.R.A.(N.S.) and Broderick v. Detroit Union R. Station & Depot Co. 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802, do not help this plaintiff. This case resembles more nearly Wink v. Weiler, 41 Ill. App. 336. Nor was Gooch leaving the defendant's premises by the means of exit provided for that purpose. Feneff v. Boston & M. R. Co. 196 Mass. 575, 577, 82 N. E. 705.

Nor can the plaintiff be helped by the suggestion made in her behalf that Gooch was using or intending to use the telephone in completing arrangements that had been partially made with reference to his being relieved from duty in the afternoon, and so was really acting in the service of the defendant when he was killed. In the first place, this is mere conjecture. McGee v. Boston Elev. R. Co. 187 Mass. 569, 73 N. E. 657; Donaldson v. New York, N. H. & H. R. Co. 188 Mass. 484, 74 N. E. 915; Lizotte v. New York C. & H. R. R. Co. 196 Mass. 519, 83 N. E. 362. In the next place, it was for Gooch himself, if he wished to have his leave of absence run through the afternoon, to make the arrangement with some substitute. So it was for him to ascertain, if he needed further information, whether the extra car was to be run that afternoon. All these arrangements, as the matter had been left, were his individual concern, rather than that of the company. There is nothing to show that Gooch was in any way acting in the service of the company in attempting to use the telephone, or to answer it if he heard a ringing from it.

It follows from what has been said that the jury were not warranted in finding that the plaintiff's intestate was in the employ of the defendant at the time of the accident which caused his death; and the defendant's first, second, and eighth requests for instructions should have been given. The other questions raised in the case become immaterial, and need not be considered.

Exceptions sustained.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plff. in Err.,
v.
JOHN MOORE.

(92 C. C. A. 357, 166 Fed. 663.)

Trial — jury — common knowledge — applicability.

1. In trials by jury, the jurors are not restricted to a consideration of the facts

Headnotes by VAN DEVANTER, Circuit Judge.

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directly proven, but may give effect to such inferences as reasonably may be drawn from them. Nor are they expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct.

Same — expert opinion — necessity for.

2. In respect of questions upon which men of ordinary observation and experience have some practical knowledge and are not incapable of forming opinions of their own, jurors are not dependent upon the opinions of experts, even though they would be assisted by them.

Reasonable care — test — practice of others.

3. The ultimate and controlling test of the exercise of reasonable care is not what has been the practice of others in like situations, but what a reasonably prudent person would ordinarily have done in such a situation; and the practice of others is evidence, but not the sole evidence, of that test.

(January 7, 1909.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and Amidon, District Judge.

Messrs. **M. B. Webber** and **Edward Lees**, for plaintiff in error:

It is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was.

The Baron Innerdale, 93 Fed. 492; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737; Edgens v. Gaffney Mfg. Co. 69 S. C. 529, 48 S. E. 538; Davidson v. Davidson, 46 Minn. 117, 48 N. W. 560; Bowen v. Chicago, B. & K. C. R. Co. 95 Mo. 268, 8 S. W. 230; Breen v. St. Louis Cooperage Co. 50 Mo. App. 202; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Case v. Chicago, R. I. & P. R. Co. 64 Iowa, 762, 21 N. W. 30; Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038; Whittaker's Smith, Neg. pp. 419–421; Morrison v. Phillips & C. Constr. Co. 44 Wis. 405, 28 Am. Rep. 599; DeVau v. Pennsylvania & N. Y. Canal & R. Co. 130 N. Y. 632, 28 N. E. 532; Murphy v. Hays, 68 Hun, 450, 23 N. Y. Supp. 70; State use of Barnard v. Philadelphia, W. & B. R. Co. 60 Md. 555.

The jury should not have been permitted to indulge in speculation as to the adequacy of the machine or any parts thereof, no evidence having been given touching thereon.

Hart v. Hudson River Bridge Co. 84 N. Y. 56; Bellinger v. New York C. R. Co. 23 N. Y. 42; Sheldon v. Booth, 50 Iowa, 209; Scattergood v. Wood, 79 N. Y. 263, 35 Am. Rep. 515; James v. Hodsden, 47 Vt. 127; Chicago v. Greer, 9 Wall. 726, 19 L. ed. 769; Tinney v. New Jersey S. B. Co. 5 Lans. 507; Hussey v. Ryan, 64 Md. 426, 54 Am. Rep. 772, 2 Atl. 729; Bemis v. Central Vermont R. Co. 58 Vt. 636, 3 Atl. 531.

Messrs. **L. L. Brown**, **W. D. Abbott**, and **S. H. Somsen**, for defendant in error:

If the evidence relative to the material facts is contradictory, or if, from the admitted or established facts, the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury.

Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423; Grand Trunk R. Co. v. Ives, 144 U. S. 417, 36 L. ed. 489, 12 Sup. Ct. Rep. 679; Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 70; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 1, 19 U. S. App. 510, 60 Fed. 351; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 157; Chicago, St. P. M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437; Railway Officials' & Employes' Acci. Asso. v. Wilson, 40 C. C. A. 411, 100 Fed. 370; McCullen v. Chicago & N. W. R. Co. 49 L.R.A. 642, 41 C. C. A. 365, 101 Fed. 71; Clark v. Zarniko, 45 C. C. A. 494, 106 Fed. 607; Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 104; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 123; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529; Chicago G. W. R. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712; Waters-Pierce Oil Co. v. Van Elderen, 70 C. C. A. 255, 137 Fed. 569; Western U. Teleg. Co. v. Baker, 72 C. C. A. 870, 140 Fed. 319; Woodward v. Chicago, M. & St. P. R. Co. 75 C. C. A. 591, 145 Fed. 578; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 149 Fed. 685; St. Louis & S. F. R. Co. v. Dewees, 82 C. C. A. 190, 153 Fed. 56; Teis v. Smuggler Min. Co. 15 L.R.A. (N.S.) 893, 85 C. C. A. 478, 158 Fed. 269.

Note. — The question whether a master has discharged his duty by furnishing for his servant an appliance in general use will be found discussed in the case note to Wiita v. Interstate Iron Co. 16 L.R.A.(N.S.) 128.

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Van Devanter, Circuit Judge, delivered the opinion of the court:

This was an action for personal injuries sustained by the plaintiff through a falling of the boom of a derrick or loading jack which he and other servants of the defendant were using in hoisting steel rails from the ground to a flat car. The derrick was securely mounted upon the rear end of an adjoining flat car, and its principal parts were a vertical iron mast of considerable size, a boom extending upward at an angle from the base of the mast, and a guy rod connecting the top of the mast with the boom and supporting the latter. At the top of the mast was a shoulder, and projecting above that was a spindle 2 or 3 inches high and 1¾ inches in diameter. An eye or hole in the end of the guy rod fitted over the spindle, and above the eye was a flat washer. Above the washer was a hole in the spindle ⅜ of an inch in diameter, into which it was designed that a pin or key should be inserted of sufficient strength and size to hold the guy rod in place; that is, to keep it from being pulled, or slipping, off the spindle. The length of the boom was between 13 and 15 feet, the length of the guy rod was about 8 feet, and the height of the mast about 8 feet. The connection of the guy rod with the boom was enough higher than its connection with the mast to make its inclination about 35 degrees from the horizontal. The boom with its attachments was of such weight that the combined strength of five or six men was required in lifting it, and the weight of each rail to be hoisted was 800 pounds. In use the upper end of the boom, from which a cable was suspended, was swung around to the side, and the cable was fastened to a rail. The cable was then moved upward, thereby lifting the rail, and the boom was swung back over the car upon which the rail was to be placed. While the derrick was being so used, and while the plaintiff in the proper discharge of his duties was guiding a rail to its proper place upon the car, the pin or key at the top of the mast gave way, the guy rod was pulled off the spindle, and the boom fell, striking the plaintiff and inflicting injuries upon him which were and are painful, serious, and permanent. The negligence charged in the complaint, omitting what has since become immaterial, was that the defendant carelessly and negligently provided and placed in the hole in the spindle, at the top of the mast, a pin or key which was not of sufficient strength or size to withstand the strain to which it would be subjected in the service in which the derrick was to be used. This and all other negligence on the part of the defendant was denied in the answer, but it was admitted therein that the defendant used the derrick in the service described, that the plaintiff was injured by the falling of the boom while the derrick was being so used, and that he was then in the discharge of his duties as a laborer in the defendant's service. Upon the trial, which was to the court and a jury, the evidence produced by the plaintiff, in addition to proving the facts before stated, also proved, or tended substantially to do so, that the derrick had been used as here described "off and on" for seven or eight months; that on the occasion in question it was being used in the customary way, nothing unusual occurring in that regard; that after the accident the head and point of a twenty-penny wire nail were found near the base of the mast, the point being pronouncedly bent, and another part of such a nail was taken out of the hole in the spindle; that in size and otherwise the three pieces appeared to be parts of the same nail; that all were rusty upon the exterior, and at one place of severance the ends were bright, while at the other they showed a rusty break extending partly through the nail, and were otherwise bright; and that the pin by which the guy rod was to be held in place on the spindle "was not supposed to be a nail—it was supposed to be a key." The part of the nail taken out of the hole in the spindle was preserved, was produced in evidence, and has been transmitted to this court as part of the record. It is ⅜ of an inch in diameter, or just one half the diameter of the hole from which it was taken, is 1¾ inches in length, or just the diameter of the spindle, is made of soft steel such as is commonly used in wire nails, and appears to have been cut or ground off at one end and partially severed in that way at the other, an old break completing the severance; but it does not appear to have been appreciably worn or reduced in size between its ends. Some of the witnesses spoke of seeing this part of the nail "driven out" of the hole in the spindle, but this cannot be taken as meaning more than that it was poked out, for the same witnesses said that it "came right out" and that the hole "was larger than" the nail. There was no evidence of how long the nail had been in the spindle, save such as was afforded by its rusty condition; nor was there any evidence of the amount of strain to which it was subjected, or of its sufficiency in strength and size, save such as was afforded by the description of the derrick, its several parts, and the mode of operating it, by the weight of the boom and the rails to be hoisted, and by the part of the nail produced in evidence. The defendant produced no evidence, and the case was sub-

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mitted to the jury upon these questions, among others: Did the defendant exercise ordinary care to provide a pin or key of sufficient strength and size to make the connection between the guy rod and the top of the mast reasonably safe when the derrick was in use? And, if not, what sum would fairly and reasonably compensate the plaintiff for the injuries inflicted upon him by the consequent falling of the boom? Other charges of negligence were also submitted to the jury, but they, as also what was said about them in the charge, have become immaterial, because, at the request of the defendant, the court submitted to the jury the special interrogatory, "What was the immediate cause of the falling of the boom?" to which the jury returned the answer, "The insufficient strength and size of the pin or key," meaning, as the record fairly discloses, that the nail was not of sufficient strength and size to be used as a pin or key. The verdict and judgment were for the plaintiff, and the defendant prosecutes this writ of error.

Preliminarily, it should be said that the court rightly charged the jury that there could be no recovery by the plaintiff unless the defendant was guilty of some of the negligence charged, that the burden of proving such negligence was upon the plaintiff, that no inference or imputation of negligence could arise out of the fact that the pin gave way on the occasion in question, that the defendant was not bound absolutely to provide a safe pin, but only to exercise ordinary care to provide a reasonably safe one, and: "Mark you, that the claim of negligence is that this pin, which held that rod, which ran from the end of the boom to the top of the mast, was of insufficient size and strength to withstand the strain which would naturally be brought against it in the lifting of the rail from the ground to the car. This is the first claim of negligence. Now, gentlemen of the jury, you have heard the evidence as to the size of that pin, as to the character of that apparatus, and as to the way in which the work was done; and the first question for you to ask yourselves when you get to the jury room is this: Did the defendant company exercise ordinary care in the furnishing of that apparatus as to the pin? Would an ordinarily prudent man have furnished an apparatus with a pin of that size and strength to do that work? Or would an ordinarily prudent man have said, that pin is not of sufficient size and strength to stand the strain which will naturally be brought against it by the lifting of these rails? If, in answering that question, you say that an ordinarily prudent man would have said that the pin was not of sufficient size and strength to withstand that strain, then the defendant company has been guilty of negligence in furnishing the derrick with that pin on top of the mast; that is, if you say that an ordinarily prudent man, performing the duty of furnishing a reasonably safe appliance, would have said that that pin would not be reasonably safe, considering the work that the apparatus had to do and the strain which would be brought upon it, then the defendant would be guilty of negligence in furnishing the derrick with that pin.

"You must be satisfied that the necessary facts have been proved here by a fair preponderance of the evidence, before there can be any recovery. You must not speculate; it must not be a matter of speculation or of guess; but you must be satisfied in your own minds, by a fair preponderance of the evidence, of these facts, which it is essential should be established in order to entitle the plaintiff to recover. If you are not so satisfied, it is not for you to speculate as to how this accident happened. You must find out how it did happen; and then, after finding out how it did happen, if you are satisfied, under the instructions I have given you, that the defendant was negligent, . . . you will ascertain what the plaintiff should recover."

In various ways the defendant objected that there was no evidence to justify a finding that the pin was not of sufficient strength and size, and the principal question now to be considered is whether these objections were well taken. The contention is that there was no evidence from which the jury could determine the character of the pin required, the strength of the pin used, or the amount of strain to which it was subjected, and, therefore, that they could not say that the pin was insufficient without going outside the evidence and indulging in mere conjecture. At the same time the admission is actually or tacitly made that, if an expert in mechanics or in the construction and operation of appliances like the derrick in question had also given testimony to the effect that the pin used was not sufficient to withstand the strain placed upon it in the hoisting of the rails, the question of its sufficiency should have been submitted to the jury.

It must be conceded that the case made by the evidence is close to the line which marks the separation of evidence from conjecture, but can it be said, upon a careful consideration of all that the proofs tended to establish, that it is on the forbidden side of the line? Of course, jurors are not restricted to a consideration of the facts directly proven, but may give effect to such inferences as reasonably may be drawn from

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them. Nor are they expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct. Thayer's Treatise on Evidence, 194, 263, 277, 296; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 663, 664, 21 L. ed. 745, 749; Head v. Hargrave, 105 U. S. 45, 49, 26 L. ed. 1028, 1030; The Conqueror, 166 U. S. 110, 131, 41 L. ed. 937, 946, 17 Sup. Ct. Rep. 510; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 185, 23 L. ed. 872, 876; Phillips v. Detroit, 111 U. S. 604, 606, 28 L. ed. 532, 533, 4 Sup. Ct. Rep. 580; Jacobson v. Massachusetts, 197 U. S. 11, 30, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 111, 52 L. ed. 121, 126, 28 Sup. Ct. Rep. 58; Lafayette Bridge Co. v. Olsen, 54 L.R.A. 33, 47 C. C. A. 367, 371, 108 Fed. 335; Nyback v. Champagne Lumber Co. 48 C. C. A. 632, 638, 109 Fed. 732; Baker v. F. A. Duncombe Mfg. Co. 77 C. C. A. 234, 146 Fed. 744; R. v. Aspinall, L. R. 2 Q. B. Div. 48, 61; Patterson v. Boston, 20 Pick. 159, 166; Com. v. Peckham, 2 Gray, 514; Bradford v. Cunard S. S. Co. 147 Mass. 55, 16 N. E. 719; McGarrahan v. New York, N. H. & H. R. Co. 171 Mass. 211, 217, 220, 50 N. E. 610; Kitzinger v. Sanborn, 70 Ill. 146, 149; Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 538, 546; Stevens v. Minneapolis, 42 Minn. 136, 140, 43 N. W. 842; Taylor v. Grand Lodge A. O. U. W. 101 Minn. 72, 77, 11 L.R.A.(N.S.) 92, 118 Am. St. Rep. 606, 111 N. W. 919, 11 A. & E. Ann. Cas. 260; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274, 292; Lillibridge v. McCann, 117 Mich. 84, 41 L.R.A. 381, 72 Am. St. Rep. 553, 75 N. W. 288; White v. Phœnix Ins. Co. 83 Me. 279, 22 Atl. 167; State v. Maine C. R. Co. 86 Me. 309, 312, 29 Atl. 1086; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 563, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Baker v. Hope, 49 Cal. 598; Swain v. Fourteenth Street R. Co. 93 Cal. 179, 28 Pac. 829; Post v. Chicago, B. & Q. R. Co. 121 Mo. App. 562, 97 S. W. 233; Ayer & L. Tie Co. v. Keown, 122 Ky. 588, 93 S. W. 590. As has been seen, the boom and the load which it was designed to lift were exceedingly heavy, and the boom was supported in its oblique position solely by the guy rod, whose downward inclination toward the mast was about 35 degrees from the horizontal. Therefore, the uplift of the rod at its connection with the mast must have been pronounced, and must have subjected the pin, by which the rod was held in place upon the spindle, to a corresponding strain. As the derrick was constructed, the hole in the spindle was made ⅜ of an inch in diameter, and that gave rise to a permissible inference that it was designed that the pin should be of substantially that size. The nail used as a pin, but "not supposed" to be so used, was only one half the diameter of the hole, and its strength was affected accordingly. Besides, it was made of a soft quality of steel, which materially increased its susceptibility to the cutting or grinding action incident to the uplift and movement of the rod. True, no mechanical expert gave his opinion upon the character of pin required, the strength of the nail used, or the amount of strain to which it was subjected, but upon those questions the jurors were not incapable of forming opinions of their own. Being men of ordinary observation and experience, they must have possessed some practical knowledge of the law of gravitation, of the elementary principles of mechanics, of the common use of pins in holding the wheels of various vehicles in place upon their spindles and in holding together different parts of other appliances and machinery, of the quality, strength, and size of those pins, and of the relative quality, strength, and size of twenty-penny wire nails. Doubtless they would have been assisted by the opinions of competent experts, but they were not wholly dependent upon them (Head v. Hargrave, The Conqueror: Lafayette Bridge Co. v. Olsen; Nyback v. Champagne Lumber Co.; McGarrahan v. New York, N. H. & H. R. Co. and Stevens v. Minneapolis,—supra), and so it cannot be said that there was no substantial evidence from which the jury could find that the nail, so used as a pin, was insufficient in strength and size.

But it is urged that the evidence made such a finding inadmissible, because it conclusively proved that the nail had been used as a pin for seven or eight months, during which it was shown to be quite adequate to the strain put upon it. The record does not sustain the contention. How long the nail had been used as a pin was not shown, save as its rusty condition may have warranted an inference that it had been in the spindle, with the incident exposure to the weather, for some time. At most that would have been only a permissible inference to be drawn by the jury, and not a necessary or conclusive one, because the nail may have been rusty when it was placed in the spindle. And for another reason the asserted proof of demonstrated adequacy was not conclusive. It consisted of statements that the derrick was used "off and on" from early

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in March until late in October following, that it was taken out on the road at times and then returned, that it was not in use all the time, but only occasionally, and that the extent of its use from early in June until late in October, so far as known by one of the crew, was seven or eight days. But there was no proof that, during the periods of use, whatever they may have been, the nail was not appreciably yielding to the cutting or grinding action, indicated by the ends of its severed parts, which was incident to the uplift of the guy rod and the swinging of the boom from side to side when the derrick was in use.

It is also urged that such a finding was inadmissible because there was no evidence of what pins were used by other owners and operators of like derricks. The contention must fail, because it proceeds upon a theory which gives undue and controlling influence to the conduct of others. Without question, it would have been permissible to show what pins were used by other owners and operators of like derricks, for that would have been some evidence of what could have been, and ought to have been, done by the defendant; but evidence of that character was not indispensable, because the ultimate and controlling test of the exercise of reasonable care is not what has been the practice of others in like situations, but what a reasonably prudent person would ordinarily have done in such a situation. The law is not so unreasonable as to afford no test where there has been no practice by others with which the conduct in question can be compared; nor does it permit common sense and reason to lose their sway because, through ignorance, inattention, or selfishness, an unreasonable practice has prevailed. Chicago Great Western R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657, 665, and authorities there cited; Nyback v. Champagne Lumber Co. supra; Dawson v. Chicago, R. I. & P. R. Co. 52 C. C. A. 286, 288, 114 Fed. 870; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 32, 128 Fed. 529; 1 Labatt, Mast. & S. § 50.

Exceptions were taken to portions of the charge in respect of the assessment of damages and other matters, but none of them affords any ground for a reversal. Some were addressed to excerpts which, standing alone, might be subject to criticism, but taken with the context, and as they must have been understood by the jury, were unobjectionable; some were rendered immaterial by the jury's answer to the special interrogatory; and the others were plainly without merit.

It follows that the judgment should be affirmed, and it is so ordered.

Sanborn, Circuit Judge, concurring:

This case involves the liability of the master for the breach of its duty to its servant to exercise ordinary care and prudence in the selection, arrangement, and care of a simple machine which it furnished. In my opinion this liability is measured by the following rules of law, which I think have been established by decisions of the Supreme Court and of this court.

The limit of the duty and of the liability of the master is the exercise of ordinary care to furnish and keep in repair reasonably safe machinery. That duty is discharged and that liability ceases when the master has exercised ordinary care to furnish such machinery and appliances as persons of ordinary intelligence, prudence, and caution commonly supply under like circumstances. Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; Southern P. Co. v. Seley, 152 U. S. 145, 153, 38 L. ed. 391, 395, 14 Sup. Ct. Rep. 530; Patton v. Texas & P. R. Co. 179 U. S. 658, 664, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 393, 34 U. S. App. 743, 74 Fed. 195, 198; H. D. Williams Cooperage Co. v. Headrick, 86 C. C. A. 548, 550, 159 Fed. 680, 682. "The defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned. . . . Neither individuals nor corporations are bound as employers to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees, nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are thus employed." Washington & G. R. Co. v. McDade, 135 U. S. 554, 569, 570, 34 L. ed. 235, 240, 241, 10 Sup. Ct. Rep. 1044, 1049.

The true test of ordinary care is that degree of care which persons of ordinary intelligence and prudence commonly exercise under similar circumstances. If the care used in a given case rises to or above that standard, there is no actionable negligence; if it falls below it, there is such negligence. Union P. R. Co. v. Daniels (Union P. R. Co. v. Snyder) 152 U. S. 684, 691, 38 L. ed. 597, 601, 14 Sup. Ct. Rep. 756; Southern P. Co. v. Hetzer, 1 L.R.A.(N.S.) 288, 68 C. C. A. 26, 35, 135 Fed. 272, 281; Chicago G. W. R. Co. v. Egan, 86 C. C. A. 230, 235, 159 Fed. 40, 45; H. D. Williams Cooperage Co. v. Headrick, 86 C. C. A. 548, 550, 159 Fed. 680, 682; Grand Trunk R. Co.

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v. Ives, 144 U. S. 408, 416, 417, 36 L. ed. 485, 488, 489, 12 Sup. Ct. Rep. 679; Washington & G. R. Co. v. McDade, 135 U. S. 554, 569, 34 L. ed. 235, 240, 10 Sup. Ct. Rep. 1044; Choctaw O. & G. R. Co. v. Holloway, 191 U. S. 334, 338, 48 L. ed. 207, 210, 24 Sup. Ct. Rep. 102; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; Charnock v. Texas & P. R. Co. 194 U. S. 432, 437, 48 L. ed. 1057, 1059, 24 Sup. Ct. Rep. 671. In Union P. R. Co. v. Daniels, supra, a case which involved the duty to exercise care to furnish reasonably safe machinery for the servant, the Supreme Court sustained this charge: "The duty of the defendant towards him was the exercise of reasonable care in furnishing and keeping its machinery and appliances about which he is required to perform his work, in a reasonably safe condition. It was the defendant's duty, also, to use like ordinary care in selecting competent fellow servants and in a sufficient number to insure that the work would be safely done; and this duty was discharged by the defendant, if the care disclosed by it in these several matters, accorded with that reasonable skill and prudence and care which careful, prudent men engaged in the same kind of business ordinarily exercise."

I do not assent to any direct or indirect departure from these rules. While it may be theoretically true that the measure of care required of a master is that which an ordinarily prudent man would have used under like circumstances, the best evidence what that degree of care was and the true standard of its measurement is the degree of care which ordinarily prudent, cautious, and rational employers ordinarily exercise under like circumstances. Where there is substantial and undisputed evidence what degree of care such employers commonly exercised in similar circumstances, and no evidence that the master failed to exercise that degree of care, it is not in my opinion permissible for the jury to speculate or opine that a reasonably prudent man would have exercised a higher degree of care than such men actually did exercise, and to charge the defendant with damages because he failed to reach such a speculative, variant, and uncertain standard. Southern P. Co. v. Hetzer, supra; Chicago G. W. R. Co. v. Egan, 86 C. C. A. 230, 159 Fed. 40, 45.

In the case at bar, however, there was no evidence what degree of care ordinarily cautious, prudent, and rational employers commonly exercise in the selection and care of such a machine as that in use at the time of the accident; and upon the ground that, in the absence of such evidence, and in view of the proof of the size of the pin and of the size of the hole in which it was placed, of the character of the machine and of its work, I do not dissent from the conclusion that it was permissible for the jury in this case to find what degree of care an ordinarily prudent man would have exercised under like circumstances, and that the defendant failed to use that care.

NEBRASKA SUPREME COURT.

MAGGIE McELROY, Appt.,
v.
METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK.

(— Neb. —, 122 N. W. 27.)

Insurance — contract — situs.

1. Where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into.

Same — foreign company — laws of foreign state — effect.

2. Insurance business transacted in this state by New York insurance companies without any provision that the New York laws shall govern is not subject to the provision of the New York statute requiring a notice to be mailed to the policy holder in that state as a condition of forfeiture for nonpayment of premiums.

Same — contract — express terms — waiver by agent.

3. The agent of an insurance company cannot, by oral contract with the assured, waive the express terms of the policy and extend the time for a premium, when the policy provides that none of its terms can be varied nor modified, nor any forfeiture waived, nor premiums in arrears received, except by agreement in writing signed by the president, vice president, secretary, or assistant secretary.

(June 25, 1909.)

Headnotes by CALKINS, C.

Case Note. — Conflict of laws as to insurance contracts.

The earlier cases on this subject are covered in a note to Johnson v. Mutual L. Ins. Co. 63 L.R.A. 833. The present note, which is confined to the subsequent cases, adheres to the same scope, and follows, as nearly as may be, the same classification as the earlier note.

Where contract deemed to have been made —policy mailed to insured or his agent.

As shown in the earlier note (63 L.R.A. 837 et seq.), if the local agent's authority is limited to receiving and forwarding applications to the home office of the insurer for acceptance or rejection, the contract

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APPEAL by plaintiff from a judgment of the District Court for Cass County in defendant's favor in an action brought to recover a sum alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. A. N. Sullivan, for appellant:

By the terms of the contract, the place of performance was New York, and the rights of the parties must be determined by the laws of that state.

9 Cyc. Law & Proc. § 2, p. 669; Citizens' Nat. Bank v. Hine, 49 Conn. 236; Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; Medbury v. Hopkins, 3 Conn. 472; Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183; Champion v. Wilson, 64 Ga. 184; Dunn v. Welsh, 62 Ga. 241; Stricker v. Tinkham, 35 Ga. 176, 89 Am. Dec. 280; Herschfeld v. Dexel, 12 Ga. 582; Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368; Strawbridge v. Robinson, 10 Ill. 470, 50 Am. Dec. 420; Lewis v. Headley, 36 Ill. 433, 87 Am. Dec. 227; Sherman v. Gassett, 9 Ill. 521; McDaniel v. Chicago & N. W. R. Co. 24 Iowa, 412; Boyd v. Ellis, 11 Iowa, 97; Young v. Harris, 14 B. Mon. 556, 61 Am. Dec. 170; Goddin v. Shipley, 7 B. Mon. 575; Beirne v. Patton, 17 La. 589; Maguire v. Pingree, 30 Me. 508; White v. Perley, 15 Me. 470; Larrabee v. Talbott, 5 Gill, 426, 46 Am. Dec. 637; De Sobry v. De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 535; Culver v. Benedict, 13 Gray, 7; Penobscot & K. R. Co. v. Bartlett, 12 Gray, 244, 71 Am. Dec. 753; Wyse

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of insurance will be deemed to have been made at the home office, when a policy in substantial conformity to the application is mailed directly from the home office of the insurer to the insured or his agent in another state, if no conditions precedent to its taking effect are expressly imposed, and there is nothing in the transaction indicating that the contract was intended to be left open until the receipt of the policy by the insured. To the same effect is Tuttle v. Iowa Traveling Men's Asso. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131.

And the same rule was applied in Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801, notwithstanding that the insured, after receiving the policy through the mail, executed and mailed to the insurer a note for the first premium. The court seems to have assumed that the note itself as a contract was made in the state in which it was mailed by the insured, though it was of the opinion that even the note was governed by the law of the other state, as the place of performance.

So, in Orient Ins. Co. v. Rudolph, 69 N. J. Eq. 570, 61 Atl. 26, where a policy of insurance issued by a Connecticut corporation on property in New York provided that it should not be valid until countersigned by the agent of the company in New York, the contract was deemed to have been made in the latter state, it appearing that, after being countersigned in that state, it was mailed directly to the insured at his residence in New Jersey.

In Swing v. Dayton, 124 App. Div. 58, 108 N. Y. Supp. 155, however, where the contract of insurance was mailed from Ohio to the insured in Pennsylvania, the contract was deemed to have been made in the latter state; but the contract in this instance expressly provided that it should become a mutual agreement upon its acceptance. (See, to same effect, cases cited at p. 838 of the earlier note.)

In Swing v. Wellington (Ind. App.) 89 N. E. 514, also, the decision that policies mailed from Ohio to the insured in Indiana were Indiana contracts and governed by the law of that state was apparently upon the ground that the contracts were not to become executed until received and inspected by the insured in Indiana.

So, in Supreme Lodge, K. P. v. Meyer, 198 U. S. 508, 49 L. ed. 1146, 25 Sup. Ct. Rep. 754, it was held that a certificate of insurance issued in Illinois to a resident of New York, which by its terms was first to take effect as a binding obligation when the insured should execute the agreement indorsed thereon, to accept it "subject to all the conditions therein contained," was a New York, and not an Illinois, contract, the agreement having been executed in New York. It does not appear in this case whether the certificate was mailed to the insured or delivered to him by an agent of the insurer; but it is clear that the decision would have been the same whatever the fact in that respect.

—policy mailed to local agent of insurer.

The rule stated in the earlier note (63 L.R.A. 840), to the effect that where an application is accepted at the home office of the company in one state and the policy is mailed to the local agent of the insurer in another, to be by him delivered to the insured, but expressly stipulates that it shall not be valid, or that it shall not take effect, until countersigned by such agent, the contract is regarded as made in the state in which the policy is so countersigned, is also supported by the later cases. Orient Ins. Co. v. Rudolph, supra; Hardiman v. Fire Asso. of Philadelphia, 212 Pa. 383, 61 Atl. 990.

So, Dolan v. Supreme Council (Mich.) 13 L.R.A.(N.S.) 424, 113 N. W. 10 (overruled on rehearing on another point in 152 Mich. 266, 16 L.R.A.(N.S.) 555, 116 N. W. 383) held that the contract evidenced by a mutual benefit certificate issued by an association organized in another state, but countersigned as required by the laws of the order, by the officers of the local branch in Michigan, and presumably delivered in that state, was a Michigan contract. See also Orient Ins. Co. v. Rudolph, supra.

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v. Dandridge, 35 Miss. 672, 72 Am. Dec. 149; Brown Bros. v. Freeland, 34 Miss. 181; Dalton v. Murphy, 30 Miss. 59; Wooten v. Miller, 7 Smedes & M. 380; Bliss v. Houghton, 16 N. H. 90; Lee v. Selleck, 32 Barb. 522, 20 How. Pr. 275; Pomeroy v. Ainsworth, 22 Barb. 118; Merchants' Bank v. Spalding, 12 Barb. 302; Bowen v. Bradley, 9 Abb. Pr. N. S. 395; Dickinson v. Edwards, 58 How. Pr. 24; Connecticut Mut. Life Assur. Co. v. Cleveland, C. & C. R. Co. 23 How. Pr. 180; Bank of Commerce v. Rutland & W. R. Co. 10 How. Pr. 1; Thompson v. Ketcham, 4 Johns. 285; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Curtis v. Hutchinson, 1 Ohio Dec. Reprint, 471; Waverly Nat. Bank v. Hall, 150 Pa. 466, 30 Am. St. Rep. 823, 24 Atl. 665; Correll v. Georgia Constr. & Invest. Co. 37 S. C. 444, 16 S. E. 156; M'Candlish v. Cruger, 2 Bay, 377; Baxter v. Wiley, 9 Vt. 276, 31 Am. Dec. 623; Warder v. Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488; Crumlish v. Central Improv. Co. 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456; Kennedy v. Knight, 21 Wis. 340, 94 Am. Dec. 543; Fisher v. Otis, 3 Chand. (Wis.) 83; Hall v. Cordell, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Brabston v. Gibson, 9 How. 263, 13 L. ed. 131; Bell v. Bruen, 1 How. 169, 11 L. ed. 89; Andrews v. Pond, 13 Pet. 65, 10 L. ed. 61; Cox v. United States, 6 Pet. 172, 8 L. ed. 359;

The rule stated in the earlier note (63 L.R.A. 841), to the effect that where the contract expressly stipulates that it is not to take effect until the payment of the first premium, or until the payment of the first premium and delivery of the policy, and the first premium does not accompany the application, but the company sends the policy to its own agent, who delivers the same to the insured upon the receipt of the first premium from the latter, the contract will be deemed to have been made in the state where the policy was so delivered and the premium paid, and not in the state where the application was accepted and the policy issued, is sustained by McELROY v. METROPOLITAN L. INS. CO.; Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031 (reversing [Tex. Civ. App.] 79 S. W. 367); Pool v. New England Mut. L. Ins. Co. 123 App. Div. 885, 108 N. Y. Supp. 431.

So, in Grevenig v. Washington L. Ins. Co. 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790, where the policy merely provided that it should not be binding until the first premium should be received by the company or some authorized agent, and did not expressly require delivery, the contract was deemed to have been made in Louisiana upon its delivery there by the local agent of the insurer and his receipt of the first premium, although it was issued by a New York company.

In Summitt v. United States L. Ins. Co. 123 Iowa, 681, 99 N. W. 563, a contract evidenced by a policy of insurance issued to a resident of Iowa by a New York company was found to have been made, executed, and delivered in New York, although it expressly provided that it was to take effect upon delivery to the assured; but in this case it appeared that the policy was signed in New York, and nothing was shown regarding the place of actual delivery.

In Harrigan v. Home L. Ins. Co. 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, where the application provided that the policy should not become binding upon the company until the first premium was received by the company in the lifetime of the assured, the contract was deemed to have been consummated in New York upon the acceptance of the application in that state and the transmission of the policy to the local agency in California for delivery to the insured; but in this case the insured gave his note for the first premium at the time he signed the application, and received a receipt therefor, which provided that, in the event of the acceptance of the application, the policy should be in force from the date of acceptance. It was further found by the court that there was no rule of the company, condition in the policy or application, nor any instruction to the agents, which prohibited payment by notes or which rendered the policy inoperative until payment in money was made or duly waived.

So, in Rose v. Mutual L. Ins. Co. 240 Ill. 45, 88 N. E. 204, where the question seems to have been as to the time, rather than the place, where the contract was made, there being a provision in the application that the insurance should not take effect until the first premium should have been paid and the policy issued, but no provision as to delivery, it was held that an actual delivery was not essential and that the contract was completed by an unqualified acceptance of the application and the placing of the policy, which acknowledged the receipt of the first premium, in the hands of an agent for delivery.

It is stated in the earlier note (63 L.R.A. 843) that the real difficulty in determining the place where the contract is made, when the policy is mailed to an agent of the insurer and by him delivered to the insured, arises when no conditions are expressly imposed upon the contract's taking effect: but that in such case the weight of authority, while not without conflict, appears to be to the effect that the contract will be deemed to have been made at the home office if the first premium accompanied the application; otherwise at the place where the premium is paid; thus impliedly holding that delivery in itself, in the absence of an express stipulation to that effect, is not an implied condition of the consummation of the contract, but that the payment of the first premium

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Martin v. Roberts, 36 Fed. 217; Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864; Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274; York v. Wistar, Fed. Cas. No. 18,141; Chatenay v. Brazilian Submarine Teleg. Co. [1891] 1 Q. B. 82, 60 L. J. Q. B. N. S. 295, 63 L. T. N. S. 739, 39 Week. Rep. 65; Sands v. Smith, 1 Neb. 108, 93 Am. Dec. 331; Richards, Ins. p. 50.

Mr. J. B. Strode, for appellee:

A contract of insurance is deemed to be executed at the place where the last act is done which is necessary to make the contract binding on the parties, and if the policy does not become binding until delivery, the place of delivery is the place of contract.

22 Am. & Eng. Enc. Law, 2d ed. p. 1349; 1 Joyce, Ins. § 225; 1 May, Ins. 4th ed. § 66; 25 Cyc. Law & Proc. p. 748; 3 Page, Contr. § 1718; Antes v. State Ins. Co. 61 Neb. 55, 84 N. W. 412; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 100; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262-270, 45 L. ed. 181-186, 21 Sup. Ct. Rep. 106; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettis) 140 U. S. 226, 232, 35 L. ed. 497, 500, 11 Sup. Ct. Rep. 822; Mutual L. Ins. Co. v. Hill, 193 U. S. 551-556, 48 L. ed. 788-792, 24 Sup. Ct. Rep. 538; Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031; Grevenig

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is (page 847). See also the two cases last above cited.

In Lake Charles v. Equitable Life Assur. Soc. 114 La. 836, 38 So. 578, in which it is stated that the contract of insurance is completed at the place where the policy is delivered and the first premium collected, it does not appear whether or not there was an express stipulation making delivery or payment of premium a condition precedent to the contract's taking effect.

In Cowen v. Equitable Life Assur. Soc. 37 Tex. Civ. App. 430, 84 S. W. 404, the court was apparently of the opinion that a policy issued by a New York company, and sent by it to its agent in Texas, and there delivered to the insured, must be deemed to be a Texas contract, notwithstanding that it did not appear to have been sent to be delivered subject to the payment of the first premium or the note therefor. As a matter of fact, however, the court was of the opinion that the notice of the second premium, which was the point in controversy, was sufficiently addressed to answer the requirements of the New York statute, if that were held applicable.

Choice of laws—general principles of commercial law.

In the earlier note (63 L.R.A. 850) attention is called to the fact that the Federal courts may decide questions of general commercial law relating to insurance contracts, with reference to their own precedents, and without reference to the decisions of the courts of the state whose law, if statutory, would concededly govern. This principle was recognized, though not applied, in McCue v. Northwestern Mut. L. Ins. Co. 167 Fed. 435. The court, in considering the question whether recovery might be had on an insurance policy on the life of a person who was legally executed for crime, said that, in the case of contracts of insurance general in character and governed by the rules of commercial law, the Federal court must, regardless of state decisions (in view of the decision in Burt v. Union C. L. Ins. Co. 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139), hold that a policy of life insurance "does not insure against the legal execution of the insured for crime;" but that, in special contracts not governed by the rules of commercial law, but provided for by special legislation of a state, conferring special rights and vested interest enforceable alone under such state legislation, the Federal courts must (under the ruling in Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578), be governed by the law of that state. It was accordingly held that, since, by the rule of public policy established by the supreme court of Wisconsin, the manner of the insured's death does not avoid the policy where third persons are beneficiaries, in the absence of any provision in the policy to that effect, the legal execution of the insured for crime did not avoid a policy issued by a Wisconsin corporation created under a special act under which the persons insured are members of the corporation during the time they remain insured, the policy showing upon its face that it was executed at the home office of the company in Wisconsin, and being by its express terms payable there. It should be observed that this note does not purport to cover the question as to whether the Federal courts are bound to follow the decisions of the local state courts in relation to insurance contracts,—that question being left for consideration in a future note covering the general subject of the duty of the Federal courts to follow the decisions of the state courts on questions of general commercial law. The point is referred to in this connection merely for the purpose of calling attention to the fact that a decision of a Federal court sitting in one state, with reference to a contract which, under general principles of private international law, should be governed by the law of another state, does not necessarily involve a repudiation of that general principle, although it applies a rule of law contrary to that established by the decisions of the courts of that state, since the result may be referable to the principle already stated, that a Federal court is not bound to follow a decision of the state court on questions of general

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v. Washington L. Ins. Co. 104 Am. St. Rep. 483, note; Johnson v. Mutual L. Ins. Co. 63 L.R.A. 841, note; Millard v. Brayton, 177 Mass. 533, 52 L.R.A. 117, 83 Am. St. Rep. 294, 59 N. E. 436; Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Albro v. Manhattan L. Ins. Co. 119 Fed. 629; Perry v. Dwelling-House Ins. Co. 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731; Grevenig v. Washington L. Ins. Co. 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790; Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. 59 C. C. A. 545, 124 Fed. 27; Horton v. New York L. Ins. Co. 151 Mo. 604, 52 S. W. 356; Moore v. Northwestern L. Ins. Co. 112 Mo. App. 696, 87 S. W. 988; Washington L. Ins. Co. v. Glover, 25 Ky. L. Rep. 1327, 78 S. W. 147; Cowen v. Equitable Life Assur. Soc. 37 Tex. Civ. App. 430, 84 S. W. 404; Fidelity Mut. Life Asso. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; Mutual Ben. L. Ins. Co. v. Robison, 54 Fed. 580, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723; Northwestern Mut. L. Ins. Co. v. Elliott, 7 Sawy. 17, 5 Fed. 225; Ford v. Buckeye State Ins. Co. 6 Bush, 133, 99 Am. Dec. 663.

If the policy is a New York contract, a premium notice was not required as such notice did not apply to nonresident policy holders.

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commercial law; and this principle, of course, applies equally, if not *a fortiori*, to the decisions of a court of a state other than that in which the Federal court is sitting, as to those of the courts of the latter state. In such a situation (as is pointed out in notes to Root v. Kansas City Southern R. Co. 6 L.R.A.(N.S.) 212, and Southern Exp. Co. v. Gibbs, 18 L.R.A.(N.S.) 880) there is, from the point of view of the Federal court, no question of conflict of laws at all, since the rule established by the Federal precedents is equally the rule for both states, so far as the Federal courts are concerned.

—express stipulation as to governing law; public policy.

It is stated in the earlier note (63 L.R.A. 848) that, when by an express stipulation in the contract the parties have designated the governing law, the question as to what law governs is answered, and that any inquiry as to the place where the contract was made, or as to whether the law of that or of some other place should govern, is unnecessary; and that the only inquiry is as to whether in a particular case it is contrary to the public policy of the forum to apply the law so designated, or to refrain from applying the law of the forum to the particular point in question. Cases in support of that statement are there cited.

So, a stipulation as to the place of a contract of insurance, and the provisions by which it shall be governed and construed, are controlling on both parties. A different principle applies only where the stipulations of the parties or the express provisions of the contract impair the obligation of a contract or conflict with the laws of the state where the contract was made. Polk v. Mutual Reserve Fund Life Asso. 137 Fed. 273.

In Williams v. Mutual Reserve Fund Life Asso. 145 N. C. 128, 58 S. E. 802, 13 A. & E. Ann. Cas. 51, involving a contract made before the passage of the North Carolina statute providing that all contracts of insurance, application for which is taken within the state, shall be deemed to have been made within this state and subject to the laws thereof, it was held that a policy which was issued by a New York company to a resident of North Carolina was, by its express terms, made a New York contract, it being expressly provided in the contract that it should be governed by the laws of the state of New York, and the place of the contract being expressly agreed to be the home office of the association, in the city of New York.

In New York L. Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004, it appeared that the application for insurance stipulated that the contract should be "construed according to the laws of the state of New York," but the court said that the question at issue must be determined without reference to the New York statutes relied upon, since they were not proved in the case, and judicial notice could not be taken thereof.

In Russell v. Grigsby, 168 Fed. 577, the court said that the provision in the insurance contract that the place of the contract should be in the state of Pennsylvania was an obligatory term, and the contract of insurance should be construed according to the law of Pennsylvania, but that that provision did not affect the contract of assignment of the policy, which was a different contract.

As pointed out in the earlier note (pages 849 et seq.), the law of the state which, according to the general principles, should govern the contract, or even the law of the state which the parties have expressly stipulated to be the governing law of a contract, will not be applied if contrary to the public policy of the forum. The application of that exception is shown in the later subdivisions of the note, in connection with the specific questions involved. So, *a fortiori*, an express statutory provision of the state in which the action is brought, like that referred to in Williams v. Mutual Reserve Fund Life Asso. supra, will govern contracts made subsequent to its passage. It is so held in Owen v. Bankers' L. Ins. Co. (S. C.) 66 S. E. 290, under a statute to such effect, notwithstanding an express stipulation in the contract that it should be subject to the laws of New York.

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284, 100 N. Y. Supp. 1075; Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031.

Under policies in which waivers are not only required to be in writing, but are forbidden altogether except by certain designated persons, the restriction on the authority of agents to waive is binding.

Hartford F. Ins. Co. v. Landfare, 63 Neb. 562, 88 N. W. 779; German Ins. Co. v. Heiduk, 30 Neb. 296, 27 Am. St. Rep. 402, 46 N. W. 481; Metropolitan L. Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345; Collins v. Metropolitan L. Ins. Co. 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092; May, Ins. § 137; 25 Cyc. Law & Proc. p. 861; Union Cent. L. Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906; Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252; Porter v. United States L. Ins. Co. 160 Mass. 183, 35 N. E. 678; Mallory v. Metropolitan L. Ins. Co. 97 Mich. 416, 56 N. W. 773; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Cleaver v. Traders' Ins. Co. 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; Iverson v. Metropolitan L. Ins. Co. 151 Cal. 746, 13 L.R.A.(N.S.) 866, 91 Pac. 609; Cayford v. Metropolitan L. Ins. Co. 5 Cal. App. 715, 91 Pac. 266.

Calkins, C., filed the following opinion.

This was an action upon a policy of life insurance issued by the defendant upon

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The application made by the later cases of the rule with reference to express stipulations as to the governing law, as well as the exception based on public policy, is shown in the subsequent subdivisions.

Laws of state of incorporation as limitation upon powers of insurance company.

See also earlier note, 63 L.R.A. 853.

In so far as the laws of the state in which an insurance company is incorporated are limitations upon its powers to contract, they, of course, apply wherever the contract may have been made or wherever it may, by its terms, be performable; and a provision in the charter of the corporation is, of course, such a limitation upon its powers. Thus, in Supreme Lodge, N. E. O. O. P. v. Hine (Conn.) 73 Atl. 791, involving a question as to beneficiaries under a certificate issued by a mutual benefit association, a Massachusetts corporation, the court said that the contract was to be construed in accordance with the laws of Massachusetts and the charter and general laws of the corporation.

As pointed out in the earlier note (63 L.R.A. 853), some of the cases have taken the position that every statute relating to insurance enacted in the state in which the insurer is incorporated is a limitation upon its powers which accompanies it wherever it may contract; but, as there shown, this position is contrary to the great weight of authority. The *dicta* to that effect in Fidelity Mut. Life Asso. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635 (cited in the earlier note), were expressly repudiated in the subsequent case of Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031 (reversing [Tex. Civ. App.] 79 S. W. 367). To the same effect is Grevenig v. Washington L. Ins. Co. 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790. In both cases the contract having been consummated outside of New York, the New York statute with respect to notice as a condition of forfeiture for nonpayment of premiums was held inapplicable.

So, in Mutual L. Ins. Co. v. Mullan, 107 Md. 457, 69 Atl. 385, where the question was whether an untrue statement in an application for life insurance avoided the policy irrespective of its materiality to the risk, the court repudiated the contention that the contract of insurance must be construed in accordance with the laws of the state where the company was created and agreeably to its charter, in order to preserve the scheme of mutuality; Distinguishing Supreme Council, R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 48 Atl. 866, on the ground that in that case the insurer was a mutual benefit association, which is not controlled by the ordinary rules of life insurance, whereas in the case at bar there was nothing to show that the insurer was a mutual company except the inference to be drawn from the word "mutual" in its corporate name.

—place of performance.

It was suggested in the earlier note (63 L.R.A. 854) that (in view of the general principles deduced from cases dealing with other classes of contracts, which, prima facie at least, and in the absence of indications of a contrary intention, refer many of the essential elements to the law of the place of performance as such) too little attention has been paid to the claims of the law of the place of performance as such in respect of insurance contracts. This suggestion is also applicable to most of the later cases, which, like most of those cited in the earlier note, in the absence of an express stipulation as to the governing law, refer the contract to the law of the place where it was found to have been made, *i. e.*, consummated, without reference to the law of the place of performance as such; unless, indeed, they decline to apply the law of that state for reasons of public policy peculiar to the law of the forum as such.

However, in Banco de Sonora v. Bankers' Mut. Casualty Co. 124 Iowa, 576, 104 Am. St. Rep. 367, 100 N. W. 532, it was held that the question whether a person who mailed a package of money was an adult within the meaning of a contract insuring a

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the life of one Julia McElroy, in which policy the plaintiff was named as beneficiary. The defense was that the policy had been forfeited for nonpayment of a semiannual premium which fell due December 28, 1906, and remained unpaid at the time of the death of the assured, which took place February 27, 1907. There was a trial to a jury, upon which the court directed a verdict for the defendant, and, from a judgment entered thereon, the plaintiff appeals.

1. It is conceded that, if the contract is to be considered as made in and construed by the laws of this state, the policy was by its express terms forfeited by the failure to pay the premium in question, unless the time of such payment was extended or such forfeiture waived. The defendant is a New York corporation, and there was in force in that state at the time of the issuance of the policy in question a statute regulating the business of life insurance, which, amongst other things, provided that "no life insurance company doing business in this state will, within one year after the default in payment of any premium, instalment, or interest, declare forfeited or lapsed any policy hereafter issued. . . . unless a written or printed notice stating the amount of such premium . . . due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, . . . at his or her last known postoffice address in this state. . . . The notice

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bank against the loss of currency in the mails, which required the packing and sealing of the packages containing the money to be witnessed by two adults, one of whom should have charge of the same until deposited and registered at the postoffice, since it related to the performance of the contract, was to be determined by the law of the place where this particular part of the contract was to be performed; and, it appearing that the parties contemplated that the money would be prepared for shipment in Mexico, that portion of the contract was to be performed there, and the question was therefore to be determined by the law of Mexico, notwithstanding that the package, which was lost, was registered from one point in Arizona to another. A similar decision in the same case was rendered in (Iowa) 95 N. W. 232 (referred to in the earlier note, page 855). While the policy in this case was issued by a Mexican corporation and the contract was consummated in Mexico, the decision, as already intimated, was put upon the ground that Mexico was the place of the performance of the particular part of the contract in question.

But in J. W. Matthews & Co. v. Employers' Liability Assur. Corp. 127 App. Div. 195, 111 N. Y. Supp. 76 (affirmed without opinion in 195 N. Y. 593), it was held that the question of larceny, for the purposes of a fidelity policy of insurance, should be determined by the law of New York, where the policy was delivered and the insured resided, and not by the law of Connecticut, where the money was collected and misappropriated.

In Michaelsen v. Security Mut. L. Ins. Co. 150 Fed. 224 (reversed on another point in 83 C. C. A. 334, 154 Fed. 356, 12 A. & E. Ann. Cas. 37), the court, in referring to the law of New York the question as to the right or remedy of the insured in case of an anticipatory breach of a policy issued by a New York company, said in effect that there was no dispute but that New York was the place of performance: but, as the policy in this instance expressly stipulated that it should be governed by and construed according to the laws of New York, there would seem to be no question but that the law of that state should govern, unless, as was contended, the law of Pennsylvania, as the law of the forum, should apply.

In Cudahy Packing Co. v. New Amsterdam Casualty Co. 132 Fed. 623, the question as to the rate of interest to be allowed upon a claim arising under a policy of indemnity insurance was referred to the law of New York, apparently for the reason that the policy was to be paid in that state, although it is also stated that the evidence shows that the contract was both executed and countersigned in New York, and, by inference, was delivered in Nebraska.

So, in Napier v. Bankers' L. Ins. Co. 51 Misc. 283, 100 N. Y. Supp. 1072, where it was held that the law of New York governed with respect to notice of nonpayment of premiums, the opinion intimated that the decision was not upon the ground that the law of the place where the contract is made as such governs, but that, when the contract is silent as to the place of performance, the place of making is presumed to be the place of performance. Other instances in which the law of the place of performance as such has been impliedly adopted or rejected will be found in the subsequent subdivisions.

—the law of state of insured's residence as such.

As pointed out in the earlier note (63 L.R.A. 855), where an action is brought upon a contract of insurance in the state in which the property is situated, the court will, of course, apply a statute of that state which, either expressly or by construction, extends to all contracts of insurance upon property within the state, although the contract may have been made and the loss may be payable in another state.

An analogous principle is applied in Fidelity Mut. L. Ins. Co. v. Miazza (Miss.) 46 So. 817, with respect to a policy of insurance on the life of a resident of the state, it being there held that the provision of the Mississippi statute that "all contracts of insurance on property, lives, or interest in this

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shall also state that, unless such premium . . . shall be paid . . . by or before the day it falls due, the policy and all payments thereon will become forfeited and void." [N. Y. Laws, 1897, chap. 218, p. 92]. There was an attempt to give the notice required by this statute, but it is claimed it was so imperfect as not to amount to a compliance with the above-quoted provisions. The question is therefore presented whether the rights of the parties under the policy sued on are to be determined by the laws of this state or those of New York. It is a general principle that, if the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to give validity to the contract is the place where the contract is entered into. Antes v. State Ins. Co. 61 Neb. 55, 84 N. W. 412; Bascom v. Zediker, 48 Neb. 380, 67 N. W. 148; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106. In the body of the policy sued on, it is provided that no obligation is assumed by the company until the first premium has been paid, nor unless, upon the delivery of the policy, the assured is living and in sound health; and in the application, which is a part of the policy, there is inserted the stipulation: "I further agree that the company shall incur no liability under this application until it has been received, approved, and the policy issued and delivered, and the premium has actually been paid to and accepted by the company during my lifetime and while I

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state, shall be deemed to be made therein," cannot be changed by the contract of the parties. See also Owen v. Bankers' L. Ins. Co. supra.

So, in Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801, an action by a Pennsylvania corporation to recover on a note given for the first premium on a policy on the life of a resident of Wisconsin, the court, notwithstanding that it was of the opinion that the contract of insurance was made in Pennsylvania and that the note sued on, being payable in Pennsylvania, would ordinarily be governed by the law of that state, held that there could be no recovery, because of the Wisconsin statute providing that no corporation or individual shall do any business of insurance with any resident of the state, except in accordance with certain conditions and restrictions, which had not been complied with.

—construction and interpretation of language of policy, generally.

See also earlier note in 63 L.R.A. 856, and the previous heading in this note "Law of place of performance."

In Supreme Council, A. L. H. v. Getz, 50 C. C. A. 153, 112 Fed. 119, it was said that the contract, being a Pennsylvania contract, must be construed according to its laws. So far as appears, however, there was no occasion for making any choice between the laws of different states in that case.

In Northwestern S. S. Co. v. Maritime Ins. Co. 161 Fed. 166, an action on a policy of marine insurance, the court said that, the policy having been issued in England and delivered to the brokers there, and the premium being paid there through the brokers, it was an English contract, to be construed and enforced according to the English law, although the insurance was procured by a corporation doing business at San Francisco, acting as agent for the owner.

In Franklin L. Ins. Co. v. Morrell, 84 Ark. 511, 106 S. W. 680, involving the question whether the beneficiary had a vested interest in the certificate, it was held that the contract, being an Illinois contract, must be construed according to the laws of that state; but in that case the contract was executed in Illinois, and the insurance society was domiciled in that state, and the member also resided there at the time the policy was issued, so that the law of Illinois was both the *lex loci contractus* and the *lex loci solutionis*, and as the question clearly related to the substance of the contract, and not to the remedy merely, it was clear that the law of Illinois must govern.

In Progresso S. S. Co. v. St. Paul F. & M. Ins. Co. 146 Cal. 279, 79 Pac. 967, involving a policy of marine insurance upon two steamboats about to be towed from a point in Michigan to a point in Alaska, the court, without making any reference to the place where the contract was made, held that the construction of the phrases in the policy, "warranted free from all average and salvage," and "actual total loss," should be construed according to the law of California, as the contract provided for performance in San Francisco, that being the place where the policy was payable.

In Ætna Ins. Co. v. Mount, 90 Miss. 642, 15 L.R.A.(N.S.) 471, 44 So. 162, 45 So. 835, it was held that, the contract of insurance being a Louisiana contract, merely brought into Mississippi for the purposes of suit, the question as to whether the violation of the iron-safe clause invalidated the policy as to fixtures as well as goods covered by it should be determined by the law of Louisiana. It is apparent, however, that this case cannot be regarded as authority for anything more than the elimination of the law of the forum as such as the governing law.

In Hardiman v. Fire Asso. of Philadelphia, 212 Pa. 383, 61 Atl. 990, the court apparently assumed that the place where the contract was made would determine whether the law of New Jersey or the law of Pennsylvania should govern in determining the question whether the property became vacant or unoccupied within the meaning of the policy; and, having found that the policy, which was apparently issued by a

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am in good health." In this case the policy was sent from the company's home office in New York to its agent in Nebraska, who delivered the same to the assured upon the payment by her of the first premium, at Plattsmouth, Nebraska, on the 28th day of July, 1905. Applying the principle above quoted to these facts, the contract of insurance in question must be considered a Nebraska, and not a New York, contract.

2. The effect of this statute upon policies of insurance issued by New York companies upon the lives of persons residing in other jurisdictions has been the subject of consideration in the courts of California, Washington, Texas, and the Supreme Court of the United States. Harrigan v. Home L. Ins. Co. 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Griesemer v. Mutual L. Ins. Co. 10 Wash. 202, 38 Pac. 1031, 1034; Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106; Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538. In the California case above referred to, which was decided in August, 1899, it was held that the provision of the New York statute prevented the forfeiture of a policy issued under such circumstances without the notice therein provided for. In each of the other jurisdictions an opposite conclusion was reached. In Mutual L. Ins. Co. v. Cohen, supra, there was a very full consideration of the subject in an opinion by Brewer, J., with the reasoning of which we

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Pennsylvania corporation, became a completed contract in New Jersey, referred the question to the law of that state, without any inquiry as to the place of performance. As a matter of fact, the court was of the opinion that the law of New Jersey was the same as that of Pennsylvania on the point.

In Standard Leather Co. v. Mercantile Town Mut. Ins. Co. 131 Mo. App. 701, 111 S. W. 631, the court assumed that the question as to the effect of an outstanding mortgage on a covenant in an insurance policy, that the contract shall be void if the interest of insured is other than unconditional ownership, would be determined by the law of Pennsylvania, if proven, the insured property being in that state and the insured being domiciled therein, notwithstanding that the policy was issued by a Missouri corporation; but, in the absence of proof of the law of Pennsylvania, it indulged the presumption that it was the same as that of Missouri. (On the general subject as to the course to be pursued when the proper law is not proven, see note to Cherry v. Sprague, 67 L.R.A. 33.

—designation of beneficiaries; insurable interest.

As intimated in the earlier note (63 L.R.A. 856), the question whether a person may properly be designated as a beneficiary in a certificate issued by a mutual benefit association must be determined by the laws of the state in which the association is incorporated. To that effect also is Supreme Lodge, N. E. O. P. v. Hine (Conn.) 73 Atl. 791, holding that such a certificate issued by a Massachusetts association was to be construed in accordance with the law of that state and the charter and general laws of the corporation, even though the certificate was delivered in Connecticut.

So, in Grimme v. Grimme, 198 Ill. 265, 64 N. E. 1088, the Illinois court assumed, without any inquiry as to where the contract was made, that the eligibility of the beneficiary named in a certificate issued by a fraternal association of Missouri must be determined with reference to the statutes of Missouri.

In Pool v. New England Mut. L. Ins. Co. 123 App. Div. 885, 108 N. Y. Supp. 431, the court, having found that the contract was made in New York, held that the law of New York governed the question whether the personal representatives of the wife or of the husband were entitled to the proceeds of a policy issued by a Massachusetts corporation, insuring the life of the husband in consideration of a premium paid by the wife, expressly naming the latter as assured, and providing for the payment of the benefit to her executors, administrators, and assigns, she having predeceased her husband and named him as her executor, sole legatee, and devisee.

In Burns v. Burns, 190 N. Y. 211, 82 N. E. 1108, it was held that the persons entitled to take under a certificate issued by an Ohio corporation to a resident of New York, which stipulated that the contract should be governed by and construed according to the laws of Ohio, which was agreed to be the place of the contract, were to be determined by reference to the statutes of Ohio, notwithstanding that the association had, under a stipulation of the parties, deposited the money in a bank in New York. Though perhaps not important for the purposes of this note, it may be mentioned that the word "heirs" was held to have been used inappropriately in this connection, and was construed to mean not those who would be entitled to take real property under the Ohio statutes, but those who, under its laws, would be entitled to take the personal property in case of intestacy. As authority for thus practically substituting "next of kin" for "heirs," the court cited New York cases, and did not refer to any Ohio case on the point. The court in this case also remarked that the general rule that succession to personal property is governed by the law of the decedent's domicil has no application to a case where, as in the case at bar, the insurance money is distributed solely under a contract of the decedent, and independently of any other consideration except as to any appropriate provision of the laws of Ohio. This remark appears to conflict with

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are satisfied. It does not appear that this question has been before the court of appeals of New York; but the supreme court has lately had it under consideration in a case where a policy was issued and delivered in the state of New York to a person who resided in Chicago, and had no postoffice address in New York. Napier v. Bankers' L. Ins. Co. 51 Misc. 284, 100 N. Y. Supp. 1075. The conclusion there arrived at was that the provisions of the statute only applied to policies issued to persons residing and having a postoffice address in the state of New York. Attention is directed to the use of the words "in this state," which it appears were recently added to the statute by amendment, and it is urged that the use of these words tends to show that the intention of the legislative act was to confine the provisions of this section to policies issued within that state. We are satisfied that the forfeiture must be governed by the law as it exists in Nebraska, and, while it would be well within the jurisdiction of the lawmaking power of this state to enact a similar statute concerning policies upon the lives of the residents thereof, we must hold that, the failure to pay the semiannual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

3. It is contended by the plaintiff that the evidence established a course of dealing, between the agents of the company and the assured, which justified the assured in

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the doctrine of Knights Templars & M. Mut. Aid Asso. v. Greene, 79 Fed. 461, in which, as shown in the earlier note (63 L.R.A. 857), Judge Taft took the position that—subject to the qualification that the language used in the contract to designate the beneficiaries cannot be construed to include persons not belonging to the classes to which the beneficiaries are limited by the laws of the state in which the insurer is incorporated—the question what beneficiaries are intended by a word designating a class, *e. g.*, "heirs," should be determined with reference to the intention of the insured alone (the insurer having no substantial interest in the matter except to see that the benefit is confined to the class of beneficiaries allowed by the law of its incorporation), and, accordingly, that the law of the insured's domicil should govern in the absence of any indication to the contrary. It is apparent, however, that the Burns Case, though in other respects almost identical with the case referred to, is distinguishable therefrom by reason of the express stipulation that the law of Ohio should govern.

In Plant v. Mutual L. Ins. Co. 26 Ohio C. C. 499, the law of Ohio was held to govern with respect to the distribution of a fund under a policy issued in New York by a New York corporation, the application having been made in Ohio, and the policy delivered there, and the premiums paid there.

In Thomas v. Covert (Thomas v. Supreme Lodge, K. H.) 126 Wis. 593, 3 L.R.A. (N. S.) 904, 105 N. W. 922, 5 A. & E. Ann. Cas. 456, where a benefit certificate issued by a Missouri corporation licensed to do business in Wisconsin was issued through a local lodge in Wisconsin of which deceased remained a member until his death, he being a resident of Wisconsin during his membership, it was held that the question as to the intent with which the words "legal heirs" were used in the certificate must be ascertained with reference to what persons are designated as distributees under the laws of Wisconsin; it being further held that those words were presumably intended to designate the persons entitled under the Wisconsin statute to take as distributees of personal property in case of intestacy. It is to be observed that in this case, as in the Greene Case, and unlike the Burns Case, there was no express stipulation in the certificate to the effect that it should be governed by the law of the state in which the association was incorporated.

In Re Peckham (R. I.) 69 Atl. 1002, the court referred the question whether the first wife of the insured, who was designated as beneficiary, took a vested interest which passed to her personal representatives upon her death without issue before the husband, to the law of Connecticut, upon the ground that the contract was made in that state and was to be performed there. It would seem from the recital in the policy that the insured was a resident of Rhode Island.

The effect of the designation as beneficiary of one having no insurable interest in the life of the insured was, in Dolan v. Supreme Council, C. M. B. A. (Mich.) 13 L.R.A.(N.S.) 424, 113 N. W. 10, referred to the law of Michigan, as the place where the contract was consummated, although the association was organized under the laws of another state; and while the decision in this case was overruled on a rehearing in 152 Mich. 266, 16 L.R.A.(N.S.) 555, 116 N. W. 383, because of a mistake as to the true rule of Michigan on the subject, it was still assumed that the law of Michigan governed.

In connection with the question as to the governing law as to beneficiaries, attention should, perhaps, be called to the Missouri cases, which hold or assume that, in determining whether an insurance company incorporated in another state, and which has complied with the conditions of doing business in Missouri, is entitled to be regarded as a fraternal benefit association, entitled as such to the privileges of local associations of that character and to the exemption extended to them from certain provisions of the general insurance law, the question as to who may become beneficiaries of the foreign association must be determined by the law of the state in which it is organized. See Blatzell v. Modern Woodmen,

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waiting until the agent called at the house to collect the premium. It appears that the company issued in this locality a kind of policy called the industrial, in amounts of $50 to $200, upon which the premiums were paid by weekly instalments. By the express terms of these industrial policies, the agents of the company were required to go to the home of the assured and collect the premium; and the evidence established that the custom was not to strictly enforce the rule requiring the premiums the day they became due, the assistant superintendent having authority to extend the time, provided that he saw the assured personally and found him in good health. No such custom nor practice was established in reference to the class of policies sued upon, and the policy under consideration contained the provision that none of its terms could be varied or modified, nor any forfeiture waived, or premiums in arrears received, except by agreement in writing signed by either the president, vice president, secretary, or assistant secretary, whose authority for that purpose was not to be delegated. The evidence shows that all the premiums paid on the policy were paid to agents of the defendant by Frank McElroy, the father of the assured, at his place of business in Plattsmouth. Only two premiums were ever paid, and one of these was that paid at the time the policy was delivered. There was no promise on the part of the agent to waive the forfeiture or postpone the payment, unless the same

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98 Mo. App. 153, 71 S. W. 1071; Dennis v. Modern Brotherhood, 119 Mo. App. 210, 95 S. W. 967; Pauley v. Modern Woodmen, 113 Mo. App. 473, 87 S. W. 990. The question, however, considered in these cases, as to the conditions necessary to entitle the foreign association to the benefit of the peculiar privileges and exemptions extended to local fraternal benefit associations, is not deemed to be within the scope of this note.

Assignment.

The general principle stated in the earlier note (63 L.R.A. 858), that an assignment of the policy of insurance is a contract distinct and separate from the original contract of insurance, and is governed by the law of the place where it (the assignment) is made, without reference to the law of the place where the original contract of insurance was made, or to the law governing that contract, is further supported by Russell v. Grigsby, 168 Fed. 577, and Miller v. Manhattan L. Ins. Co. 110 La. 651, 34 So. 723.

So, in Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139, where the policy was made and to be performed in New York and the assignment by the insured to his wife was delivered to the company in that state, it was held that whether the assignment invested her with the legal title depended on the laws of New York, but that, as both were domiciled in Massachusetts, the question whether a full title passed as between them depended on the laws of Massachusetts regulating the marriage relation, and also on the effect of the want of delivery to her of either the policy or the assignment.

As to notice; forfeiture; extended insurance.

As shown in the earlier note (63 L.R.A. 862 et seq.), there is considerable variation among the cases as to the governing law with respect to notice as a condition of forfeiture for nonpayment of premiums, though those variations are due in a large measure to the differences in the facts. As there shown, in the absence of any express stipulation upon the subject, the governing law in that respect is, according to the weight of authority, the law of the state where the contract is consummated, and not the law of the state in which the insurer is incorporated. That is substantially the position taken in McELROY v. METROPOLITAN L. INS. CO.

In Cowen v. Equitable Life Assur. Soc. 37 Tex. Civ. App. 430, 84 S. W. 404, the court also expressed an opinion to the effect that the New York statute prohibiting forfeitures for nonpayment of premiums, unless written notice shall have been duly addressed to the insured, would not apply to a policy of insurance issued by a New York corporation, it having been found that the contract was consummated in Texas, although, as a matter of fact, the court was of the opinion that in any event the notice of the premium in this instance was sufficient to answer the requirements of the New York statute.

So, in Nall v. Provident Sav. Life Assur. Soc. (Tenn. Ch. App.) 54 S. W. 109, where, to use the language of the court, "the policy shows on its face that it was executed in the city of New York," it was held that the New York statute as to notice, in force at the time the policy was issued, became a part of the contract and governed its provisions. Here, again, the court apparently assumed that the policy became a contract in New York, although from the recital of the policy it appears that the insured was a resident of Alabama.

The assumption in Germania L. Ins. Co. v. Peetz (Tex. Civ. App.) 47 S. W. 687, that the New York statute with respect to notice would govern, may, like some of the cases cited in the earlier note, be accounted for by an express stipulation in the application, that New York was the place of the contract.

In Harrigan v. Home L. Ins. Co. 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, however, the court said that the insurance company was located in the state of New York, and it was agreed that the policy was a contract which was to be performed in that state.

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might be inferred from the testimony of Frank McElroy, which shows that, in the latter part of January or first of February, he had a conversation with Mr. Davies, the agent of the defendant, in which he said, when asked what Mr. Davies's exact words were: "The way I understood it when I spoke to him about it, he said it would be all right to keep the other money and give it to him altogether. Afterwards he came to the shop, and said he didn't know about that, and he asked me for my daughter's address, and I told him I didn't have it. I told him then, if he insisted on the money to go up and see my wife, as it was no benefit to me anyhow. She had money." It appears that it was the practice of the company to send receipts to its local agents before a premium became due, and that the agent was authorized to deliver such receipt upon payment of the premium at any time within thirty days of the date upon which the same had become due. In case of nonpayment of the premium within that period, the agent was required to immediately return the receipt to the home office, and was without any authority to accept the premium thereafter without further instructions. The date of the above conversation is not very definite, but we will assume that it was before the expiration of the thirty-day period. The evidence does not seem to us sufficient to sustain a finding that the agent did agree to give the time beyond the expiration of this period for the payment of the premium. Whether he did or

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and seems to have assumed that that in itself would have been sufficient to subject the contract to the law of New York with respect to notice, and that an express waiver of notice was ineffectual. The opinion considered at length the question whether the contract was consummated in New York or California, and finally decided that it was consummated in New York; but this point seems to have been considered in passing upon the question whether the policy was to be considered as a "writing executed out of this state," for the purposes of the California statute of limitations.

As shown in the earlier note (63 L.R.A. 863), it was held in Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538, that, even assuming that a general declaration in a contract of life insurance that it was to be held and construed to have been made in New York would, if there was nothing else, make controlling all the applicable statutes of that state with respect to notice, its effect, so far as notice was concerned, was overcome by another stipulation in the contract, which amounted to an admission by the insured of the receipt of every notice in respect of payment of premiums which could be implied from any other part of the policy or required by statute. This doctrine was followed by the Texas supreme court in Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031, although, so far as appears, there was not an express stipulation in the policy in that case referring it to the law of New York, and the contract was made in Texas. The doctrine, however, was invoked by the court in answer to the contention that the law of New York, as the law of the place of performance of the contract, should govern.

So, in Mutual Reserve Fund Life Asso. v. Minehart, 72 Ark. 630, 83 S. W. 323, the effect of an express stipulation in a contract of life insurance consummated in New York, that it should be governed by and construed according to the laws of New York, was held to be counteracted, so far as the New York statute with reference to notice was concerned, by a special and express provision on the subject of notice.

It will be observed that, both in the Bradley Case and in McElroy v. Metropolitan L. Ins. Co., the contract was deemed to have been consummated, outside of New York, in the first case in Texas, and in the latter Nebraska. Nor, so far as appears, was there in either case an express stipulation declaring New York to be the place of the contract, or providing that the contract should be governed by the law of New York; while the stipulation to that effect in Mutual L. Ins. Co. v. Hill, supra, was counteracted by other provisions already referred to.

It may perhaps be questioned whether the point made in these cases (which is supported by the decision in Napier v. Bankers' L. Ins. Co. 51 Misc. 284, 100 N. Y. Supp. 1075), to the effect that the New York statute in respect of notice, by its terms or by construction of the courts of that state, is inapplicable to persons not having a postoffice address in that state, would necessarily lead to the conclusion that the provisions of that statute would be inapplicable in case of a contract (containing no inconsistent provision) expressly stipulating that the law of New York shall govern even though the insured was a resident of another state and had no postoffice address in New York, since it would be at least possible to take the view in such a case that the parties had expressly adopted the provisions of the statute in respect of notice as a part of their contract, irrespective of the fact that the statute as such might be inapplicable to such a situation. In any event, the point as to restricted application of the New York statute, even if it were to be conceded to apply to the case just supposed, would not militate against the general proposition that the law of New York should govern, but would merely bear on the question what the law of New York as applied to the particular situation is. In other words, when, under the operation of the general principles of private international law, the contract is referred to the law of New York and the law of that state is consulted on the point in question, it might be found that that law

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not, it is clear that he had no authority to make any such agreement. We think the restriction upon the power of agents to waive the forfeiture of the policy is binding. Hartford F. Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 779. The witness McElroy relates another conversation with the agent, Mr. Davies, as follows: "The next time I seen him was about the 18th or 19th. That was after getting a despatch from Chicago, calling me there on account of my daughter's sickness. I met him there, and, 'Now,' I says, 'if you have got that receipt, I have got the money in my pocket,' and he said, 'No,' but he would get my receipt the next week." This conversation was after the agent had returned to the home office the receipt, at the end of the period of thirty days, and when he neither had, nor pretended to have, authority to accept the payment of the premium. The offer of McElroy to pay at this time could have no effect, unless the time of payment of the premium had been extended by the former conversation. As we have seen, the agent had no authority to make that extension. The district court did not therefore err in refusing to submit this question to the jury, and in directing a verdict for the defendant.

We therefore recommend that the judgment of the district court be affirmed.

Duffie, Epperson, and Good, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

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contained no express provision on the subject of notice applicable to the particular case in hand. This circumstance, however, would not justify the formulation of a new principle (at least not a substantive principle) referring the question of notice to the law of the place of the insured's residence as such. This is illustrated by the result in Napier v. Bankers' L. Ins. Co. 51 Misc. 283, 100 N. Y. Supp. 1072 (supra), where the court, having found that the contract in question was a New York contract, although the insured was a resident of Ohio, held that it must be governed by the laws of New York; although, when the court came to consult the law of that state, it apparently found no provision at all with respect to notice, and therefore held that no notice was necessary, the statutory provision on that subject not being applicable, because the insured did not have a New York address. It may be, however, that a court of another state in which the insured resided, upon becoming convinced that the New York statute, by its terms or by judicial construction, is limited to cases where the insured had a New York address, might be inclined to apply its own statute relating to notice, assuming that it had one, upon the ground of public policy, notwithstanding an express stipulation referring the contract to the law of New York. The distinction between referring such a result to a substantive principle of private international law and referring it to the exception, inherent in all such principles, that the court may give effect to its own distinctive public policy, may, perhaps, seem somewhat academic and unimportant, when the action is brought in a court of the state in which the insured resided; but the importance of the distinction is apparent if the action happens to be brought in a third state, especially one which has no statutory provision in respect of notice.

See also, supra, "Laws of state of incorporation as limitation upon powers of insurance company."

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Paid-up or extended insurance.

See also earlier note, 63 L.R.A. 862 et seq.

In Nielsen v. Provident Sav. Life Assur. Soc. 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168, the court said that the statute of New York as to the application of the reserve fund to the purchase of a paid-up policy, or the continuance of the policy for the full amount for a limited time, must be considered as a part of the contract of insurance, and inserted, for the purpose of a construction of the policy, as an additional provision, with the same effect as if it had been originally incorporated therein. Whether this holding was by virtue of an express stipulation in the policy referring it to the law of New York, or because of the fact that the contract was made in New York, does not appear from the report of the case.

In Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935, the Missouri statute as to extended insurance was applied to a policy of insurance issued by a New York company upon the life of a resident of Missouri, the application having been made to an agent of the insurer in St. Louis and the policy issued there.

So, in Whittaker v. Mutual L. Ins. Co. 133 Mo. App. 664, 114 S. W. 53, the Missouri statute on this subject was applied to a policy issued by a New York company to a resident of Missouri. The court said that the contract, being a Missouri contract, was governed by the laws of that state. But whether or not the contract was actually consummated in Missouri does not appear, and the decision may have been rested upon the ground that the foreign corporation was doing business generally within the state, without reference to the place where the particular contract in question was consummated.

In Moore v. Northwestern L. Ins. Co. 112 Mo. App. 696, 87 S. W. 988, the Missouri statute, which provides for extended insur-

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ance after the payment of three annual premiums, was held applicable to a policy issued by a Minnesota corporation which was doing a general insurance business in Missouri, the policy having been issued to the insured while in the latter state, notwithstanding that, by the terms of the policy, the insured was not entitled to extended insurance until after the expiration of five years, and then only for a period of six months. The court said that the company was permitted to do business in Missouri upon condition that it should be governed by her laws, and that the section in question as much a part of its contract as if written in the policy in place of the provisions therein regarding nonforfeiture.

In Provident Sav. Life Assur. Soc. v. Bailey, 118 Ky. 36, 80 S. W. 452, the court said that the basis of computing extended insurance under a policy issued by a New York corporation must be determined by the written contract which the parties made, unaffected by subsequent legislation in New York, remarking that the New York statutes on that subject had no extraterritorial effect, and were not retrospective.

As to effect of misrepresentation in application.

See earlier note in 63 L.R.A. 864.

In Fidelity Mut. L. Ins. Co. v. Miazza (Miss.) 46 So. 817, where the policy was issued by a foreign corporation upon the life of a resident of Mississippi, the court held that the question as to the necessity that a misrepresentation in the application shall have been material, in order to avoid the policy, as well as the effect of a truthful but mistaken answer on a material point, would be determined by the law of Mississippi. This, however, was by virtue of an express declaration in the Mississippi statute that all contracts of insurance on property, lives, or interest in this state, should be deemed to be made therein.

In Mutual L. Ins. Co. v. Mullan, 107 Md. 457, 69 Atl. 385, the court applied the Maryland statute providing that no misrepresentation or untrue statement in the application made in good faith shall bar recovery, unless it relates to some matter material to the risk, notwithstanding an express stipulation in the policy that it should be subject to the charter of the company and to the laws of New York, upon the ground that it was contrary to the public policy of Maryland to permit a contract of insurance made in that state with a citizen of that state, since the passage of the act in question, to be governed by the harsh rules of the common law presumptively in force in New York.

Upon the same ground, the Pennsylvania court in Keatley v. Travelers' Ins. Co. 187 Pa. 197, 40 Atl. 808, applied a similar statute of Pennsylvania, notwithstanding a stipulation in the policy that it should be held of Connecticut issue and construed solely by reference to Connecticut laws.

In Owen v. Bankers' L. Ins. Co. (S. C.) 66 S. E. 290, supra, a statutory provision of South Carolina that a life insurance company, by the receipt of premiums for two years, shall be deemed to have waived any right to dispute the truth of an application for insurance or allege that the insured had made false representations, was applied to a policy issued by a New York company on the life of a resident of South Carolina, notwithstanding that the contract expressly provided that it should be subject to the laws of New York; but this was in consequence of another express statutory provision in South Carolina declaring that the place of making and performance of such a contract shall be deemed and held to be within South Carolina.

In Leonard v. State Mut. Life Assur. Co. 27 R. I. 121, 114 Am. St. Rep. 30, 61 Atl. 52, the court, while holding that the Rhode Island statute to this effect was not applicable, because it was passed after the issuance of the policy in suit, held that the policy, having been issued in Massachusetts by a Massachusetts company, and to be executed there, was subject to the Massachusetts laws to the same effect.

Cases like Pauley v. Modern Woodmen, 113 Mo. App. 473, 87 S. W. 990, and Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 S. W. 1130, are not deemed to be within the scope of this note, since they merely deal with the question whether foreign associations doing business in Missouri were entitled to the special privileges extended by the Missouri statute to fraternal benefit associations, including exemption from the general law regulating insurance, to the effect that no misrepresentation made in securing a policy shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to a loss on the policy. It will be observed that the question here was simply which law of Missouri should apply, and not whether the law of Missouri or of some other state should govern, although in the latter case the court did remark, in connection with the statement that there was no suggestion that, under the law of Connecticut, where the association was organized, it had no power to make the statements warranties and of the essence of the contract, that in the case of mutual associations the court may look to the law of their home state for the effect to be given to their contracts.

Suicide.

See earlier note in 63 L.R.A. 867.

In Tuttle v. Iowa State Traveling Men's Asso. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131, the court apparently assumed that the question whether suicide not contemplated at the time of the application would constitute a defense was to be determined by the law of the place where the contract was consummated; and in this case the court, having found that the contract was consummated in Iowa, where the company was incorporated, and not in

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Missouri, where the insured apparently resided, held that the law of the latter state precluding the defense of suicide under such circumstances was inapplicable.

The reason given in the last subdivision for excluding cases like Pauley v. Modern Woodmen, supra, applies equally to cases like Herzberg v. Modern Brotherhood, 110 Mo. App. 328, 85 S. W. 986, and Dennis v. Modern Brotherhood, 119 Mo. App. 210, 95 S. W. 967, passing upon the question whether the Missouri statute, applicable to contracts of life insurance generally, which precludes the defense of suicide, unless insured contemplated suicide at the time of taking out the policy, or the special statute which permits such defense to fraternal benefit societies which answer to the description of such societies given in the Missouri statute—applied to contracts of foreign insurance associations which had complied with the conditions of doing business in Missouri. Here again it will be observed the question is not whether the law of Missouri or some other state governs, but which of two rules of law in Missouri is applicable.

As to the governing law with respect to the right of the beneficiaries to recover under an insurance policy where the insured was legally executed for crime, see McCue v. Northwestern Mut. L. Ins. Co. 167 Fed. 435, supra.

Necessity of attaching application or copy thereof to policy.

See earlier note in 63 L.R.A. 867 et seq.

The case of Provident Sav. Life Assur. Soc. v. Hadley, 43 C. C. A. 25, 102 Fed. 856 (writ of certiorari denied in 179 U. S. 686, 45 L. ed. 386, 21 Sup. Ct. Rep. 919), cited in the earlier note (63 L.R.A. 867), was followed in Manhattan L. Ins. Co. v. Albro, 62 C. C. A. 213, 127 Fed. 281 (writ of certiorari denied in 194 U. S. 633, 48 L. ed. 1159, 24 Sup. Ct. Rep. 857), holding that the Massachusetts statute providing in effect that, unless a correct copy of the application is attached to the policy, it shall not be considered a part of the policy or received in evidence, applied in an action in Massachusetts to recover from a New York life insurance company upon an insurance contract completed in Massachusetts.

Contractual limitation.

See also earlier note in 63 L.R.A. 868.

In Roberts v. Modern Woodmen, 133 Mo. App. 207, 113 S. W. 726, where a policy was issued by a fraternal benefit association of Illinois, to a person then a resident of Illinois, the certificate being delivered in that state, the validity of the stipulation in the certificate limiting the time for bringing an action thereon was held to be governed by the law of Illinois, and not by the law of Missouri, although the action was brought in the latter state and the association in question was authorized to do business therein as a fraternal beneficiary association.

Remedy for anticipatory breach.

In Michaelsen v. Security Mut. L. Ins. Co. 150 Fed. 224 (an action in a Federal court sitting in Pennsylvania), where the contract expressly stipulated that it should be governed and construed according to the laws of New York, it was held that the law of New York would govern with respect to the remedy of the insured in case of an anticipatory breach of the contract by the company; and that, if the law of New York in such a case requires the plaintiff to file a bill to compel the insurance company to continue the contract, then the plaintiff is bound by that law, notwithstanding that the suit was brought in another state. The court conceded that such matters as the bringing of suit, admissibility of evidence, and statute of limitations, which are merely matters of remedy, depend on the law of the forum, but apparently regarded the question as to the nature of the remedy as pertaining to the substantive rights of the parties, and not to the remedy in the sense in which the law of the forum governs as to matters of remedy. This case was reversed (83 C. C. A. 334, 154 Fed. 356, 12 A. & E. Ann. Cas. 37) upon the ground that law of New York permitted an action for damages under such circumstances.

NEW MEXICO SUPREME COURT.

ANNA JASPER
v.
MIRA M. WILSON et al., Appts.

(— N. M. —, 94 Pac. 951.)

Sale — contract — agent's authority.

1. Power to make a binding contract for sale of real estate is conferred on a broker by an owner residing in a foreign country, who intrusts to his discretion the subject-matter of the amount to be paid for the property, requesting him to do the best he can, and receive the purchase money and apply it in satisfaction of the grantor's debts.

Same — extent of power.

2. Authority conferred on a real estate broker to make a binding contract for the sale of land includes power to bind the

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Case Note. — Power of real estate broker to make a contract of sale.

A full discussion of this question may be found in a case note to Weatherhead v. Ettinger, 17 L.R.A.(N.S.) 210.

As was said in that note and supported by a number of cases, since it is generally conceded that the only duty of a real estate broker is to find a purchaser who is ready, willing, and able to purchase upon the terms specified, the overwhelming weight of authority is that the intention on the part of an owner of property to empower a real estate broker to make a binding contract of sale is not inferred except from the use of

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grantor to execute covenants of general warranty and furnish an abstract of title.

Same — exceeding authority — waiver — enforcement.

3. Although a broker for sale of real estate exceeds his authority in contracting to furnish a warranty deed and abstract of title, the grantee may waive such requirements, and enforce the contract as one providing for a bare transfer of title.

Same — privies — enforcement.

4. Persons who purchase real estate, with notice of a binding contract on the part of the grantor to convey to another, may be compelled to honor the former contract.

Contract — receipt — mutuality.

5. A contract for sale of real estate, embodied in a receipt reciting payment of a portion of the purchase money, and the amount and time of payment of the balance, is not unenforceable against the grantor, as lacking in mutuality.

(February 26, 1908.)

APPEAL by defendants from a decree of the District Court for Bernalillo County enforcing specific performance of a contract to sell real estate. Affirmed.

The facts are stated in the opinion.

Mr. Neill B. Field, for appellants:

The broker had no authority to bind his principal to furnish an abstract of title at his own cost.

Balkena v. Searle, 116 Iowa, 374, 89 N. W. 1087; Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964.

Written authority to a real estate broker to sell and receive a deposit thereon does not authorize the broker to execute a contract which will bind his principal.

Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758; McCullough v. Hitchcock, 71 Conn. 404, 42 Atl. 81; Carstens v. McIlvaiy, 1 Wash. 359, 25 Pac. 471; Sullivant v. Jahren, 71 Kan. 127, 79 Pac. 1071; Helling v. Darby, 71 Kan. 107, 79 Pac. 1073; Cadigan v. Crabtree, 186 Mass. 7, 66 L.R.A. 982, 104 Am. St. Rep. 543, 70 N. E. 1033; Gestring v. Fisher, 46 Mo. App. 603; Ingold v. Symonds, 125 Iowa, 82, 99 N. W. 713; Stillman v. Fitzgerald, 37 Minn. 186, 33 N. W. 564; Keim v. O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073.

Defendants Walker, Lester, and Jackson were guilty of no inequitable conduct, and therefore could not be held to have taken title as trustees for the plaintiff.

Pom. Eq. Jur. ¶ 1053; 1 Story, Eq. Jur. § 187; Moore v. Crawford, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447; Huxley v. Rice, 40 Mich. 73; Ware v. Egmont, 4 DeG. M. & G. 473; Trinidad v. Milwaukee & T. Smelting & Ref. Co. 11 C. C. A. 479, 27 U. S. App. 469, 63 Fed. 887; Wilson v. Miller, 16 Iowa, 115; Bugbee's Appeal, 110 Pa. 338, 1 Atl. 273; Townsend v. Little, 109 U. S. 511, 27 L. ed. 1014, 3 Sup. Ct. Rep. 357.

A proper case for relief by a judgment for specific performance is not established.

Willard v. Tayloe, 8 Wall. 566, 19 L. ed. 503; Hennessey v. Woolworth, 128 U. S. 442, 32 L. ed. 501, 9 Sup. Ct. Rep. 109; Merritt v. Wassenich, 49 Fed. 788; Columbia College v. Thacher, 87 N. Y. 317, 41 Am. Rep. 365; Mansfield v. Sherman, 81 Me. 370, 17 Atl. 300; Burkhalter v. Jones, 32 Kan. 5, 3 Pac. 563.

The contract was lacking in mutuality.

Norris v. Fox, 45 Fed. 406; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955; Duff v. Hopkins, 33 Fed. 599; Borel v. Mead, 3 N. M. 39, 2 Pac. 222; Couch v. McCoy, 138 Fed. 696.

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unequivocal expressions to that effect; and that the employment of a real estate broker as such, or the mere listing of property with him, or the direct instruction to find a purchaser, or any communication from the owner to the broker with respect to the sale of land, will be regarded as giving the agent only the authority to find a purchaser, and that no wider power than that is necessarily indicated by the words "to sell," or "make a sale." Among the cases decided since the date of that note, the following also support the above rule: Ross v. Craven (Neb.) 121 N. W. 451 (letter merely stating terms of sale); Lichty v. Daggett (S. D.) 121 N. W. 862 (letter stating that property was for sale and giving terms); Hutchins v. Wertheimer, 51 Wash. 539, 99 Pac. 577 (answer, upon inquiry, that owner was willing to dispose of property at the price stated); Hardinger v. Columbia, 50 Wash. 405, 97 Pac. 445; Lawson v. King (Wash.) 104 Pac. 1118 (letter stating price and time allowed for selling).

This was also recognized in Watters v. Dancey (S. D.) 122 N. W. 430, and Flegel v. Dowling (Or.) 102 Pac. 178.

However, in Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71, it was held that a contract with a firm of real estate brokers, containing such phrases as to sell "for me," "in my name," and "I agree to sell and convey by a good and sufficient grant, bargain, and sale deed, and give the usual covenants therein to any purchaser obtained by said company," with other various circumstances, indicated an intention on the part of the property owners to empower the real estate brokers to make a binding contract of sale.

In Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011, it was held that a letter promising a payment of commissions upon the condition that brokers should close a sale of the lands at the price and upon the terms particularly specified therein made out a contract for the sale of the property, and not merely a contract to find a purchaser.

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Messrs. **Klock & Owen**, for appellee:

The broker was authorized to execute a valid contract, to deliver it, and to receive the purchase price.

Haydock v. Stow, 40 N. Y. 363; Story, Agency, §§ 210, 211, 217; Moore v. Moore, 5 N. Y. 256, affirming 4 Sandf. Ch. 37; Torrey v. Bank of Orleans, 9 Paige, 649, affirmed in 7 Hill, 260; Smith v. Allen, 86 Mo. 178; Stewart v. Wood, 63 Mo. 256; Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265; Johnson v. Dodge, 17 Ill. 441; Lawrence v. Taylor, 5 Hill, 107; Hawkins v. Chace, 19 Pick. 502; Pringle v. Spaulding, 53 Barb. 17; 2 Parsons, Contr. 291; Winch v. Edmunds, 34 Colo. 359, 83 Pac. 632; McNeil v. Shirley, 33 Cal. 202; Johnson v. McGruder, 15 Mo. 365; West v. Mills, 83 App. Div. 629, 82 N. Y. Supp. 473; McCarty v. Stanfill, 19 Ky. L. Rep. 612, 41 S. W. 278; Weaver v. Snively, 73 Neb. 35, 102 N. W. 77.

The authority conferred by the letter included the right on the part of the broker to bind the owner to give a deed of warranty and abstract of title, as agreed in the contract.

Schultz v. Griffin, 121 N. Y. 294, 18 Am. St. Rep. 825, 24 N. E. 480; LeRoy v. Beard, 8 How. 451, 12 L. ed. 1151; Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671; Vanada v. Hopkins, 1 J. J. Marsh, 293, 19 Am. Dec. 92; Taggart v. Stanbery, 2 McLean, 543, Fed. Cas. No. 13,724; Rawle, Covenants, § 20, note.

The contract was valid.

Borel v. Mead, 3 N. M. 39, 2 Pac. 222; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Re Hunter, 1 Edw. Ch. 5; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Tripp v. Bishop, 56 Pa. 424; Smith's Appeal, 69 Pa. 474; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

The plaintiff was entitled to the decree of specific performance.

Losee v. Morey, 57 Barb. 564; Willard, Eq. Jur. 279, 280; Story Eq. §§ 746, 751; Hall v. Warren, 9 Ves. Jr. 608; Greenaway v. Adams, 12 Ves. Jr. 400; Seymour v. Delancy, 3 Cow. 445, 15 Am. Dec. 270; Bowen v. Irish Presby. Congregation, 6 Bosw. 245; Best v. Stow, 2 Sandf. Ch. 298; Brown v. Haff, 5 Paige, 235, 28 Am. Dec. 425; Phyfe v. Wardell, 5 Paige, 268, 28 Am. Dec. 430; Crary v. Smith, 2 N. Y. 60; 4 Pom. Eq. Jur. 3d ed. § 1402, p. 2761.

The defendant Walker could not have demanded of the owner the specific performance of any contract for the sale of the lots, even if one binding on the owner had been made, as the defendant Walker entered into a contract and took the property with notice of the right and equity of the plaintiff.

Atcherley v. Vernon, 10 Mod. 518; Daniels v. Davison, 16 Ves. Jr. 249; Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019; Ash v. Hare, 73 Me. 401; Connihan v. Thompson, 111 Mass. 270; Hayward v. Kane, 110 Mass. 273; Page v. Martin, 46 N. J. Eq. 585, 20 Atl. 46.

A vendee or assignee who takes with notice of prior equities will be required to perform the contract of his vendor or assignor.

Flagg v. Mann, 2 Sumn. 551, Fed. Cas. No. 4,847; White v. Mooers, 86 Me. 62, 29 Atl. 936; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544; Palmer v. Palmer, 114 Mich. 509, 72 N. W. 322; Williamson v. Brown, 15 N. Y. 354; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239; Tuttle v. Jackson, 6 Wend. 213, 21 Am. Dec. 306; Whitbread v. Boulnois, 1 Younge & C. Exch. 303; United States v. San Pedro & C. & del A. Co. 4 N. M. 590, 17 Pac. 337.

Parker, J., delivered the opinion of the court:

This is a suit for specific performance of a contract for the sale of real estate. The contract is in the following form:

Albuquerque, N. M., Nov. 16, 1904.

Received from Mrs. W. V. Jasper the sum of $100 as part payment on the west ninety-four and two-thirds (94⅔) of lots 10, 11, and 12 in block 44 of the Huning's Highland addition to the city of Albuquerque, New Mexico, the purchase price to be eight hundred dollars ($800), the balance to be paid on the delivery of a good and sufficient warranty deed and abstract of title.

A. Fleischer,
Agent for Mrs. Mira M. Wilson.

Fleischer was a real estate broker in the city of Albuquerque, and wrote the defendant Wilson as follows:

October 19th, 1904.

Mrs. M. M. Wilson,
Salazer, State of Mexico, Mexico.

Dear Madam:—

I have an offer of $700.00 for your lots on the northeast corner of Railroad avenue and High street. This is a cash proposition. Kindly let me know at once whether you will be willing to accept that offer. While this is not as much as you had expected to get, I would urge you strongly to accept the amount in view of the fact that there is a likelihood of cement walks being ordered before long on both sides, which would mean

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an expenditure of about $250.00. Please let me hear from you without delay and oblige.

Yours respectfully.

The defendant Wilson replied as follows:

Salazar, State of Mexico,
October 23d, 1904.

Mr. A. Fleischer,
Albuq., N. M.

Dear Sir:—

Your favor of the 19th inst. just at hand. I am at a loss what to reply. I could have got $1,000 cash less commission when I was at Albuq., but I asked $1,000 net. And if the little lot brought $500.00, it seems to me the big one should be worth at least $1,000.00. But if it is going to be necessary to put down cement walk at a cost of $250.00, I suppose it would be best to sell before then. The Moore Real Estate Co. had a customer for them, and I thought there would have been a sale before now. If the walks are to be ordered, and you cannot get more than $700.00, I expect it will be best to accept it. Yet it looks like giving them away. However, do the best you can for me. If you sell, apply the money on the Rosenwald debt. Send the new interest notes to me for signature, and fix all other matters as you think best. Thanking you in advance for your attention advice, I remain.

Very respt'ly,
Mira M. Wilson.

After receiving the letter of October 23, 1904, from the defendant Wilson, Fleischer negotiated a sale of the property in question, and executed the contract above set out. On the same day he wrote the defendant Wilson as follows:

Albuquerque, N. M., Nov. 16th, 1904.

Mrs. Mira M. Wilson,
Salazar, Mexico.

Dear Madam:—

. . . I herewith inclose warranty deed for the R. R. Ave. lots, which you will please have properly signed by yourself and husband before a U. S. commissioner of deeds. You may then return it to me or to the bank, with proper instructions. You will have to pay the first half of the 1904 taxes and also furnish an abstract. You will notice that I got $100.00 more for it than I offered you in my last letter. I turned the other party down and tried it again with the above result. My commission will be $40. We will have to apply most of the proceeds on the mortgage, so that I can get a release. Hoping that this is satisfactory to you and that you will give this matter your prompt attention, I am, with kind regards,

Very respectfully yours.

To this letter the defendant Wilson replied as follows on November 22d:

Salazar, State of Mexico,
November 22d, 1904.

Mr. A. Fleischer,
212½ S. 2d St.,
Albuquerque, N. M.

Dear Sir:—

Your favor of the 16th inst. with inclosure just received. I had just started a letter to you, which explains itself. Am sorry you are short of money for taxes. Of course, take amount from proceeds of sale. Hope, however, you will be able to collect soon and get in better tenants. I cannot understand why you send this deed for my signature, and so will hold it to hear from you again. When you sold the other lot the deed and transfer was made by Rosenwalds, who held it by deed of trust, the same as they still hold this one. Had you not overlooked that fact? You remember all I done was to pay for the recording of the satisfaction of mortgage or release. I would go on and sign the deed anyway, but it would cost me $40,00 to do so. Mr. Wilson would have to lay off and lose so much time, which together with our expenses would be no small amount. As I did not sign a deed for the other transfer, and as Rosenwalds do hold deeds of trust for the property, I thought perhaps it would be unnecessary to do so, and I now await your further instructions. I will attend to it at once if necessary. I am sorry you could not realize more on the lots, but hope all will come out right any way. Apply what you need to on the mortgage. I suppose you can apply $700.00. Pay taxes 1st ½ 1904 $31.25, your commission $40,00, pay for abstract and what little is left deposit to my credit. Have new notes for interest drawn and send to me for signature. And if you will kindly tell me if you think it advisable to put the remaining debt into the building and loan, or lease it as it is? Trusting that I make you no unnecessary delay by not signing the deed before asking questions, I remain,

Very respt'ly,
Mira M. Wilson.

1. Counsel for defendants earnestly insists that these letters did not authorize the agent Fleischer to bind the defendant Wilson by a contract to sell her land. Under the view which we take of the scope of the power conferred upon the agent Fleischer by the correspondence above quot-

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ed, it becomes unnecessary for us to define the exact limits of the power of an ordinary real estate broker. Whether the ordinary power to sell is a power merely to find a purchaser and bring him to the principal, or whether it includes a power to make a binding contract of sale, it is not necessary to decide; but we do hold that the power conferred upon the agent in this case was an enlarged power, and a power sufficient to enable him to make a binding contract of sale. This clearly appears from the circumstances in which the parties were situated, the terms employed in the letters, and all the facts surrounding the transaction. The owner was a resident of Mexico, a long distance from the city of Albuquerque. She intrusted the subject-matter of the amount to be paid for the property to the discretion of her agent. She requested him to do the best he could for her, to receive the money, and to apply it to the payment of her debts. At the time she conferred the power she intended to surrender all further dominion over the property, and believed that she had clothed the agent with ample power, not only to contract for the sale of the property, but even to pass the title to the purchaser. Under such circumstances the power conferred is an enlarged power, and much beyond that ordinarily conferred upon a real estate broker, and is sufficient to authorize the agent to contract for the sale of the land. Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265; Rutenberg v. Main, 47 Cal. 213; Smith v. Allen, 86 Mo. 178; Weaver v. Snively, 73 Neb. 35, 102 N. W. 77. We therefore hold that the agent in this case was clothed with the power to make a binding contract of sale.

2. Conceding that the agent was clothed with power to make a binding contract upon his principal to convey her title to the plaintiff, still it is urged by counsel for the defendants that the power did not include the power to contract for a deed with covenants of general warranty and for an abstract of title. Proof of custom or usage was relied upon by plaintiff to supplement the power directly conferred, and thus sustain the power to contract for general warranty of title and abstract of title. We have examined the record and must say that the proof of custom or usage is very unsatisfactory, and whether the same was established is very doubtful. But, assuming that there was no sufficient proof of custom or usage, or, assuming that usage or custom was inadmissible as supplementing the power, still we believe that the great weight of authority is to the effect that a power to sell and make a binding contract of sale implies a power to contract for a conveyance with general warranty. 2 Page, Contr. § 963; Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92; Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151; Mechem, Agency, § 322. But, assuming that the power conferred upon the agent in this case did not include the power to contract for abstract of title and conveyance by deed with general warranty, there is another principle, it seems to us, which is controlling in this case. It is a well-recognized principle of equity that a vendee, in an action brought by him for specific performance of a contract may waive the performance on the part of the vendor of portions of his contract, and may elect to take a partial performance, if he himself is willing to fully perform. This doctrine has been most frequently applied in those cases where the vendor has found himself unable to fully comply as to the amount of land contracted for, or as to the land being free from encumbrances. We can see no reason, however, why the doctrine should not likewise be applied to a case like this one, where, assuming the agent has exceeded his power, the vendee elects to take partial performance. The vendee, plaintiff in this case, has taken a decree of the court below devesting the title of the vendor, and vesting it in plaintiff. It is to be assumed that the vendee took this decree without objection, and it must be held in this court to amount to an election or waiver of full performance by the vendor. The only case we have been able to find in which this principle has been specifically applied to a state of facts like those in the case under consideration is the case of Vanada v. Hopkins, above cited. See also Hammond v. Michigan State Bank, Walk. Ch. (Mich.) 214. A similar doctrine is often applied. Thus, a purchaser may elect to take a defective title; or he may elect to take a part of the land less a homestead; or he may elect to take subject to a mortgage, and take decree so as to protect against it. See 26 Am. & Eng. Enc. Law, p. 83, § 3; Lancaster v. Roberts, 144 Ill. 225, 33 N. E. 27; Hill v. Ressegieu, 17 Barb. 162; Townsend v. Blanchard, 117 Iowa, 36, 90 N. W. 519; Peters v. Delaplaine, 49 N. Y. 368; Bull v. Bell, 4 Wis. 54. See Pom. Spec. Perf. of Contracts, §§ 438, 439, and note. It is a familiar principle that, where a part of the acts are within, and a part without, the power, the former are valid. Mechem, Agency, §§ 414, 416. A contrary doctrine was announced in Dellet v. Whitner, Cheves, Eq. 213.

3. It is urged by counsel for defendants that the defendants Arthur E. Walker, Raymond H. Lester, and Benton S. Jackson, who are the purchasers from the defendant Wilson, have been guilty of no inequitable

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conduct against the plaintiff, but have simply been diligent, and succeeded in getting a conveyance from the defendant Wilson, notwithstanding her contract with the plaintiff in this case. It appears, however, that these defendants were fully advised, before they opened up negotiations with the defendant Wilson, of the fact that the agent Fleischer had contracted with the plaintiff for the purchase of this land. They, therefore, bought with notice of the plaintiff's rights, and cannot complain if those rights are enforced by the court. Pom. Spec. Perf. of Contr. § 465. It is further urged that the contract is lacking in mutuality, and therefore not enforceable. It is unnecessary to go further than to cite the case of Borel v. Mead, 3 N. M. 39, 2 Pac. 222, as decisive of the doctrine that a contract of this kind is enforceable by a decree for specific performance, and this seems to be the settled doctrine of the courts.

For the reasons stated, the judgment of the lower court is affirmed, and it is so ordered.

Mills, Ch. J., and McFie, Pope, and Mann, JJ., concur. Abbott, J., having tried the case below, did not participate in this decision.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

C. P. DORR, Appt.,
v.
A. MIDELBURG.

(— W. Va. —, 65 S. E. 97.)

Deed — conditional delivery — parol evidence.

1. If a deed for land, absolute and complete on its face, be delivered by grantor to grantee, as an escrow, to take effect in any event, the condition is void and the deed becomes absolute, and the title passes immediately to the grantee on the delivery thereof, and the condition of the delivery of the deed cannot be shown by parol evidence thereof, so as to defeat the deed.

Executed land contract — defect in title — rescission.

2. No question of identity of the subject-matter of the contract being involved, a court of equity will not, at the suit of the vendor, set aside or rescind in its entirety an executed contract of sale of several lots of land simply because it turns out that the vendor had no title to one or more of the lots conveyed. In such case, the vendee may elect to affirm the contract as to the lots to which the vendor had title, and recover a proper proportion of the purchase money paid for the lot or lots of land lost for want of title of the vendor.

(June 11, 1909.)

APPEAL by complainant from a decree of the Circuit Court for Kanawha County dismissing a bill filed to enjoin the prosecution of an action brought to recover a portion of the purchase price of certain lands sold and conveyed, and to have the deed thereof set aside either in part or *in toto*. Affirmed.

The facts are stated in the opinion.

Messrs. **Linn, Byrne, & Cato** for appellant.

Mr. **W. S. Laidley**, for appellee:

A deed cannot be delivered to the grantee, to take effect upon conditions not appearing on its face.

11 Am. & Eng. Enc. Law, p. 337 c; Towner v. Lucas, 13 Gratt. 705; Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Stevens v. Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499; American Buttonhole Overseaming Sewing Mach. Co. v. Burlack, 35 W. Va. 657, 14 S. E. 319; Holston Salt & Plaster Co. v. Campbell, 89 Va. 396, 16 S. E. 274; Lyttle v. Cozad, 21 W. Va. 183.

There can be no evidence by parol to prove that a deed complete and perfect on its face was delivered to the grantee upon a condition.

Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544; Blair v. Security Bank, 103 Va. 762, 50 S. E. 262; Owens v. Boyd Land Co. 95 Va. 560, 28 S. E. 950; Peyton v. Stuart, 88 Va. 50, 13 S. E. 408, 16 S. E. 160; Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239; Tait v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697; Barnett v. Barnett, 83 Va. 504, 2 S. E. 733; Watson v. Hurt, 6 Gratt. 633; Towner v. Lucas, supra; Woodward v. Foster, 18 Gratt. 200; Ward v. Churn, 18 Gratt. 801, 98 Am. Dec. 749; Southard v. Curley, 134 N. Y. 148, 16 L.R.A. 561, 30 Am. St. Rep. 642, 31 N. E. 330; Maxwell Land-Grant Case, 121 U. S. 381, 30 L. ed. 959, 7 Sup. Ct. Rep. 1015; Sangston v. Gordon, 22 Gratt. 755; Miller v. Fletcher, supra; Colhoun v. Wilson, 27 Gratt. 639; Southern Mut. Ins. Co. v. Yates, 28 Gratt. 585; Nash v. Fugate, 32 Gratt. 595, 34 Am. Rep. 780.

Headnotes by MILLER, P.

Note. — The effect of the delivery of a deed to the grantee therein named, subject to a future extrinsic condition, is discussed in the case note to Wipfler v. Wipfler, 16 L.R.A. (N.S.) 941.

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Miller, P., delivered the opinion of the court:

The plaintiff, on June 20, 1905, in Webster county, where he resided, made and delivered to defendant, residing at Charleston, in Kanawha county, a deed of general warranty for lot 15, in block K, and lots 13, 16, 17, 18, and 19 in block L, of the Ruffner addition to said city, the consideration being $2,200, $1,000 in cash and the balance in two equal annual payments, represented by notes of $600 each. At the time he received the deed, defendant gave plaintiff his check for $1,000 on a Charleston bank for the cash payment, and executed and delivered to him also his two notes for the deferred payments, for which a vendor's lien was reserved in the deed. At the same time, at the request of defendant, plaintiff gave him two separate memorandums in writing, as follows: The first:

Webster Springs, W. Va., June 20, 1905.
I have this day sold to A. Midelburg certain lots in the town of Ruffner, Kanawha county, W. Va., and executed to him a deed for same. Now I agree to execute any further deed or deeds that he may wish for said six lots in Ruffner addition, Charleston, W. Va. C. P. Dorr.

The second:

There is no mortgage or deed of trust given by me or Duffy on any of these lots. I hold all the judgments against P. F. Duffy, the former owner of the six lots. I refer to the deed made to A. Middleburg, June 20th, 1905. C. P. Dorr.

Plaintiff says he placed the check in bank, directing the cashier not to send it forward for collection for a week or so; but it was in fact forwarded for collection, and was paid by the Charleston bank on June 26th, after defendant had reached his home in Charleston, June 23, 1905. The following day, June 24th, defendant, after consulting his attorney, and, as he claims, had had him examine the title for liens only, had him also prepare a new deed for the lots, antedating it to correspond with the date of the original deed, with more accurate description of the lots, and containing also, in addition to the covenants of general warranty, covenants against "all encumbrances." This deed defendant forwarded to plaintiff by mail at Webster Springs, with a letter saying:

Inclosed please find another deed for six lots you sold me, kindly sign yourself and wife, and have acknowledged and return by registered letter to Charleston. By so doing you will oblige,

Yours truly,
A. Middleburg.

Plaintiff, being absent from home, did not receive this letter, and the deed inclosed, until July 10, 1905, when he and his wife signed, acknowledged, and returned it to defendant, who received it on July 12, 1905, and notwithstanding he had learned between the date of forwarding the new deed to plaintiff and the date of its return to him, if not before, that Dorr had, more than a year before, conveyed said lot No. 13 to Mrs. Petty, who had built a house upon it and was occupying the same as a residence, he at once, without notice to Dorr, placed the deed on record, and then notified Dorr and demanded of him repayment of one sixth of the purchase money, which plaintiff refused, but offered to return to defendant his money and notes on a reconveyance of the lots. Defendant, declining this proposition, brought suit against Dorr to recover the value of lot No. 13. Whereupon plaintiff filed his bill in the circuit court against defendant to enjoin the prosecution of said action at law, and seeking in the alternative, either to have his deed set aside and annulled so far as it relates to said lot No. 13, or, if the defendant should prefer, that it be wholly set aside, for general relief.

The grounds for the relief alleged are substantially these: That before and at the time of making the original deed, he met defendant at Webster Springs, who inquired if he did not own some lots in Charleston, and he answering that he did, defendant inquired how many, and that he answered that he did not remember, that he had sold one lot to the city of Charleston and another to O. A. Pelly; that he did not know the location of the lots except in a general way; that he finally found his tax receipts for taxes paid upon the lots owned by him for the year 1904, which covered said lot No. 13, but that he explained to the defendant that he did not know whether or not he owned all the lots covered by the tax receipts, but that defendant appeared to be well acquainted with the property, and knew what lots plaintiff owned, and proposed to pay him a price which he declined, but finally agreed to sell defendant all the lots he owned at the price agreed,—$2,200; that he executed and delivered the deed to defendant for the lots which he supposed he owned, with the understanding and agreement that defendant should, upon his return to Charleston, see W. E. R. Byrne, plaintiff's attorney and agent, examine the records, and ascertain just what lots plaintiff

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did own, and if the deed executed was correct and included only the lots which plaintiff owned, and was otherwise satisfactory, the same should be considered as delivered, and might be put to record; but if such investigation should show that the deed included more or less property than plaintiff owned or was otherwise unsatisfactory, defendant should have a new deed prepared according to the facts found to exist, conveying just what property plaintiff did own, and sent to plaintiff to be executed; that it was further agreed that if, upon such investigation, it should be found that plaintiff did not own as many lots as was supposed, or, if what he did own were not dseirably located, on being so advised by defendant, plaintiff should refund to defendant the money paid and surrender to him his notes, and that the deed or contract should be declared at an end; that on receiving from defendant the deed prepared by his attorneys in lieu of the original deed, and believing that the same had been prepared in accordance with said contract, and after consulting with said Byrne, so as to convey all the lots owned by plaintiff, and no more, he executed, acknowledged, and returned it to defendant. It is furthermore charged in the bill that, without consulting said Byrne, and after having ascertained from the record that plaintiff had previously conveyed and did not then own said lot No 13, and with intent to wrong, cheat, and defraud him, defendant caused said deed to be prepared, forwarded, and executed by plaintiff and returned to him for recordation, and that plaintiff was thereby induced by mistake on his part and fraud on the part of defendant to execute and deliver said deed including said lot No. 13; that immediately on learning of the mistake on his part and fraud of defendant, plaintiff offered to refund defendant his money and return to him his notes, and requested a reconveyance of said lots.

The defendant demurred to plaintiff's bill, which was overruled, and also answered, putting in issue all the material allegations of the bill, and upon final hearing, October 12, 1907, upon bill, answer, and depositions taken, the court below pronounced the decree appealed from, dissolving the injunction and dismissing the bill.

Briefly, the grounds for relief relied on by plaintiff are: First, that the delivery of his original deed to defendant was conditional, and as an escrow, not to be effective unless, upon consulting with Byrne and the examination of the title, everything should be found satisfactory; second, that by failing to comply with the condition on which said deed was delivered, and by promising plaintiff to prepare the second deed, as alleged, defendant had perpetrated a fraud on him, entitling him to the relief prayed for.

On the first proposition, plaintiff and defendant, the only witnesses to the transaction, in their evidence, are in direct conflict, defendant swearing positively that the only contract or memorandum had with plaintiff, outside of the deed itself, is contained in said two memorandums. But what could it avail plaintiff if we should assume the fact to be as alleged and proven by him? He admits that he actually made and delivered the deed to defendant, though upon condition, and not to become effective until conditions fulfilled. The question is thus presented: Can a deed for land, absolute on its face, be delivered by grantor to grantee as an escrow or upon a parol condition? The general rule, founded on the ancient common-law definition of an escrow, is that it cannot be so delivered; that such a condition is void, and that the title passes absolutely to the grantee. 16 Cyc. Law & Proc. p. 571; Miller v. Fletcher, 27 Gratt. 403, 405, 21 Am. Rep. 356; Hicks v. Goode, 12 Leigh, 479, 490, 37 Am. Dec. 677; Lyttle v. Cozad, 21 W. Va. 183, 200, 201; Whitney v. Dewey, 10 Idaho, 633, 69 L.R.A. 572, 581, 80 Pac. 1117; 16 Am. Dig. Century ed. 3124, cols. 153–155, and many cases there cited; 1 Devlin, Deeds, 3314. In 16 Am. Dig. supra, our own case of Newlin v. Beard, 6 W. Va. 110, is cited for the contrary doctrine; and in Lyttle v. Cozad, supra, Judge Green, at page 201, referring to the views of Judge Staples, as expressed in Miller v. Fletcher, supra, says: "But, nevertheless, these views cannot, perhaps, be easily reconciled, if at all, with the decisions in Stuart v. Livesay, 4 W. Va. 45, and Newlin v. Beard, supra." The cases cited, and, indeed, all the cases in which the question is presented, draw the distinction more or less clearly, between a delivery in escrow or a conditional delivery to the grantee, and cases where the grantee has in some way obtained manual possession of the deed, but there has been no intentional delivery of the deed for any purpose; for, as some of our cases hold, delivery is always a question of intention of the parties, and if there has been no intention to deliver, if the minds of the parties have never met on the subject of delivery, there is no delivery, no intention to pass the title on any terms or conditions, hence no contract, no deed. Adams v. Baker, 50 W. Va. 249, 40 S. E. 356, citing Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201; Glade Coal Min. Co. v. Harris (W. Va.) 63 S. E. 873. "But where it is the intention of the parties for the title to pass upon any contingency or in any event from the grantor to the grantee, and the deed is delivered

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to the grantee, absolute on its face, then the vesting of title becomes a question of law, and must date from the delivery; and, since the grantee cannot act as the agent of both himself and the grantor for the purpose of a second delivery, title must necessarily have passed upon the original delivery." Whitney v. Dewey, supra. The Idaho court says in the same connection: "This rule is very clearly stated by the New York court in Braman v. Bingham, 26 N. Y. 492, where it was said: 'The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed in any event, without the further act of the grantor.'" We do not regard Stuart v. Livesay and Newlin v. Beard, supra, as opposed to the general rule laid down in these authorities, any more than Miller v. Fletcher and other Virginia cases cited therein may be regarded in conflict therewith, for in neither of these cases was a deed for land, delivered to a grantee, in any way involved. In the first two cases the actions were upon bonds conditioned for the payment of money, and pleas by defendants of *non est factum*. This was also the character of the action in Miller v. Fletcher. In the latter case, however, Judge Staples, in the syllabus, does state the rule broadly, as follows: "A deed, perfect on its face, cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is said to be a valid deed. In all such cases the condition is void, and the deed is at once operative;" and "Parol evidence is inadmissible to prove that a deed, perfect on its face, was delivered to the grantee on a condition." In Nash v. Fugate, 32 Gratt. 595, 605, 34 Am. Rep. 780, twice before the Virginia court of appeals, and reported the first time in 24 Gratt. 202, 18 Am. Rep. 640, the doctrine of Miller v. Fletcher was relied on, but Judge Staples, who also wrote the opinion in the latter case, says: "Counsel insist that there is no substantial distinction between a delivery directly to the obligee by all the parties signing the paper, and a delivery by part of them to the principal obligor, and by the latter to the obligee. In either case the delivery is absolute and the condition void. A moment's reflection will, however, show there is a wide distinction between the two cases. A deed cannot be delivered as an escrow to the party on whose behalf it is made; no matter what may be the form of the words used, the delivery is absolute, and the deed takes effect immediately. An escrow, on the other hand, *ex vi termini*, is a deed delivered to some third person, a stranger, to be by him delivered to the grantee, upon the performance of some condition. When the books speak of the delivery to a stranger as an essential to an escrow, it is in contradistinction to a delivery to the party in whose behalf the deed is made." As in Miller v. Fletcher, the instrument involved in Nash v. Fugate was a bond for the payment of money, not a deed for land. The precise points presented by two pleas and instructions to the jury based thereon and decided were, first, that a bond containing a number of scrolls for signing below the names of sureties who signed it, but in other respects complete and perfect on its face, and signed and delivered by the sureties to the principal obligor on condition that he should obtain additional sureties to execute it before delivery to the obligee, but delivered by him without having complied with the condition, was binding on the sureties, unless the obligee had notice of the unfulfilled condition, the additional scrolls not being sufficient to put him on inquiry as to the authority to deliver the bond; and, second, that a bond so signed by principal and sureties may be avoided by parol proof, clear and satisfactory, that the obligee had notice at the time he received the bond from the principal of the condition on which the bond had been delivered to the principal. The distinction here sought to be maintained is the distinction between a deed delivered as an escrow to a party to the deed, and one that is delivered to a stranger. As observed by Judge Staples in Miller v. Fletcher, Judge Cabell, in Hicks v. Goode, supra, 12 Leigh, at page 490, 37 Am. Dec. 677, says: "I am not disposed to controvert the distinction between a deed delivered as an escrow to the party to the deed, and one that is delivered to a stranger. While it is universally conceded that where a deed is sealed and delivered to a stranger, as an escrow, until certain conditions are performed, and then to be delivered to him to whom the deed is made, to take effect as the deed of him who sealed it, such deed, even although the other party get it into his possession, is as inoperative, until the conditions are performed, as if it had never been delivered at all; yet it seems to be settled, also, that if a deed be sealed and delivered to the party himself to whom it is made, as an escrow, but to become the deed of him who sealed it on certain conditions, in such case, let the form of the words be what it may, the delivery is absolute, and the deed shall take effect presently as his deed, and the party is not bound to perform the conditions." And after referring to the authorities and the reasons given by them for this doctrine, Judge Cabell further says: "As already observed, I shall not controvert the propriety of this distinction. But I must say that

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the reasoning on which it is founded is not only very technical, but it is unsatisfactory to my mind; for it is not every tradition, or passing of a deed from the hands of one to the hands of another, that will constitute a legal delivery of it as a deed. Something, at least, is due to the intention with which the tradition is made, and such intention, on such an occasion, is generally gathered from our words rather than from our actions. Therefore I am not disposed to carry the doctrine farther than it has already been carried by the adjudged cases."

In Humphreys v. Richmond & M. R. Co. 88 Va. 431, 13 S. E. 985, 992, 993, the instrument involved was a contract for a right of way, made, executed, and delivered to the president of the railroad company, on condition that it should not be used unless the withholding of it would defeat the building of the road, or the board of directors of the road should make compensation for the right of way. But, in disregard of the condition of delivery, after the road was completed, though there had been no necessity for using the contract, and although no compensation had been made by the directors, the president turned the contract over to the right-of-way agent of the road, who had knowledge of the conditions on which it was delivered to the president, and it was held "that the contract was void, and that the owner might recover the damages for his land." In this case it is to be observed that the delivery of the deed was not directly to the company, but to the president, in escrow, and the agent of both parties. The Virginia court, in this case, among other cases, cites our case of Newlin v. Beard, supra, for the proposition that the knowledge of the right-of-way agent must be attributed to the company of which he was agent. After carefully considering all these authorities, I confess that I am left in some confusion as to which is the true doctrine on the subject; but I think it may safely be deduced from them that, in the case of a deed for land, absolute and complete on its face, if it be made, executed and delivered by the grantor to the grantee, to take effect upon any condition, the condition is void and the deed becomes absolute, and the title passes immediately on the delivery thereof, and the condition cannot be shown by parol evidence so as to defeat the deed. It may be well to observe, also, that the theory on which parol evidence is often admitted to defeat a deed or bond delivered as an escrow, or on condition, is not that it is competent thereby to vary or contradict the terms of a valid instrument, but to show that in fact there has been no delivery, that the minds of the parties have never met on the fact of delivery, so as to create a valid and binding contract. Nash v. Fugate, supra, 32 Gratt. 608, 34 Am. Rep. 780; Ware v. Allen, 128 U. S. 597, 32 L. ed. 565, 9 Sup. Ct. Rep. 174. We have extended the consideration of this subject further, perhaps, than has been necessary or profitable, in view of the real question involved, and we will pursue it no further.

The second and only other question calling for decision is, Did defendant fraudulently obtain execution of either of said deeds, as alleged, or was there such mistake in the property intended to be conveyed as to render the deed void in whole or in part, at the election of the grantor? So far as the question of the conditional delivery of the deeds, or either of them, is concerned, affirmed by plaintiff and denied by defendant, may be regarded as an element entering into this question, the decree of the court below must be regarded as a finding on conflicting evidence, in favor of defendant, which, on well-recognized rules of practice, we cannot disturb. The same thing is true as to the question of fraud raised by the pleadings and proofs. This question of fraud as presented is one of fact, and not of law, which the decree appealed from has settled in favor of defendant on conflicting evidence, and we cannot disturb this finding.

But may the plaintiff rescind because of his mistake in attempting to convey lot No. 13, previously granted, and to which he had at the time no title? There can be no doubt but that plaintiff intended to sell and defendant intended to buy this lot along with the other lots conveyed. No question of identity of the subject-matter of the contract, therefore, is involved. We have cases holding that where there has been a mutual mistake as to the subject-matter of the contract, and the deed does not convey the property which the seller intended to sell and pointed out to the buyer, and which the buyer intended to buy, a court of equity, at the suit of either party, may rescind the contract. Baxter v. Tanner, 35 W. Va. 60, 12 S. E. 1094; Pratt v. Bowman, 37 W. Va. 715, 17 S. E. 210; Silliman v. Gillespie, 48 W. Va. 374, 37 S. E. 669; and Fearon Lumber & Veneer Co. v. Wilson, 51 W. Va. 30, 41 S. E. 137. See also Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Leas v. Eidson, 9 Gratt. 278; Glassell v. Thomas, 3 Leigh, 128; 1 Sugden, Vend. & P. 378, and cases cited in note (f). But the exact question we have for decision here is, Will a court of equity, at the suit of the vendor, set aside or rescind in its entirety an executed contract of sale of lots simply because it turns out that he had not title to one of the lots sold and purchased, no question of identity of the subject-matter

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of the contract being involved? The authorities we think clearly hold that where the subject-matter of the contract and the consideration are single, the vendee may rescind the contract, for partial rescission of an entire contract cannot be had. 1 Page, Contr. § 138; Hearne v. New England Mut. M. Ins. Co. 20 Wall. 491, 22 L. ed. 397; Dunsmore v. Lyle, 87 Va. 391, 12 S. E. 610. And the decisions seem equally clear that where there has been a sale of several parcels of land, and the vendor has title to only a part, the vendee is entitled to have a conveyance of that part if he will pay the price therefor and accept it in full satisfaction of that part. White v. Dobson, 17 Gratt. 262; Dunsmore v. Lyle, supra; Van Eps v. Schenectady, 12 Johns. 436, 7 Am. Dec. 330. In the last case, where several lots were sold and purchased for separate considerations, it was held that failure of title to one of the lots constituted no defense to a suit for the purchase money due for the lots to which the vendee got good title. And 29 Am. & Eng. Enc. Law, p. 669, says: "On the sale of separate lots, however, the failure of title to some of the lots is no ground for rescinding the sale of the others." Citing Van Eps v. Schenectady, supra; Stoddardt v. Smith, 5 Binn. 355. The general rule is that "when the contract is entire, it will not be rescinded in part and affirmed as to the rest, but it must be rescinded *in toto*. But where it is severable, one part alone may be rescinded and the remainder affirmed." 29 Am. & Eng. Enc. Law, 2d ed. p. 675, and notes 8 and 9, and cases cited, including our case of Worthington v. Collins, 39 W. Va. 406, 19 S. E. 527. Hearne v. New England Mut. M. Ins. Co. 20 Wall. 488, 491, 22 L. ed. 395, 397. We have here, then, a simple case of failure of title to one of the lots conveyed, and where the vendee has elected to take those to which the vendor had good title, and is suing to recover back the money paid, or an equitable proportion thereof to cover the value of the lot to which plaintiff had no title. This, we think, he has the right to do. Butcher v. Peterson, 26 W. Va. 452, 53 Am. Rep. 89. We therefore affirm the decree below.

ALABAMA SUPREME COURT.

TUSKEGEE LAND & SECURITY COMPANY, Appt.,
v.
BIRMINGHAM REALTY COMPANY.

(— Ala. —, 49 So. 378.)

Covenant — breach — railroad in street.

1. No breach of covenant of seisin or right to convey is shown by the existence of a railroad in the abutting street, where the deed conveys only to the edge of the street.

Same — encumbrance.

2. The existence of a railroad in a street, damages for the construction of which to the property conveyed have been released by the grantor, is a breach of covenant against encumbrances in a grant of property abutting on the street, although the deed purports to convey only to the line of the street.

(April 8, 1909.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham in defendant's favor in an action brought to recover damages for breach of covenants in a deed to certain real estate. Reversed.

The facts sufficiently appear in the opinion.

Mr. W. C. Ward, for appellant:

The abutting owner has in the street easements of access, light, and air, which are property rights as inviolable as the property in the lots themselves, on which recovery may be had of the railroad.

2 Dill. Mun. Corp. 4th ed. § 712; Adams v. Chicago, B. & N. R. Co. 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; Columbus & W. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Sheffield & T. Street R. Co. v. Moore, 83 Ala. 294, 3 So. 68; New & Old Decatur Belt & Terminal R. Co. v. Karcher, 112 Ala. 676, 21 So. 825.

The fact that defendant, before the execution of its deed of conveyance to plaintiff, had consented in writing that the railway company might construct tracks along Avenue A, and did release the railway from all damages, etc., constituted a breach of the covenant against encumbrance.

11 Cyc. Law & Proc. p. 1116, note 45; Copeland v. McAdory, 100 Ala. 553, 13 So. 545; Moore v. Johnston, 108 Ala. 326, 18 So. 825; 8 Am. & Eng. Enc. Law, 2d ed. p. 123, note 1; Lexington & O. R. Co. v. Applegate, 8 Dana, 289, 33 Am. Dec. 497; Flynn v. White Breast Coal Co. 72 Iowa, 738, 32 N. W. 471.

Plaintiff could not recover from the railway, as one claiming title under one who is estopped is also bound by the estoppel, unless it is fraudulent.

27 Am. & Eng. Enc. Law, 2d ed. p. 188; McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194; Pool v. Harrison, 18 Ala. 514.

Note. — The above decision seems to be one of first impression upon the question whether the right of a public-service corporation to use a street is an encumbrance upon abutting property, and therefore a breach of covenants in a deed conveying such property, as an extensive search has failed to disclose any other case in which that question was considered.

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When a railroad occupies a right of way by its tracks, cars, and trains, and operates them over the track, that is exclusive possession, and constitutes eviction of all others.

8 Am. & Eng. Enc. Law, 2d ed. pp. 117, 123; Tiedeman, Real Prop. § 680; Moore v. Vail, 17 Ill. 185; Tennessee & C. R. Co. v. East Alabama R. Co. 75 Ala. 516, 51 Am. Rep. 475; Electric Lighting Co. v. Mobile & S. H. R. Co. 109 Ala. 193, 55 Am. St. Rep. 927, 19 So. 721; Purifoy v. Lamar, 112 Ala. 132, 20 So. 975; Farley v. Bay Shell Road Co. 125 Ala. 196, 27 So. 770; 11 Cyc. Law & Proc. p. 128, note 92.

Mr. **O. S. Welch** also for appellant.

Messrs. **London & Fitts**, for appellee:

The owner of the lot at the time of the construction of a railroad in front of it is the only one who can maintain a suit to recover damages for the additional servitude imposed upon the highway.

Evans v. Savannah & W. R. Co. 90 Ala. 54, 7 So. 758; Louisville & N. R. Co. v. Hill, 115 Ala. 334, 22 So. 163; Huntsville v. Ewing, 116 Ala. 576, 22 So. 984.

No conveyance of any interest in the street could impair the defendant's right to grant and convey to the plaintiff a fee-simple title to the land abutting on the street.

Demopolis v. Webb, 87 Ala. 659, 6 So. 408; Chambers v. Talladega Real Estate & L. Asso. 126 Ala. 296, 28 So. 636.

Mayfield, J., delivered the opinion of the court:

The appellee, on the 1st day of December, 1902, sold and conveyed to appellant three certain lots in the city of Birmingham, Alabama. The deed contains covenants as to seisin, good right to convey, and against encumbrances, except a certain mortgage deed named, and contains a warrant of title against the claims of all persons, etc. The three lots were described as a whole, and not separately, and, as described, formed a parallelogram, the corresponding sides of which were, respectively, 100 feet and 140 feet. The northern boundary of the lots was described as the southern boundary of Avenue A, the eastern boundary as the western boundary line of Seventeenth street of such city, the southern boundary as the northern margin line of a "20-foot alley," and the western boundary described as a straight line 140 feet long, and parallel with the eastern boundary and Seventeenth street. It will be observed that this property abuts Avenue A on the north, Seventeenth street on the east, and an alley on the south, but extends no farther than the southern margin of Avenue A, the western margin of Seventeenth street, nor the northern margin of the alley,—thus rebutting what might otherwise be a presumption that the deed passed the fee, subject to the public easement of right of way, to the center of the avenue, street, and alley, which were named as three of the boundaries of the property. While the avenue, street, and alley constitute three of the four boundaries, there is no presumption in this case, because of these recitals, that it was contemplated or intended to pass title to any part of the soil of such thoroughfares.

It also appears that on the 10th day of June, 1902, six months and nine days prior to the conveyance by appellee to appellant, above referred to, the appellee, for a valuable consideration, executed and delivered a contract to the Birmingham & Atlanta Air Line Railway, its successors and assigns, the right to lay railway tracks along Avenue A, in front of the lots described in appellee's deed to appellant, and to operate cars and trains thereon, and released the railway from all damages to said lots by reason of the laying of said tracks and operation of said railway. On the 30th day of April, 1902, 7 months and 1 day before appellee conveyed to appellant, and 1 year, 1 month, and 11 days before appellee conveyed or attempted to convey to the railway company the right to build its tracks on Avenue A, and released it from damages, on that account, for injury to the property in question, the city authorized the railway company to build, construct, and operate a steam and commercial railroad along said Avenue A, in front of this property; and it is alleged that the said railway did, on the 10th day of June, 1902, take possession of said avenue, in front of said property, and construct a double-track railroad along said avenue, in front of the property in question, one of which tracks is between the center of said avenue and plaintiff's property. The width of this avenue does not appear. The appellant, grantee, sues upon the covenants and warranties of appellee's deed to him.

The complaint, as last amended, contains five counts. The first is as for breach of covenant of seisin. The second is for breach of right to convey, in that a part of the property was in Avenue A, a public thoroughfare of the city of Birmingham. The third, fourth, and fifth counts as for breach of covenant against encumbrances. The defendant demurred to each count, separately, as originally filed and as subsequently amended. The court sustained the demurrer in each instance. The plaintiff then declined to plead further, and suffered a final judgment, from which he appeals, assigning as error the various rulings of the court in sustaining defendant's demurrer.

The trial court was clearly correct in sus-

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taining the demurrers to counts 1 and 2, which relied on breach of covenants of seisin and good right to convey, in that the counts do not show either a breach as to seisin or as to good right to convey; but they affirmatively show that there was no attempt to convey any part of the avenues, and in no wise show or attempt to show the property conveyed was not owned in fee by appellee, nor that it had not a good right to grant the whole of the land conveyed or attempted to be conveyed. But we are constrained to hold that counts 3, 4, and 5, which sought to recover as for breach of covenants and warranties against encumbrances, are each good, and were not subject to appellee's demurrer. The amendments go only to the extent, and not to the right, of recovery. While, as stated above, there was no attempt by the appellee to convey to appellant any part of the avenues, and herein any prior conveyance by appellee to the railroad company of any part of the avenues would be no breach of the covenants of seisin, fee, or right to convey, yet it is alleged that a part of the conveyance of appellee to the railroad company was a release of the company from any damages to this property, subsequently conveyed to appellant, by reason of the construction or operation of their railroad along the avenue in front of appellant's property. While this was not a conveyance of any part of appellant's property, nor a conveyance or grant of any right of way over or across any part thereof, it was, however, an encumbrance thereon, which might, and which is alleged did, damage plaintiff and render his property less valuable than it would have been without such encumbrance.

It is claimed by counsel for appellee that the alleged grant, conveyance, covenant, or permit, as it is variously alleged that the appellee made or extended to the railroad company, was void, and therefore it could not be a breach of the covenants. True, this grant by appellee could not alone authorize the railroad company to construct or operate its road along a public thoroughfare of a municipal corporation,—such corporation, or the legislature, alone, could do that,—yet it is proper, and within the power of property owners along a public highway, street, or avenue, to convey to a railroad company the right to construct and operate its roads along or over such highways, and for a consideration to release such railroad company, its successors or assigns, from all damages or liabilities as to the property abutting such highways, by so constructing or operating such roads; and such contracts would certainly be valid, so far as they relate to damages or injury to such abutting property by reason of constructing or operating the road on a public highway, no matter whether the title to the fee in the highway be in the abutting owners, in the city, or even in the railroad company itself, or in a stranger. This, of course, might be limited to those damages not the result of the negligence of the railroad company; but, as to this, it is unnecessary now to decide. If this grant or contract which the appellee is alleged to have made to or with the railroad company to build and operate its railroad along Avenue A, in front of the property in question, and which, for a valuable consideration, released the railroad company for damages to the property on that account, constituted an "encumbrance" upon the property subsequently conveyed to appellant with covenants against encumbrances, then there was a breach, which was sufficiently alleged to constitute a cause of action. If this was not an encumbrance, then, of course, there was no breach or cause of action alleged.

We are of the opinion that, under the definitions and authorities, this constituted an encumbrance within the covenant of the deed. An "encumbrance" is defined as "any right to or interest in land, which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. Prescott v. Trueman, 4 Mass. 627, 629, 3 Am. Dec. 246 (citing 2 Greenl. Ev. 242)." This definition has been accepted and adopted by nearly all the courts, and all text writers, since it was announced. See cases collected in Words & Phrases, pp. 3519, 3520. It will be noticed that one of the elements of this definition is that the right or interest which constitutes the encumbrance shall be consistent with the passage of the fee. Mr. Rawle, in his valuable and comprehensive work on Covenants of Title, says that the word "encumbrance" has no technical meaning; that it is not one of the "terms of the law," and hence no definition of it will be found in the old books; that it has been defined within the last century. See 5th ed. § 75. It is also said to be a weight on the land which must lessen its value, and is also stated to be "any right existing in another to use the land, or whereby the use by the owner is restricted." Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976. Again, it is said to be "any claim which charges, burdens, obstructs, or impairs the use of the land, or prevents its transfer." Anonymous, 2 Abb. N. C. 56, 62.

An encumbrance, within the meaning of the law relating to covenants and warranties, does not depend for existence upon the extent or amount of the diminution in value, but extends to cases in which, by reason of the burden, claim, or right, the

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owner does not acquire complete dominion over the land which the grant apparently gives. Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; Demars v. Koehler, 62 N. J. L. 203, 72 Am. St. Rep. 642, 41 Atl. 720. An easement in or over the land or any part conveyed is undoubtedly an encumbrance. The right of a third party to use water from a brook running through the land, and easements as to light and air, have been held to be within the term. The filing of a map by the department of parks, under a statute which provided that, on the final opening of a street, no compensation should be allowed for any building erected thereon after the filing of the map, was held to be an encumbrance. Forster v. Scott, supra. The right of a city to open a street without paying damages for buildings erected in the bed thereof after the street was laid and platted was held to be an encumbrance. Evans v. Taylor, 177 Pa. 286, 69 L.R.A. 790, 35 Atl. 635. Water or gas rents past due, which are a charge upon the property, are encumbrances. Wood's Estate, 41 Phila. Leg. Int. 225; Re Gerry (D. C.) 112 Fed. 958. An encumbrance is held to exist upon property which is subject to easements for widening a street or for building a sewer. Blackie v. Hudson, 117 Mass. 181; Cadmus v. Fagan, 47 N. J. L. 549, 4 Atl. 323; Barth v. Ward, 63 App. Div. 193, 71 N. Y. Supp. 340; Warvelle, Vend. & P. 2d ed. 971 et seq. These same definitions and doctrines are announced, and these and many other cases cited, by the text writers on the subject. See 3 Sutherland, Damages, 3d ed. §§ 620–630; Rawle, Covenants, 5th ed. chap. 5, §§ 70–90.

A covenant against encumbrances, usually expressed in American conveyances as a separate and independent covenant, is a covenant *in præsenti*, broken, if at all, when made, by the existence of the encumbrance, without regard to future or ultimate disturbance or damage, and does not run with the land; but, if coupled to the covenant for quiet enjoyment, as is usually the case in England, it is then a covenant *in futuro*, and runs with the land until a breach. Rawle, Covenants, § 70. In the case at bar it is *in præsenti*.

It is conceded by the learned counsel for appellee, in his able brief in this case, that "the owner of lots abutting on a street or avenue in a city has an easement in such street or avenue, nor is it denied that the construction of any railroad, other than a street railroad, in such street or avenue, in front of the lots of the abutting owner, is an additional servitude, for which the owner of the lots is entitled to compensation; and it is further conceded that the existence of a public highway over land sold to another is a breach of a covenant against encumbrance, and gives a cause of action to the grantee, although he may have had knowledge of the highway." But it is contended by counsel that when a street, such as the one in question, becomes dedicated and accepted by the city, only an easement remains in the property owner or his vendee, and that thereafter conveyance by the abutting owner of any rights or title to the street, inconsistent with the rights of the public, is absolutely null and void, and is, therefore, not the subject of an encumbrance. In this we cannot agree with counsel to the full extent of his argument. It may be void as against the city, or as to a third party who owns the fee to the street. It might not, alone, authorize a railroad company to construct its road upon the street, though the grantor own the fee thereto; but, in connection with the authority from the city or the legislature, it will authorize the construction and operation of the railroad upon the street, and in that case it alone might prevent the present owner, the grantor, or his successors in interest, from recovering damages for injury to the property abutting upon the street by reason of constructing or operating the railroad. To this extent we hold that it is an encumbrance which will prevent the grantee, or his subsequent grantee, from recovering damages against the railroad company, its grantee or successor, for injuries or damages suffered as to the abutting property described in the encumbrance, consequent upon the construction or operation of the railroad in accordance with the grant.

It is true, as contended by counsel, that only the owner of the land at the time of the construction of the railroad in front of it can maintain a suit to recover damages for the additional servitude imposed upon the highway; but in the case at bar he (appellant here) cannot and never could maintain it, in this case, for the sole reason that his grantor, the former owner of the land, had permitted or induced the road to do the very thing of which he complains, and had thereby released or exempted it from any liability for injury to this property, by reason of constructing or operating the railroad upon this street which the property abuts. This is a charge upon this particular land described. It allowed the obstruction of ingress to and egress from this property by way of this avenue. It authorized the railroad company to envelop and cover this property with smoke, to throw upon it cinders and dust, and, by its proximity, to cause or make great noise (all such matters being necessarily or usually incident to the operation of steam commercial railroads, and frequently the occasion of great incon-

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venience and other results disagreeable to people residing near the tracks), to build main lines and side tracks upon the avenue, to fill these tracks with cars and trains, which would impede travel by other modes, and might thereby greatly inconvenience plaintiff in the proper use of his property, and might greatly diminish the value of his property, render it less salable and desirable; for all of which he would be without remedy in damages, because of the conveyance by his grantor to the railroad company.

Of course, it may be shown on the trial that the railroad, as constructed and operated, is of no detriment; that the property is not fitted for residence property or retail business, but only for wholesale stores, coal, cotton, iron, or other warehouses, yards, etc., which would render the railroad track at that place an advantage, rather than a detriment. This, however, would go only to the amount, and not to the right, of damages. Plaintiff might be entitled to recover nominal damages only, because no actual damages were or could be shown, if there was certainly shown a breach of the covenant, as alleged.

The judgment is reversed, and the cause remanded.

Dowdell, Ch. J., and Simpson and Denson, JJ., concur.

Petition for rehearing denied May 11, 1909.

ALABAMA SUPREME COURT.

E. G. SUELL, Admr., etc., Appt.,
v.
FRED DERRICOTT et al.

(— Ala. —, 49 So. 895.)

Death — action — defenses — availability.

1. In an action for wrongful death under a statute authorizing the action when the intestate could have maintained an action for the same act if death had not ensued, all defenses are available to defendant which would have been available had the action been brought by the person injured.

Evidence — burden of proof — wrongful death.

2. In an action for wrongful death by intentionally killing plaintiff's intestate, where self-defense is pleaded, plaintiff must first establish his case by proper and sufficient proof, and defendant then has the burden of establishing his justification or excuse.

Death — defense — prevention of crime.

3. That the killing was in self-defense or to effect an arrest for felony is a good defense in an action for wrongful death under a statute giving the personal representative a cause of action when the intestate could have maintained an action for the same act had death not ensued.

Evidence — death — burglary.

4. Upon trial of an action for damages for wrongful death, where the defense is that the killing was in making an arrest for burglary, evidence is admissible that the building into which deceased was attempting to break contained a safe with money in it.

Trial — direction of verdict — evidence.

5. The court should not direct a verdict against an issue which there is evidence to support.

Appeal — misleading instructions.

6. The giving of abstract and misleading instructions is not necessarily reversible error.

Case Note. — Justifiable killing as a defense in an action for death intentionally inflicted.

The conclusion reached in the above case, that it is a good defense to a civil action for death intentionally inflicted, that the killing was justifiable, is supported by all the authorities. Morgan v. Barnhill, 55 C. C. A. 1, 118 Fed. 24; Rutherford v. Foster, 60 C. C. A. 129, 125 Fed. 187; Cobb v. Owen, 150 Ala. 410, 43 So. 826; Richards v. Burgin (Ala.) 49 So. 294; Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399; Morris v. Platt, 32 Conn. 75; McKinney v. Carmack, 119 Ga. 467, 46 S. E. 719; Forbes v. Snyder, 94 Ill. 374; Locher v. Kluga, 97 Ill. App. 518; Head v. Martin, 85 Ky. 480, 3 S. W. 622; McClurg v. Igleheart, 17 Ky. L. Rep. 913, 33 S. W. 80; Tucker v. State, 89 Md. 471, 46 L.R.A. 181, 43 Atl. 778, 44 Atl. 1004; White v. Maxcy, 64 Mo. 552; Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; Nichols v. Winfrey, 79 Mo. 544, 90 Mo. 403, 2 S. W. 305; Vawter v. Hultz, 112 Mo. 633, 20 S. W. 689; Besenecker v. Sale, 8 Mo. App. 211; Pierce v. Myrick, 12 N. C. (1 Dev. L.) 345; Darling v. Williams, 35 Ohio St. 58; Marks v. Borum, 1 Baxt. 87, 25 Am. Rep. 764; Jenkins v. Hankins, 98 Tenn. 545, 41 S. W. 1028; March v. Walker, 48 Tex. 372; Wallace v. Stevens, 74 Tex. 559, 12 S. W. 283; Garcia v. Sanders, 90 Tex. 103, 37 S. W. 314; Croft v. Smith (Tex. Civ. App.) 51 S. W. 1089; Gray v. Phillips (Tex. Civ. App.) 117 S. W. 870.

In most of these cases the point was assumed, the question discussed being whether the killing in the particular case was in fact justifiable; but that is a question which depends upon principles equally applicable to criminal prosecutions, and is not within the scope of this note.

As to liability of sureties on the bond of a peace officer for the death of a person due to the act or default of the principal or one of his deputies, see case note to Growbarger v. United States Fidelity & G. Co. 11 L.R.A.(N.S.) 758.

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Same — findings — evidence — disturbance.

7. The findings of a jury which there is evidence to support should not be disturbed on appeal unless they are so palpably wrong as to shock the conscience of the court.

(May 13, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Bibb County in defendants' favor in an action brought to recover statutory damages for the intentional killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. **Logan, Vandegraaff, & Fuller** for appellant.

Messrs. **John T. Ellison, Daniel Collier, and Percy & Benners** for appellees.

Mayfield, J., delivered the opinion of the court:

This action is by the appellant, as administrator, against the defendants (appellees), brought under § 27 of the Code of 1896, known as the "homicide act," to recover damages for the wrongful death of his son, who is alleged to have been killed by the defendants by unlawfully and intentionally shooting him with a gun or a pistol.

While this court has passed upon a great number of appeals in cases brought under this statute, this is one of the few in which the court is called upon to review a case in which the wrongful death complained of was the result of the intentional killing with a deadly weapon, and which, if without justification, would be murder. While we are not wholly without precedent in this or other states and jurisdictions, the cases are far less numerous than those in which the death was the result of negligence, simple, gross, or wanton. This court has construed this statute to be punitive in its nature and purpose, and not compensatory, and to provide that the damages recoverable be distributed under the laws of distribution as other personal property of the deceased, and that they are not liable to the payment of debts of the deceased. Statutes like ours were clearly intended to correct what was deemed a defect of the common law, that the right of action based on a tort or injury to the person died with the person. Our statute, as it now exists, was evidently in a large degree modeled after the English act of Parliament known as "Lord Campbell's act," passed in the year 1846. It must be observed that the right of action is only given under this statute to the personal representative when the intestate could have maintained an action for the same act had it failed to produce death. A corollary of this is that, if the wrongful act complained of had not produced death, but only an injury, and the person injured could not have maintained an action, then the personal representative cannot maintain an action under the statute when death results. It would therefore seem to follow that all defenses available to the defendant if the action had been brought by the person injured when death did not result are available to the defendant in an action brought by the administrator of the person injured for the wrongful death; that the burden of proof and the weight and sufficiency of the evidence would be the same in both cases.

It is too well settled in this state to need citation of authority that contributory negligence on the part of the plaintiff is available as a defense where the injury is the result of simple negligence, and that it is not available as a defense when the injury is the result of wanton negligence or wilful injury. A case decided by this court, something like the one in question, is that of King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119, in which the court, through Somerville, J., decided that the action could not be maintained under the statute against a saloon keeper who sells or gives intoxicating liquors to a man of known intemperate habits who is helplessly drunk at the time, though the drinking of the intoxicant caused his death almost immediately. The reason assigned by the court was that, if death had not resulted, the person drinking could not have maintained an action for the wrongful act on the part of the defendant complained of, and that death and the injury were the result of drinking the intoxicant, and not the result of the sale or delivery to the person intoxicated. In fact, the court in that case held that the plaintiff's intestate was guilty of contributory negligence which resulted in the injury. In this the court was probably in error (though it is not necessary to be decided, and we do not decide the point). The wrongful act there complained of was a wilful and intentional one, and the contributory negligence, if it existed, would have been no defense. We only cite or refer to this case on the proposition that the action can only be maintained by the administrator when the action could have been maintained by his intestate if death had not resulted. We have been unable to find any case, in this or any other court, in which the facts constituting the killing were similar to the facts in this case. While some of the defenses interposed in this case have been interposed in others, we have found no case in which all the defenses of this were so interposed.

For a clear understanding of the legal questions involved in this appeal, it may be

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venience and other results disagreeable to people residing near the tracks), to build main lines and side tracks upon the avenue, to fill these tracks with cars and trains, which would impede travel by other modes, and might thereby greatly inconvenience plaintiff in the proper use of his property, and might greatly diminish the value of his property, render it less salable and desirable; for all of which he would be without remedy in damages, because of the conveyance by his grantor to the railroad company.

Of course, it may be shown on the trial that the railroad, as constructed and operated, is of no detriment; that the property is not fitted for residence property or retail business, but only for wholesale stores, coal, cotton, iron, or other warehouses, yards, etc., which would render the railroad track at that place an advantage, rather than a detriment. This, however, would go only to the amount, and not to the right, of damages. Plaintiff might be entitled to recover nominal damages only, because no actual damages were or could be shown, if there was certainly shown a breach of the covenant, as alleged.

The judgment is reversed, and the cause remanded.

Dowdell, Ch. J., and Simpson and Denson, JJ., concur.

Petition for rehearing denied May 11, 1909.

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v.
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1. In an action for wrongful death under a statute authorizing the action when the intestate could have maintained an action for the same act if death had not ensued, all defenses are available to defendant which would have been available had the action been brought by the person injured.

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2. In an action for wrongful death by intentionally killing plaintiff's intestate, where self-defense is pleaded, plaintiff must first establish his case by proper and sufficient proof, and defendant then has the burden of establishing his justification or excuse.

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4. Upon trial of an action for damages for wrongful death, where the defense is that the killing was in making an arrest for burglary, evidence is admissible that the building into which deceased was attempting to break contained a safe with money in it.

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5. The court should not direct a verdict against an issue which there is evidence to support.

Appeal — misleading instructions.

6. The giving of abstract and misleading instructions is not necessarily reversible error.

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7. The findings of a jury which there is evidence to support should not be disturbed on appeal unless they are so palpably wrong as to shock the conscience of the court.

(May 13, 1909.)

APPEAL by plaintiff from a judgment of the Circuit Court for Bibb County in defendants' favor in an action brought to recover statutory damages for the intentional killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. **Logan, Vandegraaff, & Fuller** for appellant.

Messrs. **John T. Ellison, Daniel Collier, and Percy & Benners** for appellees.

Mayfield, J., delivered the opinion of the court:

This action is by the appellant, as administrator, against the defendants (appellees), brought under § 27 of the Code of 1896, known as the "homicide act," to recover damages for the wrongful death of his son, who is alleged to have been killed by the defendants by unlawfully and intentionally shooting him with a gun or a pistol.

While this court has passed upon a great number of appeals in cases brought under this statute, this is one of the few in which the court is called upon to review a case in which the wrongful death complained of was the result of the intentional killing with a deadly weapon, and which, if without justification, would be murder. While we are not wholly without precedent in this or other states and jurisdictions, the cases are far less numerous than those in which the death was the result of negligence, simple, gross, or wanton. This court has construed this statute to be punitive in its nature and purpose, and not compensatory, and to provide that the damages recoverable be distributed under the laws of distribution as other personal property of the deceased, and that they are not liable to the payment of debts of the deceased. Statutes like ours were clearly intended to correct what was deemed a defect of the common law, that the right of action based on a tort or injury to the person died with the person. Our statute, as it now exists, was evidently in a large degree modeled after the English act of Parliament known as "Lord Campbell's act," passed in the year 1846. It must be observed that the right of action is only given under this statute to the personal representative when the intestate could have maintained an action for the same act had it failed to produce death. A corollary of this is that, if the wrongful act complained of had not produced death, but only an injury, and the person injured could not have maintained an action, then the personal representative cannot maintain an action under the statute when death results. It would therefore seem to follow that all defenses available to the defendant if the action had been brought by the person injured when death did not result are available to the defendant in an action brought by the administrator of the person injured for the wrongful death; that the burden of proof and the weight and sufficiency of the evidence would be the same in both cases.

It is too well settled in this state to need citation of authority that contributory negligence on the part of the plaintiff is available as a defense where the injury is the result of simple negligence, and that it is not available as a defense when the injury is the result of wanton negligence or wilful injury. A case decided by this court, something like the one in question, is that of King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119, in which the court, through Somerville, J., decided that the action could not be maintained under the statute against a saloon keeper who sells or gives intoxicating liquors to a man of known intemperate habits who is helplessly drunk at the time, though the drinking of the intoxicant caused his death almost immediately. The reason assigned by the court was that, if death had not resulted, the person drinking could not have maintained an action for the wrongful act on the part of the defendant complained of, and that death and the injury were the result of drinking the intoxicant, and not the result of the sale or delivery to the person intoxicated. In fact, the court in that case held that the plaintiff's intestate was guilty of contributory negligence which resulted in the injury. In this the court was probably in error (though it is not necessary to be decided, and we do not decide the point). The wrongful act there complained of was a wilful and intentional one, and the contributory negligence, if it existed, would have been no defense. We only cite or refer to this case on the proposition that the action can only be maintained by the administrator when the action could have been maintained by his intestate if death had not resulted. We have been unable to find any case, in this or any other court, in which the facts constituting the killing were similar to the facts in this case. While some of the defenses interposed in this case have been interposed in others, we have found no case in which all the defenses of this were so interposed.

For a clear understanding of the legal questions involved in this appeal, it may be

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well to state the substance of the evidence. While the evidence is not wholly undisputed, and different inferences therefrom might be drawn, the substance of the evidence showed, almost without conflict, that, on the night of the killing, the intestate and one Ed Riley had either broken into, or were attempting to break into, a storehouse, at Hargrove, Alabama, containing goods, wares, merchandise, etc., which store belonged to the Cahaba Southern Mining Company, a corporation. The defendant Derricott was superintendent of the company, and had charge of the building referred to. The other defendant, Franklin, was the agent of the Southern Railway Company at the same place. Hargrove was a mining camp. The store referred to was a commissary. On the night of intestate's death, the defendant Franklin was awakened by his wife, about 12 or 1 o'clock, and told by her that she heard a noise like someone breaking into the store. Franklin got up, procured a pistol, went around to the commissary, and saw two men, as he said, trying to break into the store. He fired his pistol twice into the air to frighten them away, but they did not leave. He then went to Derricott's house and told him of the circumstances. Derricott dressed and went with him to the store, as some of the evidence tended to show, with the intention of capturing or arresting the men. They carried a lantern, and, turning the corner, in sight of the store, they saw a man standing near the wall of the store, with an object in his hand, said by the witnesses to look like a gun as best they could see. They also heard sounds, as they approached the store, like the ripping off of planks. As they so turned the corner of the store and saw the man, they called to him to stop. The man turned, bringing the object in his hand (said by them to resemble a gun) to point in the direction of the defendants, whereupon both of them fired, and the man fell dead. The deceased, on examination, proved to be plaintiff's intestate. It was soon perceived that another man was under the store, who, on being called to and assured that no harm would be done him, came out, proving to be Ed Riley. Riley was examined on the trial in behalf of the plaintiff. The substance of Riley's testimony was that he and the deceased had been drinking heavily, that they went to the store with an iron bar, and that deceased was breaking into the store, or had been attempting to break into it, with the iron bar; that when Franklin fired the first two shots they ran under the store, and that Snell only came out immediately before he was shot. It appeared that planks had been pulled off the store, and that through the cellar door a hole had been broken, as large as a man's head, and (inferentially, at least) that this was done with the iron bar Snell had in his hand at the time he was shot,—the object which, as they say, defendants thought to be a gun. Neither of the defendants recognized Riley or deceased before the shooting or before the killing.

The complaint contained several counts charging, in different words, the unlawful and intentional killing of plaintiff's intestate, by shooting him with a gun or pistol. Demurrers to the complaint were interposed, but were finally withdrawn, and no question is raised as to the sufficiency of the complaint. To the complaint, the defendants filed the plea of the general issue, and a great number of special pleas of justification. Demurrers were sustained to all the pleas except 9, 10, 12, and 15, and were overruled as to these; consequently, these are the only pleas necessary to be considered on this apppeal. Plea No. 9 in effect alleged that, at the time of the killing, defendants were in the act of arresting intestate for the commission of a felony, and that they used no more force than was necessary. Plea No. 10 is substantially the same, except in alleging that they had reasonable cause to believe that intestate had committed a felony, instead of that he had actually committed it. Plea No. 12 alleged that the killing was necessary in order to arrest intestate and in order to prevent great bodily harm being done to defendants, and that, at the time they killed intestate, he was attempting to commit burglary in the presence of the defendants; while plea No. 15 set out the facts fully, averring that at the time they shot intestate they honestly believed that the iron bar which he had in his hand was a gun or rifle, that the motion he made towards them was a hostile one, that it was necessary to shoot, and that they did so to protect themselves, under the honest or reasonable apprehension of great bodily harm at the hands of intestate. So the defense relied upon, and the issues upon which the cause was tried, were, in short, self-defense, and second, that the killing was necessary to arrest a felon and to prevent the commission of a felony.

The trial resulted in a verdict and judgment for defendants, from which the plaintiff appeals, here assigning as error the rulings of the court overruling his demurrers to the 9th, 10th, 12th, and 15th pleas, several rulings upon the evidence which were adverse to plaintiff, the giving of certain charges requested in writing by the defendants, and the refusal of the court to give certain charges requested in writing

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by the plaintiff. We have been greatly aided, in our examination of the new and important questions involved on this appeal, by the full and able briefs filed by the learned counsel on the respective sides.

It has been held by high authority that the law of self-defense in civil actions brought for wrongful death is the same as in criminal prosecutions for homicide, except that the burden does not rest upon the plaintiff of proving the cause beyond a reasonable doubt, and that the plea of self-defense does not cause the burden to shift, though as to this last proposition we do not decide, because not necessary. See Tiffany, Death by Wrongful Act, § 64; Cobb v. Owen, 150 Ala. 410, 43 So. 826. In this case, as in all similar ones under this statute, the burden is on the plaintiff to establish his case, and, as a part of it, to show that the killing was wrongful. If plaintiff's own evidence should show that, although his intestate was killed, the act complained of was done in justifiable exercise of the right of self-defense, or that it was justifiable or necessary for any other reason, then, of course, he would not have proven his case. We also think the true rule to be that, in cases like the one at bar, where the death is caused by intentional shooting, the case should be tried in the same manner and governed by the same principles of law as if the intestate had not died of his injuries, and as if he were suing to recover damages for the wrongful act. We think the better rule to be that the burden of proof, in cases like this, is on the plaintiff, as in other civil cases, to first establish his case by proper and sufficient proof, and that, having done this, the burden of proof is then on the defendant to show justification or excuse, which he sets up in his special pleas. March v. Walker, 48 Tex. 377; Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399; Darling v. Williams, 35 Ohio St. 58; Tucker v. State, 89 Md. 471, 46 L.R.A. 181, 43 Atl. 778, 44 Atl. 1004.

The first question of importance for us to determine is whether or not the special pleas to which demurrers were overruled presented a good defense. Homicides committed for the prevention of any forcible or atrocious crimes are justifiable by the law of nature, and also by the law of England as it stood so early as the time of Bracton, and as it was declared by statute (24 Hen. VIII., chap. 5; 4 Bl. Com. 213). If any person attempts robbery or murder of another, or attempts to break open a house in the nighttime (which extends also to an attempt to burn it), and is killed in such attempt, the slayer shall be acquitted and discharged. Blackstone, supra; 3 Greenl. Ev. § 115.

These same questions have been frequently decided in this court relative to criminal trials of homicide. It was said by Chief Justice Dargan (in Oliver v. State, 17 Ala. 587), that "the law will justify the taking of life when it is done from necessity, to prevent the commission of a felony." A similar rule was declared, also, in the cases of Dill v. State, 25 Ala. 15; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; and Storey v. State, 71 Ala. 329; and these same propositions and the same authorities were reaffirmed and quoted by Chief Justice Stone in the case of Bostic v. State, 94 Ala. 45, 10 So. 602, from which we have nearly literally quoted.

Somerville, J., in Storey's Case, 71 Ala. 336, in speaking of the rule that the defendant must decline or offer to decline the combat by retreat, if he can do so with safety, but who is justified in setting up self-defense, says: "Where, however, the assault is manifestly felonious in its purpose and forcible in its nature, as in murder, rape, robbery, burglary, and the like, as distinguished from secret felonies like mere larceny from the person or the picking of one's pocket, the party attacked is under no obligation to retreat. But he may, if necessary, stand his ground and kill his adversary." This is taken literally from 2 Bishop on Criminal Law, § 553. Mr. Bishop says that the general doctrine is that, however complete the right of self-defense may be, yet it is founded on necessity, and cannot extend beyond that foundation; in other words, it cannot be exercised in any case or to any degree which is not necessary. He also says that no man may lawfully deprive another of life merely because he prefers his own life to the other's. And, again, that no exact rule can be laid down to determine under what circumstances a man may stand upon his own rights, to the destruction of the life of him who comes to take them away. Where only an assault is intended, the right of perfect defense to the extent of taking life does not exist, yet he may repel force by force and give blow for blow; but where the attack is made with murderous intent, the person attacked is under no obligation to flee; he may stand his ground, and, if need be, kill his adversary. This has been many times decided by this court.

Mr. East has said that a man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In this case he is not obliged to retreat, but may

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pursue his adversary until he has secured himself against all danger: and if he kill him in so doing, it is called justifiable self-defense.

Mr. Bishop states the doctrine of self-defense as follows [1 Crim. Law, 7th ed. § 865]: "If the individual [person] assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable." In the rule of self-defense of one's person or of his property, there are exceptions to the general proposition, the same as in every department of knowledge; but these exceptions are intended to reach the same result that is aimed at by the rule, rather than to depart from the rule; consequently the exception should keep us within the meaning of the rule, rather than lead us from the rule.

As to the right to kill in making arrests or to prevent an escape, the rule may be stated as follows: "When, as a general proposition, one refuses to submit to arrest after he has been touched by the officer, or endeavors to break away after the arrest is effected, he may be lawfully killed, provided this extreme measure is necessary. . . . In cases of felony, the killing is justifiable before an actual arrest is made, if in no other way the escaping felon can be taken. . . . In cases of felony, if the felon flee from justice . . . it is the duty of every man to use his best endeavors for preventing an escape; and if, in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable . . . but if he may be taken in any case without such severity, it is at least manslaughter in him who kills him, and the jury ought to inquire whether it was done of necessity or not." [2 Bishop, Crim. Law, 7th ed. §§ 647, 648.] Justification, however, happening in cases of persons charged with misdemeanors or breaches of the peace, is subject to a different rule from that as to felony. Generally speaking, in misdemeanors, it will be murder to kill the party accused, when fleeing from arrest, though he cannot otherwise be taken; but, under some circumstances, it might be manslaughter, if it appeared that death was not intended.

There is another rule of law, well settled, applicable to homicides, and that is, that whatever one may do for himself he may do for another. That is to say, a guest in the house may defend the house, or the occupant may assemble his neighbors for its defense. There is also a rule of law that, in cases of self-defense, the party is not required to know the real fact, but he may act upon a reasonable and well-founded appearance and apprehension; and, whenever a man exercises the right of self-defense, he is understood to act on the facts as they reasonably appeared to him, or as they would appear to a reasonable man, similarly situated; and if, without fault or carelessness on his part, he is misled concerning the facts, and defends himself according to what he reasonably supposes the facts to be, he is justifiable, though in truth the facts as they were reasonbly supposed did not exist, and in fact he had no occasion for the extreme measure. Mr. Wharton has stated the law applicable to this case as follows [Homicide, 3d ed. § 514]: A man may repel force by force in the defense of his person, habitation, or property against one or many who manifestly intend or endeavor, by violence or surprise, to commit a known felony on either. In such cases he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them, he happeneth to kill, such killing is justifiable. "The right of self-defense in [such] cases," says the author, "is founded on the law of nature, and is not, nor can be superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force, and even his servant attendant on him or any other person present may interpose for [the purpose of] preventing mischief, and, if death ensue, the party so interposing will be justified." [Old ed. § 532.] The author cites a number of cases,—one, where the landlord was awakened by his servant and told that she heard thieves breaking open the door, and the landlord, rising suddenly and running down the stairs with a drawn sword, came upon the deceased (another servant), who had secreted herself in the buttery, but was now observed by the wife of the landlord, who cried out, "Here they be that would undo us," and the landlord thereupon thrust his sword into the servant and killed her; and it was held to be misadventure. Another case he cites was where an English nobleman, being weary of life and willing to be rid of it by the hand of another, having first blamed his keeper or tenant for suffering his deer to be destroyed, commanded him to execute the law; then went into his own park at night as if with intent to steal the deer, and being questioned by the keeper, who knew him not, the nobleman refused to stand or answer, and was shot by the keeper; this, says Lord Hale, "was holden excusable homicide."

It will be observed that a distinction is made between felonies and misdemeanors, as to the amount of force that may be used to prevent the one or the other, or that may be employed to arrest persons, or to prevent the escape of persons who have com-

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mitted the one or the other. It is not only the right of all persons to prevent felonies in certain cases, but at common law it was made the duty, and was made a misdemeanor known as misprision, for any person seeing a felony attempted, not to prevent it by force if necessary, and one who failed to discharge such duty was guilty of the misdemeanor called misprision of felony. Carpenter v. State, 62 Ark. 286, 36 S. W. 906.

Mr. Bishop says that the doctrine of misprision may be stated as follows [1 Criminal Law, §§ 720, 721]: A man cannot be liable for a crime which another commits, unless his own will in some degree concurs in and contributes to it; but when such crime is a treason or felony, and he stands by while it is done, without using the means in his power to prevent it, though his will does not concur in it, or when he knows of such crime, though in his absence it is committed, and makes no disclosure of it to the authorities, nor does anything to bring the offender to justice, the law holds him guilty of a breach of that duty which every man owes to the community wherein he dwells and the government which protects him.

Lord Coke said: If any be present when a man is slain, and omit to apprehend the slayer, it is a misprision. Misprision of a felony is a criminal neglect either to prevent the felony being committed by another, or to bring to justice the person known to be guilty of the felony. 1 Bishop, Crim. Law, § 507.

A man's house is his castle for purposes of defense only, and, as has been said by this court, it cannot be turned into an arsenal of offense. While one's house formerly meant his home, his dwelling, the rule has also been extended to one's place of business or his place of refuge; consequently a man's place of business must be regarded *pro hac vice* his dwelling. He has the same right to defend it against intrusion, and he is under no more necessity of retreating from the one than from the other; his duty to defend one is the same as the other. Jones v. State, 76 Ala. 8; Cary v. State, 76 Ala. 78; Lee v. State, 92 Ala. 15, 25 Am. St. Rep. 17, 9 So. 407.

By statute in this state a private person is authorized to arrest for any public offense committed in his presence, or where the felony has been committed, though not in his presence, by the person arrested, or where a felony has been committed, and he has reasonable cause to believe that the person arrested committed it; and he may make the arrest for a felony on any day and at any time. Code 1907, § 6273; Cary v. State, supra.

An arrest may be made under our law without a warrant by an officer or by a private person in certain specified cases. It is the issue of the warrant without oath or affirmation that is forbidden by the Constitution, and not the arrest without a warrant. Williams v. State, 44 Ala. 41.

Under our statutes it is made the duty of every private citizen, when required by an officer, to assist him in making an arrest, and a refusal so to do is a misdemeanor. Code 1907, § 6271; Dougherty v. State, 106 Ala. 63, 17 So. 393; Watson v. State, 83 Ala. 60, 3 So. 441.

The rights and powers of a private citizen in making an arrest for an offense, and on the times and occasions provided for by the statute, are the same as those of an officer, and consequently, in making arrests in the cases, and on the times and occasions so provided by statute, he is entitled to the same justification and defense as the officer. It is the settled law of this state that life may be taken if necessary to prevent the commission of a felony, or if necessary to arrest a felon after it has been committed. Clements v. State, 50 Ala. 117; Williams v. State, 44 Ala. 41.

But an officer is not justified in taking the life of one charged only with a misdemeanor. Handley v. State, 96 Ala. 50, 38 Am. St. Rep. 81, 11 So. 322. Neither an officer nor a private citizen is ever authorized to use any more force than is necessary to effect the arrest.

As a general rule, at common law an arrest could not be made without a warrant, but if the felony or breach of the peace threatened or committed within the view of an officer authorized an arrest, it was his duty to arrest without warrant, or, if a felony had been committed, and there was probable cause to believe that the particular person was the offender, he could be arrested without a warrant; but the matter of arrest is now in this state largely the subject of statutory regulation, which, in some degree, is an affirmation of the rules at common law. Of course, an officer or a private citizen, under the statute, cannot justify an arrest upon the ground that he had reasonable cause to believe the person arrested had committed a felony, unless he has information of facts derived from credible sources, or from persons reasonably presumed to know them, which, if submitted to the judge or the magistrate having jurisdiction, would require the issue of a warrant of arrest. Cunningham v. Baker, 104 Ala. 171, 53 Am. St. Rep. 27, 16 So. 68.

Applying these principles of law above announced to the special pleas 9, 10, 12, and 15, to which demurrers were overruled, we cannot say that the trial court committed reversible error in overruling the plaintiff's

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demurrers thereto. We do not mean to say that they were invulnerable or unassailable, but none of them were subject to the particular grounds of demurrers assigned, or, if so subject, such ground of demurrer was not sufficiently certain or specific to point out the defect. This is particularly true as to plea No. 12, the ground of demurrer being that "the said plea fails to aver facts, but sets up merely the conclusion of the pleader." This is not wholly true as to this plea; it does aver a number of different facts, and probably contains some conclusions, too, but, if so, they are not sufficiently pointed out by the demurrer to put the court in error for overruling it.

There was no error in overruling plaintiff's objection to the question: "Was there a burglar-proof and fireproof safe in said storehouse, and, if so, did it contain money?" Whether or not the intestate and the other party had committed burglary, or were in the act of committing burglary at the time of the killing, was a material question, and the contents of the house which they were alleged to have burglarized, or were attempting to burglarize, was a proper subject for the consideration of the jury.

As to the refusal of the requested charges, the recitals of the bill of exceptions are as follows: "Here the plaintiff requested the court to give the following charges in writing, and the court refused to give each one of said charges, and marked across the face of each one, 'Refused. B. M. Miller, Judge.'" This language is slightly different, but not materially different, from the recital in the case of Southern R. Co. v. Douglass, 144 Ala. 351, 39 So. 268, or that in the case of Verberg v. State, 137 Ala. 73, 97 Am. St. Rep. 17, 34 So. 848, and under the authority of those cases, and others which might be mentioned, it would probably be construed as a request to give the charges in their entirety, and consequently all might be refused if any one was bad. But the writer of this opinion has never thought that the presumption should be indulged from such recitals that the request was to give all the charges together as an entirety, and not to give or refuse each separately. The writer thinks that it is a matter of common knowledge, which this court and each member thereof practically as well as judicially knows, that the charges were requested and were given or refused separately. In fact, he thinks it is a well-known practice that they are requested, given, or refused separately, when they are separately numbered, though they may be all written upon the same sheet of paper. But it is not necessary to again decide that question in this case, because, the recital not being exactly the same as the others, and owing to the opinion of the writer as stated above, he has examined separately each charge refused to the plaintiff, and thinks and holds that each of said charges was properly refused. The first was practically the affirmative charge as to plea No. 9, and it was held that this plea was sufficient, and there was clearly and certainly evidence which tended to support every material averment, and consequently such charge should not be given. There was certainly evidence tending to show that a felony had been committed by the intestate; consequently for that reason the second charge was properly refused. There was also evidence tending to show that a burglary had been committed; consequently the court should not charge as a matter of law that no burglary had been committed. The third charge was properly refused, because there was evidence tending to support every fact which the charge requested the court to charge had not been proven. A great number of these charges were in effect the affirmative charge as to respective issues raised by the pleas, and, as there was evidence tending to support each one of them, the court could not direct a verdict as to such issues. As the verdict was for the defendants, it is unnecessary to pass upon the charges relating to the amount of verdict or measure of damages.

We have examined each of the charges given at the request of the defendants, and we find no error in any one. We deem it unnecessary to discuss each of these charges separately. It is true that some few of the charges may be abstract, and some misleading, but the giving of abstract or misleading charges is not necessarily reversible error. A great number of the charges given at the request of the plaintiff are set out, as well as those given at the request of the defendants, and after a careful examination of every exception and objection by the plaintiff, and of every assignment of error, we are unable to find any error, and certainly none to the injury of the plaintiff, for which the judgment in this case can be reversed.

It appears from the pleadings and evidence in this case that the plaintiff and defendants had a fair trial, and that the questions of fact involved in the case were fairly and fully submitted to the jury under proper instructions by the trial court, which resulted in a verdict for the defendants, and we are unable to say that it was not in accordance with the law and the evidence in the case. The weight and sufficiency of the evidence and the inferences to be drawn from it were questions exclusively for the jury, and they have decided them against the plaintiff, and we are not prepared to say that the verdict was unwarranted. We are

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not prepared to say that any reasonable man would not have done what the defendants did on this occasion, under the evidence and circumstances shown by this record, though these were exclusively questions for the jury; and, unless the findings are so palpably wrong as to shock the conscience of the court, the verdict should not be disturbed by the trial court or the appellate court.

Finding no error in the record, the case must be affirmed.

Dowdell, Ch. J., and Simpson and Denson, JJ., concur.

GEORGIA SUPREME COURT.

JOHN MACKENZIE, Plff. in Err.,
v.
L. P. MINIS et al.

(132 Ga. 323, 63 S. E. 900.)

Contract — employment — construction — satisfaction — termination.

1. Where an employee entered into a written contract with his employer to continue at least three years if the former proved himself "competent and satisfactory," and agreed to perform all the duties of a first-class gardener and manager of his employer's place, to "the satisfaction" of the latter, he was subject to be discharged if the employer was dissatisfied; and this was not dependent on whether there were reasonable and sufficient grounds for such dissatisfaction.

Headnotes by LUMPKIN, J.

Same — good faith.

2. The promisor whose satisfaction is made the test must act honestly and in good faith. His dissatisfaction must be real, not merely pretended.

Same — dissatisfaction — evidence — sufficiency.

3. Were it necessary for the employer to have had reasonable grounds for dissatisfaction, there was evidence from which their existence might have been found.

Adverse possession — relation between master and servant.

4. Where a servant, in connection with his service, and for the necessary or better performance thereof, occupies a house, free of rent, upon the premises of the master, such possession is not adverse to the master, nor as a tenant, but is treated as the possession of the master.

Landlord — discharge of servant — creation of tenancy.

5. In such a case, a tenancy at will or by sufferance does not spring up immediately upon the discharge of the servant. To have that effect, the subsequent occupancy, if alone relied on, must be sufficiently long to warrant an inference of consent to a different holding.

Trespass — discharged servant — duty.

6. Where a servant employed under a contract of the character stated in the first headnote was discharged by his employer, it was his duty to leave the premises and remove his personal goods therefrom. To insist on retaining possession of the house, entering on the land and continuing to treat it as if there had been no discharge, made him a trespasser, although he contended that under the contract he could not be discharged for three years.

Case Note. — Termination of contracts of employment which contain stipulations permitting rescission by the employer if the work is not satisfactorily performed.

The above topic is treated in an exhaustive note to Beissell v. Vermillion Farmers' Elevator Co. 12 L.R.A.(N.S.) 403. This note includes only the later cases.

When one whose employment involves taste, fancy, personal satisfaction, or judgment is engaged for a fixed period, but with the right reserved by the employer to discharge him if his work is not satisfactory to him, the employer has an absolute right to discharge him when he will, and the question of his good faith in discharging him is not material. Saxe v. Shubert Theatrical Co. 57 Misc. 620, 108 N. Y. Supp. 683 (an actor); Brown v. Retsof Min. Co. 127 App. Div. 368, 111 N. Y. Supp. 594 (a general sales agent invested with responsible duties involving wide discretion).

But where the employment is not of such character, good faith in the discharging employer is a question of fact for the jury. Saxe v. Shubert Theatrical Co. supra.

Where a mine foreman is employed "for so long a time up to five years that [he] satisfactorily performs his duties as foreman," his employers have an absolute right to discharge him at any time that they, in good faith, become dissatisfied with his work, even though his work is in fact well done; and this is true even though, in discharging him, they assigned as a reason that which would not justify them, if another and good reason existed which they did not assign. Corgan v. George F. Lee Coal Co. 218 Pa. 386, 120 Am. St. Rep. 891, 67 Atl. 655, 11 A. & E. Ann. Cas. 838.

A contract of employment of a cotton buyer for a fixed period, which was, however, dependent on the employer's satisfaction with his services, may be terminated by the employer whenever he becomes dissatisfied, and it is error to tell a jury that the employee cannot be discharged except for good and sufficient cause. Stewart v. Exum, 132 Ga. 422, 64 S. E. 471. The effect, if any, of bad faith in making the discharge was not considered.

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Injunction — discharged servant — trespass.

7. Under such circumstances, there was no error in granting an injunction against the employee, who was alleged to be insolvent, continually trespassing, and causing damage of such a character as not to be capable of computation or of being satisfied by an ordinary suit at law.

Same — mandatory.

8. The essential nature of the interlocutory injunction granted being to restrain such a continuing trespass, it was not subject to objection as being mandatory in character, although it included a restraint against the servant from keeping his goods on the master's premises.

Appeal — harmless error — evidence — exclusion.

9. If there was any error at all in excluding from evidence an affidavit made by the master on the day after the discharge of the servant, for the purpose of causing a warrant to issue to dispossess the latter as a tenant by sufferance, a reversal will not be required where the making of such affidavit was proved by other evidence without objection or conflict, and no injury could have probably arisen therefrom, the injunction being nevertheless fully authorized.

(March 10, 1909.)

ERROR to the Superior Court for Habersham County to review a judgment enjoining defendant from remaining on certain premises and from interfering with the plaintiffs' peaceful possession thereof. Affirmed.

Statement by **Lumpkin, J.**:

Mrs. Louisa P. Minis was the owner of a tract of land called the "Rockwood Place," where she had a summer home. On it was a residence, a gardener's house, servant's quarters, stables, a greenhouse, barn, and other improvements suitable for a well-furnished and convenient summer home. J. F. Minis, her husband, acted as her agent and representative in connection with the property. He employed Mackenzie under the following written agreement:

Mr. J. F. Minis agrees to employ John Mackenzie as his head gardener to take charge of his place at Clarkesville, Habersham county, Georgia. Mackenzie pays his way and that of his niece to New York, the passage-money to be refunded him on his arrival. Mr. Minis pays the railroad fare of Mackenzie and niece from New York to Clarkesville. The engagement is to be at least for three years if Mackenzie proves himself competent and satisfactory. Mr. J. F. Minis agrees to pay Mackenzie the first year £80 per year, the second year £100 per year, the third year £130 per year; to provide him a house near Mr. Minis's residence free, and fuel (wood) and vegetables free; also milk as long as the cows are in milk, Mackenzie looking out that all the cows are not dry at the same time; Mackenzie agreeing to look carefully after the cows, fruit trees, flowers, grapes, and greenhouses, and perform all duties incumbent on a first-class gardener and manager, to Mr. Minis's satisfaction, his niece to look after the milk and butter whenever Mr. [and] Mrs. Minis are absent.

[Signed] J. F. Minis.
[Signed] John Mackenzie.
London, June 26th, 1906.

Mackenzie went upon the place under this contract, and commenced work. In December, 1908, Minis gave to him the following written notice of discharge:

Habersham County, Georgia.

To John Mackenzie:

You are hereby notified that you are this day discharged from my employment; and you are directed to remove yourself, together with all your effects, from my premises and that of Mrs. L. P. Minis, the farm known as Rockwood Place, not later than 6 o'clock P. M. on the 8th day of December, 1908. This December, 1908.

[Signed] J. F. Minis, for Himself and as Agent for Mrs. L. P. Minis.

Mackenzie claimed that there was no right to discharge him on the part of Minis or his wife, and continued to live in the house on the land where he had been prior to the discharge, and to go upon the land. Mr. and Mrs. Minis filed an equitable petition, alleging the foregoing facts, and also, in substance, as follows: Mackenzie had not proved himself satisfactory, and had not performed the duties incumbent upon him under the agreement, to the satisfaction of Minis or of his wife. They had the right to discharge him, and had done so. He refused to leave the place, taking his belongings with him, and persisted in remaining on it, in walking over it, and in using it just as if he had a right to be there, insisting that he could not be discharged until three years after the date of the contract. His relations with them had become such that it was impossible to have anything further to do with him, or to have him on the place; and it was necessary for them to employ another gardener in order to provide for the crops, etc., for the coming year. They needed the gardener's house, and could not get another gardener as long as Mackenzie insisted upon remaining on the place and in possession of the house. There was a great deal of personal property on the place, in addition to the live stock; and the

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vegetables, flowers, fruit, garden, and the place generally, need attention. Mackenzie was no longer in their employment, and his presence made it impossible for them to enjoy their home or prepare it for their use in the summer time, or to secure a gardener. They were unwilling to leave their property in possession of Mackenzie or subject to his control. He was insolvent and unable to respond in damages, if he should be sued; and the damages would be irreparable, being of such special and peculiar character that they could not be determined or compensated in money. Mackenzie was remaining on the property and using it without their consent and in defiance of their rights and demands. They had not violated the contract; but, if so, they were amply able to respond in damages. They prayed that Mackenzie, "his agents and representatives, be enjoined and restrained from remaining on the premises hereinbefore mentioned, and from keeping his property or effects thereon, and from using the same in any way, or walking over or on the same, and from doing anything in defiance or in violation of the rights of your petitioners as owners and possessors of said property." The defendant in his answer admitted that Minis was the agent of his wife, and that Mrs. Minis herself exercised some acts of control, that the place was improved as plaintiffs alleged, and that the contract was made as set out above. He denied the other allegations. By way of cross action he alleged that the plaintiffs were indebted to him in the sum of $462.56, on which were allowed credits for certain articles of personalty, such as shingles, blocks, old fence posts, old lumber, window sash, barbed wire, piping, and guttering, aggregating $16.15, and leaving a balance of $446.41, for which he prayed judgment. On the hearing the presiding judge granted an injunction providing that the defendant, "his servants, agents, and representatives, be and they are hereby restrained and enjoined from remaining on the premises mentioned in the petition, or any part thereof, and from going on the same and keeping their goods thereon, and from interfering with the possession or rights of plaintiffs as to said premises." The defendant excepted.

Messrs. **Robert McMillan** and **H. H. Dean** for plaintiff in error.

Messrs. **J. C. Edwards, Adams & Adams**, and **A. L. Alexander** for defendants in error.

Lumpkin, J., delivered the opinion of the court:

According to the contention of the defendants in error, in whose favor the presiding judge found in granting the interlocutory injunction, Minis, acting for himself and his wife, lawfully discharged Mackenzie, who was employed as a gardener and manager, and in connection with his employment was living on the land of Mrs. Minis; but the employee claimed that he could not be discharged, refused to leave the place, with his belongings, and persisted in walking over it and using it as if he had a right to be there. The plaintiffs invoked the aid of the court to prevent his continuing to do so. The written contract of employment provided that the engagement should be for at least three years "if Mackenzie proves himself competent and satisfactory," and that he should perform all duties incumbent on a first-class gardener and manager, "to Mr. Minis's satisfaction." Whether wisely or unwisely, he saw fit to make the "satisfaction" of Minis the test of the performance, not whether he discharged his duties properly or diligently as a matter of fact, or in such manner as to satisfy the judge or the jury.

1. Parties who labor under no disabilities may make contracts on their own terms, and if there is no fraud or mistake, and the terms are not illegal or contrary to public policy, they must abide the contract. That it may be unwise or disadvantageous to one party furnishes no reason for disregarding it. Suppose that a man who desired a watch should write to a dealer in New York that he had seen a picture of one in the jeweler's catalogue, but was unwilling to buy it on mere description or representation; that, unless he liked it or was satisfied with it on inspection, he would be unwilling to buy it, whether or not it was like the description, and regardless of whether it was in fact a good watch, or whether other people liked it or not; that he must be the judge of whether he was satisfied, and, if he was so, he would take it, otherwise not. If, on these terms, the dealer should ship the watch, and upon examination the proposed purchaser should not be satisfied with it and should refuse to take it, certainly the dealer could not recover against him on the ground that the watch was of good quality and workmanship, and he ought to have been satisfied. To a suit for such a purpose the conclusive answer would be that the seller contracted to make the satisfaction of the intended purchaser the test. If the thing ordered were a coat instead of a watch, with the same stipulations, would the case be different? The illustration hypothesizes a more elaborate agreement than that under consideration. But it will serve to show that there is nothing illegal or extraordinary in undertaking to do a thing or furnish an article the acceptance of which shall depend on the satisfaction of the other contracting party. Where the fancy, taste, sensibility, or judg-

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ment of the promisor is involved, there is practical unanimity that, if one agrees to accept and pay if he is satisfied with a thing, he cannot be compelled to do so on proof that other people are satisfied with it, or that he ought to be. Where the question is one of operative fitness or mechanical utility, there is not perfect unanimity of opinion on the subject; but the great weight of authority applies the same principle. 9 Cyc. Law & Proc. pp. 618, 623. In Tyler v. Ames, 6 Lans. 280, it was held that a contract to employ an agent for a year, if he "could fill the place satisfactorily" might be terminated by the employer, when, in his judgment, the agent failed to meet that requirement of the contract. In the opinion of Mullin, P. J., it was said: "If he [the employer] is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as, without such a clause, he would have the right to dismiss the plaintiff if he did not properly perform his duties." In Singerly v. Thayer, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230, it was held that, where an agreement was to make and furnish an article to the satisfaction of a person for whom it was to be made, it was not a compliance with the contract to prove that he ought to be satisfied. In McCarren v. McNulty, 7 Gray, 139, it was said that "an action for work and labor in making a bookcase which the plaintiff has agreed in writing to construct for the defendants of a certain kind and dimensions, 'in a good, strong, and workmanlike manner, to the satisfaction of' one of the defendants, is not maintained by proof that . . . [the bookcase] was constructed according to the terms of the agreement, without also proving that it was satisfactory to or accepted by that defendant." See also Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446; Hart v. Hart, 22 Barb. 606; Moore v. Robinson, 92 Ill. 491. In the case of Zaleski v. Clark, supra, the plaintiff on the second trial obtained a judgment, and it was affirmed in 45 Conn. 397. But the apparent inconsistency is explained by the fact that on the last hearing the question considered was whether the finding of facts on the first trial was *res judicata* on the second trial, and it was held that the grant of a new trial reopened the entire case for a rehearing on the evidence; there having been no separate finding of facts on the second trial. The presumption was that sufficient facts were shown to sustain the judgment. See also 21 Alb. L. J. 465; 22 Id. 20; Allen v. Mutual Compress Co. 101 Ala. 574, 14 So. 362; Gwynne v. Hitchner, 66 N. J. L. 97, 48 Atl. 571; Johnson v. Bindseil, 15 Daly, 492, 8 N. Y. Supp. 485; Kendall v. West, 196 Ill. 221, 89 Am. St. Rep. 317, 63 N. E. 683; Tennant v. Fawcett, 94 Tex. 111, 58 S. W. 824; Rossiter v. Cooper, 23 Vt. 522; Crawford v. Mail & Exp. Pub. Co. 163 N. Y. 404, 57 N. E. 616; Harder v. Marion County, 97 Ind. 455; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157; Singerly v. Thayer, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230; Church v. Shanklin, 17 L.R.A. 207, and note (95 Cal. 626, 30 Pac. 789).

2. The promisor whose satisfaction is thus made the test must act honestly and in good faith. His dissatisfaction must be real, not merely pretended. Thus, if a suit of clothes were agreed to be made to the satisfaction of the purchaser at a fixed price, if they were in fact satisfactory to him, he could not feign dissatisfaction in order to get out of the contract merely because another similar suit was offered to him at a less price. This would not be dissatisfaction; it would be fraud. Some courts have held that, if a test of a reasonable character is necessary to determine fitness, the person to be satisfied must make such test or allow it to be made. So, if an employer should agree to pay for the services of an employee at a given rate, if they were satisfactory to him, he should give the employee a trial. Some of the decisions which are apparently in conflict with the ruling above stated may be distinguished by reason of the particular facts involved in them. Some may be reconciled with the general rule by taking into consideration the element of good faith or mere pretense of dissatisfaction. A few are in direct conflict with it. 9 Cyc. Law & Proc. p. 624. The rule is tacitly recognized in Baldwin Fertilizer Co. v. Cope, 110 Ga. 325, 35 S. E. 316.

3. Were it necessary for the master to have some reasonable ground for dissatisfaction, there are indications in the defendant's answer and affidavit that, while acting as manager and head gardener for the plaintiffs, he sold to himself and carried to his own place certain wire, guttering, piping, etc. He stated in his affidavit that these things were of no use to his employers, and were of use to him, and that Minis had authorized him to sell, and had ratified the sale of some like useless articles by accepting pay therefor, and he entered these things as a credit upon the amount which he claimed to be due him by the plaintiffs. It also appeared from his affidavit that he borrowed a few tools, such as a saw, a hammer, a square, a plane, etc., with which to do some repairing on a place which he himself had bought, and that Minis had sworn out criminal warrants against him, alleging larceny on his part, and a possessory war-

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rant to recover the alleged stolen goods, but the trial of the latter had resulted in favor of the defendant. Whether these acts were criminal, or furnished a proper basis for a possessory warrant or not, an agent with authority to sell property for his principal is not generally authorized to buy it for himself without the assent of the principal; and whether the borrowing of an employer's tools for use on work of his own would authorize the action taken by the employer or not, these things might furnish a very reasonable ground for dissatisfaction on the part of one who by the contract was to be satisfied. Without intimating any opinion, therefore, as to the merits of the cases arising under the warrants, we hold that there was no error on the part of the presiding judge under the evidence as to this feature of the present case.

4–6. The next question which arises is whether the employee occupied the premises of the employer, or a portion of them, as a tenant, so that he could decline to relinquish possession or to stay off of the property, after being discharged. Where a servant occupies a dwelling house belonging to the master, free of rent, as incidental to and connected with the performance of his duties as such servant, if he quits the service of the master before the expiration of the term, or is discharged by the master, his right to the possession of the dwelling house ceases, and he must surrender it. In such cases, in the eye of the law, the master has never parted with possession of the premises, the servant's possession being regarded as that of the master. Hence the master may enter and use such reasonable force as may be necessary to expel the servant. It has been said that, "when a servant is discharged, the master's right in this respect does not depend upon the question whether the servant is rightfully or wrongfully discharged, but exists in the one case as well as in the other, the master incurring the peril of paying damages for a breach of the contract if the discharge is wrongful; but the right to expel the servant from the house exists whether he had good cause therefor or not." Wood, Mast. & S. 2d ed. §§ 155, pp. 304 et seq. It is possible for one to be a servant, and at the same time a tenant of his master. He may have a contract of employment, and also a contract to rent a dwelling or parcel of land. If so, his right to retain possession of the premises, or to require a proceeding to remove him as a tenant, depends on the contract involved. It has been said: "'If the occupation is connected with the service, or if it is required, expressly or impliedly, by the employer, for the necessary or better performance of the service, then it is for his benefit, and he continues in possession.' The question is whether it is subservient and necessary to the service." Id. 308; Haywood v. Miller, 3 Hill, 90; People ex rel. Hubbard v. Annis, 45 Barb. 304; R. ex rel. Astley v. Spurrell, L. R. 1 Q. B. 74; R. v. Kelstern, 5 Maule & S. 136. "In such case a tenancy at will or at sufferance does not spring up immediately upon the termination of the service. To have that effect, the subsequent occupancy must be sufficiently long to warrant an inference of consent to a different holding." Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158. The termination of service there was by a discharge.

In the case before us Minis, with the knowledge, consent, and approbation of his wife, who owned the property, contracted with Mackenzie to employ the latter as head gardener to take charge of the place. The engagement was to be for at least three years "if Mackenzie proves himself competent and satisfactory," and also that he should "perform all duties incumbent on a first-class gardener and manager, to Minis's satisfaction." The employer agreed to pay him a certain stipulated amount per annum, to provide him free a house near the main residence on the land, and also fuel and vegetables. The employee was to look after the cows, fruit trees, flowers, grapes, and greenhouses. He was also to have milk as long as the cows were giving it, and his niece was to look after the milk and butter when he was absent. It is evident from the reading of the contract that the furnishing of the house upon the place to the manager and head gardener was an incident to the service, and for the purpose of aiding in its discharge, and was not a letting of any part of the property to him as a tenant of the owner. The occupancy of the house was directly connected with the service to be rendered, and for the better performance thereof. In law, therefore, the employer did not resign possession to the employee as to a tenant, but the possession of the employee was in effect that of the master. When the employee was discharged, it was his duty to resign possession and to leave the premises. He had no right to persist in remaining on the place, walking over it, and using it as if he had not been discharged. Nor could he do this because he insisted that he could not legally be discharged for three years from the date of the contract. If in any case an action at law for a breach of contract, brought by a discharged employee against his employer, would not furnish a sufficient remedy if the discharge were wrongful, this is not such a case. There was no contention that the plaintiffs were not solvent and able to respond in damages if any should be recovered against them, and

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there was nothing to show that irreparable damages would accrue to him. The employee was not invoking the aid of the court, but seeking to compel the continuance of the contract of employment, or at least the retention of some of its benefits, after his discharge, by merely insisting on remaining on the place, and dealing with the property as if he had not been discharged.

7. It was contended that an application for injunction was not the proper remedy. In 20 Am. & Eng. Enc. Law, 2d ed. p. 36, it is said: "Where a servant has been discharged and ordered to leave the master's house or premises, and remains, he is a trespasser whether the discharge was rightful or not, and the master may eject him, using as much force as is necessary, but not more, and may remove the servant's goods from the house or premises." See also Champion v. Hartshorne, 9 Conn. 568; Foye v. Sewell, 21 Abb. N. C. 15; Haywood v. Miller, supra; Perret v. Sanchez, 12 La. Ann. 687; Kerrains v. People, supra. If the discharged employee was a trespasser, and the employer had the right to remove him and his goods from the property, and even to use such reasonable force as might have been necessary for that purpose, but not more, was he obliged to resort to the use of such force, which might involve a personal conflict and serious consequences, for the purpose of asserting his rights, rather than to appeal to the law for their enforcement? In Stamford v. Stamford Horse R. Co. 56 Conn. 381, 1 L.R.A. 375, 15 Atl. 749, an injunction was asked by a borough to restrain the company from laying down its track in a street. The right of the borough to forcibly remove the track was insisted upon as a ground for questioning the jurisdiction of a court of equity. But the court sustained the injunction, adding: "And none the less so because of its right to remove the track by force. As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance and in some cases of trespass the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter." This statement was quoted with approval by the Supreme Court of the United States in Re Debs, 158 U. S. 564, 582, 39 L. ed. 1092, 1101, 15 Sup. Ct. Rep. 900, 905, and in the opinion Mr. Justice Brewer said: "Grant that any public nuisance may be forcibly abated, either at the instance of the authorities or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result." It cannot be successfully contended that, because the plaintiffs might have used reasonable force for the purpose of removing the defendant and his effects, they were compelled to use such force rather than to apply to the court for relief. This becomes specially evident when it is remembered that the owner of the property and the substantial employer is a woman, and the employee is a man.

Did the plaintiffs have any other legal remedy which would afford them adequate relief? A criminal prosecution would not do so. Such a case, though instituted by a prosecutor, would be a proceeding between the state of Georgia on the one part and the accused on the other to punish a violation of the criminal law, if one has taken place. It would not be a civil remedy for the purpose of enforcing the rights of the employer. A proceeding under Civil Code 1895, § 4823, alleging forcible entry or detainer, would not lie, because the controversy has not reached the point of using force so as to bring it within that statute (Curry v. Hendry, 46 Ga. 631; Coker v. McKinney, 68 Ga. 289), and we have just shown that the employer is not compelled to press it to that condition before appealing to the court for relief. A summary proceeding against the discharged employee, as an intruder, under Civil Code 1895, § 4808, would not furnish a sufficient remedy, for two reasons: First. To be an intruder, within the meaning of the statute, the original entry must have been unlawful. Murdock v. Miller, 21 Ga. 368; Thompson v. Glover, 120 Ga. 440, 47 S. E. 935. The element of good faith in claiming a right of possession is also involved, the Code section cited requiring that the affidavit made in order to commence the proceeding shall state that the person against whom it is directed "does not in good faith claim a right to such possession, and yet refuses to abandon the same." Second. The person claimed to be an intruder may tender a counter affidavit, and make an issue for trial. No bond is required of him; and, if the plaintiffs in this case were compelled to proceed against the defendant in the manner so provided, the discharged employee could accomplish his purpose, and re-

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main upon the land of his employers by simply making a counter affidavit denying that he was such an intruder. A proceeding to evict him as a tenant at sufferance would not suffice, because, as we have already seen, he is not a tenant. An action for damages against him as a trespasser would not furnish adequate relief, because the trespass does not consist of a single act, but is continuing in its character, which might involve multiplicity of suits; and it is also charged that the defendant is insolvent, and a recovery against him would be of no value. We do not know of any remedy at law which would furnish complete and adequate relief to the plaintiffs. If, therefore, the discharged employee has no right to insist upon entering and remaining upon the premises and dealing with them as if he were still employed there, and, if against his trespasses so committed, the plaintiffs are entitled to relief, it follows that they may apply to a court of equity; and, the only sufficient remedy which can be furnished being by the writ of injunction, that writ is available to them. If the defendant could insist on remaining upon the land until the end of a common-law proceeding adjudicating him to be a trespasser, which we have shown he is, then through "the law's delay," —that is, the necessary time which would elapse before the final adjudication—he would have accomplished the very thing which we hold to be illegal. Under such circumstances, the plaintiffs are entitled to present relief. See Scott v. Scott, 33 Ga. 102. The defendant in this case did not demur to the proceeding in equity by the plaintiffs, but denied the substantial allegations of the petition, and set up a counterclaim to recover judgment for what he asserted was due to him. Had he demurred to the petition for want of equity, it is apparent from what has been said above that his objection would not have been sustainable.

8. It was contended that, as the defendant had already entered on the land, and his personal chattels were there, a court of equity would not by injunction compel their removal; that this would be in the nature of a mandatory injunction, which a court of equity will not grant in this state. We recognize the general rule that an injunction can only restrain, and cannot compel, performance. Civil Code 1895, § 4922. "While under the Code an injunction which is purely mandatory in its nature cannot be granted, the court may grant an order the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may incidentally be compelled to perform some act." Goodrich v. Georgia R. & Bkg. Co. 115 Ga. 340, 41 S. E. 659. An interlocutory injunction cannot be used where the real, substantial purpose is to obtain affirmative relief by compelling the performance of some act. But where the essential nature and purpose of the injunction is not to compel the performance of an act, but to restrain, this may, and sometimes does, incidentally involve some affirmative action, in order to make the restraint effective, and not a mere mockery. No precise line can be established mathematically and absolutely dividing the one condition from the other, but the actual difference is substantial, and nearly always palpable. To illustrate: An interlocutory injunction could not properly be granted to compel specific performance of a contract of sale, although it were shaped so as nominally to restrain the defendant from refusing to convey. There the real purpose would be to compel affirmative action. On the other hand, if an insolvent trespasser should enter upon land and begin cutting down the timber upon it, or tearing down and destroying the houses or other valuable improvements there located, he could be enjoined from further trespassing, although obedience to the order might involve affirmatively the removal of his tools and vehicles with which he intended to haul away the wood when cut. Against such an injunction, it would be no valid objection to say that he had already set foot upon the land before the injunction was granted, or that he had already begun to cut the trees, or had already driven his wagons upon the premises. The main, substantial purpose of the order would be to restrain, although incidentally some affirmative action on the part of the defendant might be necessary in order to yield obedience to the injunction. Very commonly the intention to do an irreparable injury is not so clearly manifested as to furnish ground for an injunction, until the wrong has been commenced; but it will not oust the court of its jurisdiction for the wrongdoer to say that he has reached the property and begun the commission of the wrong before the plaintiff can reach him with an injunction. In Russell v. Mohr-Weil Lumber Co. 102 Ga. 563, 29 S. E. 271, and in Vaughn v. Yawn, 103 Ga. 557, 29 S. E. 759, the right of possession of land was in controversy between two parties, and it was held that the writ of injunction could not be used to oust one of them from the actual possession and admit the other into possession of the premises. This is very different from the case at bar, where the employee has no claim of title or right of possession adverse to his employers. Here, too, the main, substantial relief sought was to restrain the continuing trespass by the discharged employee, who was alleged to be insolvent, upon the prem-

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ises of the employers. It was alleged that the vegetables, flowers, fruit, garden, and the place generally, needed immediate attention; that, while the defendant persisted in his conduct, the plaintiffs could neither enjoy their home, nor prepare it for their use in the summer time, nor secure another gardener. His conduct gives legitimate ground for injunction. If this should be held otherwise, every cook who might be discharged, although rightfully, might insist upon entering and remaining in the kitchen and using the utensils, by claiming that the discharge was unlawful. Every housemaid, when discharged, might continue to enter the house and rooms of her former employer, and to handle the furniture or other articles of personalty, by refusing to recognize the discharge. Every coachman, after being discharged, might insist upon entering the stables and handling the horses, because he claimed that his discharge was improper. In fact every servant could refuse to be discharged, or to recognize the discharge, and insist on continuing to act as if there had been none, and the employer would be helpless.

9. The defendant offered in evidence an affidavit which had been made by Minis for the purpose of dispossessing him on the day after he was discharged. This affidavit proceeded on the theory that the discharge made Mackenzie a tenant at sufferance, and subject to be dispossessed as such. We have already seen that this was an erroneous view. Had there been a considerable lapse of time or other circumstances which rendered it a legitimate subject of controversy whether Mackenzie was a tenant or a servant occupying a portion of his master's premises, this affidavit would have been admissible to throw light on that subject, as an admission on the part of the person making it. But where it was evidently made merely under a mistaken idea of the correct mode of enforcing the right of the master, and was later followed by a proper proceeding, its rejection furnishes no ground for reversing the judgment or refusing the grant of the injunction. It may also be stated that the affidavit which was excluded was not accompanied by any warrant or other record or proof that the proceeding was still pending, or that there had been an adjudication when the equitable petition was filed, and that the affidavit of Mackenzie, which was introduced in evidence without objection, stated that Minis swore out a dispossessory warrant against him, alleging that he was a tenant at sufferance, so that the fact to show which the affidavit could have been introduced was otherwise proved. This was not a case of election between one of two remedies which were open to the plaintiff; but an error in selecting a remedy which would not lie, and the subsequent enforcing of one which was proper.

Judgment affirmed.

All the Justices concur.

IOWA SUPREME COURT.

GEORGE HUFFMAN
v.
MARCY MUTUAL TELEPHONE COMPANY, Appt.

(— Iowa, —, 121 N. W. 1033.)

Telephone — abuse of privilege — discontinuance.

A telephone company which has established no rules as to abuse by patrons of the privileges of the service cannot discontinue the service of a customer two months after he has been warned for using profane and indecent language over the line and interfering with its use by other patrons, where he heeded the warning, and his misconduct ceased from that time.

(June 30, 1909.)

Case Note. — Right to withdraw telephone service because of abuse of privilege.

Cases are not lacking on the right of a telephone company to remove the instrument or discontinue the service because of nonpayment of telephone rentals or tolls at the time required by the contract or regulations of the company; but there is but little authority on the specific question involved in HUFFMAN v. MARCY MUT. TELEPH. CO., as to the right of the telephone company to remove the instrument or discontinue the service because of the subscriber's abuse of the privilege.

The case most resembling HUFFMAN v. MARCY MUT. TELEPH. CO. is Pugh v. City & Suburban Teleph. Asso. 8 Ohio Dec. Reprint, 644 (affirmed without opinion in 13 Ohio L. J. 190), holding that a rule of the telephone company, embodied in its contract with the patron, to the effect that the use of the instrument for the transmission of "profane or improper language" will be held sufficient cause for the cancelation of the contract and the removal of the instrument, was a reasonable and valid regulation; and the majority were of the opinion that under this regulation the telephone company was authorized in removing the telephone because of the subscriber's use of the word "damn" upon an occasion when he was having difficulty in getting connections. There was a conflict in the evidence as to the context in which that word was used; but the majority were apparently of the opinion that even the subscriber's own version of his remarks: "If you can't get the party

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APPEAL by defendant from a decree of the District Court for Boone County granting a writ of mandamus compelling it to restore a telephone and service therefor to plaintiff's residence. Affirmed.

The facts are stated in the opinion.

Messrs. **Ganoe & Ganoe**, for appellant:

A telephone company has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just, and to refuse to furnish telephonic communications to any subscriber in its territorial jurisdiction who refuses to comply with such reasonable rules and regulations.

American Waterworks Co. v. State, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; Williams v. Mutual Gas Co. 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; Jones, Teleg. & Teleph. Cos. p. 242, § 250; Pugh v. Telephone Co. 27 Alb. L. J. 163.

The commission of the wrongful acts after the management of the telephone company had warned plaintiff to desist therefrom gave the company a right to refuse further service to plaintiff and to remove the telephone from his residence.

People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co. 19 Abb. N. C. 466; Gardner v. Providence Teleph. Co. 23 R. I. 262, 55 L.R.A. 113, 49 Atl. 1004; Jones, Teleg. & Teleph. Cos. §§ 250, 251; Nye v. Western U. Teleg. Co. 104 Fed. 630; Pugh v. Telephone Co. supra.

A telephone company does not have the right to allow one of its subscribers or patrons to use obscene, slanderous, or defamatory language over its lines concerning another of its patrons or subscribers, and if, with knowledge of such fact, it continues to render service to a subscriber who uses it for such purpose, the company will become a publisher of such matter, and will be liable for damages therefor.

Peterson v. Western U. Teleg. Co. 65 Minn. 18, 33 L.R.A. 302, 67 N. W. 646; Jones, Teleg. & Teleph. Cos. § 250.

One must so use his own property as not to injure another.

Jones, Teleg. & Teleph. Cos. § 251; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; Munn v. Illinois, 94 U. S. 124, 24 L. ed. 83; Anderson's Law Dict. p. 1076; 1 Bl. Com. 306; 2 Kent, Com. 340.

The company had a right to believe that the offending subscriber and his family would, in the future, use the phone as he and they had used it in the past, and to remove his phone and refuse him further service.

Ellis v. State, 138 Wis. 513, 20 L.R.A. (N.S.) 444, 119 N. W. 1110; Blackburn v. State, 23 Ohio St. 146; Farr v. Payne, 40 Vt. 615; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Metzger v. Schultz, 16 Ind. App. 454, 59 Am. St. Rep. 323, 43 N. E. 886, 45 N. E. 619; 1 Greenl. Ev. 15th ed. p. 62.

I want, you can shut up your damn old telephone," was sufficient to justify the telephone company in discontinuing the service. There was a dissenting opinion apparently inspired by a doubt whether the word "damn" was to be regarded as a profane or even improper remark under the circumstances.

A different question as to the abuse of the privilege was presented in Gardner v. Providence Teleph. Co. 23 R. I. 262, 55 L.R.A. 113, 49 Atl. 1004, holding that a telephone company was justified in withdrawing the service from a subscriber upon the latter's refusal to discontinue the use of extention instruments not furnished by the company, but obtained by him from other sources. The majority opinion, however, declares that the right of the telephone company to prohibit the use of extension sets not provided by it is subject to the obligation that the company itself shall be able and willing to furnish extension sets as efficient and convenient as the state of the art affords, upon reasonable terms; and that if the company neglects its duty to the public, and is not provided with the means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them except at exorbitant rates, the customer may supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation. The Chief Justice, while agreeing with the general statements of law in the majority opinion, dissented from the conclusion therein in favor of the telephone company, for the reason that in his opinion the company's charge for the extension service was exorbitant, and the case, therefore, fell within the exception or limitation of the general rule. In this connection it appeared that the subscriber had been receiving for $82 per year a satisfactory service by using long distance extension sets purchased by him in connection with a grounded telephone circuit, whereas the company refused to permit the use of long distance extension sets except in connection with a metallic service, the rate for that service being $220 per annum, although it offered to annex to the subscriber's grounded circuit, for a reasonable price, such an extension set as was appropriate for that circuit and which it contended would give satisfactory service. In a *per curiam* response to a petition for rehearing, it was remarked that there was no evidence that the company's charge for a metallic circuit, combined with a long distance set, was exorbitant.

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Messrs. **Whitaker & Snell**, for appellee:

It is the duty of defendant to furnish its telephone service to plaintiff and the public generally upon tender of the price of its service, under reasonable terms, rules, and regulations.

27 Am. & Eng. Enc. Law, 2d ed. p. 1021; Cumberland Teleg. & Teleph. Co. v. Hobart, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349; Kirby v. Western U. Teleg. Co. 4 S. D. 105, 30 L.R.A. 612, 46 Am. St. Rep. 765, 55 N. W. 759.

The defendant cannot discriminate, but must furnish all its subscribers and patrons like service, upon like terms and under like conditions.

State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; State ex rel. Gwynn v. Citizens' Teleph. Co. 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; Jones, Teleg. & Teleph. Cos. §§ 243, 246.

A past breach of contract, if shown, is insufficient excuse for refusal to furnish service, upon tender of the price of service and compliance with reasonable rules and regulations of the company.

Jones, Teleg. & Teleph. Cos. § 251; State ex rel. Webster v. Nebraska Teleph. Co.; State ex rel. Gwynn v. Citizens' Teleph. Co.; and Cumberland Teleg. & Teleph. Co. v. Hobart,—supra.

Ladd, J., delivered the opinion of the court:

The defendant company operates a telephone system in Ogden with twenty-three lines extending therefrom into the surrounding country. One of these lines extended to the residence of plaintiff and had six patrons. He was one of these until November 8, 1907, when the company removed the telephone, and refused further service. Thereupon he paid what was owing it, tendered customary advance charges for putting in an instrument and making connections, and demanded that the service be restored. This was refused, on the ground that plaintiff had forfeited the right thereto by the use of profane, vulgar, and indecent language over the line, and by interfering, and permitting members of his family to interfere, with the use thereof by others. No question is raised but that telephone companies are, to a limited extent, and yet in a strict sense, common carriers of intelligence and news, and are bound to afford equal facilities to all in like situations. They must supply all alike who are alike, and cannot discriminate against anyone. State ex rel. Gwynn v. Citizens' Teleph. Co. 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; 23 L.R.A. (N.S.) Gardner v. Providence Teleph. Co. 23 R. I. 262, 55 L.R.A. 113, 49 Atl. 1004; Godwin v. Carolina Teleph. & Teleg. Co. 136 N. C. 258, 67 L.R.A. 251, 103 Am. St. Rep. 941, 48 S. E. 636, 1 A. & E. Ann. Cas. 203; Missouri ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co. (C. C.) 23 Fed. 539; Jones, Teleg. & Teleph. Cos. §§ 243, 246; 26 Cyc. Law & Proc. p. 375; 27 Am. & Eng. Enc. Law, 2d ed. p. 1021. Though a patron may have been delinquent, this will furnish no excuse for refusal to restore the service if he shall pay the amount for which he is delinquent, and tender the price of service, with compliance with the reasonable rules and regulations of the company. State ex rel. Webster v. Nebraska Teleph. Co. and State ex rel. Gwynn v. Citizens' Teleph. Co. supra; Jones, Teleg. & Teleph. Cos. § 251. The remedy in event of refusal is by writ of mandamus. Jones, Teleg. & Teleph. Cos. § 254, and cases cited above. As said, these propositions are not controverted. The sole issue on which the cause is submitted is whether the right to telephone service had been forfeited by plaintiff. As there was but a single line, and each patron was indicated by particular rings of the bell, others than those talking innocently in ascertaining whether the line were in use, or as eavesdroppers, might hear conversations in progress, or expressions directed to them. At one time when plaintiff was conversing over the line, he was disturbed by someone, as he testified, by putting the receiver over the transmitter and whistling, and he remarked: "That sounds nice; it sounds like it might be a 'chippy.'" According to several witnesses to whom he related the incident, he said it might be an old "chippy," and the manager of the company testified that he had told him that he had said: "It is the G—— d—— chippies on the line." There was evidence that at another time he called up one of the patrons, toward whom he entertained ill feelings, and blatted like a sheep in the telephone, though he denied this. His daughter was proven to have taken down the receiver, on one occasion, listened, and then rattled the receiver holder and trilled in the transmitter. Patrons of the line, as well as those in charge of the switch board, testified that there had been much disturbance on the line by way of interrupting conversations by talking in the telephone or in ringing the bell, all of which ceased upon terminating service for plaintiff. On the other hand, plaintiff denied having caused such disturbance, as did his wife, and both to having properly instructed their children. He admitted having employed the word "chippy," but explained that this was to ascertain who was interfering, and that no profanity accompanied it. In the latter

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part of August, or fore part of September, when plaintiff told the manager of the use of such word, and inquired if there had been complaints of his disturbing the line, he was answered in the affirmative. He then inquired if this came from two families named, and the manager warned him that such language over the line could not be tolerated, and that unless he quit disturbing the line he would take out his telephone. There was no evidence of improper language or of any disturbance after this time, though the manager testified that a complaint came in later, and that he was notified by one patron that, unless the service for plaintiff was discontinued, he might remove the telephone from his residence.

No one can well defend the language employed by plaintiff. As a witness he admitted its impropriety. And though not chargeable with all the disturbance on the line, we entertain no doubt but that both he, and one of his children at least, had abused the privileges accorded them, and so far ignored the golden rule as to have made use of the line as a vehicle of petty spite toward two of his neighbors. But it does not appear that they persisted upon being warned that such conduct would not be tolerated, nor that they were guilty of any impropriety thereafter during the two months intervening between such warning and the removal of the telephone. Much is said in argument of the right of such a company to adopt reasonable rules and regulations for the transaction of its business. That it might have established such rules is not open to debate. Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa) 120 N. W. 966. But we have discovered none in the record before us, and it would scarcely seem necessary to prescribe in advance a rule prohibiting the employment of profane, vulgar, or indecent language over a telephone line, especially when this is likely to be heard by third persons, or prohibiting interference with the use of the line by others. Such a line, when used in common, enters many family circles, and the proprietor is warranted in assuming, at least until the contrary appears, that its patrons will have regard for the ordinary amenities of life, and observe the courtesies common to civilized society. Upon discovery that in this it has been mistaken as to any subscriber, and that, notwithstanding being duly warned, he persists in the use of improper language over the line, or purposely interferes in conversations between other patrons of the system, in order to annoy or interrupt their conversations, or force them to yield the line for his own convenience, and this is persisted in after being duly warned to desist therefrom, there would seem to be but one adequate remedy, and that is to withdraw the service from such person. Jones, Teleg. & Teleph. Cos. § 250. Otherwise the efficiency of the enterprise would be impaired or destroyed, and the proprietor fail in furnishing the character of service impliedly promised. The very nature of the service undertaken exacts control to this extent, for without the power to withdraw it under the circumstances mentioned, there could be no assurance of its character or efficiency. A single patron by meddling and discourtesy might deprive his neighbors of the benefits of a convenient invention, and destroy the value of the property devoted to the public service. This power to regulate is essential in order to enable the defendant to perform such service, and is clearly to be implied from the nature of the enterprise. But it ought never to be arbitrarily exercised. Reasonable caution must be taken lest injustice be done. Some allowance is to be made for the infirmities of human nature. Local customs are not to be ignored. Habit sometimes excuses, if it does not justify, the use of objectionable language. Early environment, more often than an evil spirit, is responsible for bad manners. Undisclosed emergencies may extenuate lapses from propriety. So that, when rules to guide patrons have not been promulgated in advance, it is not unreasonable that any patron misusing his privileges be duly warned thereof by the telephone company, and given an opportunity to mend his ways, before being finally deprived of this most convenient means of business and social communication. Such was the course pursued by defendant, with the result that, in so far as appears, the objectionable conduct ceased, and apparently the telephone was removed two months later owing to the threat of another patron, rather than because of any persistent interference with the service by plaintiff. The decree directing the restoration of the telephone and connections has our approval.

Affirmed.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

NELSON-BETHEL CLOTHING COMPANY, Appt.,
v.
EDNA MAY PITTS.

(— Ky. —, 114 S. W. 331.)

Master — dangerous appliance — belt.

1. A belt by which a sewing machine is connected with a shaft by means of which the power is applied to it is not a dangerous instrument which will render the master

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Messrs. Whitaker & Snell, for appellee:

It is the duty of defendant to furnish its telephone service to plaintiff and the public generally upon tender of the price of its service, under reasonable terms, rules, and regulations.

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Affirmed.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

NELSON-BETHEL CLOTHING COMPANY, Appt.,
v.
EDNA MAY PITTS.

(— Ky. —, 114 S. W. 331.)

Master — dangerous appliance — belt.

1. A belt by which a sewing machine is connected with a shaft by means of which the power is applied to it is not a dangerous instrument which will render the master

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liable for injury to an employee through getting caught therein, merely because it is put together with hooks.

Same — instruction — risk.

2. A master is not liable for injury to the operator of a sewing machine whose hair is caught in the belt which she is attempting to connect with the shaft furnishing power to the machine, merely because her superior, to whom she complained that the belt was not fit, told her it was all right, and that there was no danger in her putting it back on the machine, where neither had in mind the danger of her getting caught in it, and she understood such risk as well as he did.

(December 18, 1908.)

APPEAL by defendant from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. **J. T. O'Neal**, with Mr. **Fred Forcht, Jr.**, for appellant:

The particular danger or defect as to which an assurance is given must be the proximate cause of the injury.

Shemwell v. Owensboro & N. R. Co. 117 Ky. 556, 78 S. W. 448; Burlington & C. R. Co. v. Liehe, 17 Colo. 280, 29 Pac. 175; International & G. N. R. Co. v. Turner, 3 Tex. Civ. App. 487, 23 S. W. 146; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Hilje v. Hettich, 95 Tex. 321, 67 S. W. 90; Illinois Steel Co. v. Mann, 197 Ill. 186, 64 N. E. 328; 1 Labatt, Mast. & S. 1184; Lowcock v. Franklin Paper Co. 169 Mass. 313, 47 N. E. 1000.

The servant assumed the risk.

1 Labatt, Mast. & S. 589; Wilson v. Chess & W. Co. 117 Ky. 567, 78 S. W. 453; Kelly v. Barber Asphalt Co. 93 Ky. 363, 20 S. W. 271; McCormick Harvesting M. Co. v. Liter, 23 Ky. L. Rep. 2154, 66 S. W. 761; Mellott v. Louisville & N. R. Co. 101 Ky. 212, 40 S. W. 696; McGhee v. Bell, 19 Ky. L. Rep. 267, 39 S. W. 823; Duncan v. Gernert Bros. Lumber Co. 27 Ky. L. Rep. 1039, 87 S. W.

Case Note.—Assurance of safety by master or vice principal.

This question is discussed in the note to McKee v. Tourtellotte, 48 L.R.A. 542, in which the earlier cases will be found collected.

The general rule of law to be gathered from the authorities reviewed in that note, as well as from those herein cited, may be stated thus: Where a servant undertakes certain work, or continues to perform work, relying upon the assurance of his master or the latter's representative that such work may be performed in safety, the mere fact that, before such assurance was given, the fears of the servant as to the possibility of injury had been excited by circumstances that had come to his knowledge, will not, as a matter of law, charge him with contributory negligence or with an assumption of the risks involved in the work, unless the danger was so obvious that no man of ordinary prudence would incur it. Labatt, Mast. & S. §§ 446-454; Harder & H. Coal Min. Co. v. Schmidt, 43 C. C. A. 532, 104 Fed. 282; Highland Boy Gold Min. Co. v. Pouch, 61 C. C. A. 40, 124 Fed. 148; Allen v. Gilman, 127 Fed. 609; Reiter-Connolly Mfg. Co. v. Hamlin, 144 Ala. 192, 197, 40 So. 280; Southern Cotton Oil Co. v. Spotts, 77 Ark. 458, 92 S. W. 249; Warren Vehicle Stock Co. v. Siggs (Ark.) 120 S. W. 412; Starr v. Kreuziberger, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 787; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521; McIntyre v. Empire Printing Co. 103 Ga. 288, 29 S. E. 923; Bush v. West Yellow Pine Co. 2 Ga. App. 295, 58 S. E. 529; Watson Cut Stone Co. v. Small, 181 Ill. 366, 54 N. E. 995; Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332; Chicago Screw Co. v. Weiss, 203 Ill. 526, 68 N. E. 54; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Springfield Boiler & Mfg. Co. v. Parks, 123 Ill. App. 503, affirmed in 222 Ill. 355, 78 N. E. 809; Walter v. Fisher, 96 Ill. App. 590; Harte v. Fraser, 104 Ill. App. 201; Fletcher Bros. Co. v. Hyde, 36 Ind. App. 96, 75 N. E. 9; Purcell Mill & Elevator Co. v. Kirkland, 2 Ind. Terr. 169, 47 S. W. 311; Stomme v. Hanford Produce Co. 108 Iowa, 137, 78 N. W. 841; Lasch v. Stratton, 101 Ky. 672, 42 S. W. 756; Wake v. Price, 22 Ky. L. Rep. 696, 58 S. W. 519; East Jellico Coal Co. v. Stewart, 24 Ky. L. Rep. 420, 68 S. W. 624; Dryden v. Pogue Distillery Co. 26 Ky. L. Rep. 528, 82 S. W. 262; Keen v. Keystone Crescent Lumber Co. (Ky.) 118 S. W. 355; McHenry Coal Co. v. Phelps (Ky.) 122 S. W. 829; Burgess v. Davis Sulphur Ore Co. 165 Mass. 71, 42 N. E. 501; O'Brien v. Nute-Hallett Co. 177 Mass. 422, 59 N. E. 65; Lord v. Wakefield, 185 Mass. 214, 70 N. E. 123; McKinnon v. Ritter-Conley Mfg. Co. 186 Mass. 155, 71 N. E. 296; Dunphy v. Boston Elev. R. Co. 192 Mass. 415, 78 N. E. 479; Berube v. Horton, 199 Mass. 421, 85 N. E. 474; Carriere v. Merrick Lumber Co. (Mass.) 89 N. E. 544; Shadford v. Ann Arbor Street R. Co. 121 Mich. 224, 80 N. W. 30; Brown v. Lennane, 155 Mich. 686, 118 N. W. 581; Anderson v. Pitt Iron Min. Co. 103 Minn. 252, 114 N. W. 955; Duerst v. St. Louis Stamping Co. 163 Mo. 607, 63 S. W. 827; Connolly v. St. Joseph Press Printing Co. 166 Mo. 447, 66 S. W. 268; Bane v. Irwin, 172 Mo. 306, 72 S. W. 522; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Cole v. St. Louis Transit Co. 183 Mo. 81, 81 S. W. 1138; Burkard v. A. Leschen & Sons Rope Co. 217 Mo. 466, 117 S. W. 35; Stalzer v. Jacob Dold Packing Co. 84 Mo. App. 565; Haworth v. Mineral Belt Teleph. Co. 105 Mo. App. 161, 79 S. W. 727; Carter v. Bald-

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762; Anderson v. H. C. Akeley Lumber Co. 47 Minn. 128, 49 N. W. 664; Hayden v. Smithville Mfg. Co. 29 Conn. 548; Jones v. Manufacturing & Invest. Co. 92 Me. 565, 69 Am. St. Rep. 535, 43 Atl. 512; Rooney v. Sewall & D. Cordage Co. 161 Mass. 153, 36 N. E. 789; Goodes v. Boston & A. R. Co. 162 Mass. 288, 38 N. E. 500; Daniels v. New England Cotton Yarn Co. 188 Mass. 260, 74 N. E. 332; Reis v. Struck, 23 Ky. L. Rep. 1113, 64 S. W. 729; Lindsay v. Hollerbach & M. Contract Co. 29 Ky. L. Rep. 70, 4 L.R.A.(N.S.) 830, 92 S. W. 294.

Messrs. **Ray Bizot** and **Edwards, Ogden, & Peak**, for appellee:

By complaining of her fear of being hurt in putting on the belt, the plaintiff availed herself of the benefit of the assurance of safety.

Louisville & N. R. Co. v. Vestal, 105 Ky. 462, 49 S. W. 204; Lasch v. Stratton, 101 Ky. 672, 42 S. W. 756; Louisville & N. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866; Louisville & N. R. Co. v. Shivell, 13 Ky. L. Rep. 903, 18 S. W. 944; Quaid v. Cornwall, 13 Bush, 601.

The plaintiff did not assume the risk incident to the employment in continuing in the work.

Illinois C. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32; 4 Thomp. Neg. § 4664; Cumberland Teleph. & Teleg. Co. v. Harp, 28 Ky. L. Rep. 909, 90 S. W. 980; Cumberland Teleph. & Teleg. Co. v. Metzger, 29 Ky. L. Rep. 1024, 97 S. W. 35; Merganthaler-Horton Basket Mach. Co. v. Lyon, 28 Ky. L. Rep. 471, 89 S. W. 522.

Hobson, J., delivered the opinion of the court:

The Nelson-Bethel Clothing Company is a manufacturer of pants in Louisville. Edna May Pitts was in its service as the operator of a sewing machine. There were some forty or fifty sewing machines in two rows, the ordinary Singer sewing machines, except that, instead of being operated by a pedal, the belt was passed over a wheel setting upon a shaft which ran under all of the sewing machines, and was turned by an electric motor. The belts operating the sewing machines were the usual sewing machine

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win, 107 Mo. App. 217, 81 S. W. 204; Roberti v. Anderson, 27 Nev. 396, 76 Pac. 30; Burnham v. Concord R. Co. 69 N. H. 280, 45 Atl. 563; Siedentop v. Buse, 21 App. Div. 592, 47 N. Y. Supp. 809; Hannigan v. Smith, 28 App. Div. 176, 50 N. Y. Supp. 845; Schmit v. Gillen, 41 App. Div. 302, 58 N. Y. Supp. 458; Pilkey v. Harrower, 59 App. Div. 378, 69 N. Y. Supp. 243; Wolf v. Devitt, 83 App. Div. 42, 82 N. Y. Supp. 189, affirmed without opinion in 179 N. Y. 569, 72 N. E. 1152; McDougald v. Lumberton, 129 N. C. 200, 39 S. E. 826; Hughes v. Fayette Mfg. Co. 214 Pa. 282, 63 Atl. 692; Faulkner v. Mammoth Min. Co. 23 Utah, 437, 66 Pac. 799.

Thus, in Merriweather v. Sayre Min. & Mfg. Co. (Ala.) 49 So. 916, it was held that the servant had the right to rely on the assurance of the master as to the safety of the machinery, appliances, and places to work, where the attention of the master had been called to them, unless the danger was so obvious that no prudent man would use such machinery or appliance, or would work at such a place.

And in Milby & D. Coal & Min. Co. v. Balla, 7 Ind. Terr. 629, 18 L.R.A.(N.S.) 695, 104 S. W. 860, it was held that where the servant received an assurance from the master that a particular tool or appliance was safe, he might rely upon such assurance, if it appeared that the master had the greater knowledge or means of knowledge concerning it, and might continue in the master's employment, unless he knew, or, by the exercise of ordinary care for his own safety must necessarily have known, of the defects and of the danger incident to the use of such tool or appliance.

And in Burnside v. Novelty Mfg. Co. 121 Mich. 115, 79 N. W. 1108, it was held not to be negligence for an employee who was in

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doubt about the safety of the place where he was sent to work to defer to the opinions and assurances of his employer or the latter's representative, who were supposed to know, and who, from their positions, were bound to have special knowledge as to whether it was safe or not.

And in Ohio Copper Min. Co. v. Hutchings, 172 Fed. 201, it was held that a servant who knew that the place where he was sent to work was dangerous if unprotected, and who also knew that employees of another branch of the service were especially charged with the duty of safeguarding it, was entitled to rely upon the representation of the performance of that duty, made by a superior who spoke for his employer, unless its untruthfulness was manifest, and that it was not incumbent upon the servant to make an effort or to take care to discover whether the assurance of safe condition given him was true, if the insufficiency of the precautions adopted was not so patent as to be readily observed by him.

So, the rule was stated in Levy v. Rosenblatt, 21 Pa. Super. Ct. 543, to be that, if the master gave the servant to understand that he did not consider the risk one which a prudent person should refuse to undertake, the servant had a right to rely upon his master's judgment, unless his own was so clearly opposed thereto that in fact he did not rely upon his master's opinion.

And in Industrial Lumber Co. v. Bivens (Tex. Civ. App.) 105 S. W. 831, it was held that a servant who had been assured by his foreman that there was no danger, and who was ordered by him to go back to work, had the right to rely upon the superior knowledge of his foreman, unless the danger was so patent that no one of ordinary experience and observation would have under-

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belts, consisting of a round leather thong fastened together by a hook or hooks. Miss Pitts had been in the business of operating such machines something over five years, having worked in a number of similar establishments in the city of Louisville, and was regarded as a skilled hand. She had worked at this particular machine for two months, when she was hurt on August 3, 1905. The machine table was 31 inches high. The drive wheel on the shaft was 11 inches in diameter. The wheel directly under the machine was 5 inches in diameter, and the distance between the wheel on the shaft and the wheel under the machine was 14 inches. The shaft was 1⅜ inches in diameter. About two weeks before, she had had trouble with her belt, and had gone with it to the forelady, who had sent her to Pat Begley, whose business it was to fix the belts. She asked him for a new belt, and he refused to give it to her, but, instead, gave her a piece of belt about 1½ feet long, and took out the worst part of her belt, telling her that her belt was all right, it was safe, and would not break any more. The belt then consisted of three pieces put together with hooks. She used the belt without any further trouble for two weeks, when one morning it began to break again, and it then broke seven times. When a belt would break, they would get hooks from Begley and fasten it together, and put it on themselves.

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taken to continue in the work, despite such assurance of the foreman and his order.

So, in accordance with this rule of law, a servant will not be charged with the assumption of the risks involved in his work, or with contributory negligence, where, after a complaint by him of a defect in an appliance which he is called upon to use, or of the unsafe condition of a place where he is compelled to work, and after a promise by the master to remedy the same, the master assures the servant that the defect or unsafe condition has been remedied. Hayward v. Key, 70 C. C. A. 402, 138 Fed. 34; Lynch v. M. T. Stevens & Sons Co. 187 Mass. 397, 73 N. E. 478; Lavelle v. Dunn-Green Leather Co. 194 Mass. 294, 80 N. E. 475; Rogers v. Chicago, G. W. R. Co. 65 Minn. 308, 67 N. W. 1003; Barbour v. Miles, 14 Ohio C. C. 628; Young v. Mercantile Steam Laundry Co. 198 Pa. 553, 48 Atl. 497; Jefferson & N. W. R. Co. v. Woods (Tex. Civ. App.) 64 S. W. 830.

As was before stated, if the danger is known to and comprehended by the servant, so that, in the exercise of ordinary prudence, he should not incur it, the assurance of the master or his representative will not avail the servant. And in the following cases this rule was applied to prevent recovery for injuries to the servant under such circumstances: Kansas City Southern R. Co. v. Billingslea, 54 C. C. A. 109, 116 Fed. 335; Walker v. Scott, 67 Kan. 814, 64 Pac. 615, reversing 10 Kan. App. 413, 61 Pac. 1091; Lindsay v. Hollerbach & M. Contract Co. 29 Ky. L. Rep. 68, 4 L.R.A. (N.S.) 830, 92 S. W. 294; Burke v. Davis, 191 Mass. 20, 4 L.R.A.(N.S.) 971, 114 Am. St. Rep. 591, 76 N. E. 1039; Lavelle v. Dunn-Greene Leather Co. 194 Mass. 294, 80 N. E. 475; Rohrabacher v. Woodard, 124 Mich. 125, 82 N. W. 797; Goga v. American Car & Foundry Co. 142 Mich. 340, 105 N. W. 859; Epperson v. Postal Teleg. Cable Co. 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; Evans v. Eastman Kodak Co. 129 App. Div. 768, 113 N. Y. Supp. 986; Engel v. Standard Lighting Co. 12 Ohio C. C. 489; Louisiana Extension R. Co. v. Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; Haywood v. Galveston, H. & S. A. R. Co. 38 Tex. Civ. App. 101, 85 S. W. 433; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257.

Thus, in Elgin, J. & E. R. Co. v. Myers, 226 Ill. 358, 80 N. E. 897, it was said that where the servant knew of the defect or what the danger was, he could not be said to rely upon the assurance that the danger did not exist, and that it was only where the servant had been misled by the assurance of the master, or someone standing in the master's place, that he could excuse himself from the assumption of the risk on the ground that he had been assured by the master that there was no danger in the use of the appliance which he knew, as a matter of fact, was defective and the use thereof attended with danger.

And in Hencke v. Ellis, 110 Wis. 532, 86 N. W. 171, it was held that an assurance of safety to one employed to do the work of a specialist, the kind that he was trained to do, was not material except where the person giving the assurance must be presumed to have better judgment or information than the one assured, so that the latter might reasonably rely thereon instead of on his own judgment.

Of course, an assurance of safety by the master will be of no avail to the servant where his injuries were caused by his own negligence, and not by any defect in the appliance furnished him, or the unsafe condition of his place of work. Phillips v. Michaels, 11 Ind. App. 672, 39 N. E. 669; Reis v. Struck, 23 Ky. L. Rep. 1113, 64 S. W. 729; Cisney v. Pennsylvania Sewer Pipe Co. 199 Pa. 519, 49 Atl. 309.

And where the servant merely consults with his master's representative upon the manner of performing his work, and is directed to do the work in a certain manner, with an assurance of safety, such assurance will avail him nothing if he adopts his own method of performing the work, and is thereby injured, especially where the servant's knowledge is superior to that of the master's representative. Knorpp v. Wagner, 195 Mo. 637, 93 S. W. 961.

The servant's continuance in the performance of his work, in reliance upon the master's promise to remedy a dangerous condition, of course, presents another question

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Her statement as to what took place at this point is as follows:

I took the belt back, and told Pat I could do nothing with this belt, it was rotten, and he took it out of my hands, and he said: "You are crazy, girl. That belt is all right." It was split in places, and he gave me three hooks, and he told me to go back and fix my belt. Well, I says: "Pat, suppose you put this belt on yourself." He says: "No, I won't." He said: "I am not getting paid for putting on belts. I am getting paid for pressing."

Q. What time was that?

A. The day I received my injury.

Q. What were you doing at the time you were injured?

A. I was throwing my belt on. We had to take a little string in our hands, and put it on the belt, you know, and hold the two ends in your fingers, and then get under there, all in a kneeling position, and you had to put your head and all under, and then you had to take that belt and throw it on, like that, and just as I throwed it on I got caught. I had to get right down under, and the shaft would go around and touch your skirt, and, of course, the wheel come out that way, and you had to get pretty close to snap your belt on, because you were all crouched up under there. You had no way to move. You would have to hold your left hand somewhere while you were throwing on with the right hand, like that. I never did think there was danger in such a thing when I was told there was not.

Q. Who told you there was not?

A. Pat Begley.

Q. Would you tell the jury whether Pat Begley or anyone representing the company explained to you how to put the belt on and the dangers incident to the work?

A. No, sir; no one had ever told me.

Q. What inspection, if any, was made by anyone representing this company of your belt?

A. None.

On cross-examination, she testified as follows:

Q. Now, Miss Pitts, you understood perfectly well how to operate the machine, did you not?

A. The machinery, the sewing part, yes, sir.

Q. That was very simple?

A. Not the belt.

Q. That was very simple?

A. The sewing, put the work under the foot of the machine was simple to do, but not to fix the belt.

Q. You knew there was a revolving shaft under there, didn't you?

A. I did.

Q. You knew there was a little pulley that operated your machine, and, when, it was off of that pulley, your machine would stop, and the roller would go on?

A. Yes, sir.

Q. You knew that the way to start your machine was to put this belt over this larger pulley, didn't you?

A. Yes, sir.

Q. Was there anything about the machine that you did not know?

A. I had no experience in putting on belts. I did not know it was dangerous at all. I relied on them telling me it was safe.

Q. Relied on who?

A. Pat Begley said I could not get hurt when I told him to put it on.

Q. And with your right hand you were putting on this belt?

A. I was.

Q. Don't you know that your hair was caught down on the shaft at least 12 or 15 inches—

A. No, sir; the belt took my hair just as I put it on. One of the hooks or something skinned the side of my head, and took me.

Q. The belt did? Well, your hair was not caught on the shaft according to your recollection?

A. I don't know.

When her hair was thus caught, it was wrapt around the shaft, and her whole scalp was torn from her head before the machinery could be stopped. Everything was torn off from the nape of the neck down to the bone, about one half of the eyebrow being torn off, and the right ear was pulled about an inch out of the head. There was a terrible hemorrhage from the wound, and there was also a fracture of the spine. She brought suit to recover for her injuries, and, a verdict and judgment having been entered in her favor for the sum of $8,129.16, the defendant appeals.

The ground upon which the recovery was had was that the belt of the machine was not reasonably safe for use; that its defective and unsafe condition was known to the defendant, and unknown to her; and that she was assured that the belt was reasonably safe and suitable for use, and used it, not realizing that its condition was dangerous, relying upon the statements of Begley, the dangerous condition of the belt not being so manifest that a person of ordinary prudence would not have used it. At the other places where she had worked, similar to this, it was customary for a man to put on the belts for the girls; but at this place the girls always put on their own belts, and she had put her belt on often before, and had put it on seven times that morning before the time that she was hurt. The belts when new were put together with hooks,

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and, when they would break, would be repaired with hooks. Begley furnished the hooks to the girls, and they put them on. When he furnished Miss Pitts that morning three hooks, she borrowed some pincers from a girl near her, and had put the belt together with the hooks just before she attempted to put it on, when she was hurt. The belt at this time differed from an ordinary sewing machine belt only in this: that it consisted of more pieces and had more hooks in it than a belt usually has, and she had put the hooks in herself. Begley says that he offered to put the belt on for her, and she declined his assistance. She denies this, and says he declined to put it on for her. The proof for the defendant was to the effect that her hair was not put up; that a short time before the forelady had called her atention to her hair being down, and directed her to tie it up, and she had agreed to do so, but had not in fact done it; and that this was the cause of her hair being caught. The belt was on the machine when the machinery was stopped, and was all right, and her hair was found wound around the shaft. It is insisted for the defendant that the court should have instructed the jury peremptorily to find for it, because the assurance of Begley that the belt was all right had referred to the sufciency of the belt for running the machine, and not to any danger of her getting her hair caught in it; that she knew of the danger of her hair being caught as well as Begley, and, being an experienced operator, she understood the situation as well as he did, and no warning or caution of danger was required. The proof for the plaintiff was that she was working by the piece, and that, when the belt would break, she would lose the time taken in repairing it. She had lost a good deal of time that morning by reason of having to put the belt on seven times. It was for this reason that she took the belt to Pat Begley, and insisted on his giving her a new belt, telling him that it was rotten. When he said to her that the belt was all right, he simply meant that the belt was not rotten, and would do if put together, and so he gave her three hooks and told her to go back and fix her belt. Evidently what he thought was that the belt had not been hooked together right. She took the hooks, put the belt together herself, and, in attempting to put it on the machine, her hair was caught, and she received a frightful injury. But, although she was terribly injured, the master is not responsible to her in damages unless at fault, and by reason of his fault she was hurt. She had operated sewing machines for years, and knew as much about the belts as Pat Begley did. All belts for sewing machines are put together with hooks, and whether they have two or more hooks does not render the sewing machine belt a dangerous instrumentality. She had often put this belt on. She understood that it was a part of her duty, and that she was hurt in putting it on was an accident which none of the parties anticipated, or had any reason to anticipate.

In 4 Thompson on Negligence, § 4667, the rule is thus stated: "Such a promise on the part of the master does not, of course, relieve the servant of the duty of continuing to exercise reasonable care for his own safety; nor will the promise, when it has no relation to the danger which the servant in fact incurs, be available to lay the foundation of an action against the master." This principle was recognized by this court in Shemwell v. Owensboro & N. R. Co. 117 Ky. 556, 78 S. W. 448, where the keeper of a pumping station complained that the roof was defective, and the master promised to repair it. A few days afterward the roof took fire, and Shemwell went upon it to put out the fire. The roof fell and he was injured. The court, in refusing a recovery, said: "In the instant case, appellant, as has been suggested, probably notified his superior of the defects in the roof only as affecting its purpose as a roof. If appellant had been injured by the roof falling in upon him (and that danger had not been a patent one), or by reason of its leaky condition, he would have been protected against the damages. But it is not shown or claimed that he notified his superior that the roof was so rotten as to be unsafe to get upon, and therefore there was no promise or undertaking by the superintendent to repair such a defect, or to take the consequences upon the employer meantime. The promise to repair, and the assumption of consequences during repairs for a reasonable time, necessarily are referred to the particular defects which the parties were discussing." In Kelly v. Barber Asphalt Co. 93 Ky. 363, 20 S. W. 271, Kelley was bending over a revolving shaft in order to draw up buckets, and in doing this his shirt was caught by the revolving shaft, and he was painfully injured. It was held that he could not recover, upon the ground that he was bound to know that, if his clothes were caught by the revolving shaft, he would get hurt, and that it was incumbent on him to keep out of the way of it. The same rule was applied in Daniels v. New England Cotton Yarn Co. 188 Mass. 260, 74 N. E. 332, where a girl, as here, had her scalp torn off by a braid of her hair becoming caught around a roller of a machine at which she was working. See, also, McCormick Harvesting Mach. Co. v. Liter, 23 Ky. L. Rep. 2154, 66 S. W. 761. The only thing in this

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case to distinguish it from those cited is the testimony of the plaintiff as to what Pat Begley said to her. It is true that, after telling just what did take place between her and Begley, she says that she thought there was no danger in such a thing when Pat Begley told her there was not, and also says that Pat Begley said to her that she could not get hurt when she told him to put it on. But she knew as well as Begley that, if her hair got caught, she would get hurt. Neither she nor Begley had in mind her getting her hair caught. She had often put that belt on before. She had put it on seven times that morning, and she understood the whole matter as well as anybody. No rule is better settled than that the servant cannot recover on account of an assurance of the master when he understood the risk as well as the master, and, in fact, did not rely upon the superior knowledge of the person making the assurance. The thing that was under discussion between her and Begley was the sufficiency of the belt to run the sewing machine. Neither of them, at any time, had in mind that the belt itself was a source of danger.

Under all the evidence, the court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

KENTUCKY COURT OF APPEALS.

LOUISVILLE ATHLETIC CLUB et al., Appts.,
v.
GEORGE NOLAN.

(— Ky. —, 119 S. W. 800.)

Nuisance — prize fight — right to interfere.

A private citizen cannot enjoin a prize fight which constitutes a public nuisance, unless he suffers some special injury from it.

(June 4, 1909.)

APPEAL by defendants from a decree of the Chancery Branch, First Division, of the Circuit Court for Jefferson County, permanently enjoining the holding of prize fights on certain premises. Reversed.

The facts are stated in the opinion.

Messrs. **O'Neal & O'Neal** for appellants.

Messrs. **Greene & Tilford** for appellee.

Hobson, J., delivered the opinion of the court:

George Nolan brought this suit against the Louisville Athletic Club and James Norton. He alleged in his petition that Norton is the owner of a building in Louisville on the north side of Broadway between Eighth and Ninth streets; that he resides on Broadway between Seventh and Eighth streets, about a square from the Norton building, and on the same side of the street; that Norton has leased to the Louisville Athletic Club a hall on the third floor of his building for the purpose of its holding there a series of prize fights, the first to be held on December 18, 1908; that the prize fights will be brutal and demoralizing, corrupting the morals and disturbing the peace of the neighborhood; that crowds will be congregated in and about the building, and a large number of disorderly persons who will be noisy and vicious, emitting loud cries during the progress of the fight; that, by reason of the proximity of his property, he and his family will be brought into contact with a large number of disorderly persons, and disturbed by the noises from the building; that thereby the peace and happiness of his home will be destroyed, his rest at night disturbed, and the value of his property decreased. An answer was filed, putting in issue the allegations of the petition, proof was taken, a temporary injunction was granted, and this on final hearing was perpetuated. The athletic club and Norton appeal.

The case has been briefed entirely upon the question whether the contests which the athletic club proposes to give will be prize fights under the statute. But there is another question in the case which must be determined before we reach that question. It will be observed that the injunction is aimed at an anticipated nuisance. At the time the petition was filed no prize fight had come off, no crowd had gathered, and no noise had been made. Ordinarily the chancellor will not grant an injunction to restrain an anticipated nuisance unless the proof shows that substantial injury will be done the plaintiff if the injunction is not granted. Nolan is the only witness who is introduced on the question. He testifies that prize fights are brutal and demoralizing; that a good many disreputable people attend them, and are very noisy sometimes.

Being asked what effect the prize fights held there would have upon his family and the enjoyment of his home, he says:

A. They would have no effect—only the crowd going there and coming back, inclined to be, some disreputable characters raising a noise, and I don't know what other uble. I only know there is a great many

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Note. — A careful search has failed to disclose other cases on the right of a private citizen to maintain a suit to join a prize fight.

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disreputable people. We don't know what trouble they might cause. They create a good deal of noise.

Q. As I understand it, you live on the same side of the street as this building is on?

A. Yes, sir.

Q. Within a square?

A. Yes, sir.

Q. How many brothers in your family?

A. Three.

Q. And your mother lives there with you?

A. Yes, sir.

Q. Do you consider that you would be injured by the holding of this prize fight?

A. I believe I would.

Q. And you object, do you?

A. Yes, sir.

This is the only evidence to show that Nolan will be injured in any way by the proposed prize fight. It is insufficient to warrant an injunction. Although the prize fight may be a public nuisance, still a private citizen cannot maintain an action to enjoin it unless he suffers some special injury. It does not appear that the value of Nolan's property will be in any way depreciated, or that the peace or quiet of his home will be disturbed. The persons who attend the prize fight may not pass his house, and whether or not a sufficient noise will be made to disturb anybody at his house is wholly a matter of conjecture. We held in Com. v. McGovern, 116 Ky. 212, 66 L.R.A. 280, 75 S. W. 261, that the state may maintain a petition in equity to enjoin a prize fight; but a private citizen cannot do so unless he suffers some special injury therefrom.

Judgment reversed and cause remanded for a judgment dismissing the petition.

MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE
v.
INTOXICATING LIQUORS,
MAINE CENTRAL RAILROAD COMPANY, Claimant.

(Seven cases.)

(104 Me. 463, 72 Atl. 331.)

Intoxicating liquors — interstate commerce — constructive delivery.

Intoxicating liquors shipped from another state to fictitious consignees, or to local merchants who did not order and do not claim them, cannot, although they had been placed by the carrier in its warehouse and remained there twenty-four days, be regarded as constructively delivered, so as to lose their character as articles of interstate commerce, and become subject to local seizure.

(December 1, 1908.)

REPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the full bench of proceedings of search and seizure in which certain intoxicating liquors were seized and in which the Main Central Railroad Company appeared as claimant, alleging that the liquors had been unlawfully seized by the state. Judgment for claimant.

The facts are stated in the opinion.

Mr. **Frank A. Morey** for the State.

Messrs. **White & Carter,** for claimant:

The liquors had not been delivered, and had not lost their character as articles of interstate commerce.

26 Am. & Eng. Enc. Law, pp. 1096, 1107; Whitehead v. Anderson, 9 Mees. & W. 518; Farrell v. Richmond & D. R. Co. 102 N. C. 390, 3 L.R.A. 647, 11 Am. St. Rep. 760, 9 S. E. 302; Harding Paper Co. v. Allen, 65 Wis. 584, 27 N. W. 329; McFetridge v. Piper, 40 Iowa, 627; Alsberg v. Latta, 30 Iowa, 442; O'Neil v. Garrett, 6 Iowa, 480; Brewer Lumber Co. v. Boston & A. R. Co. 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; Calahan v. Babcock,

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Case Note. — What is sufficient to terminate interstate transportation of intoxicating liquors.

This question is discussed in the case note to State v. Intoxicating Liquors, 11 L.R.A. (N.S.) 550. As there shown, the final interpretation placed by the United States Supreme Court upon the words, "upon arrival in such state," found in the act of Congress of August 8th, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177, was that delivery of an interstate shipment of intoxicating liquors to the consignee was essential to constitute arrival in the state, and this interpretation has been applied in the following cases: Vernon v. State (Ala.) 50 So. 57; Com. v. People's Exp. Co. 201 Mass. 564, 88 N. E. 420; Schwedes v. State (Okla.) 99 Pac. 804; High v. State (Okla. Crim. App.) 101 Pac. 115; Moreland v. State (Okla. Crim. App.) 101 Pac. 138; Hudson v. State (Okla. Crim. App.) 101 Pac. 275; McCord v. State (Okla. Crim. App.) 101 Pac. 280; State v. Eighteen Casks of Beer (Okla.) 104 Pac. 1093; State v. Kenney, 62 W. Va. 284, 57 S. E. 823; State v. United States Exp. Co. 63 W. Va. 299, 60 S. E. 144.

But, in State v. Intoxicating Liquors, 104 Me. 502, 71 Atl. 758, it was held under the United States "pure food law," approved June 30, 1906, prohibiting the introduction into one state from another state or country of any liquors misbranded or adulterated within the meaning of the act, that, as to such liquors, the statute removed the Federal barrier to the operation of the police power of the state upon them, and, having been brought into the state in violation of the act of Congress, they became subject to the laws of the state the moment they came within its limits.

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21 Ohio St. 281, 8 Am. Rep. 63; Jeffris v. Fitchburg R. Co. 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; Wheeling & L. E. R. Co. v. Koontz, 61 Ohio St. 551, 76 Am. St. Rep. 435, 56 N. E. 471; Adams Exp. Co. v. Kentucky, 206 U. S. 136, 51 L. ed. 991, 27 Sup. Ct. Rep. 606.

Spear, J., delivered the opinion of the court:

Seven cases are considered in this opinion, each involving the single question of constructive delivery of intoxicating liquors by a common carrier, under the so-called Wilson act (act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177). No other question is raised either by the state or claimant of the liquors seized. The facts disclose that certain intoxicating liquors were shipped from different points without the state, arriving at different times by way of the Maine Central Railroad at its freight station in the city of Lewiston. All the goods were shipped in the names of local firms, who did not order or claim them, or to fictitious names, persons to the railroad company unknown. The various invoices, upon their arrival, were placed in the freight shed of the defendant company, and from time to time thereafter were seized upon proper warrants charging the liquors to be deposited within the state for the purpose of illegal sale. The warrants were served, the seizures made, the liquors libeled, the claimant appeared, a hearing was had, the liquors were declared forfeited, and the claimant appealed. The fact that a portion of these liquors finally declared forfeited had been once seized and ordered returned on the ground that they came within the protection of the interstate commerce clause of the Constitution becomes immaterial in the consideration of the one issue involved. The longest time any package was in the custody of the railroad company, after its arrival at Lewiston, before seizure, was a period of twenty-four days. The element of time makes this case the strongest for the state, as all the other elements are common to all the cases.

No question is raised that the goods seized were moving in interstate commerce, unless they had been constructively delivered to the consignees. Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; State v. Intoxicating Liquors, 102 Me. 385, 120 Am. St. Rep. 504, 67 Atl. 312.

In the Heyman Case, the court intimate what facts may be regarded as sufficient to establish constructive delivery in cases of this kind. They say: "Of course, we are not called upon in this case and do not decide if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered." In this paragraph the court seems to have undertaken to state, but not to decide, the three essential elements of constructive delivery to be notice to the consignee of the arrival of the goods, a reasonable time on his part after notice to receive them, and a mutual design or arrangement with the carrier to hold them for the consignee. The only evidence of constructive delivery in the case at bar is found in the fact that the goods were retained by the railroad company without actual delivery for a space of twenty-four days (giving the state the benefit of the strongest case), and that the consignees were represented by fictitious names and were to the claimant unknown.

In specifying the elements above named, the court uses a phrase which seems to have peculiar significance in its application to the class of cases now under consideration; namely, "designedly left in the hands of the carrier for an unreasonable time." This phrase was undoubtedly intended to allude to a passive or silent understanding between the shippers of liquors, the carriers, and the consignees with reference to those transactions which operate to enable an evasion of the law, and assist consignees in obtaining a safe delivery of their contraband goods. Yet, notwithstanding this interpretation of the phrase, if a correct one, and sufficient to authorize the inference of constructive delivery, we are unable to find any evidence in the statement of facts which warrants us in declaring that the goods in question were constructively delivered. It will be observed by a reading of the above paragraph that the conduct which might be sufficient for the predication of constructive delivery is ascribed to the acts of the consignee, and not to the acts of the carrier. But in the case at bar it is not the consignee, but the carrier, who is the claimant. Therefore it appears that the elements of constructive delivery referred to in the Heyman Case as applicable to consignees are not found at all in the case at bar against the carrier, as the consignees were fictitious.

The essential elements of constructive delivery are well defined in law. The rule is well established that a constructive delivery can be effected only by an agreement between the carrier or middleman and the buyer or person claiming under him, whereby the

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former agrees to hold goods for the latter for some purpose other than that of carriage to and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent. 26 Am. & Eng. Enc. Law, p. 1096, and cases cited. See also Harding Paper Co. v. Allen, 65 Wis. 584, 27 N. W. 329; Jeffris v. Fitchburg R. Co. 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; Brewer Lumber Co. v. Boston & A. R. Co. 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548.

The last case involved the replevin of lumber sold by the plaintiff to George A. Paul, and claimed by right of stoppage *in transitu*.

It appears that the car of lumber was shipped January 31, 1908, and arrived at the yard of the defendant in Boston on February 19th, and Paul was notified by an agent of the defendant. On March 4th the defendant stored the lumber in one of its sheds and notified Paul of this fact. On April 9th Paul made an assignment for the benefit of his creditors, and on April 16th the plaintiff notified the defendant not to deliver the lumber to Paul, claiming the right of stoppage *in transitu*. The court held that the transit of the lumber was not ended when the plaintiff asserted his right to it, and that it made no difference whether the goods were in the hands of the carrier as carrier, or whether the carrier, at the journey's end, put them in a warehouse, laying down this rule: "While the position of the carrier may be changed to that of bailee or agent for the purchaser of the goods, yet this is a question of an agreement between the carrier and the purchaser." In this case it will be seen that the goods were in the hands of the carrier about two months before they were claimed by stoppage *in transitu*, yet the court held that there was no constructive delivery.

The relation of carrier to the shipper, the consignee, and the goods is originally fixed by law and by a contract between the parties, which is that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee. This contract, once existing, can be changed only by the operation of law or by an agreement between the parties. When the goods arrive at their journey's end, it is the duty of the carrier to store them. This duty is imposed by law. When stored, they are still in the possession and custody of the carrier, and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. State v. Intoxicating Liquors, supra. The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery, or by a new contract with the consignee in the place of the contract of carriage. As already seen, in the case before us, no actual delivery of the goods was made, and no evidence is found adequate to establish proof of constructive delivery. Therefore the various packages of goods seized must be held at the time of their seizure to have still been in transit as interstate commerce in the hands of the carrier.

In accordance with the stipulation in the report, the entry must be, in Nos. 19 to 25, inclusive: Judgment for the claimant. Liquors ordered to be returned.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANNA MARY ROCKWELL
v.
PATRICK McGOVERN.

(202 Mass. 6, 88 N. E. 436.)

Evidence — res ipsa loquitur — sinking walk.

1. The sudden sinking of a sidewalk under the weight of a pedestrian, to his injury, is, under the doctrine of *res ipsa loquitur*, evidence of negligence on the part

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Case Note. — Applicability of maxim, Res ipsa loquitur, to caving in or sinking of surface of street.

In Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689, plaintiff, a pedestrian, was injured by the caving in of a street pavement at a place where a water pipe had been laid two months and twenty days prior to the injury, during which time the street had been subjected to common use. The action was brought against the city as well as the contractor. At the trial, the judge applied the maxim, *Res ipsa loquitur*, and judgment was had against the contractor. The court of appeals, reversing the judgment on the ground that the maxim had no application, and that the trial court erred in so charging the jury, called attention to the facts that the suit was against the city as well as the contractor; that the street was under the care, custody, and control of the city, which was charged with the duty of keeping it in repair; that the city had its inspectors upon the job, watching the manner in which the trench was filled, and that there was no evidence tending to show that the pavement was out of repair, or that the city had knowledge of the defect. It will be observed that in ROCKWELL v. MCGOVERN the city was not joined as a defendant.

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of a contractor who, in the execution of public work, took up and relaid the walk.

Same — other accident.

2. In an action for injury to a pedestrian by the sinking of a sidewalk, against a contractor for public work who had, in the execution of his contract, taken it up and relaid it, evidence is admissible of a previous cave-in, as tending to show the nature of the soil and the degree of care required of defendant in refilling the excavation made by him.

(May 19, 1909.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Overruled.

Plaintiff, a pedestrian on a public street of Boston, was injured by the sudden sinking under her weight of a portion of a sidewalk which had been taken up and relaid by defendant, a contractor, in the execution of public work.

Further facts sufficiently appear in the opinion.

Mr. M. O. Garner for defendant.

Mr. George P. Beckford for plaintiff.

Morton, J., delivered the opinion of the court:

There was evidence warranting a finding that the plaintiff was in the exercise of due care. She was a traveler upon the highway with nothing in the apparent condition of the sidewalk to call for anything more than ordinary care on her part, and it could be found and must have been found that she was exercising the degree of care required of her.

There was also evidence which warranted a finding that the accident was caused by the negligent manner in which the defendant had refilled the excavation and in which he had relaid the brick. There was evidence warranting the jury in finding that, if the excavation had been properly filled and the brick properly laid, the accident would not have happened. The case was especially one for the application of the doctrine of *res ipsa loquitur*. For a statement of the doctrine, see Thomas v. Boston Elev. R. Co. 193 Mass. 438, 440, 79 N. E. 749. Evidence of the "slide" or "cave-in" which occurred in the summer was admissible as tending to show the nature of the soil, and as bearing in that way upon the degree of care required in refilling the excavation.

We do not construe the declaration as alleging that the defendant was engaged in the work of excavation at the time of the accident, but as meaning that at some time he had been so engaged, and had so negligently carried on the work as to permit the sidewalk to drop, and that the plaintiff fell into the hole thereby caused. So construed, there was no variance between the pleadings and the proof.

Exceptions overruled.

NEBRASKA SUPREME COURT.

CHARLES PUMPHREY, Plff. in Err.,
v.
STATE OF NEBRASKA.

(— Neb. —, 122 N. W. 19.)

Criminal law — selection of jury — harmless error.

1. A judgment of conviction will not be set aside because of alleged error in overruling defendant's challenges for cause to veniremen, where none of said persons sat upon the jury, and it does not affirmatively appear that they were peremptorily challenged by him.

Same — review.

2. The trial court is vested with great discretion in excluding veniremen or talesmen from a jury, and its rulings in that

Headnotes by ROOT, J.

Case Note. — Religious belief as qualification of witness.

The earlier cases upon this subject are collected and discussed in an exhaustive note to State v. Washington, 42 L.R.A. 553, and this note deals with the later cases only.

It appears from an examination of the cases as set forth in the earlier note that in the majority of the jurisdictions no religious belief is required to render a witness competent, and in some states even an atheist may be a competent witness. On the other hand, the rule still prevails in numerous jurisdictions that a belief in Divine punishment is necessary in order to render a witness competent, and in a number of states the credibility of a witness may be attacked upon the ground of his religious belief or disbelief.

The rigid requirement of the common law that a witness must believe in a Supreme Being and Divine punishment, in order to be competent as a witness, has been modified by statute or constitutional provision in many jurisdictions, and in some, by express constitutional provision, a witness cannot be questioned as to his religious belief. In consequence of these statutory and constitutional enactments the recent cases are not very numerous, at least as compared with those arising under the common law.

A witness who believed in God and that "all the punishment a man gets is in this world," but who did not believe in rewards and punishments after death, was held to be competent as a witness in Beeson v. Moore, 132 Ala. 391, 31 So. 456. The court

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particular are not subject to review unless a fair jury was not obtained.

Homicide in commission of robbery — malice.

3. Homicide committed in the perpetration of a robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice.

Criminal law — opening statement — harmless error.

4. In a prosecution for the alleged commission of a crime, the defendant may waive his opening statement to the jury, but if the court compels counsel, over their objections, to make that statement, the error is without prejudice, unless it affirmatively appears from the record that defendant suffered some disadvantage thereby.

Japanese witness — obligation of oath.

5. An adult citizen of the Empire of Japan is prima facie competent to take an oath and testify in the court of this state. If a litigant conceives that such a witness

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said that it was not necessary to declare what the ruling would be had it been shown that the proposed witness did not believe in Divine punishment, either in this world or the next.

A witness who believed in God, but not in a future state of rewards and punishments dependent upon conduct on earth, was held properly rejected in Bell v. Bell, 34 N. B. 615.

Where two Chinamen gave in general, unmistakable evidence of a belief in the existence of the Godhead and that God was the avenger of falsehood, it was held in Birmingham R. Light & P. Co. v. Jung (Ala.) 49 So. 434, that it was not erroneous to hold such witnesses competent to take the oath, although they evinced in some particulars crude, and perhaps absurd, ideas with respect to their belief of the source of the Godhead.

Section 7 of the Bill of Rights embodied in the state Constitution of Kansas provides that no person shall be incompetent to testify on account of religious belief; and it was consequently held in Dickinson v. Beal, 10 Kan. App. 233, 62 Pac. 724, that it was immaterial what a witness believed or did not believe in respect to the existence of God, and his belief or disbelief could not be used to impair his testimony.

So, in Louisville & N. R. Co. v. Mayes, 26 Ky. L. Rep. 197, 80 S. W. 1096, the court quoted with approval the following from Bush v. Com. 80 Ky. 244: "We think that this provision of the Constitution not only permits persons to testify without regard to religious belief or disbelief, but that it was intended to prevent any inquiry into that belief for the purpose of affecting credibility."

And in Brink v. Stratton, 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148, it was held that a witness cannot be questioned as to his belief in a Supreme Being, who would punish him for false swearing, for the purpose of affecting his credibility, under constitutional provisions that no person shall be incompetent to be a witness on account of his religious belief, which provisions also abrogated all disqualification from civil rights on account of such belief.

And in Clinton v. State, 53 Fla. 98, 43 So. 312, 12 A. & E. Ann. Cas. 150, it was held that the common-law rule had been changed in Florida by the Constitution, and that neither a belief in a Supreme Being nor in Divine punishment is requisite to the competency of a witness. And it was held that a boy fourteen years of age, apparently not possessed of a high order of intelligence, was not necessarily incompetent because he had no knowledge of the Bible or of God, or of any punishment for telling a lie except what would be inflicted by the person with whom he lived.

Where the statute provides as the only qualification of a witness in a criminal trial that "he shall be a person of proper understanding," it was held in State v. Williams, 111 La. 179, 35 So. 505, that the competency of a witness in such a trial is not affected by his ignorance of or contempt for the 9th Commandment.

Whether a child's religious training has been so developed that he comprehends his responsibility to God for lying was held in Bright v. Com. 120 Ky. 298, 117 Am. St. Rep. 590, 86 S. W. 527, to be immaterial as affecting his competency, and the question is one of credibility only.

Whether or not young children or persons of weak intelligence are competent as witnesses is, of course, another question.

In Du Puy v. Transportation & Terminal Co. 82 Md. 408, 33 Atl. 889, 34 Atl. 910, in a separate opinion by Judge Bryan, it is stated that the 36th article of the Declaration of Rights makes it necessary for the qualification of a witness that he shall believe in the existence of God, and that under His dispensation he will be morally accountable for his acts, and be rewarded or punished therefor in this world or in the world to come; and a witness is severely criticized who, upon being asked as to his belief in God, gave no answer. This point is apparently overlooked, however, by the majority of the court.

The exclusion of Chinese as witnesses, under the act of Congress, to prove the fact that a Chinaman claiming the right as a merchant to re-enter the United States had been engaged as such for a year before his departure, was held in Li Sing v. United States, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449, not to be violative of constitutional guaranties. The court said that the enforcement of acts providing for the exclusion of Chinese from this country was often attended with great difficulty, arising from the loose notions entertained by witnesses of the obligation of an oath, and Congress was justified in requiring the testimony of at least one "white" witness.

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does not understand, or will not give heed to, the oath administered, he may interrogate the witness before he is sworn, or prove his incompetence by other relevant evidence. If he fails to do so, the relevant testimony of the witness should be received.

Criminal law — examination of witness — discretion of court — review.

6. The trial judge in his discretion may refuse to permit a witness to testify in narrative form; and his ruling will not be reviewed unless that discretion was clearly abused.

Same — sufficiency of evidence — review.

7. It is the province of a jury in a criminal case to try the issue joined by a plea of not guilty, and, if the evidence of the state uncontradicted will support a conviction, this court will not ordinarily interfere with a verdict against the defendant.

(June 11, 1909.)

ERROR to the District Court for Douglas County to review a judgment convicting defendant of murder in the perpetration of a robbery. Affirmed.

The facts are stated in the opinion.

Messrs. **John O. Yeiser** and **Carl E. Herring** for plaintiff in error.

Messrs. **W. T. Thompson**, Attorney General, and **Grant G. Martin**, for defendant in error:

The burden of proving an alien witness incompetent is on the party objecting to him, for every person living in a Christian community is presumed to have the requisite amount of religious faith.

30 Am. & Eng. Enc. Law, p. 938; R. v. Pah-Mah-Gay, 20 U. C. Q. B. 195.

Root, J., delivered the opinion of the court:

Plaintiff in error was convicted of committing murder while in the perpetration of a robbery, and, from a sentence of imprisonment in the state penitentiary for life, has appealed to this court.

1. The first error argued is that the court should not have overruled defendant's challenges for cause to various veniremen, because thereby he was compelled to exhaust his peremptory challenges. The bill of exceptions discloses the challenges and the court's rulings, but none of those veniremen were sworn or acted as jurors in the case. Whether they were eventually excluded by the court on its own motion by agreement of the state and defendant, upon a subsequent challenge of the state, or peremptorily by defendant, does not appear. The record, therefore, does not support the contention of defendant, and the error assigned will be resolved against him. Shumway v. State, 82 Neb. 165, 119 N. W. 517; Kennison v. State (Neb.) 119 N. W. 768.

2. Defendant also claims that the court should not have excused the veniremen London, Thomas, Schmidt, and Winans. The first-named individual was excused because his answers indicated that he did not possess sufficient intelligence to perform the duties of a juror. The answers were contradictory, and the court did not err in dismissing this man from the jury. Defendant was being tried for murdering a Chinaman, and the answers of Thomas, Schmidt, and Winans indicated that because of the nationality of the deceased they would not be inclined to convict defendant. Other veniremen were excused because they had conscientious scruples against inflicting the death penalty. There is nothing in the record to indicate that twelve impartial men were not secured to act as jurors in the case, and the court ruled wisely and justly in excusing the men first referred to. Richards v. State, 36 Neb. 17, 53 N. W. 1027; State v. Miller, 29 Kan. 43. The veniremen whose *voir dire* examination disclosed that they were prejudiced against inflicting the death penalty were also properly excluded from the jury. Rhea v. State, 63 Neb. 461, 476, 88 N. W. 789.

3. An assault is made upon the information and the statute under which it was drawn, but the questions presented, as we understand them, have been set at rest in Morgan v. State, 51 Neb. 672, 71 N. W. 788, and Rhea v. State, supra, and will not be further considered.

4. After the jurors were sworn, the county attorney made his opening statement of the case. Defendant's counsel thereupon requested permission to waive a statement at the close of the state's evidence. To this the county attorney objected, and the court directed defendant's counsel to state the defense, although they desired to waive that statement. It has been held in other jurisdictions, in construing statutes as mandatory as § 478 of the Criminal Code, that the prosecution may introduce evidence without a preliminary opening statement. Holsey v. State, 24 Tex. App. 35, 5 S. W. 523; People v. Stoll, 143 Cal. 689, 77 Pac. 818; People v. Weber, 149 Cal. 325, 336, 86 Pac. 671. Much stronger reasons exist for permitting a defendant to waive his statement of defense, and, if he is content to rest upon his plea of not guilty, the court ought to permit him to do so. On the other hand, there is nothing in the record to indicate what statements defendant's counsel made, nor that he was prejudiced thereby. The error was without prejudice.

5. One Jack Naoi was called as a witness by the prosecution, and upon the county attorney's statement that the witness was a citizen of Japan, and could not speak the

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English language, an interpreter was produced. Defendant's counsel objected to the witness being sworn, for the alleged reason that Japan is a heathen country, that prima facie the witness was not qualified to take an oath, and that the state ought to remove that presumption before the oath was administered. The objection was overruled, the witness sworn, and his testimony given through the medium of an interpreter. Counsel for defendant cites Speer v. See Yup Co. 13 Cal. 73, but that case is not in point. The opinion therein was controlled by a statute absolutely disqualifying Indians as witnesses, and in People v. Hall, 4 Cal. 399, the same court had construed the word "Indian" as including the Mongolian race. Section 328 of the Civil Code (Cobbey's Anno. Stat. 1907, § 1313) provides that every human being, with certain named exceptions, of sufficient capacity to understand the obligations of an oath, is a competent witness in all cases, civil and criminal. Among the exceptions are "Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly." We are not inclined to adopt the reasoning of the California court that the legislature intended to include the Japanese in the foregoing exception; but, if such were the case, the answers of the witness to the questions propounded through the interpreter clearly take him without the exception. Section 365 of the Code (Cobbey's Anno. Stat. 1907, § 1350) provides: "Before testifying the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding upon the conscience of the witness." It is urged that the witness was an idolater, and would not be bound by an appeal to the "invisible God" of the Christians. In Priest v. State, 10 Neb. 393, 399, 6 N. W. 468, 469, we approved Bouvier's definition of an oath as "an outward pledge given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God." In that case an Indian was held to be incompetent to testify. The Japanese, however, are a civilized people, and have at least three recognized religions—Buddhism, Shintoism, and Christianity. No efforts were made by defendant's counsel to prove that the witness was not a Christian, nor did they examine him to ascertain whether he understood the obligations of the oath that was thereafter administered to him. The rule seems to be well established that, unless an adult witness comes within some exception to the general rule, the presumption is that he is competent to testify, and the burden is upon the objecting party to establish the contrary. This may properly be done by preliminary questions propounded to the proposed witness, or by any other of the known methods of establishing a fact. The issue will then be determined by the court. 2 Elliott, Ev. § 778; Arnd v. Amling, 53 Md. 192, 197; Donnelly v. State, 26 N. J. L. 463, 506; Territory v. Yee Shun, 3 N. M. 100, 2 Pac. 84. Counsel for defendant not having established that the oath administered was not in form to bind the conscience or awaken the apprehension of the witness, this assignment of error must be overruled.

6. Defendant testified in his own behalf. His counsel, after leading him up to the assault upon Ham Pack, the deceased, requested witness to go on and relate the transaction. The county attorney objected to an answer in narrative form, and the court compelled defendant's counsel to proceed by questions and defendant by answers thereto, and error is assigned upon this ruling of the court. The subject was one within the court's discretion, and it had authority to compel the investigation to continue by questions and answers, so that the county attorney might exclude incompetent and irrelevant testimony by interposing objections to questions, rather than to break in upon a long statement of fact to object to irrelevant, immaterial, or incompetent testimony voluntarily stated by the witness. The trial judge must be permitted to exercise an almost unfettered judgment in controlling this element of practice, and its action, unless plainly a gross abuse of discretion prejudicial to the complaining litigant, will not be reviewed in this court. Clark v. Field, 42 Mich. 342, 4 N. W. 19. In the instant case the witness gave his version of the crime clearly and succinctly, and he was not in any manner prejudiced by an orderly course of trial.

7. The instructions given were fair. Those requested by defendant and not given were properly refused, and the modification of instruction numbered 5, requested by defendant, was proper. Although we have not specifically mentioned every error assigned in the petition in error, we have examined all of them, and find that none of those not referred to in detail in this opinion present any serious question for consideration.

8. It is urged that the probabilities are entirely favorable to defendant's innocence. The testimony is in hopeless conflict. That Ham Pack was murdered and robbed in the county of Douglas during the night of July 10, 1907, is established by the evidence of defendant and that of the witness Mullin. Each accuses the other of committing the crime. There is considerable evidence in

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the record corroborating defendant, but there are also facts and circumstances shown by the evidence that corroborated Mullin's testimony. It is unfortunate that defendant's impeaching witnesses were all inmates of the state penitentiary, although he was not responsible for their duress, and probably none others were available for his purpose. If the jurors believed Mullin, as they had a right to, they could not conscientiously do otherwise than to find defendant guilty. The questions of fact having been determined by the tribunal whose solemn duty it was to ascertain them, and there being sufficient competent evidence to sustain the verdict, we cannot interfere. The rulings of the court were not favorable to defendant, but were not prejudicially erroneous.

The defendant has received a fair trial within the meaning of the law, and the judgment of the District Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

LEEDS & CATLIN COMPANY, Plff. in Err.,
v.
VICTOR TALKING MACHINE COMPANY et al.

(83 C. C. A. 170, 154 Fed. 58.)

Patent — combination — unpatented element — infringement.

One who manufactures and sells unpatented disks for use in a talking machine in which such disks are one element of the patented combination for the production of sound infringes the combination patent as soon as the disk is used in the combination.

(Wallace, Circuit Judge, dissents.)

(May 2, 1907.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review judgment imposing a fine upon defendant for violating an injunction against the infringement of a patent. Affirmed.

The facts are stated in the opinions.

Argued before Wallace and Coxe, Circuit Judges, and Hough, District Judge.

Mr. **Louis Hicks** for plaintiff in error.

Mr. **Horace Pettitt** for defendants in error.

Hough, District Judge, delivered the opinion of the court:

Defendants in error, having brought suit against the plaintiff in error, alleging infringement of the Berliner Gramaphone patent (No. 534,543), procured an injunction restraining the manufacture, use, or sale of sound reproducing apparatus or devices embodying the subject-matter specified in claims 5 and 35 of said patent, and also the use or employment in any way of the method set forth in claim 5 thereof (reported [C. C.] 146 Fed. 534, affirmed by this court in 79 C. C. A. 536, 148 Fed. 1022). The claims protected by such adjudications are "a sound reproducing apparatus consisting of (1) a traveling tablet having a sound record formed thereon, and (2) a reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described" (No. 35); and the "method of reproducing sounds from a record of the same," consisting in "(1) vibrating a stylus, and (2) propelling the same along the record by and in accordance with the said record substantially as described" (No. 5); the "record" being identical with the "traveling tablet" above mentioned. In other words, the invention under consideration is the Victor Talking Machine, and the feature thereof here important is that its reproduction of sound depends upon the record groove cut in

Case Note.* — *Manufacture and sale of a part which in itself is unpatented, as infringement of a combination patent of which such part is an essential element.

The decision of the court in the above case was affirmed by the United States Supreme Court in 213 U. S. 325, 53 L. ed. 816, 29 Sup. Ct. Rep. 503. In affirming this decision the Supreme Court enunciated a doctrine apparently equally applicable to the right to repair, replace, or reconstruct one part or element in a patented combination. The decision is of more than ordinary importance,—especially in view of the fact that the doctrine enunciated limits, to a great extent, the right to produce an element in a combination, either for repair or replacement, as such right was formerly enunciated and supposed to exist.

Here the contention was made that a person who had purchased a patented combination from the patentee had the right to replace an unpatented element of the combination, and for such purpose to purchase such element from another than the patentee or his licensee. It was also contended that where an inventor so arranges the parts of his patented combination that it cannot satisfactorily, successfully, or usefully be continued in use without the successive replacement of one of its elements, the replacement of such element, if unpatented, by the purchaser of the combination from the patentee, is in accordance with the intention of the patentee, and not a reconstruction of the patented combination; and hence is an act within the rights of the purchaser.

These contentions were supported by prior statements of the law, both by the

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the traveling tablet (or disk record), compelling the movement of the stylus across the face of the record by the horizontal revolution of the record itself. The reproducer of which the stylus is an integral part is covered by claims of the Berliner patent, not now in question; but of the combination protected by claims 5 and 35 thereof the stylus alone (or rather the machine of which it forms a part) is itself patented, while the traveling tablet, sound record, or disk record, is an unpatented article.

The Leeds & Catlin Company is a manufacturer of disk records, and, since the decision of this court above referred to, asserts that it has become a dealer in another talking machine known as the "feed-device machine," which for the purposes of this cause may be regarded as not infringing any of the rights of the Victor Company under the Berliner patent. The Leeds & Catlin disk records are equally suitable for the feed-device machine and for that of the defendant in error.

Plaintiff in error was found to have sold disk records forming an essential part of the sound reproducing apparatus and devices covered by the above-mentioned claims of the Berliner patent, and was fined for such violation of injunction. This writ of error is to review the order imposing said fine.

On ample evidence, the court below found that most of the sales of Leeds & Catlin records were knowingly made by the plaintiff in error to enable the owners of Victor talking machines to reproduce such musi-

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Supreme Court and the inferior Federal courts, although, such statements were not made when considering the question as it was directly presented in the case under consideration. These earlier decisions will hereafter be more specifically referred to.

In this case, however, these decisions were either distinguished or ignored. In denying or holding inapplicable the contentions referred to, the court said that the question thereby presented was single and direct, and its discussion could be brought to a narrow compass, its solution being dependent upon the application of some rudimentary principles of patent law, and added: "A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit, in contemplation of law, as a single or noncomposite instrument. Whoever uses it without permission is an infringer of it. Whoever contributes to such use is an infringer of it. It may be well here to get rid of a misleading consideration. It can make no difference as to the infringement or noninfringement of a combination, that one of its elements or all of its elements are unpatented. For instance, in the case at bar the issue between the parties would be exactly the same, even if the record disk were a patented article which petitioner had a license to use, or to which respondent had no rights independent of his right to its use in the combination. In other words, the fact that the disk sold by petitioner is unpatented does not affect the question involved, except to give an appearance of a limitation of the rights of an owner of a Victor machine other than those which attach to him as a purchaser. The question is, What is the relation of the purchaser to the Victor Company? What rights does he derive from it? To use the machine, of course, but it is the concession of the argument of petitioner that he may not reconstruct it. Has he a license to repair deterioration, and when does repair become reconstruction? It would seem that, on principle, when deterioration of an element has reached the point of unfitness, there is a destruction of the combination, and a renewal of the element is a reconstruction of the combination. And it would also seem, on principle, that there could be no license implied from difference in the durability of the elements, or periodicity in their use." In referring to the contention that it was not an infringement, because the purpose in producing the element in question was to increase the purchaser's repertory of tunes, the court said that "the right of substitution or 'resupply' of an element depends upon the same test. The license granted to a purchaser of a patented combination is to preserve its fitness for use so far as it may be affected by wear or breakage. Beyond this there is no license."

As already suggested, the doctrine enunciated in this case apparently limits the doctrine as formerly enunciated by that court as well as by the inferior Federal courts. But to just what extent, if at all, the court intended to limit the rule formerly applied, is in doubt. Indeed, this must necessarily be true, owing to the nature of the question,—it depending so much upon the facts in the particular case. The language of the court to the effect "that, on principle, when deterioration of an element has reached the point of unfitness, there is a destruction of the combination, and a renewal of the element is a reconstruction of the combination," if taken literally, would, however, seem to be in conflict with many earlier decisions on the subject.

In this connection a review of the earlier decisions may be of value. The general doctrine is that a purchaser of a patented article may use it until it is worn out, and may at his pleasure repair and improve it. Wilson v. Simpson, 9 How. 109, 13 L. ed. 66; Chaffee v. Boston Belting Co. 22 How. 217, 16 L. ed. 240; American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 27 L. ed. 79, 1 Sup. Ct. Rep. 52.

He cannot, however, under the guise of repairing and improving a patented article, practically reconstruct it. Shickle, H. & H. Iron Co. v. St. Louis Car Coupler Co. 23 C. C. A. 433, 40 U. S. App. 728, 77 Fed. 739;

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cal pieces as they wished by the combination of the Leeds & Catlin record with said machines; that the Leeds & Catlin Company made no effort to restrict the use to which their records might be put until after motion to punish for contempt had been made; that the only effort at such restriction ever made was to insert upon the face of the records a notice to the effect that such record was intended and sold for use with the "feed-device machine;" that the records sold by plaintiff in error were far more frequently bought to increase the repertory of the purchaser's Victor machine than to replace worn-out or broken records. In our opinion it is also established by the evidence that the "feed-device machine," above referred to, was not, at or before the time of beginning this proceeding, a practically or commercially known reproducer of musical or spoken sound, whereas the Victor machine, embodying the claims of the Berliner patent here under consideration, was at such times widely known and generally used, and that the plaintiff in error knew, and sold its records with the knowledge, that if its output was to be used at all by the public it would be used with the Victor machine and in the combination protected by the claims of the Berliner patent above referred to. Upon these facts it is clear that the Leeds & Catlin Company have made and sold a single element of the claims of the Berliner patent, with the intent that it should be united to the other element and complete the combination; and

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Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322.

But where any element of a combination is temporary in its relation to the whole combination, it is not infringement for a purchaser to procure or manufacture such temporary part, where the nature and characteristics of the part, in its physical relation to the combination, are such as to indicate that the inventor must have contemplated that such part would very frequently be replaced during the natural lifetime of the combination as a whole. Wilson v. Simpson and Chaffee v. Boston Belting Co. supra; Farrington v. Water Comrs. 4 Fisher, Pat. Cas. 216, Fed. Cas. No. 4,687; Goodyear Shoe Machinery Co. v. Jackson, 55 L.R.A. 692, 50 C. C. A. 159, 112 Fed. 146; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005; Alaska Packers Asso. v. Pacific Steam Whaling Co. 93 Fed. 672; O'Rourke Engineering Constr. Co. v. McMullen, 150 Fed. 338.

The mere fact, however, that the part in question must be more frequently renewed than other parts of the combination is not, of itself, sufficient to indicate an intention on the part of the inventor that purchasers should replace such part at their pleasure; and, generally, the substitution of an important part or element in the combination, intended to be permanent, in place of the corresponding member, is reconstruction, and is clearly distinguishable from replacing or repairing a fragile member whose life is necessarily short. American Graphophone Co. v. Amet, 74 Fed. 789.

Shickle, H. & H. Iron Co. v. St. Louis Car-Coupler Co. supra, apparently extends this doctrine to the extent that the purchaser of the patented combination, one element or part of which is more apt to break in use than the other parts, may replace such part whenever necessary because of breakage, although it is one of the essential elements in the combination, providing the remaining elements of the combination remain intact and serviceable. The right to manufacture, however, was expressly limited to this purpose.

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A valuable case on this question, which contains a general summary of the law, is Morrin v. Robert White Engineering Works, 138 Fed. 68. Modified and affirmed in 74 C. C. A. 466, 143 Fed. 519. In holding that this doctrine did not extend to a vital element of the combination, the court thus stated the rules governing the right of a purchaser of a patented combination to replace parts thereof on his own authority: 1. When its consumption is the very purpose of the device. 2. When its use upon external objects must work its early destruction. 3. When it is intended to be destroyed, and is destroyed, after a single use, and becomes waste material. 4. When, in the arrangement of an element not the chief element, it is so fashioned and placed as to be specially subjected to external forces that make it peculiarly liable to breakage and wear. 5. When it is not the chief part of the combination. 6. When it is an ordinary working part, like the cam in actuating machinery, although specially adapted for the proper operation of the device, even though the cam is the most essential element in the combination. The court, however, added that a part of a combination could not be replaced by the purchaser when it is a vital element of the combination in fact and in regard to patentability, —especially when it is not intended to be of short life because of the action of external forces thereon. The foregoing summary indicates the position of the courts on the subject up to the time of that decision. A comparison of it with the doctrine enunciated by the United States Supreme Court in Leeds & C. Co. v. Victor Talking Mach. Co. will show a limitation on the rights of purchasers of a patented combination to repair or replace an element therein. It is to be noted, however, that it is pointed out in this case that there was no claim made that the manufacture of the disks in question was to replace broken ones or those worn out in use, and it is specifically found that the infringing disks were made to be used in connection with the patented combination to increase the purchaser's repertory of tunes.

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this is infringement (Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288) adopted by this court (Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005).

The facts above recited are scarcely controverted, nor is it denied that the above inference should ordinarily be drawn; but plaintiff in error seeks to avoid that result by asserting that the records under consideration are but temporary, perishable, and unpatented parts of the patented combination; and therefore under Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627, free to be manufactured and sold by anyone. This contention is not supported by the evidence. Disk records are fragile (*i. e.*, brittle and easily broken), but they are not perishable (*i. e.*, subject to decay by their inherent qualities, or consumed by few uses or a single one). Neither are they temporary, *i. e.*, not intended to endure; on the contrary, we find them capable of remaining useful for an indefinite period, and believe that they usually last as long as does the vogue of the sounds they record. A rifle bullet, lost by a single discharge, is a perishable and temporary part of the combination of rifle and ammunition, and probably a cartridge shell, though capable of reloading and use several times, may also be so regarded; but the missle of a toy gun, picked up and used again and again in its original form, is in no proper sense of the words either "perishable" or "temporary," though it may by repeated use wear out sooner than does the gun with which it is repeatedly combined.

Again, it is urged, inasmuch as disk records are unpatented articles of commerce, which may be used upon the feed-device machine or lawfully exported to foreign countries, that no infringement can be alleged against the maker and seller thereof, because his product may be or is in fact used by purchasers as one element of a patented combination. This argument disregards the facts established herein. It is true that the doctrine of contributory infringement has never been applied to a case where the thing contributed is one of general use, or suitable to a variety of other uses,—especially where

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In holding that the manufacture of disks for this purpose was infringement the court applied the general doctrine that it is infringement to make one element in a combination with intent to bring about its use in the protected combination. This general doctrine was recognized and applied in the following cases: Schneider v. Pountney, 21 Fed. 399; Traverse v. Beyer, 23 Blatchf. 423, 26 Fed. 450; Celluloid Mfg. Co. v. American Zylonite Co. 35 Fed. 417; Schneider v. Missouri Glass Co. 36 Fed. 582; White v. Hunter, 47 Fed. 819; Thomson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 712; Red Jacket Mfg. Co. v. Davis, 27 C. C. A. 204, 53 U. S. App. 478, 82 Fed. 432; American Graphophone Co. v. Leeds, 87 Fed. 873; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 996; Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co. 106 Fed. 724, affirmed in 55 C. C. A. 390, 118 Fed. 562; Canda v. Michigan Malleable Iron Co. 61 C. C. A. 194, 124 Fed. 486; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co. 147 Fed. 266; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100.

Where the article claimed to be an infringement can be used only in a patented combination, the inference of the intention of the maker and seller to infringe is certain. Thomson-Houston Electric Co. v. Ohio Brass Co. supra.

This is especially true where the infringing part is an essential element in a combination and is of no practical value or utility except as used in the combination. Traverse v. Beyer and Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co. supra.

This doctrine does not apply where the article in question is useful when not used in connection with, or as an element of, the patented combination. In such case, in order to make out a case of infringement, it must also be shown that the manufacturer knew the article was to be used in the combination. Snyder v. Bunnell, 29 Fed. 47; Robbins v. Aurora Watch Co. 43 Fed. 521; Stearns v. Phillips, 43 Fed. 792; Lane v. Park, 49 Fed. 454; Robbins v. Columbus Watch Co. 50 Fed. 545; Cary Mfg. Co. v. Standard Metal Strap Co. 57 C. C. A. 235, 120 Fed. 945; Saxe v. Hammond, Holmes, 456, Fed. Cas. No. 12,411; Keystone Bridge Co. v. Phœnix Iron Co. 5 Fisher, Pat. Cas. 468, Fed. Cas. No. 7,751.

It has been held that, even though the right to repair, replace, or substitute an element does not exist because the element in question is unbroken and in perfect condition, yet where it is not the vital element in the combination the purchaser of the combination may replace such part with one of a different manufacture which is an improvement thereon, without rendering himself or the manufacturer of such part guilty of infringement, but the manufacture and use thereof must be confined strictly to the purpose mentioned. Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005.

The right to improve is also limited to the purchaser of the combination. It is confined to his use thereof. He cannot replace an element in the patented combination, even though an improvement thereon, and place it on the market for sale as the original article improved. National Phonograph Co. v. Fletcher, 117 Fed. 149.

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there is no definite purpose that the thing sold shall be employed with others to infringe a patent right. Rumford Chemical Works v. Hygienic Chemical Co. (C. C.) 148 Fed. 866, and cases cited. But this plaintiff in error is shown to have manufactured and sold records for the express purpose of supplying the users of Victor machines. Nor are such records staple articles of commerce (Cortelyou v. Charles E. Johnson & Co. 76 C. C. A. 455, 145 Fed. 935); on the contrary, they cannot be practically used within the United States except with the Victor reproducer; for we regard the feed-device machine either as a curiosity or a pretense, while the foreign trade of plaintiff in error is not interfered with by the injunction, nor affected by the order under review.

It is further contended that those who purchase the patented combination in question without restriction have a lawful right to provide themselves with unpatented records made by any person whatever, by way of replacement and repair. We perceive no substantial difference in the meaning of these words. To return to use something injured or lost, or substitute for something defaced or destroyed another thing substantially identical, is to repair. The right of general repairing has not been questioned; but what plaintiff in error has done is not to mend or better broken or other records, nor even to furnish new records identical with those originally offered by the Victor Company, but to place upon new disks such other sound records as are thought to command a market, and to induce users of the patented machine not to replace, but to increase, their stock of recorded words and music. The right of repair is measured by the right of the owner of the patented article, and such owner, when doing what is above outlined, is no more repairing his machine than is one repairing a stereopticon by changing the pictures therein to suit the whim of the person gazing through it.

The final contention against the order below admits that the record actuating the stylus is a vital part of the combination claims of the patent in question, but declares that any purchaser of the patented article may immediately substitute for even an essential element therein any other element which he conceives better suited to his purpose, and, of course, if this be true, such preferred elements may be freely manufactured and sold. We think this contention disposed of by Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005; for the right of substitution there recognized was specifically restricted so as to refuse "authority to reconstruct or rebuild a combination which has been sold by the complainant," and, whenever a Leeds & Catlin record is placed in a Victor machine, the patented combination is instantly reconstructed. The right of substitution rests upon the right to improve, pointed out by Clifford, J., in Chaffee v. Boston Belting Co. 22 How. 223, 16 L. ed. 242, and is different from the right to repair. But there is here no true substitution, and improvement is scarcely pretended. From a legal standpoint the disks of both parties are identical, because the grooving capable of actuating the reproducer is the same. What is substituted is but music or words, and what is improved, either price or novelty, is sound. These are but accidents, and no more important than the color of the disk. The true inquiry is whether the owner of a patented combination, the elements of which are durable, unbroken, and in good repair, may buy from the patentee one specimen of a single element, from an outsider an indefinite number of identical specimens of the same element, and keep and use them all, under cover of the word "substitution;" it further appearing that the element so procured and used is useful and commercially known only in respect of the said combination.

We think this cannot lawfully be done, and affirm the order below.

Wallace, Circuit Judge, dissenting:

In considering the question of infringement, claim 5 may be laid out of view, as it covers merely the function of the machine or combination of claim 35. It is more than doubtful whether the claim is not void upon its face, but assuming it to be valid, as must be done for present purposes, it is not infringed except by using the combination or machine of claim 35. A sound record is one of the parts ennumerated in claim 35. It is, however, only a subsidiary part of the machine. Its relation to the machine proper is analogous to that of the sheet of paper in a typewriting machine, or the stalks of corn in a corn cutter. It is the thing which is to be operated on by the machine proper. The invention of the claim consisted in substituting a universal joint, or swinging arm, in lieu of a feed screw device, and thereby producing a new form of reproducing stylus for engaging with the record; and everything else in the machine was old. This clearly appears by the opinion in the suit in which the validity of the patent was established. Victor Talking Mach. Co. v. American Graphophone Co. (C. C.) 140 Fed. 860.

It is not questioned, and cannot be, that the plaintiffs in error were at complete

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liberty to make and sell such sound records as they did, provided they did not sell them to purchasers who had no right to use them in combination with the other devices enumerated in claim 35. They have been adjudged guilty of contempt because they have sold them, or threatened to sell them, to users of the so-called "Victor" machine, which embodies the combination, and who purchased their machines from the Victor Talking Machine Company, the owner of the patent. If these purchasers were at liberty to remove a sound record which originally accompanied the machine, and substitute for it a sound record sold by the plaintiffs in error, they were not infringers; and plainly the plaintiffs in error could not be infringers by assisting the purchasers to do that which they had a right to do. The real question in the case, therefore, is whether the purchasers of the Victor machines infringe the patent by using in their machines the sound records manufactured by the plaintiffs in error.

The purchaser of a patented machine from the owner of the patent acquires the right to do what he may choose with the particular machine, or any of its parts, as freely as he could if it, or none of its parts, had ever been patented. Undoubtedly he cannot, after his machine has practically ceased to exist for any useful purpose, reconstruct it by reparation, nor can he then reconstruct it by disorganizing it and substituting as new parts the dominating and vital features of the patented invention. But no question of this kind is involved in the present controversy. The only question is whether he can discard a part he does not care to use, and substitute another. When such a part is not the fundamental invention in the patented machine, I cannot doubt he is at liberty to do so. This was so decided by this court in the "trolley stand" case (Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005), and is not an open question in this court, unless it is proposed to reconsider and overrule that decision. He is not under any implied promise to maintain the machine as an entity, and may do whatever he chooses with any of its parts, as fully as if there had not been a patent.

Let us consider from a practical standpoint what any other rule would lead to in a case like the present. The purchaser here has bought with his machine a sound record, or half a dozen sound records, each having the necessary grooves cut in it to enable him to reproduce for his own pleasure a particular piece of music. The record is a fragile thing which is to be inserted into the machine by the user, and must be adjusted accurately to the vibrating parts, and is to be removed when he wants to reproduce a different piece of music. Any slip of the hand will destroy it. Not only is this so, but its sound reproducing qualities are lost by the contact of the needle which is vibrated in its grooves, long before the machine proper is worn out, and generally early in its normal life. Whenever either of these things happens, a machine, which costs at least $17, is disabled unless a record like one which has been sold with it at the price of 35 cents, and which anybody and everybody has a right to make, may be replaced in the machine in lieu of the useless one. If the owner of the patent stops manufacturing records, or no longer has in the market a record grooved like the one which has been destroyed, what is the purchaser to do if he has not the right to replace a record without the permission of the patent owner? The purchasers of the Victor machine cannot require the Victor Talking Machine Company to supply them with records, and can only procure them from it on such terms as it pleases to exact. If they are not at liberty to procure them elsewhere, the company can dictate how long they are to enjoy the use of their machines.

Such a rule of infringement as is adopted by the majority opinion, not only extends the monopoly of the patent owner to an unprecedented extent, but is subversive of the right of a purchaser of the patented thing to realize its fair measure of usefulness by making necessary reparations or changes by way of improvement.

Affirmed by Supreme Court of United States, April 19, 1909, 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495.

OKLAHOMA SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,
v.
FREDA RICHARDS.

(— Okla. —, 102 Pac. 92.)

Invalid release — action — restoration of consideration.

1. Where personal injuries have been suffered, for which a liability exists, and a release therefor has been fraudulently procured for a grossly inadequate sum, an action for damages may be maintained without first obtaining a decree to rescind or to cancel the release; and the plaintiff is

Headnotes by DUNN, J.

Note. — As to right, in action at law, to attack release for fraud, see case note to Olston v. Oregon Water Power & R. Co. 20 L.R.A.(N.S.) 915.

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not precluded from attacking a release so obtained, when it is set up as a defense, because he has not restored or tendered back the amount received by him at the time the release was obtained.

Action — condition precedent — tender of performance.

2. When, in an action at law, the tender of performance of an act is necessary to the establishment of any right against another party, such tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.

Fraudulent release — evidence — sufficiency.

3. Plaintiff was injured while traveling on one of defendant's passenger trains. On the following day, while she was in bed at the railway company's hospital, away from friends or acquaintances, and still suffering from the effects of injuries sustained, the extent of which she did not know, and apparently not in a position to ascertain, she was visited by a claim agent and physician in the employ of the defendant. The agent desired to effect a settlement and release of the damages and liability, and, in order to induce plaintiff to sign such release for a grossly inadequate sum, he and the physician represented to her that her injuries were slight and temporary, when in fact they were serious and dangerous, which fact the physician knew, or should have known, had he exercised the proper care. Plaintiff believed the representations, and acted thereon by signing the release, which she would not have done had she been advised of her true condition. Held, that such facts sustained the averments of plaintiff's reply, which alleged that the release was procured by fraud, and a verdict based thereon will not be set aside on the ground that it is not sustained by sufficient evidence.

Appeal — verdict — excessiveness.

4. In an action for damages for personal injuries, where the evidence shows that plaintiff had always theretofore been well and able to make a living for herself and two children by washing, and also by running a boarding house, keeping from twelve to fifteen boarders, with the same number of rooms, in which she did all the work herself, making thereby on an average of from $65 to $75 per month, and which shows that since her injury, a period of about two and one-half years, she had been unable to earn anything, but had been compelled to pay out a great deal of money for physicians' services, suffering intense pains and agony at times as a result of her injuries, which were probably permanent, we are not able to say that a judgment for $6,300 is excessive, or shows by its amount to have been rendered as a result of passion or prejudice.

(February 23, 1909.)

ERROR to the District Court for Comanche County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Flynn & Ames** for plaintiff in error.

Messrs. **Stevens & Myers** and **Horace Speed** for defendant in error.

Dunn, J., delivered the opinion of the court:

The defendant in error, who will be hereafter denominated "plaintiff," on the 8th day of September, 1904, began her action in the district court of Comanche county against plaintiff in error, who will hereafter be denominated "defendant," to recover damages in the sum of $10,000 for and on account of injuries received by her in a wreck while she was traveling on one of the trains of defendant. To this petition the defendant filed an answer containing a general denial and a plea of accord and satisfaction, in that plaintiff had, for a valuable consideration, discharged and released the defendant of any and all claims for damages occasioned and growing out of her alleged injury. The release thus pleaded was proven on the trial, and is as follows:

Whereas, I, Freda Richards, of Lawton, of the county of Comanche, Oklahoma territory, was injured on the 9th day of April, 1904, on a line of railroad owned or operated by the St. Louis & San Francisco Railroad Company, while a passenger on train 408, which was wrecked near Seneca, Missouri, April 9, 1904, under circumstances which I claim rendered such company liable in damages, although such liability is denied by such railroad company, and the undersigned being desirous to compromise, adjust, and settle the entire matter: Now, therefore, in consideration of the sum of one hundred and no-100 dollars ($100) to me this day paid by the St. Louis & San Francisco Railroad Company, in behalf of itself and other companies whose lines are owned or operated by it, I do hereby compromise said claim, and do release and forever discharge the said St. Louis & San Francisco Railroad Company, and all companies whose lines are leased or operated by it, their agents and employees, from any and all liability for all claims for all injuries, including those that may hereafter develop, as well as those now apparent, and also do release, and discharge them of all suits, actions, causes of action, and claims for injuries and damages which I have or might have, arising out of the injuries above referred to, either to my per

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son or property; and do hereby acknowledge full satisfaction of all such liability and causes of action. I further represent and covenant that, at the time of receiving said payment and signing and sealing this release, I am of lawful age and legally competent to execute it, and that, before signing and sealing it, I have fully informed myself of its contents and executed it with full knowledge thereof.

Given under my hand and seal this 9th day of April, A. D. 1904.

Freda Richards. [Seal.]

To this answer and release, plaintiff replied generally: That, owing to her injuries, she was greatly shocked and mentally disturbed; that immediately after the wreck she was taken to the defendant's hospital at Springfield, Missouri, where the agents of the defendant examined her the same day and within a short time after her arrival, and, for the purpose of obtaining the same and of inveigling and deceiving her into executing it, the physician and the claim agent of the defendant stated to plaintiff that she was but slightly injured and would recover her health in a short time, and that her injuries consisted only of slight bruises and the shock and jar inflicted at the time of the wreck. This is followed by a statement that the representations were false and untrue, that the plaintiff relied upon and believed the representations, and was induced thereby to sign the release, and that, had she known that they were false, she would not have signed it. On the case coming on for trial before a jury, counsel for plaintiff made his opening statement, in which he stated facts supporting the petition and reply, whereupon counsel for defendant moved for judgment on the pleadings and statement of counsel for plaintiff for the reason that the same failed to state facts sufficient to support a judgment for plaintiff, and that they did show facts which entitled defendant to a judgment. This was overruled and the ruling excepted to. Whereupon counsel for defendant made his statement to the jury, in which he admitted the wreck and that plaintiff was a passenger on the train. He denied, however, that there was any negligence on the part of the company causing the wreck, but that the same came from unforeseen causes.

In reference to the release signed by plaintiff, counsel stated that, "after the wreck, and while Mrs. Richards was in full possession of all of her faculties, she entered into a contract with the plaintiff, by which her claim was compromised and settled in full, and by virtue of that compromise and settlement she received $100, which she still retains. The contract was entered into, was in writing, and signed by her. We think the evidence will show that the release was fairly entered into. She was not induced by fraud to execute it, and that is a full, complete discharge and settlement of the claim now brought forward." On the offering of evidence, counsel for defendant again objected to any evidence in support of the pleadings, and exception to the overruling of this motion was properly reserved. Practically the same questions were raised again by counsel for defendant on the conclusion of the evidence for plaintiff. A demurrer lodged thereto, alleging its insufficiency to support plaintiff's claim, was overruled and exception saved. Plaintiff received the $100 in the manner as stated, on the signing of the release. No mention of the same was made in her petition. The release was pleaded as a complete defense in the answer of defendant and relied upon on the trial, and is almost the sole reliance in this court. Its inadequacy, on account of the alleged fraudulent manner in which it was procured, was set up in the reply, and no tender, either in the pleading or elsewhere, by the plaintiff to the defendant, was made of the money received. The court, after informing the jury that if it found the defendant was liable to plaintiff by reason of the wreck, and that the contract or release offered in evidence by the defendant was fraudulent and therefore void, then instructed it that "you should then further consider the evidence in this case to determine what, if any, damage the plaintiff is entitled to recover for, and, if you find from the evidence that the $100 received by the plaintiff at the time of the execution of contract or release was equal or greater than the damage that she sustained, your verdict should be for the defendant." Verdict was rendered in favor of plaintiff in the sum of $6,200. Judgment was entered thereon, to reverse which proceedings in error were begun in the supreme court of the territory of Oklahoma, and the case is now before us for our consideration and review by virtue of our succession to the duties and jurisdiction of that court.

Several questions were presented by counsel on the foregoing facts. The principal one, however, grows out of the release, the conditions under which it is alleged to have been secured, and the fact that the consideration received was not returned, or offered to be returned, prior to the institution of the action. The position of counsel for defendant on this matter will probably be best stated by quoting from their brief. "In cases involving contracts which are attacked because of fraud, there is a funda-

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mental distinction between that fraud which enters into the execution of the contract, and that which enters into its procurement. By fraud in the execution is meant that fraud which induces a person to sign an agreement which they do not really intend to make, such as signing a release by representing that it is not a release, but only a receipt for doctor's bills, or some other instrument. By fraud in the procurement is meant those false representations by which a person is induced to sign an instrument, the contents of which they understand perfectly, but which they would not sign but for false representations as to collateral matters. The courts hold that, where the fraud enters into the execution of the contract, there is no contract, because the minds of parties have not met, and that, consequently, the consideration need not be returned; but where the fraud does not affect the execution of the instrument, but only collateral matters inducing the party to sign it, the consideration must be returned." In support of this we are cited a great many authorities so holding, and to Wilson's Rev. & Anno. Stat. (Okla.), 1903, §§ 825–827, on rescission. Section 827, supra, provides: "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: First: He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and second: He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

The foregoing quotation from counsel's brief, the provisions of the statute, and the numerous authorities presented by each side, all of which we are called on to consider and apply to the facts in this case, present an invitation to enter a field of legal exploration, of which a commentator thereon (8 A. & E. Ann. Cas. p. 179) says: "The authorities are in hopeless conflict on the question of the necessity for the releasor to return or tender the consideration upon repudiating a release of damages for personal injuries, procured from him by fraud. It has been held, on the one hand, that the releasor cannot maintain an action of damages for the injuries sustained until he has had the release rescinded in an equitable proceeding instituted for that purpose. On the other hand, it has been held that the releasor may repudiate the release and bring an action for the injuries without returning or tendering back the money paid him as a consideration for executing the release. Between these extreme views a number of different and conflicting rules have been laid down by the courts." Counsel for plaintiff take the position that neither the equitable suit mentioned nor the return of or the tender of the money received is necessary, and cite numerous authorities to sustain the same. To endeavor to reconcile the conflicting opinions rendered by the different courts on this proposition would be to assume a task in which there is no promise or prospect of accomplishment. In this situation, it of necessity follows that we are driven to elect which, in our judgment, is the correct rule; nor in this are we aided by any previous decision of this jurisdiction.

In our judgment the rule which should govern the procedure in this class of cases is laid down in the following authorities, as there is absolutely nothing involved on the one hand but the money consideration paid, and, on the other, the privilege of asserting a right which plaintiff contends she was induced to apparently waive by the fraudulent representations of the other party, and we can see no good reason why, rights of third parties not being involved nor endangered, and the action being between the immediate *actors*, a court of law, under the procedure as administered in the Code states to-day, is not vested with power to give full and ample relief: Olston v. Oregon Water Power & R. Co. (Or.) 20 L.R.A.(N.S.) 915, 96 Pac. 1095; Wagner v. National L. Ins. Co. 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395; Baird v. Howard, 51 Ohio St. 57, 22 L.R.A. 846, 46 Am. St. Rep. 550, 36 N. E. 732; Missouri P. R. Co. v. Goodholm, 61 Kan. 758, 60 Pac. 1066; Sanford v. Royal Ins. Co. 11 Wash. 653, 40 Pac. 609; St Louis, I. M. & S. R. Co. v. Smith, 82 Ark. 105, 100 S. W. 884; Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 72 N. E. 1060; Galveston H. & S. A. R. Co. v. Cade (Tex. Civ. App.) 93 S. W. 124; Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621; Girard v. St. Louis Car Wheel Co. 123 Mo. 358, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648; 18 Enc. Pl. & Pr. p. 95. Some of the cases which we have cited, it will be noted, are those where there was, as some of the authorities say (Cutler v. Roanoke R. & Lumber Co. 128 N. C. 477, 39 S. E. 30), fraud in the factum, and others where the fraud was in the treaty. Counsel for defendant concede in the former class of cases it is not necessary to go into equity to have the release set aside, but insist that in the latter class of cases it is necessary. The

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foregoing cases do not recognize this distinction, and we do not regard it sound.

Now, must the consideration be tendered or returned to enable plaintiff to maintain her action? It is conceded that it need not be when the fraud is in the fact, but it is insisted that, where the releasor is overreached and defrauded by misrepresentations in order to induce him to give apparent consent to relieve the releasee of his liability, this species of fraud constitutes a defense for the one perpetrating it where the defrauded party brings suit without a tender or an actual repayment of the money received. The case of Sanford v. Royal Ins. Co. supra, as was noted, is one where the release was procured by fraud in the treaty, and it was there held that in such a case full relief could be given by a court of law in an action involving liability upon the original transaction. It was also contended there, as here, that the release could not be attacked for fraud, or otherwise, until the plaintiff had restored or tendered to the defendant the consideration received therefor. The supreme court of Washington on the proposition said: "In suits in equity, where a bill is filed for a rescission, a restoration of the consideration received is not necessary before suit; it being sufficient that such restoration be provided for by the judgment. Such being the rule in equity, it would seem to follow as a result of our holding upon the preceding question that the rule is applicable to the case at bar. . . . Before entering judgment in this case, the respondent remitted and appellant had credit in the judgment for the full amount of the premium note and the $10 additional."

The case of O'Brien v. Chicago, M. & St. P. R. Co. 89 Iowa, 644, 57 N. W. 425, was likewise a case where the fraud was in the treaty. The plaintiff was injured on the 8th of September, 1890, and ninety days thereafter executed a release to the company for all of his injuries. The action was brought without tendering the $250 received at the time of the signing of the release; but the court instructed the jury that, if they found for the plaintiff, they should deduct from the amount awarded to him the sum of $250, which he had already received. It was insisted in that case, as in this, that it should be reversed and remanded for a new trial because of the failure of the releasor to make an antecedent tender or return of the money. After citing a number of cases and fully considering the matter, and coming to the conclusion that this was not necessary, the court said: "We may well inquire: Why should the plaintiff tender to the defendant that which the plaintiff was entitled to retain, even if defeated in the action? In that event, he would retain the $250 by virtue of what the defendant contends is a valid transaction. When the court directed the jury that, if the plaintiff was entitled to recover, the sum paid at the alleged settlement should be deducted from the verdict, it was, in effect, a return of the money paid for the release."

The case of International & G. N. R. Co. v. Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189, written by Chief Justice Fisher, was likewise similar to the case at bar, in that the fraud was in the treaty, and not in the fact. The plaintiff, prior to bringing her suit, nor at the time, tendered or returned to the defendant the money received upon the release. The only thing that she did was to recite a tender of it in her petition, where, in fact, she anticipated a defense, and where, as is said in the case of Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31, and as is said in the case of Trotter v. Mutual Reserve Fund Life Asso. 9 S. D. 596, 62 Am. St. Rep. 887, 70 N. W. 843: "The release was a matter of defense which should not have been mentioned in the complaint, and the allegations relating thereto might properly be regarded as surplusage." So that, for all practical results, in this case, no tender was made; but, whatever force may be given the tender mentioned in the complaint, the expressions of the court on the question that is now before us are equally forceful. The court said: "It was not necessary that the plaintiff should bring the money into court and actually tender back to the defendant the $250 as a prerequisite to entitle her to recover judgment for damages. It was in the power of the court, and it was properly exercised in this case in entering the final judgment, to have protected the defendant in its rights as to this sum, and the verdict and judgment rendered did accomplish this purpose."

The case of Galveston, H. & S. A. R. Co v. Cade (Tex. Civ. App.) 93 S. W. 124, was one decided by the court of civil appeals of Texas, wherein the fraud was in the treaty, and where the releasor actually tendered the money to defendant, who refused it by reason of the alleged lack of authority to accept it, but insisted that the money be placed or deposited in the court. The statement of the court in reference to this matter and its disposition is fully applicable to the facts in the case at bar: "If plaintiff should recover, and the same be deducted from the recovery, defendant would be as well off as if the money had been on deposit. If plaintiff should fail to recover, the money, if deposited, would not go to defendant. From defendant's standpoint,

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in either event, no useful purpose would be served by the payment of the money into court, and such a rule would work a hardship on a plaintiff, who had not the money to deposit, and would amount to a denial of relief in a meritorious case, and, at the same time, the application of such a rule would be of no practical benefit to the defendant. Besides, it was in the power of the court to protect the defendant in its rights as to said sum in the case, if the instrument is annulled, and the judgment here does this."

The case of Jones v. Gulf, C. & S. F. R. Co. 32 Tex. Civ. App. 198, 73 S. W. 1082, written by Chief Justice Garrett, was another of this kind wherein the facts were almost identical with those in the case at bar. The averments of the petition show that the claim agent and the physician in the employment of the railway company made false representations to plaintiff and his wife as to the extent of her injuries, for the fraudulent purpose of procuring a release; the statements being that she was only slightly injured, and would be well in a few weeks, when, as a matter of fact, she was permanently injured. The fraud in that case, as in the case at bar, was in the treaty, and the court held in the syllabus: "Where the release has been procured by fraud, it is not necessary for the plaintiff to pay into court the money received for its execution in order to have it set aside."

The case of Missouri P. R. Co. v. Goodholm, 61 Kan. 758, 60 Pac. 1066, was one wherein the statement of facts leaves the matter of whether the release was obtained with knowledge on the part of the injured party that he was signing a release somewhat uncertain. The statement of facts made by the court shows that Goodholm was induced to sign a release by being led to believe that his injuries were slight and temporary. The jury found that the release "was read over to him, and he was informed of its character and provisions, but that Earhart, the claim agent, and the doctor, knowingly misrepresented facts and deceived him in order to induce him to sign the same, and that he believed the representations to be true, and relied and acted upon them in executing the release." It was also found that Goodholm was not mentally incapable to make a contract, but that he signed the release without understanding or comprehending its import. The distinction which is so sharply drawn in the case at bar was either not pressed upon that court, or, if so, the court took the same view of it that we do. Goodholm made no offer to return the money which he received, and it was contended that, except by his so doing, he ought not to be permitted to maintain his suit. The court said: "If the release was procured by misrepresentation and fraud, it may be ignored by Goodholm, and an action for the injuries actually suffered may be maintained. It is not necessary that it should be first set aside in a proceeding in equity. While the fraud charged is a ground of equitable jurisdiction, legal and equitable rights are administered under our system in a single court and in one form or proceeding, and the rights of the parties can be fully protected in an action, such as the plaintiff brought. A decree of rescission or to cancel the release was therefore not a prerequisite. Nor do we think that Goodholm was precluded from attacking the release set up as a defense because the trifling amount paid when it was executed was not restored or tendered before the suit was brought. The general rule is that one who seeks to set aside a contract or conveyance should return, or offer to return, the consideration received for the same. This rule is peculiarly applicable where the property or consideration is the thing in controversy, or, rather, where the cause of action arises out of the fraudulent transaction that is attacked. Here, a right of action existed prior to and independent of the execution of release alleged to be fraudulent and void. There was an implied admission of liability of the company to the extent of $15, and as the amount paid is conceded to be due, whatever the result of the litigation, what good reason is there for returning it? Restoration or tender is required on equitable considerations, but what injustice or inequity could result to the company if the amount impliedly admitted to be due is held and credited upon any recovery against it? If the release is held to be binding, Goodholm is entitled to the money paid; and, if he establishes a liability for the injuries apparently sustained by him, it can be credited upon the recovery."

In the Goodholm Case it will be noted that it is stated by the court that there was an implied admission of the liability of the company to the extent of $15, which was conceded to be due. In the case at bar, the liability on the part of the defendant is specifically denied by the terms of the release. This difference, to our minds, is not material, however, for three reasons: First, if it was procured by fraud, it falls, and its terms go with it. The same denial of liability is then presented by the general denial of the answer. If sustained as valid, then plaintiff is entitled to keep the consideration. Second, the controlling fact in this class of cases is that the release was fraudulent, because it procured a waiver of a large liability for a grossly inadequate sum,

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and did this by improper methods. The release would not be held invalid for fraud where this is not the case. And, third, the jury found the release was fraudulent, and the defendant owed plaintiff more money than this amount at the time it was paid, and has given credit for it on its verdict, so, in either event, the plaintiff would be entitled to keep the consideration, and in either event the defendant is not injured. The plaintiff, when she brought her suit, submitted for the determination of the court the entire controversy; first, whether the release was void as to her, and, second, whether the company was liable for her damage, and it was not necessary, in order that she might have these things determined by the court in this action, that she either tender or plead a tender of the amount received by her, for, as is said in the case of Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533, from the supreme court of Minnesota, written by Mr. Chief Justice Gilfillan: "The willingness of the party to perform those terms which the court may think it right to impose as the price of any relief is sufficiently shown by his submitting his cause to the court, which has the power to impose the proper terms." The facts out of which that case arose are substantially as follows: The defendant, Freeman, for certain considerations, including the note in suit, was induced, by false and fraudulent representations as to its character, to purchase certain land. The suit being brought to enforce payment of the note, defendant set these matters up in the answer, and in a separate count set out a counterclaim for money paid for taxes, and interest on a certain loan secured by mortgage on the land, assumed by the defendant, and also interest paid on the note then in suit, prior to the ascertainment of the fraud. No tender or reconveyance was pleaded therein, and judgment was asked for the various sums paid, with interest. It was claimed that the defendant's position was untenable because there was no allegation of a tender or disaffirmance, nor any demand for a rescission of the transaction. In denying the contention of plaintiff, the learned chief justice said: "All that is required to justify a rescission by the court is that the contract is one that a court of equity will cancel or rescind on the ground alleged, that such ground of rescission exists, and that the plaintiff has not lost his right to a rescission by affirmance, laches, or otherwise. It was one of the rules of pleading in courts of equity, in suits where the court might impose conditions on the plaintiff, or give the defendant affirmative relief, as in suits for specific performance, cancelation of instruments, rescission of contracts, or for accounting, that the plaintiff in his bill should offer to do whatever the court might deem equitable. This was upon the maxim that he who seeks equity must do equity. But, although at one time a bill was demurrable if it omitted this offer, the requirement was in its nature formal. The offer was not one of the facts constituting the cause of action, any more than was the prayer for process. It may be doubted that the rule referred to still exists in courts where equity forms of pleading are retained. Columbian Government v. Rothschild, 1 Sim. 94; Wells v. Strange, 5 Ga. 22. These were suits for accounting. Jervis v. Berridge, L. R. 8 Ch. 351, was a suit for cancelation or rescission, and the offer in the bill was held not necessary. However it may be where equity forms of pleading are retained, it cannot be so under the code system, which requires a complaint to contain only a statement of the facts constituting the cause of action and the prayer for relief. See Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472. The willingness of the party to perform those terms which the court may think it right to impose as the price of any relief is sufficiently shown by his submitting his cause to the court, which has the power to impose the proper terms."

Nor should it be forgotten or overlooked in the consideration of this class of cases that they are not strictly actions brought for rescission. Hence the statute cited does apply. The contract or release is a mere incident to the suit. The cause of action grows out of an independent antecedent fact, and the release is simply a matter of evidence in defense to the plaintiff's claim of right to prosecute. Nor does it matter that plaintiff, in the release itself, waived, for a consideration, the right to maintain a suit for damages inflicted, if in fact the release was procured through fraud, for no contract is made except the parties thereto retain within themselves the right to assail it on the ground of fraud. Even a stipulation to the effect that any false and fraudulent representations inducing the other to enter into it should not affect its validity would of itself be of no validity. The law will not give effect to a stipulation, if fraudulently entered into, that would grant immunity to iniquity and fraud. 9 Cyc. Law & Proc. p. 474.

In addition to this, to our mind, the entire record shows defendant relied upon the validity of this release, and would have refused a tender had one been made. The release is pleaded in its answer. In the opening statement to the jury, counsel recited it and stated: "The release was fairly entered

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into, that she was not induced by fraud to execute it, and that it is a full and complete discharge and settlement of the claim now brought forward." The release was taken from plaintiff by the defendant for the purpose of settling the damage and of pleading it in bar of an action, should releasor bring one. We find that she brought such a suit. We find the release pleaded and urged, insisted and relied upon throughout the entire proceeding, and from the record we are forced to the conclusion, and we believe that we are safe in saying and finding, as did the supreme court of Missouri in the case of Girard v. St. Louis Car Wheel Co. 123 Mo. 358–371, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648, which was similar to the one at bar, where the defendant had taken a release and had been sued, and plaintiff had not paid or offered to tender back, that "the attitude of the defendant throughout, as well as before, the litigation, its plea of release, its setting aside in an envelope the wages of plaintiff each week, all indicate that any tender by plaintiff of repayment for the medical services would have been useless. Since the execution of that paper, defendant has continuously asserted and relied upon its validity, and still asserts it. It has been decisively held in other cases that no preliminary tender can be insisted upon as a bar to legal action, where the facts show that the tender would have been rejected. Deichmann v. Deichmann (1871) 49 Mo. 107; Westlake v. St. Louis (1882) 77 Mo. 47, 46 Am. Rep. 4. In such a state of the facts, a tender would be what Mr. Bigelow calls an idle ceremony. Bigelow, Fr. (1888) p. 424." Other authorities supporting this same principle are as follows: Hunt, Tender, § 52; Hills v. National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; United States v. Edmondston, 181 U. S. 500–508, 45 L. ed. 971–976, 21 Sup. Ct. Rep. 718; Chinn v. Bretches, 42 Kan. 316–319, 22 Pac. 426; Herberger v. Husman, 90 Cal. 583, 27 Pac. 428; Pierce v. Lukens, 144 Cal. 397, 77 Pac. 996; Williams v. Patrick, 177 Mass. 160, 58 N. E. 583; Ashley v. Rocky Mountain Bell Teleph. Co. 25 Mont. 286, 64 Pac. 765; Brock v. Hidy, 13 Ohio St. 306; Webster v. French, 11 Ill. 254–276; Merrill v. Pike, 94 Minn. 186, 102 N. W. 393; 1 Elliott, Gen. Pr. § 323.

In the case of Brock v. Hidy, supra, the court says of the necessity of making a tender that "where the vendor claims to have rescinded, repudiates, and denies the obligation of the contract, placing himself in such a position that it appears that, if the tender were made, its acceptance would be refused, then no tender need be made by the vendee. To this effect, the authorities are very full,"—citing authorities.

In the case of Webster v. French, supra, from the supreme court of the state of Illinois, the court says: "A party filing a bill submits to everything that is required of him; and the practice of the court is not to require the party to make a formal tender; whereas, in this case, from the facts stated in the bill, or from the evidence, it appears the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money."

In the case of Hills v. National Albany Exch. Bank, supra, from the Supreme Court of the United States, the court, in the syllabus, laid down, in our judgment, the rule that should govern in all cases of this character, that "when the tender of performance of an act is necessary to the establishment of any right against another party, such tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

The case of Merrill v. Pike, supra, from the supreme court of Minnesota, was one where, as in the case at bar, a release was given for personal injuries. Suit was brought by the injured party, the money was not tendered nor returned. Under the facts whereby the release was secured, the court held that the contract was voidable, though not void, and on the question of the necessity of plaintiff returning or tendering the return of the money the court said: "Plaintiff was not required to repudiate the contract nor return the money after being notified of the claim of settlement by service of the answer. Chicago, R. I. & P. R. Co. v. Doyle, 18 Kan. 58. From the nature of the defense pleaded, it is evident that defendants intended to hold plaintiff to the contract, if possible, and that they would have refused a tender of the money; and plaintiff was not required to do an unnecessary thing."

We therefore believe, with the record before us, we take no hazard in saying that it is as reasonably certain as a thing may well be that any offer made by plaintiff would have been refused. We believe counsel for defendant will concede it. If so, then why return this case for another trial that an empty, vain ceremony may be performed? And this conclusion ought not, as suggested by District Judge Hanford in the case of Hill v. Northern P. R. Co. (C. C.) 104 Fed. 754, work to the detriment of future settlements of this character. It should, however, induce people having them to be less speedy, and to enter into

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them with injured persons only in the presence of some representative of theirs, so that all parties will be more nearly on an equal footing. This would bring about equitable settlements. They would not then be attacked; but, if they are, the defendant would be thrice armed in the contest, and the plaintiff, and not the defendant, would more often be shown to be in the wrong. To hurry a claim agent to the bedside of a bruised and broken human being, still suffering from shock, dazed by the horror of the accident, stupefied by opiates or stimulants, alone except for those in the employ of the party liable, produces, almost without exception, a settlement in which the proponent dictates the terms, and produces a situation which is almost an invitation for a contest. When reason returns to the injured, and the harm inflicted is discovered, then the asserted wrong, whether true or not, done at the settlement, is made clearly apparent. If the settlement is unfair, an additional burden is likely to be placed upon the defendant to that actually due it, while, if the settlement is honest and fair, and the injured party really received all he was entitled to, the surroundings at the time of the settlement are generally sufficient to defeat and destroy it. So that, as we have seen, in the final analysis, all of such settlements, in practice and in fact, depend for their vitality and conclusiveness upon the subsequent acquiescence of the releasor, and the releasee should, from the highest promptings and motives of self-interest, see to it that they are above suspicion, so that, when assailed, the very circumstances under which they are secured do not, irrespective of merit, defeat them.

Three additional questions are discussed by counsel for defendant. The first of these is that the evidence did not sustain the theory of plaintiff, that the release was secured by fraud. The second is that plaintiff had failed to show that her injuries were the result of the wreck. The third is that the damages allowed were excessive, in that they appeared to have been given under the influence of passion or prejudice. In order to properly discuss these questions, it will be necessary to review the evidence, and this we shall briefly do: The wreck occurred on the 9th of April, 1904, in the Indian territory. The plaintiff at the time was riding in one of the passenger coaches of the company which was turned over on its side; she being struck by a seat and perhaps by some of the passengers falling on her. She fainted at the time of the accident. When consciousness returned she was lying under a seat amidst the glass from the windows. On being carried out of the coach, and placed on some cushions on the ground, she remained there with the other passengers from 6 or 7 o'clock in the evening, the time of the wreck, until about 3 o'clock in the morning, at which time she was placed upon a relief train and taken to the company's hospital at Springfield, Missouri, where she arrived somewhere between 8 and 9 o'clock in the morning. While lying on the ground at the scene of the accident, she was given a hypodermic injection and some whisky, as she remembers it, something like three times. At the hospital, after drinking some coffee, she was visited by the physician and claim agent of the company. The physician examined her to ascertain the extent of her injuries, and she testifies that the doctor told her that she was not hurt at all, that her injuries consisted of slight bruises and the shock only, and that she was frightened and nervous and would get over it in a few days, probably a week. That, after he examined her and told her there was nothing the matter, she asked him why it was her side hurt her so, and he told her that it was just from the fall, and that in a week or two she would be all right, and not to worry. After he was there she was given another hypodermic injection to relieve the pain which was coming back on her. Something like an hour or so, the claim agent returned and proposed a settlement, informing her, as did the physician, that she was frightened, and that her hurt consisted of bruises and the shock. She informed him that she would be willing to settle, but, if she knew she was injured, that she would not, that she was a widow and had children to support. The claim agent thereupon told her that, if a settlement was made, it had to be right away, because he had to leave on some business. That she had no other physician make an examination of her excepting the company's physician. That at the time she signed the release she believed the statements of the claim agent and the physician, and, had they not been made, she would not have signed it. The injury of which plaintiff complained was prolapsus of the uterus, with other bruises and injuries of an internal and external character.

A case which seems to us to be apparently fully in point on this situation of the evidence is that of Jones v. Gulf, C. & S. F. R. Co. 32 Tex. Civ. App. 198, 73 S. W. 1082, written by Chief Justice Garrett. It was a suit for personal injuries to plaintiff's wife. Demurrer was sustained to the petition, which set up: "That defendant's servants, to wit, Drs. Peeples, Phillips, and H. Waters, and defendant's claim agent, Evans, examined plaintiff's wife as to the extent of her injuries within a short time after said collision, and before the signing

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of the release, each of whom recognizing and knowing defendant's liability to plaintiff for said injuries; that for the purpose of obtaining a release from plaintiff for the damages aforesaid, and for the purpose of deceiving plaintiff, and inveigling him to execute a release for said injuries, the said physicians and claim agent, acting for and representing said defendant, stated to plaintiff that his wife was only slightly injured, and that she would be well in a few weeks, and would be able to do and perform her usual duties; that she was not severely hurt, that she had not sustained any injuries except those apparent upon her person, which consisted of slight bruises and the shake-up attending the sudden jar at the time of the collision, which statements and representations were untrue, and known to be untrue to said physicians at the time. If they were not so known, they should have been known to them at the time, and could have been known by their skill as physicians. That plaintiff believed said representations to be true at the time, and acted upon them and each of them in making and executing the release hereinafter referred to. That said statements and representations were untrue, and made for the sole purpose to induce him to sign said release. That plaintiff did not know of their falsity, and had no means of knowing the extent of said injury except through said physicians, who were acting as the agents of the defendant. That he believed the statements of the physicians and claim agent at the time he executed said release. That he would not have signed said release if he had known the falsity of said statements, made as aforesaid. That he relied solely upon the truthfulness of the representations made by defendant's physicians. That his wife was and is permanently injured to the extent of $15,000." The holding of the court on this matter was as follows: "Where the averments of plaintiff's petition showed that the claim agent and three physicians in the employ of the defendant company made false representations to plaintiff and his wife as to the extent of her injuries, for the fraudulent purpose of procuring a release of damages, when they knew or should have known of the severity of the injuries, it was error for the court to sustain a demurrer to the pleading. Where one states a fact which is or should be within his knowledge, intending that it be believed and acted on as true, he should not ordinarily be heard to say that the other party ought not to have believed him; there being nothing to show to such other the falsity of the representations."

Upon the proposition as to whether or not the injuries suffered by plaintiff were the result of the wreck, the evidence is somewhat conflicting, but plaintiff testified affirmatively thereto, and there was some corroborative proof. The jury evidently accepted this evidence. In such a case, the familiar rule obtains that "where a cause is tried to a jury, and a general verdict returned and judgment rendered on the verdict, and the evidence is conflicting and contradictory, and there is competent evidence to sustain the verdict, this court will not undertake to weigh the evidence or to determine the preponderance, but will sustain the verdict of the jury." Kuhl v. Supreme Lodge S. K. & L. 18 Okla. 383, 89 Pac. 1126. In our judgment, there is sufficient competent evidence to sustain the verdict.

The last question to which counsel for defendant address themselves, and to which our attention is invited, is that the magnitude of the judgment is evidence of the fact that it was given under the influence of passion and prejudice. The amount of injury received by the plaintiff and the amount of money redress defendant, if liable, should pay therefor, is practically altogether a matter of judgment, the exercise of which is peculiarly the province of a jury. A court should interfere only when it can say from the facts proven in the case that this power has been clearly erroneously exercised, and that the judgment is of such amount that there is a deficiency of evidence to sustain it. The facts in the case at bar show: That, prior to the accident, the plaintiff had always been well, that she had made a living for herself and two children by washing and running a boarding house, where she had from twelve to fifteen boarders, with the same number of rooms, and did all the work herself. That in this occupation she made from $65 to $75 per month, and since her injuries she had not been able to earn anything at all. That she left the hospital for St. Louis on the same day that she signed the release, being put into a berth and informed that a physician was next to her if she required help. That she remained in St. Louis about three weeks, returned to Lawton, still sick, being confined to her bed from the injuries. That she was constantly under the treatment of a physician until the December following, when she went to St. Louis again, remaining there one month, returning to Lawton, and then left for Arizona, where she remained a year and eight months, taking treatment for her lungs, which had not troubled her prior to the injuries received in the wreck. While there, she was in the hospital for over four months, paying $60 a month for nurse and doctor bills. That she had paid to the physician in Arizona $270, and yet owed him $100. That to another physician

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she had paid altogether $95 for treatment of the prolapsus, on account of which she had, since the time of the injury, suffered intense pains, suffering agony at times. Under these circumstances, we are asked to say that the verdict is excessive. We cannot do so. Other courts have had similar cases before them with the same question, and reference is here made to a few of them to show that our conclusion is not without precedent. Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247; Pittsburg, C. C. & St. L. R. Co. v. Banfill, 107 Ill. App. 254; Wynn v. Central Park, N. & E. R. Co. 38 N. Y. S. R. 181, 14 N. Y. Supp. 172; Chicago & A. R. Co. v. McDonnell, 91 Ill. App. 488; O'Neill v. Kansas City, 178 Mo. 91, 77 S. W. 64. Many other cases might be cited, but the measure of damages sustained in these, and the discussion in connection therewith, justify us in holding valid, and not excessive, the returns made here.

The language of Chief Justice Horton of the supreme court of Kansas is entirely applicable (Union P. R. Co. v. Young, 19 Kan. 488-493): "The trial court, whose imperative duty it was to set aside the verdict, or reduce its amount, if the jury erred from prejudice or other cause, has approved the same, and added its sanction to the award. The question was one peculiarly proper for the jury to determine; and, although the verdict is large,—larger, perhaps, than any member of this court would, as a juror, have returned,—we cannot, in view of all the circumstances, say that such damages are so excessive as to strike the mind at first blush as being the result of bias or prejudice. To interfere, we must say that the jury acted under some improper influence or bias in the matter. This we cannot say. . . . The trial judge had some opportunity to determine from the defendant in error while on the witness stand as to his capacity for business, and his general intelligence, which is denied to us; and, considering all the facts in the case, we do not feel at liberty of saying that the verdict of the jury is so flagrant, or outrageously unjust, as to require of us, as a reviewing court, to set it aside and grant a new trial solely for excessive damages."

The judgment of the trial court is accordingly affirmed.

Kane, Ch. J., and Turner, Williams, and Hayes, JJ., concur.

A petition for rehearing having been filed, the following **Per Curiam** response was handed down June 1, 1909:

The petition filed for a rehearing in this case resulted in further oral argument on the part of both parties, and the filing of a number of additional briefs, in which many of the authorities pro and con were again collated, considered, and discussed. No proposition was raised, however, that had not previously received the attention and consideration of the court in its original opinion. The primary contention that plaintiff could not maintain her suit without refunding or tendering to defendant the $100 received by her at the time of the executing of the release is again insisted upon. The matter has again had our careful consideration, and, while we agree with counsel for defendant that there are a number of authorities—perhaps the greater in number—sustaining their claims, yet the procedure adopted in the trial of this cause has received recognition and sanction at the hands of eminent courts, and we believe substantial justice will usually be effected thereby. It would be futile to attempt in this or any other case of similar character to so decide it that it would be in harmony with all the adjudications.

In the argument on rehearing, counsel for defendant again insisted that the Oklahoma statute on rescission controlled, and cited us to a number of authorities of California where analogous questions had, as was claimed, been before that court under a statute like this one, and been determined in conformity with their contention. Some of the cases cited, to our mind, were not applicable, while the declarations of the court in the case of Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837, met with the dissent of Justice Works and Chief Justice Beatty, and another one of the cases on which counsel relied (Marten v. Paul O. Burns Wine Co. 99 Cal. 355, 33 Pac. 1107) was repudiated and overruled by the highest court of that state, in the case of Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436. No case where the facts were like those in this case was referred to. The case which, in our judgment, most nearly meets defendant's claims of those cited, is that of Westerfeld v. New York L. Ins. Co. 129 Cal. 68, 58 Pac. 92, 61 Pac. 667. The original opinion in that case was written by Commissioner Britt, and concurred in by one other commissioner. The facts in that case were, briefly, as follows: Plaintiffs were executors of the last will of William Westerfeld. The defendant was an insurance company. In 1890, the defendant issued to plaintiffs' testator a policy of insurance upon his life in the sum of $10,000. Thereafter negotiations were entered into by the insured with the agent of the company to exchange this policy for another one of the same amount on a cheaper plan. The proposed policy was delivered to the deceased with, it was claimed, the intention of having

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the earned cash value of the first policy applied on the premiums of the second one. Decedent was in possession of both policies at the time of his death. His executors demanded payment of the amount of the second policy, which was refused on the ground that the same never was in effect, that it had been delivered to the decedent for examination only, that he never accepted it or paid any premium thereon, and that the first policy had become void because of decedent's failure to pay the fifth annual premium, which, had an exchange been effected, as contemplated, and the new policy legally delivered and accepted, would have been covered by the earned value of such surrendered first policy. The executors were induced to deliver both policies to the company upon the payment of approximately one fourth of the face value of the one sued on. After receiving this money, plaintiffs brought suit, alleging that they were induced to accept the money and surrender the policy by the false and fraudulent representations of the defendant. Suit was brought on the second policy, setting up these facts. Defendant answered, admitting making the representations alleged by plaintiffs, denied their falsity, averred that they were true, and relied upon the force and effect of the release secured. It was also contended on the part of defendant, as in the case at bar, that the action could not be maintained without rescinding the contract or compromise, and restoring, or offering to restore, the money they had received as the fruits thereof. Trial was had, and plaintiffs were given judgment. The case was appealed, and, under the decision of Commissioner Britt, the judgment of the trial court was reversed, with the statement: "Admitting that there is some conflict of authority, we are yet satisfied that the conclusion we have reached accords with the strong preponderance of adjudication, both in this state and elsewhere." When the case was heard by the supreme court, the rehearing was granted, as stated by Temple, Justice, "solely because it was thought by some members of the court that the complaint stated a cause of action for damages for deceit; it having been held in the department opinion that it did not." The supreme court concurred in the conclusion reached by the commissioners, that plaintiffs could not maintain their action, except that they first make restitution or tender before suit, but it also found and held that the representations upon which plaintiffs relied for recovery, to wit, that the policy in question was never delivered to the decedent, and that it was merely given to him to be finally delivered if he approved it and paid the premium, which he did not do, and that the deceased did not accept it, were not fraudulent, but true. The defendant also defended on an additional ground, which was likewise sustained by the court, to wit, that the agent who made the contract with the assured was without authority to do so, and that the same had not been ratified by the company. The court found as true both of these defenses, which amounted to a complete refutation of any right or claim in plaintiffs, and, it seems to us, rendered unnecessary and superfluous the passing on the question of whether or not it was necessary to make a tender. Indeed, the court says: "The facts proven do not show fraud, and plaintiffs could not recover in any form of action."

In the case at bar, under the instructions of the court, it was necessary, to recover, for the jury to find there was fraud in the procurement of the release, and for the court, in overruling the motion for new trial, to confirm this finding, and we have held in this court that the evidence reasonably tended to sustain this conclusion. In this view of the situation, in our judgment, the force of the case is, to a considerable extent, broken. Moreover, in later cases, that court, in dealing with the same statute, has, we believe, properly announced exceptions to it which are so broad and sweeping as to embrace and recognize as proper the procedure adopted in this case. One of the cases of this character is that of California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593, in which the court, quoting approvingly from the case of Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797, said: "There are exceptional cases where restoration, or an offer to restore, before suit brought, is not necessary. As, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore; or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may, by a final decree, fully adjust the equities between the parties;—and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate."

The list of authorities cited and quoted in the original opinion could be much extended, but we call attention to the cases of Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358; The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S.

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W. 117; and Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843. In the case of Union P. R. Co. v. Harris, supra, from the Supreme Court of the United States, the practice which was adopted in the case at bar, of making an allowance on the recovery of the amount received for the release, was sanctioned. It was a matter of debate in that case whether or not the release was deliberately entered into. This question was left to the jury, with the charge that, if they made an allowance to plaintiff, they should deduct from it what he had received. The same question was elaborately treated in the case of The Oriental v. Barclay, supra, in which Justice Finley, for the court of civil appeals of Texas, said: "The plaintiff's case here is a suit at law for damages flowing from an alleged tort. There are no allegations in her pleadings which invoke the exercise of the equitable powers of the court. She attacks the release pleaded in bar of her right of recovery as being without consideration, fraudulent, and void. The truth of these allegations a court of law has jurisdiction to determine, and when found to be true, will disregard the instrument, as being without legal effect. It is also true that courts with equity powers will protect the equitable rights of the defendant arising upon his answer, regardless of the nature of the relief sought by the plaintiff, and will make all necessary orders to that end, and may require a tender for that purpose. Pom. Eq. Jur. § 388. In a suit for rescission, the rule is that the admitted consideration received must be tendered back, to the end that all parties may be protected. Where such tender appears not to be necessary for the protection of all parties, the reason for its requirement ceases, and it will not be enforced by the courts. State v. Snyder, 66 Tex. 698, 18 S. W. 106; Terrill v. Dewitt, 20 Tex. 260; McCarty v. Moorer, 50 Tex. 287; Clay v. Hart, 49 Tex. 436. In cases where equitable rights arise out of the defenses urged by the defendants, and where the subject-matter of the litigation is such that the court, by its final judgment, may give full protection without the requirement of a tender, no good reason is perceived for the making of such requirement. In this case, as has already been seen, no money was received and appropriated by the plaintiff. The value of the board, lodging, nursing, medical attention, etc., claimed by defendant as a part of the consideration, under the circumstances of this case, were elements of damage arising out of the injuries inflicted; and the court was able, in its final judgment, to protect the defendant in the expense it had incurred for the benefit of the plaintiff, and did so, by having the amount of such expenditures deducted from the amount of damages found by the jury to have been sustained by the plaintiff. This practice is approved in the following cases: Chicago, R. I. & P. R. Co. v. Doyle, 18 Kan. 58; Chicago, R. I. & P. R. Co. v. Lewis, 109 Ill. 120; Mateer v. Missouri P. R. Co. (Mo.) 15 S. W. 970; Union P. R. Co. v. Harris, 158 U. S. 330–333, 39 L. ed. 1004, 1005, 15 Sup. Ct. Rep. 843. See cases cited. Under plaintiff's theory of the matter, she was never bound by the terms of the release; and as the court could fully protect the rights of the defendants in case it were found that their contention was true in relation to the board, etc., being part of the consideration agreed upon, we think the plaintiff was entitled to a judicial determination of her rights, without being embarrassed by a requirement of tender. The court did not err, therefore, in refusing to charge the jury in accordance with the contention of appellants as to a tender of the alleged consideration of the release."

It is conceded on the part of counsel for defendant that, where a release of this character is secured by a representation to the party making it that it is an instrument of an altogether different nature, so that the fraud is in the fact of the document itself, then plaintiff would be entitled to ignore it and begin action without making tender, being merely required to account for the amount received in any judgment recovered; but they contend that, where the overreaching fraud is perpetrated by a different species of deception on the part of the defendant, then plaintiff cannot be heard to prosecute an action on the original liability until rescission has been accomplished, either by restoring the money or making a tender of it. This same distinction was presented to the circuit court of appeals of the sixth circuit, in which the question was whether or not, in a suit at law, plaintiff might meet a plea of release by replication that a release was obtained by fraud, and this whether the fraud was in the execution or in misrepresentations which induced the execution, where the question was solely between the parties. Judge Taft, speaking for the court in the case of Wagner v. National L. Ins. Co. 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395, sweeps aside this artificial distinction with the following language: "Our conclusion is, therefore, that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution. We are glad to come to this conclusion, because it avoids circuity of action, and thus facilitates the administration of justice. Of course, cases may be conceived

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where the avoiding of a release may concern the rights of others not parties, or may involve the application of peculiarly equitable doctrines of confidential relations and the like, and thus present issues which only a chancellor, with his flexible procedure and careful discrimination, can properly adjust and decide. In such cases the parties can be remitted to equity; but, where the issue is simply one of fraudulent misrepresentation, it may be as well tried to a jury as to a court of equity, for fraud is an issue of which courts of law and equity, from time immemorial, have had concurrent jurisdiction." The court, in the syllabus, held as follows: "It is proper, in a suit at law, for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing execution, where the issue involves simply a question of fraud between the parties."

To our mind, the reasoning of this case on the question of procedure is unassailable; and why should it not apply with equal force to the entire question of fraud when the controversy is, as was stated and limited by that case, confined solely to a dispute between the parties? Nor, in our judgment, did it add anything to the force of the release that it contained a proviso releasing and discharging all suits, actions, and causes of action or claims growing out of the alleged injury, because the same facts which would render it invalid against plaintiff in one particular would render it equally invalid as to the other. A party fraudulently induced to waive a right to assert a right is no more bound by that kind of an agreement than by an agreement fraudulently obtained to waive any other right.

It clearly appearing to our minds that the defendant could not possibly have been injuriously affected by plaintiff's failure to restore or make tender of the sum received, the original conclusion reached is therefore adhered to.

The petition for rehearing is denied, and the mandate is directed to issue.

RHODE ISLAND SUPREME COURT.

THOMAS D. TYLER
v.
SUPERIOR COURT FOR PROVIDENCE AND BRISTOL COUNTIES.

(— R. I. —, 73 Atl. 467.)

Assignment — action for tort.

1. An assignment before judgment of an action for assault and battery and false imprisonment is void, as against public policy.

Attorney — charging lien — settlement.

2. An attorney has no charging lien for services upon his client's right of action for assault and battery and false imprisonment before judgment, which will prevent the client from settling the case against his will.

Execution — judgment on settled claim.

3. Execution cannot be issued in favor of an attorney to whom a cause of action for personal tort was assigned before judgment, to secure his fees for services, where, before the judgment was entered, the client settled the suit and released defendant from further liability.

(Sweetland, J., dissents.)

(July 7, 1909.)

PETITION for a writ of certiorari to quash the record of the Superior Court for Providence and Bristol Counties in issuing execution upon a judgment in an action for assault and battery and false imprisonment against petitioner. Granted.

The facts are stated in the opinion.

Messrs. **Gardner, Pirce, & Thornley,** and **Hugh B. Baker,** for petitioner:

In the absence of a special statute protecting an attorney, the parties in a case may settle and compromise the case before judgment is entered, regardless of the interests of the attorney, unless the settlement is collusive, and for the purpose of depriving the attorney of his fees.

Averill v. Longfellow, 66 Me. 237; Kusterer v. Beaver Dam, 56 Wis. 471, 43 Am. Rep. 725, 14 N. W. 617; Tillman v. Reynolds, 48 Ala. 365; Connor v. Boyd, 73 Ala. 385; Gregory v. Gregory, 32 N. J. Eq. 424; Heister v. Den, 17 N. J. L. 438; Mosely v. Jamison, 71 Miss. 456, 14 So. 529; Wright v. Hake, 38 Mich. 531; Swanson v. Chicago, St. P. & K. C. R. Co. 35 Fed. 638; Weeks, Attorneys at Law, 2d ed. § 382; 4

Note. — As to assignability of cause of action for personal injury, see note to North Chicago Street R. Co. v. Ackley, 44 L.R.A. 177.

As to lien of attorney on cause of action for tort, see case note to Boogren v. St. Paul City R. Co. 3 L.R.A.(N.S.) 379.

As to dismissal of suit to defeat attorney's lien or claim to compensation, see case note to Jackson v. Stearns, 5 L.R.A. (N.S.) 390.

As to power of court to protect an attorney who has taken case on contingent fee against voluntary dismissal by client without his consent, see case note to Stearns v. Wollenberg, 14 L.R.A.(N.S.) 1095.

As to validity of provision in contract for contingent fee, forbidding client to settle the claim without attorney's consent, see case note to Re Snyder, 14 L.R.A.(N.S.) 1101.

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Cyc. Law & Proc. p. 1019; 3 Am. & Eng. Enc. Law, p. 465.

At common law, an attorney had no charging lien for his fees and disbursements on a judgment obtained by him in favor of his client.

Jones, Liens, 1st ed. §§ 155–157; Baker v. Cook, 11 Mass. 236; Hill v. Brinkley, 10 Ind. 102; Hogan v. Black, 66 Cal. 41, 4 Pac. 943; Mansfield v. Dorland, 2 Cal. 507; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722.

An attorney in Rhode Island has no fixed lien on a judgment, but only an equitable right, which the court, after examining all the facts of the case, will protect or not, at its discretion.

Horton v. Champlin, supra; Jones, Liens, § 164.

Messrs. **James Harris and Irving Champlin**, for respondent:

While an attorney's lien may be waived by the transaction between the attorney and his client, showing an intention to rely upon some other security, the lien will continue unless such an intention manifestly appears.

1 Jones, Liens, § 12, p. 151.

The true principle to be applied in determining whether an attorney has a lien for his fees on the judgment he has recovered for his client is that the lien exists unless a manifest intention that it shall not exist appears.

Renick v. Ludington, 16 W. Va. 378; Adams v. Fox, 40 Barb. 442; Goodrich v. McDonald, 41 Hun, 235; Smith v. Goode, 29 Ga. 185; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Burns v. Allen, 15 R. I. 32, 2 Am. St. Rep. 844, 23 Atl. 35; Windsor v. Brown, 15 R. I. 182, 2 Am. St. Rep. 892, 9 Atl. 135.

Blodgett, J., delivered the opinion of the court:

The petitioner seeks a writ of certiorari to quash the record of the superior court in issuing an execution against the petitioner for the sum of $312.95, in the name of Patrick Concannon, plaintiff in an action for assault and battery and false imprisonment in said court, $212.95 thereof to the use of Irving Champlin, and $100 thereof to the use of James Harris, in satisfaction of their respective claims for services as counsel for said Concannon, who, pending the hearing on exceptions after verdict in his favor on June 18, 1906, for $375.83 and costs, thereafter, on July 12, 1906, executed a release under seal to petitioner in payment of the sum of $100, and signed an agreement that the case might be entered "settled," both of which acts were done without the knowledge of his counsel, the said Champlin and Harris. The release and agreement of settlement were not filed in the superior court until May 31, 1907, two days after the decision of this court overruling the exceptions of the petitioner and directing the entry of judgment for Concannon on the verdict on May 29, 1907, as of the date of said verdict on June 18, 1906.

The counsel for Concannon, alleging that his settlement of the action with Tyler without their knowledge was collusive and for the purpose of depriving them of their fees, and claiming a charging lien in that behalf upon the judgment in Concannon v. Tyler, have respectively reduced their claims for services to judgment as against Concannon, and on their motion the superior court has ordered execution to issue against Tyler, as above set forth, after the alleged settlement by the parties, who severally deny all collusion, and one of whom, Tyler, the petitioner here, has instituted this proceeding, and avers that the superior court is without jurisdiction to order execution to issue in the premises as aforesaid. The question so presented is whether counsel have a charging lien against the petitioner for their services upon these facts.

It is important to note in the first place that, unlike many other states, we have no statute regulating this matter. It is also necessary to say that on February 12, 1906, and before trial in the superior court, Mr. Champlin took an assignment of Concannon's right of action or any judgment which might be rendered in said action for assault in favor of his client, Concannon, and against Tyler, now petitioner here, as security for his fees, and gave notice thereof to Tyler. In Rice v. Stone, 1 Allen, 566, it was held that an assignment for damages for an injury to the person was void at common law, even after verdict, on grounds of public policy. It was there said by Chapman, J. (page 568): "No case is cited where it has been held that an assignment of a claim for damages for an injury to the person has been held good, when the assignment was made before judgment in an action for the tort. Such claims were not assignable at common law. On the contrary, a possibility, right of entry, thing in action, cause of suit, or title for condition broken, could not be granted or assigned over at common law. . . . But in respect to all claims for personal injuries the questions put by Lord Abinger in Howard v. Crowther, 8 Mees. & W. 603, are applicable. 'Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?' And we may add the broader inquiry: Has any court of law or equity ever sanctioned a

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claim by an assignee to compensation for wounded feelings, injured reputation, or bodily pain, suffered by an assignor? There were two principal reasons why the assignments above mentioned were held to be invalid at common law. One was to avoid maintenance. In earlier times maintenance was regarded as an evil principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much, but not the whole, of its force. It would still be in the power of litigious persons, whether rich or poor, to harass and annoy others, if they were allowed to purchase claims for pain and suffering and prosecute them in courts as assignees; and as there are no counterbalancing reasons in favor of such purchases, growing out of the convenience of business, there is no good ground for a change of the law in respect to such claims. . . . A claim to damages for a personal tort, before it is established by agreement or adjudication, has no value that can be so estimated as to form a proper consideration for a sale. Until it is thus established, it has no elements of property sufficient to make it the subject of a grant or assignment. The considerations which are urged to a jury in behalf of one whose reputation or domestic peace has been destroyed, whose feelings have been outraged, or who has suffered bodily pain and danger, are of a nature so strictly personal that an assignee cannot urge them with any force. The character of this class of claims is not changed in this respect by a verdict before judgment. It must be made the subject of a definite judgment before it is assignable,—a judgment upon which a suit may be brought. Stone v. Boston & M. R. Co. 7 Gray, 539. It is said in Langford v. Ellis, 14 East, 203, note, that the moment the verdict comes the damages are liquidated. This was an action of slander. But the principal case of Re Charles, 14 East, 198, in which the other was cited, is regarded as overturning it. Buss v. Gilbert, 2 Maule & S. 70. And these cases hold that neither an action for breach of promise of marriage nor for seduction passes to an assignee in bankruptcy before judgment. In our practice, where the points in controversy are seldom raised by the pleading, but are brought out in later stages of the case, the claim remains in great uncertainty till the judgment is rendered. And the case of Stone v. Boston & M. R. Co. cited above, follows the ancient case of Benson v. Flower, W. Jones, 215, where it was held that an action of the case is not assignable till after judgment, when it is reduced to a certainty. . . . In view of these and many other authorities to which we have referred, we are of opinion that the ancient doctrine of the common law on this subject is still in force, and that the reasons on which it was originally founded are still valid. As an assignment of a claim for a personal injury is void, though it is made after verdict in an action to recover damages for the injury, the claim of the defendant Perrin cannot prevail." And this decision was affirmed in the recent case of Flynn v. Butler (1905), 189 Mass. 377, 75 N. E. 730. And see Linton v. Hurley, 104 Mass. 353; Bennett v. Sweet, 171 Mass. 601, 51 N. E. 183.

So, in Weller v. Jersey City, H. & P. Street R. Co. (1905), 68 N. J. Eq. 659, 662, 61 Atl. 459, 460, 6 A. & E. Ann. Cas. 442, it was said by Gummere, Ch. J.: "A right of action for personal injuries cannot be made the subject of assignment before judgment, in the absence of a statutory provision to the contrary." And see cases cited. And in Hanna v. Island Coal Co. 5 Ind. App. 163, 167, 51 Am. St. Rep. 246, 31 N. E. 846, 848, it is said: "Ordinarily, however, an attorney acquires no lien for fees until after judgment. Therefore, until after judgment, the client may settle and compromise and release the cause of action in any manner he pleases without consulting his attorney, and the attorney has no power to prevent it. Simmons v. Almy, 103 Mass. 33; Parker v. Blighton, 32 Mich. 266; Pulver v. Harris, 52 N. Y. 73; Roberts v. Doty, 31 Hun, 128; Connor v. Boyd, 73 Ala. 385; Swanston v. Morning Star Min. Co. 4 McCrary, 241, 13 Fed. 215; Young v. Dearborn, 27 N. H. 324. In such a case a lien cannot be acquired before judgment, even by agreement between the attorney and client, that will prevent the client from compromising and releasing the cause of action without the consent of the attorney, although the defendant may have notice of the agreement. Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Kusterer v. Beaver Dam, 56 Wis. 471, 43 Am. Rep. 725, 14 N. W. 617; Pulver v. Harris, supra. If the cause of action is one for unliquidated damages, and is not assignable, the client cannot give his attorney any lien upon it that will prevent a settlement or compromise by the parties before judgment, even if the amount is definitely fixed, and an agreement made that the same shall become a lien, and the adverse party notified of the fact. Jones, Liens, §§ 206, 207. Actions for slander and libel, assault and battery, personal injuries resulting from the negligent conduct of others, are within the rule. . . . The charge of fraudulent collusion in the second paragraph of the complaint in no wise aids the appellant. Characterizing a transaction as fraudulent does not make it so in law, unless it is so in fact. Therefore,

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when the appellant charged that the appellee was guilty of a fraudulent collusion for the purpose of cheating him 'out of his fees and expenses,' it was incumbent upon him to state facts sufficient to support the charge. Conant v. National State Bank, 121 Ind. 323, 22 N. E. 250; Bodkin v. Merit, 102 Ind. 293, 1 N. E. 625; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Ham v. Greve, 34 Ind. 18. When Stark compromised his claim with the appellee, and dismissed the action without the consent of his attorney, he did what he had the lawful right to do. The contract to bring the action was made with Stark by the appellant. The appellee had nothing to do with it. Stark was the owner of the cause of action, and as such, under the circumstances, had the absolute control of it until it passed into a judgment. Having settled and compromised it before judgment, the appellee was released. The appellant, having acquired no lien upon or interest in such cause of action, no obligation in his favor was created by the transaction against the appellee." And see St. Joseph Mfg. Co. v. Miller, 69 Wis. 391, 34 N. W. 235.

To these decisions may be added the authority of Averill v. Longfellow, 66 Me. 237, in which it was said by Appleton, Ch. J. (page 238): "This was an action to recover damages for an assault upon the female plaintiff. The plaintiffs obtained a verdict, and the defendant filed a motion for a new trial, and the cause was continued. After the continuance, and before judgment, the parties settled; and the plaintiffs' claim was discharged. The attorney by whom the suit had been successfully prosecuted claims that the demand had been assigned to him, and that this assignment was made before or at the commencement of the suit. But the demand was not assignable. It has been repeatedly held that a claim for damages for a personal assault cannot be assigned before final judgment. McGlinchy v. Hall, 58 Me. 152; Rice v. Stone, 1 Allen, 566. The lien of an attorney does not attach until the rendition of judgment. Young v. Dearborn, 27 N. H. 324, 331. Before that, the parties may settle and disregard the claims of the attorney. Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Simmons v. Almy, supra. No lien in this case had attached. The court has no authority to set aside a settlement which the parties have deliberately made. In accordance with their agreement, the entry must be 'neither party.'"

It thus appears that the assignment by Concannon to his counsel is void, and that the rights of the parties are to be considered as though it had not been made; and this leads to a consideration of the question what those rights are. The citations heretofore made indicate the nature of the first ground urged by the petitioner here against the jurisdiction of the superior court in issuing said execution, *viz.*, that, whatever may be the right of counsel to a charging lien after judgment, no such lien exists until judgment, and parties may at will settle their own cases without the knowledge or consent, and even against the will, of their counsel until that time. The nature and extent of the right of counsel in this state after judgment are thus set forth by Durfee, Ch. J., in Horton v. Champlin, 12 R. I. 550, 552, 34 Am. Rep. 722: "Primarily, without doubt, the lien orginates in the control which the attorney has by his retainer over the judgment and the processes for its enforcement. This enables him to collect the judgment and reimburse himself out of the proceeds. It gives him no right, however, to exceed the authority conferred by his retainer. But inasmuch as the attorney has the right, or at least is induced, to rely on his retainer to secure him in this way for his fees and disbursements, he thereby acquires a sort of equity, to the extent of his fees and disbursements, to control the judgment and its incidental processes, against his client and the adverse party colluding with his client, which the court will, in the exercise of a reasonable discretion, protect and enforce; and on the same ground the court will, when it can, protect the attorney in matters of equitable set-off. We think this is the full scope of the lien, if lien it can be called."

The opinion of Potter, J., in the above case, concurring in the dismissal of the action by the attorney, rests upon the ground that the attorney has no lien in this state save for his taxable fees and taxable disbursements as for officers' and other fees: "The plaintiff evidently supposes that he has a lien, not only for the costs taxed to the attorney of the successful party, but for his charges and for all his services, sometimes called fees, as he claims a lien for costs in cases where a party recovers debt or damages only and no costs. It might possibly be for the public good if this was the law. If a man, when he began a lawsuit, knew that, having employed an attorney, he could not dismiss him, and that after he had gained his case he would be obliged to have another lawsuit with his own attorney to get his money from him, and so on again, it would tend very much to diminish litigation, and a defendant would get out of such a suit as quick as possible. . . . If any attorney should be entitled to a lien upon a judgment for money for anything beyond his taxable costs, it would seem that he ought to have the same lien where the recovery is for land. See this question decided and

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a great number of cases quoted in Humphrey v. Browning, 46 Ill. 476, 95 Am. Dec. 446. The lien claimed for the attorney is no part of the old common law. See Getchell v. Clark, 5 Mass. 309; Baker v. Cook, 11 Mass. 236, 238; Simmons v. Almy, 103 Mass. 33. A great deal of confusion may arise from not distinguishing between the costs taxed to the attorney and his charges for services. In many states there are costs taxed as between attorney and client, whereas we have none such here. And in countries or states where such a lien is held to exist, the cases generally recognize that it extends not to counsel fees proper, but to the taxed costs only. Ocean Ins. Co. v. Rider, 22 Pick. 210; Wright v. Cobleigh, 21 N. H. 339. . . . In this state costs are taxed generally only to the party recovering, and no costs are taxed as between attorney and client. It is the party who recovers the judgment, and not the attorney. By the old law a fee was taxed for the attorney, evidently intending it as an allowance for the pay of his attorney. By the law as lately amended, a fee is taxed to the attorney, thus giving countenance to the claim that, when recovered, it belongs to him. If there is any lien, therefore, it should be only for this fee, unless he has paid the officers' fees or other fees. The travel and attendance is expressly taxed for the party, and how any attorney can have any claim for this it is hard to see." And see Cozzens v. Whitney, 3 R. I. 79, 82; Whitcomb v. Straw, 62 N. H. 651; Hill v. Brinkley, 10 Ind. 102; Ex parte Kyle, 1 Cal. 331, affirmed in Mansfield v. Dorland, 2 Cal. 507; Currier v. Boston & M. R. Co. 37 N. H. 223.

In construing the phrase "fees and disbursements," above referred to, in Ocean Ins. Co. v. Rider, the court said: "We think the statute does not refer to counsel fees, but only to the taxable costs." And in Wright v. Cobleigh, supra, it is said of the attorney's lien: "This right is limited to the fees and disbursements of the attorney on that cause, and cannot be extended to 'commissions' or other charges, however proper in themselves." And see cases cited. In Humphrey v. Browning, supra, the court say (pages 477, 485 of 46 Ill.): "The only important question presented by this record which we propose to examine is, Has an attorney at law a lien upon the real estate recovered in an action of ejectment, prosecuted by him? This is a new question in this court, and if it rests upon a great preponderance of authority in its favor, as argued by appellees, it would seem to be no difficult matter to produce the authority. If it does exist in any country in the world, where the common law prevails, or equity jurisprudence obtains, the books ought to be full of such cases. Not a single case has been referred to by appellees sustaining their position. . . . A careful review of the authorities cited satisfies us that no such lien as claimed by appellees has ever been allowed in any court in England or in any of the states of this Union. No case directly on the point has been cited, for while, as in England, New York, Massachusetts, Georgia, and Florida, attorneys have a lien on the judgments recovered, for their costs, nearly all the cases show the judgments were money judgments, and the lien allowed was for taxable costs only, and not where a *quantum meruit* compensation was claimed."

That an attorney's lien, in the absence of statutory provision, does not attach until after judgment, is settled by Potter, J., in Horton v. Champlin, 12 R. I. 557, 34 Am. Rep. 722: "In Pulver v. Harris, 52 N. Y. 73, 76, the court held that the suit was subject to the control of the party; that the attorney had a lien after judgment, but not before. The latter would prevent the party from settling his case. And see Simmons v. Almy, supra; Averill v. Longfellow, 66 Me. 237." And the doctrine is supported by abundant authority. In Parker v. Blighton, 32, Mich. 266, the defendant settled with the plaintiff in a replevin suit, and it was said by Cooley, J. (page 266): "This was an action of replevin in which the defendant in error was plaintiff. The defendant below relied, among other things, on a settlement which he claimed had been made with plaintiff, and which was evidenced by a writing. It was claimed on the part of the plaintiff that the writing was obtained by duress. It was also claimed that, as the writing was obtained from the plaintiff in the absence of and without the knowledge of his attorney, it was void as depriving him of his lien for his services. If this were so, it was necessarily conclusive, as the amount in controversy was so insignificant that the most moderate charge would exceed it. The circuit judge instructed the jury that the plaintiff could not thus settle the case without the consent of his attorney. This ruling was erroneous. The attorney had no lien whatever on the suit."

In Henchey v. Chicago, 41 Ill. 136, which was an action for causing the death of plaintiff's husband by reason of insufficiently lighting and guarding an open drawbridge, the plaintiff settled the case and executed a release to the city pending the action, and without the knowledge of her counsel, and the court dismissed the case and denied the plaintiff's motion to reinstate, made upon several grounds, of which the fourth ground was: "The attorney for

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the plaintiff insists that he had an attorney's lien on the claim for damages which could not be defeated by the act of his client." The supreme court of Illinois said (page 140): "The counsel for appellant also insists that he had an attorney's lien on the claim for damages which could not be defeated by the act of his client, and which gave him a right to prosecute the suit to judgment. The extent of an attorney's lien is not very well defined, and the cases in the New York Reports are especially conflicting. We are not, however, inclined to hold that the lien attaches to a claim for unliquidated damages prior to the judgment. In Getchell v. Clark, 5 Mass. 309, on an application similar to the present, the court, refusing the motion, said: 'Before judgment it was very clear the plaintiff might settle the action and discharge the defendant, without or against the consent of his attorney, who had no lien on the cause for his fees.' A similar rule is laid down in Foot v. Tewksbury, 2 Vt. 97, Shank v. Shoemaker, 18 N. Y. 489, and Sweet v. Bartlett, 4 Sandf. 661, and we regard it as by far the sounder principle. To hold that the lien attaches to a claim for unliquidated damages before judgment would embarrass parties in all attempts to settle their suits amicably, and thereby greatly tend to prevent a result always held to be desirable. Especially would this be the case under a system of practice like ours, where the compensation of attorneys is not fixed by law. Under such a rule, attorneys, by making a demand for unreasonable fees, would be able to prevent a settlement whenever they should desire. Highly as we think of our profession, we do not deem it desirable that they should thus be able to control the most important interests of their clients, independently of the wishes of the latter. It is better that clients should be at liberty to adjust their difficulties if they can. In the particular case before us we have no doubt it would be most equitable to allow the lien. But we cannot establish the rule in reference to the merits of a particular case. 'Hard cases make bad law.' We think such an application of the lien as is here asked would be against the current of authorities and the general interests of society."

In Alexander v. Grand Ave. R. Co. 54 Mo. App. 66, the plaintiff settled with the defendant an action for personal injuries sustained while a passenger on one of its cable street cars, and did so while the action was pending, and without the knowledge of her counsel, and after notice from her counsel to the defendant company that "said attorneys, for their services in said cause, have taken an interest in whatever judgment or compromise may be obtained." The court refused to set aside the order of dismissal, made later upon the plaintiff's own motion, one of the grounds for which was "that the settlement was in violation of the rights of plaintiff's attorneys, of which defendant had notice," saying (page 73): "The claim to which these papers refer must have for its foundation either a lien in favor of the attorneys or an assignment of a part of the claim. That an attorney has no lien for his services on a judgment obtained by him was long since determined in this state. Frissell v. Haile, 18 Mo. 18; Roberts v. Nelson, 22 Mo. App. 28. And it could scarcely be pretended that an attorney, merely as such, would have a lien on the claim before it became a judgment, in the absence of a statute conferring such a lien, as the attorney can have no lien on the suit. Parker v. Blighton, supra; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 448, 27 Am. Rep. 75; Henchey v. Chicago, supra. Though there seems to have been a rule or practice adopted arbitrarily by some of the courts enforcing such liens. The court said in the foregoing case from New York that 'the courts invented this practice and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs.' But, as stated in that case and in the case cited from 18 Mo. 18, attorneys' fees in those jurisdictions were 'fixed sums, easily determined by taxation,' and this power was exercised to secure them their fees."

In the recent case of Boogren v. St. Paul City R. Co. (1906) 97 Minn. 51, 52, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691, 106 N. W. 104, 105, the facts present some similarity to the facts in the case at bar: "This is an appeal by the attorney for the plaintiff from an order discharging an order to show cause why the attorney should not be permitted to continue the action for the purpose of determining and enforcing his alleged interest therein. Some time prior to July, 1904, the plaintiff, Charles L. Boogren, claimed to have a cause of action against the St. Paul City Railway Company for damages for personal injuries alleged to have been occasioned by the negligence of the company. On July 15, 1904, Boogren entered into a contract with the petitioner, Joel E. Gregory, an attorney at law, by the terms of which Gregory agreed to prosecute the action as the plaintiff's attorney, and to pay all expenses of the suit, and in consideration therefor Boogren agreed to pay said party of the second part [Gregory], after the expenses of said suit and other expenses have been paid, 50 per cent of all moneys received from the St. Paul City Railway Company by party of the

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first part as compensation for said injuries in said case of Charles L. Boogren v. St. Paul City Railway Company. An action to recover damages in the sum of $10,350 was thereafter brought in Ramsey county. On the trial the jury disagreed, and the case was continued to the January, 1905, term. On the defendant's motion the case was continued till the February term, and set for trial on February 14th. When the case was called for trial, the plaintiff did not appear, and his attorney stated that he was not able to find his client. The defendant's attorney stated to the court that the defendant had its witnesses subpœnaed and in court ready for the trial, but that he would consent to a continuance of the case until the April term of court. It was subsequently continued to the May term of court, and then to the June term, by agreement of the attorneys. On the call of the calendar on June 5th, the defendant objected to any further continuance, and the case was set for trial on June 9th. On June 8th the defendant filed a written dismissal of the action on the merits. This instrument bore date of January 24, 1905, and was signed by the plaintiff and defendant's attorneys. When the case was called for trial on June, 9th, the defendant informed the court that the action had been settled and that a dismissal had been filed. The petitioner then stated to the court that he knew nothing of said dismissal, and asked that the action he held open to allow him to present a petition to be allowed to continue the action for the purpose of recovering his attorney's fees and expenses. This petition was granted, and petitioner thereafter made the petition herein, and the same came on for hearing on an order to show cause. The petition stated that the settlement between the defendant and plaintiff was made with the full notice and knowledge of the lien and rights of the petitioner, and for the purpose of defrauding and cheating him out of his attorney's fees and expenditures; that his expenditures were $328.75, that the plaintiff's damages were $5,000, and that plaintiff was insolvent. The defendant moved to dismiss the petition upon the grounds (1) that it did not state facts sufficient to warrant the court in granting the petitioner the relief prayed for; (2) because the court had no jurisdiction of the subject-matter. The appeal is from an order dismissing the petition. . . . The petitioner bases his right to continue the action for the protection of his alleged interests upon the theory (1) that he has a lien which it is the duty of the court to protect, and (2) that he is the equitable assignee of an interest in the cause of action by reason of the contract between him and the plaintiff. The order of the trial court was correct. The breach of professional ethics involved cannot affect the legal rights of the parties. The petitioner had no lien upon the cause of action. He had acquired no statutory attorney's lien (Forbush v. Leonard, 8 Minn. 303, Gil. 267; Nielsen v. Albert Lea, 91 Minn. 388, 98 N. W. 195), and it is the settled law of this state that a lien cannot be created by such a contract upon a right of action arising out of personal tort. As said in Hammons v. Great Northern R. Co. 53 Minn. 249, 54 N. W. 1108: 'The plaintiff had no lien—could not have any—on the cause of action. A cause of action for a personal tort is strictly personal. It is not in the nature of property, in the sense that anyone but the injured party can have any right in it. . . . See also Anderson v. Itasca Lumber Co. 86 Minn. 480, 91 N. W. 12, 291, and Nielsen v. Albert Lea, supra. . . . It has been said that the court will protect the attorney of a party to an action against a collusive settlement in fraud of his rights. This rule applies when the attorney has acquired a lien. Weicher v. Cargill, 86 Minn. 271, 90 N. W. 402. The language used in the New York and Georgia cases must be construed in the light of the statutes of those states, which give the attorney a lien upon the client's cause of action. 3 Am. & Eng. Enc. Law, 2d ed., p. 468. There are also serious practical difficulties in the way of such a procedure when the action is to recover unliquidated damages. The power to arrest or rescind the effect of a settlement is cautiously exercised in respect to suits for debts actually owing; and the power would be more cautiously applied to actions for torts, where it would be impracticable for the court, upon the opposing representations of the parties, and without hearing the proofs, to ascertain whether there was a just cause of action, or whether there was ground to distrust the justness of the settlement. The whole case would have to be tried before the court could pronounce that the suit was properly instituted and that it afforded prima facie ground for the award of costs. . . . The policy of the law favors the adjustment of claims and the termination of litigation, and the courts are not disposed to limit the right of parties in this respect. This practice may occasionally work a hardship upon attorneys, but it is nevertheless a salutary rule. An attorney whose rights are prejudiced must look to his client for relief, or, in a proper case, proceed directly against the party by whose fraudulent conduct he has been injured. The order appealed from is affirmed."

Likewise, in Lamont v. Washington & G. R.

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Co. 2 Mackey, 502, 47 Am. Rep. 268, the facts closely resemble the case at bar and are as follows: "This case, as is very well known, was an action brought to recover damages for injuries alleged to have been suffered by the plaintiff in being forcibly and wrongfully expelled from the cars of the defendant. The case was tried three times, and on the last trial the jury rendered a verdict for the plaintiff for $15,000. The case came, in the usual form, before this court on a motion for a new trial on bills of exceptions. It was argued by counsel, and while under advisement the defendant settled with the plaintiff by paying him $2,000, and received from him a release of all claims and demands, and an order to the clerk of this court to enter the case dismissed. This was done without the knowledge of the plaintiff's attorneys. After this was done, the court rendered its opinion, setting aside the verdict in the case below and ordering a new trial, and then this order to dismiss was filed, and after that the attorneys for the plaintiff came into court and moved the court to set the cause down for trial, notwithstanding the paper filed by the defendant, purporting to be an acknowledgment that the case had been settled, on the ground that said pretended settlement between the plaintiff and the defendant was collusive, and with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services, and that knowledge of such settlement was being concealed from them by the plaintiff. The motion was accompanied with an affidavit showing that the plaintiff had agreed to pay his attorney, Mr. McPherson, a contingent fee of 33 per cent of the amount that should be recovered. The court thereupon passed a peremptory order that the defendant should pay to plaintiff's attorneys one third of the sum of $2,000, and that, in default thereof, the entry of dismissal should be struck out and the case set down for trial. That order was appealed from, and that appeal has been the subject of discussion before us. In the argument here it was claimed, on the part of the attorneys for the plaintiff, that they had a lien on the cause of action, and that the court could enforce it by allowing the suit to proceed to trial for the benefit of the attorneys, where it had been adjusted between the parties collusively, with a view to cheat the attorneys out of their compensation. Upon the other hand, it was claimed by the defendant that, before judgment, the parties to a pending suit have entire control of the subject-matter, and may settle it between themselves, without preference to either the wishes or the interests of the attorneys. The common law recognizes the lien of an attorney upon moneys of his client in his hands, and also upon papers and documents in his hands, whether they be muniments of title, or causes of action, or evidence; but there is no such thing as the lien of an attorney upon a mere claim or cause of action which his client has against a third person, apart from the tangible vouchers of the claim which may be in the attorney's possession. The very essence of the common-law lien is possession. The party who has a lien loses it the moment he surrenders possession; and possession cannot be predicated of a mere abstract right in another person. It is conceded on all hands that the parties, before judgment, may compromise and settle between themselves without reference to the attorney, which could not be the case if the attorney could be regarded as having possession of his client's cause of action . . . This present case illustrates the distinction particularly. Here is a claim for unliquidated damages, which is, in its very nature, incapable of being assigned in whole or in part to the attorney; and, in fact, the agreement which is relied upon here does not purport to assign it in any part, but is simply an engagement on the part of the plaintiff to pay his attorney a contingent fee of 33 per cent of the amount of the recovery; that is, he agrees that, in case of recovery, he personally will pay to his counsel a sum equivalent to 33 per cent of the amount recovered. It is clear, therefore, that he might as well agree to pay a gross sum of $1,000, or any other gross sum, or to convey a house and lot in case of success in the suit. Now, in no sense can that collateral engagement of the client to his attorney be said to be involved in this suit. Here is an action for damages suffered by the client. It is not a suit to recover money stipulated in a collateral agreement to be paid by client to attorney, but it is to recover damages for injuries alleged to have been suffered by the client, and quoad that the attorney cannot be interested as a party in the suit. It might as well be said that, where the client had agreed to do some collateral thing in case of the recovery of judgment, to convey a house and lot, for example, the court could, after this settlement, hold the defendant responsible for the plaintiff's engagement to convey that house and lot to his attorney. You could maintain that proposition with as much reason as that the court could compel the defendant to pay to the attorney of the plaintiff the moneys or considerations which the client had collaterally engaged to pay to his attorney. The courts will not enforce such a claim in that way. They leave the attor-

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ney to his common-law remedy on the contract. We think the whole course of the authorities is in that direction. The law is stated in the first place in Parsons on Contracts, vol. 1, p. 116, as follows: 'He [the attorney] has no claim for unliquidated damages in court until after judgment.' The case of Wood v. Anders, 5 Bush, 601, is cited, which fully sustains this proposition. Again, in Parsons (vol. 3, p. 269): 'But the lien on the cause for his fees does not attach until the judgment is rendered. Therefore, where, in a case reserved, after the opinion of the court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term, and before the judgment was actually entered, paid the whole amount to the assignee, it was held that the attorney's lien was thereby defeated.' In support of this several cases are cited, all of which fully sustain the position in the text. . . . 'It is therefore beyond dispute that the plaintiff's attorney had neither a legal nor an equitable interest by way of assignment or lien on the cause of action. The defendant was not asking any favor of the court. It was in court simply insisting upon its settlement with the plaintiff as a defense to his cause of action. Therefore, if the attorneys are entitled to the protection they now seek, it is only by the exercise of the extraordinary power of the court, to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this. It has not been conferred upon the courts by statute, usage, or common law. Its exercise to secure to an attorney the statutory fees, small in amount and easily ascertainable, was just and proper, and could lead to no abuse. But to exercise it so far as to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through, and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person, not a lawyer, would have been if he had taken the same contract. When a party has the whole legal and equitable title to a cause of action, public policy and private right are best subserved by permitting him to settle and discharge that, if he desires to, without the intervention of his attorneys' [quoted from People ex rel. Stanton v. Tioga C. P. 19 Wend. 73, Cowen, J.] . . . But enough has been said to show that all the cases hold uniformly that the court will not interfere to enforce in a summary way, through the original suit, the collateral engagements of a client for the compensation of his attorney. We are certainly as desirous as any court could be to protect the members of the bar in their relations with their clients; but it clearly seems to be, if not beyond the power of the court, certainly a practice not sustained by any authority or precedent, to enforce an engagement of this character in a summary way. The court will leave the attorney to his common-law remedy, and therefore we are compelled to reverse the order of the court below, and to allow the order of settlement to stand."

Again, in Swanston v. Morning Star Min. Co. 4 McCrary, 241, 13 Fed. 215, an action to recover damages for a personal injury was settled by the plaintiff without the knowledge of his counsel, and the court held, upon the motion to dismiss the action, as follows (page 242): "The motion to dismiss upon this agreement is resisted not by the plaintiff himself, but by his attorneys, who say that they had a contract with the plaintiff whereby, in the event of their success in this suit, they were to receive as their compensation for services one third of the amount which might be recovered. The question is made as to whether this is a champertous agreement, but we are not disposed to go into that question. It is one, perhaps, of some difficulty, and about which there is a considerable conflict of authority. It would undoubtedly be champertous if either of the attorneys had agreed to pay the costs of the proceeding; but whether a mere contract for a contingent fee of one third of the amount recovered is champertous is a question not entirely settled. We do not think it necessary, at all events, to pass upon it in this case. It is, perhaps, not improper to remark, however, that it is not a contract which commends itself very much to the favor of the courts, and this court would not be disposed to go any further than the law requires to uphold it. But, even assuming that it is a valid contract as between the plaintiff and his attorneys, the question arises, How can we, by any order of ours, continue this case and carry it on to judgment, after the plaintiff himself has sold the cause of action, and received a sum which, he says, is in full satisfaction? The attorneys are not parties to the record. No judgment could be rendered in their favor, and, if we were to go on to trial, I do not see how it is possible that any judgment at all could be rendered upon the record in the face of this dismissal, this acknowledgment of payment in full by the plaintiff himself. If the counsel for the plaintiff had any lien upon anything, the court would protect them, perhaps, by some form of proceeding in this case; that is to say, the counsel might, perhaps, be allowed

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under your statute to intervene, if you have a statute authorizing such a proceeding as that, and to assert their rights in this suit. But it is very clear that the attorneys of the plaintiff have no lien upon anything in a case of this character. I believe it is well settled that an attorney has no lien even upon a judgment recovered by him for his client in an action, unless the statute gives it. It has never been claimed that an attorney would have a lien upon a claim for unliquidated damages, and there can be no foundation for a lien of any kind or description upon anything in controversy here. If the attorneys had in their hands a contract, a promissory note, or instrument of any description that could be called property, and had rendered services in prosecuting a suit upon it, perhaps they might, by proper proceeding, be allowed to enforce a claim or lien upon it. It is enough to say that there is no doubt of the right of the plaintiff to settle the suit without the consent of his attorneys, and that, having done so, the controversy must be regarded as at an end, and the suit must be dismissed. If the attorneys have any claim against the parties who have made the settlement, they must assert it in some other mode of proceeding. It is not open for consideration here. The doctrine I have announced is supported by the cases of Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75, and Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267."

In Wood v. Anders, 5 Bush, 601, the court of appeals of Kentucky says (page 602): "The lien secured by the act of 1866 to attorneys is upon claims arising on contracts, either express or implied, which are put in their hands for collection, and on 'judgments' recovered in actions prosecuted by attorneys, without regard to the nature of the claim on which the action was prosecuted. But we do not understand the statute as going to the extent that, for a claim for unliquidated damage in cases of tort, before judgment is obtained, the defendant or defendants are to be made liable for the fee of the attorney of the plaintiff, where the parties compromise and adjust their litigation before judgment. Such cases are not embraced by the letter of the act certainly, nor does it appear from the language that such was the intention of the legislature; and courts should not give to it a meaning and operation more comprehensive than was intended. Such an interpretation would discourage compromises, and conflict with the Divine precept, to 'agree with thine adversary quickly, while thou art in the way with him; lest at any time the adversary deliver thee to the judge,' etc. [Matt. 5:25]. Nor do we understand the common law as authorizing the relief sought. Wherefore the judgment is affirmed." See also Voigt Brewery Co. v. Donovan, 103 Mich. 190, 61 N. W. 343; Randall v. Van Wagenen, 115 N. Y. 527, 12 Am. St. Rep. 828, 22 N. E. 361; Frissell v. Haile, 18 Mo. 18; Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 A. & E. Ann. Cas. 245; Shank v. Shoemaker, 18 N. Y. 489; Mosely v. Jamison, 71 Miss. 456, 14 So. 529.

In Kusterer v. Beaver Dam, 56 Wis. 471, 43 Am. Rep. 725, 14 N. W. 617, which was an action for damages for personal injuries suffered by reason of a defective sidewalk, the plaintiff settled with the defendant pending the trial and without the knowledge of her counsel, and the court dismissed the action, although the plaintiff had made an agreement with her counsel "to give to them one half of the damages recovered in said action, and all the taxable attorneys' fees, and to pay all his own costs, and, further, that said attorneys should be at no court costs whatever, and the plaintiff further agreed not to discontinue the action nor settle the same without the consent of said attorneys." A copy of this agreement had been served on the mayor of the city before the day assigned for the trial and before the settlement by the parties, and the supreme court of Wisconsin held, following the rule laid down by the court of appeals of New York, that "a party having a cause of action in its nature not assignable cannot, by an agreement before judgment or a verdict thereon, give his attorney any interest therein," saying (page 477 of 56 Wis.): "For the reasons given, we adopt and follow the rule above quoted from 71 N. Y. 443. The question above put must, therefore, be answered in the affirmative. Impressed with the equity of the claim on the part of the attorneys for the plaintiff, we have carefully reviewed many decisions, with the view, if possible, to protect them, at least to the extent of the taxable costs; but as the cause of action was not assignable, and hence remained, prior to judgment, under the absolute control of the plaintiff, and since costs were merely incident to recovery upon the cause of action, it logically follows that the attorneys had no vested interest, even in such costs, which could survive the settlement of the cause of action. Whatever claim they had for services was against their client on their contract with him."

In Tillman v. Reynolds, 48 Ala. 365, which was a suit on a promissory note, a settlement was made by the parties pending the action, and without the knowledge of the plaintiff's attorney, who claimed a lien for his services, which was denied by the supreme court of Alabama, which held (page

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367): "It is presumed that the purpose of the proceeding in the court below was to compel the defendant to pay the plaintiff's attorney's fee for instituting the suit out of the plaintiff's debt in his hands, before he paid the plaintiff the amount of the note in suit, or to make him liable for the fee, if he failed or refused to do so, because the attorney had a 'claim or lien' on the note in his possession, and the plaintiff herself was insolvent. In such a case as this, such a principle would make the defendant, in the event the plaintiff was entitled to a judgment at least to the amount of the fee due the attorney for the institution of the suit, security of the plaintiff for the payment of the fee. I am not aware of any principle governing the relation of client and attorney that goes so far. The defendant's liability is discharged when he pays the debt he owes to the plaintiff; and, whether this be done before or after the institution of the suit, its effect is the same, except as to costs of suit. Payment of the debt in suit, in either instance, is a good defense. If the payment is made before action brought, it is a good plea in bar of the action and the costs. If it is made after action brought and before judgment, it is also a good plea in bar of the action, except costs up to the plea pleaded, as a plea *puis darrien continuance*. 1 Chitty, Pl. 657, 658, marg.; 7 Bacon Abr. (Bouvier) p. 685; Rev. Code 1867, §§ 2651, 2685. The proofs in this case show that the debt had been paid before the trial, but after suit brought. This being admitted, the court was bound to charge the jury to find for the defendant. Besides, the attorney for the plaintiff is not a party to the record in the court below. No judgment could be rendered in his favor, except a judgment by confession. His lien, when he has a lien, cannot be enforced in this way by an involuntary judgment against the defendant in a court of law. McCaa v. Grant, 43 Ala. 262." See also Connor v. Boyd, 73 Ala. 385.

In Weller v. Jersey City, H. & P. Street R. Co. 66 N. J. Eq. 11, 19, 57 Atl. 730, 733, it was said by Chancellor Magie: "But the contention on the part of complainants is that the attorney holding such an agreement or assignment of a share of the damages received may, by giving notice thereof to the tort feasor, impose on the latter an obligation to account to him for such share of the compensation for such injuries as may be agreed upon between him and the person he has injured. To give such effect to a notice of such assignment would obviously operate to practically prohibit any composition between a tort feasor and the person he has wronged, when the composition consists of a cash payment to the latter for a release. It would introduce into the negotiation for settlement on the basis of a present payment to the injured person, the claim of one who was not injured, and whose only interest in the claim is what Lord Tenterden, in dealing with actions prosecuted *in forma pauperis*, called the *spes spolii*. Nor will such assignment fall within the reason of the doctrine respecting equitable assignments of choses in action under the circumstances disclosed in this bill. Such assignments admittedly operate only where some fund or property comes into existence arising out of a previous possibility. He who holds such a fund may then be liable to account to the assignee thereof. Where a composition is made between the tort feasor and the person wronged, on the basis of a payment for a release, the fund does not come into existence until the payments and the release are simultaneously exchanged. Then the fund thus created is in the hands of the releasor, and the assignee may follow it there; but it never existed in the hands of the releasee."

In construing the Maine statute in Potter v. Mayo, 3 Me. 34, 37, 14 Am. Dec. 211, Mellen, Ch. J., thus stated the policy of the law in this behalf: "According to the language of the statute, then, it appears that an attorneys' lien does not exist until judgment. The lien is upon that, and on the execution issued on such judgment. If we attend to the design and object of the provision, we shall arrive at the same conclusion. As we have above stated, the intention of the legislature was to protect the attorney's interests from the control of his client. It was to give to him the security of the judgment debtor, in addition to the original responsibility of his client. Now it is perfectly clear that, until a judgment is rendered, such additional security cannot exist, because until then no coercive power is given to the creditor, and it was against this power that the statute provision was intended as a guard."

We have thus reviewed at considerable length the decisions of the courts in other jurisdictions that the nature and extent of the rights of counsel in this behalf might the more clearly appear. We therefore hold that the assignment of this cause of action was void as against public policy, and that Concannon could not grant, nor could his counsel receive, any interest therein, legal or equitable, by any form of contract or agreement between them in relation to an action for a personal tort before the entry of judgment; that the ruling of the justice of the superior court in issuing the execution, in which, conceding the invalidity of such assignment, he held that it was nevertheless valid as notice of a right which the

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law does not permit to exist, was erroneous; that the so-called charging lien of an attorney extends, as was heretofore determined in the case of Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722, only to his taxable fees and taxable disbursements, and does not extend to his general claim for compensation; and that such lien does not attach until after judgment entered. Whether it may properly and wisely be extended is a question for the consideration of the lawmaking body. Our duty is to declare the law as it exists. Since there had been no judgment entered at the time of the settlement of the case by the parties, no lien had then attached, and it is not necessary to consider whether the settlement was or was not collusion. All collusion is denied by affidavits of both Concannon and Tyler; nor does either of them seek to avoid the settlement thus made. Having been made at a time when they were lawfully competent to make it, and when no lien of counsel had attached, the settlement should stand and must stand as the parties have agreed. It is the duty and the purpose of this court to protect and enforce the rights of counsel in all cases before it, but in so doing we cannot detract from the rights of their clients, nor give to counsel rights which the law does not confer. The petitioner here may well object to being burdened with these judgments, and may well contend that Concannon's counsel should not be allowed to visit upon the petitioner, who owed Concannon's counsel no duty, the consequences of Concannon's failure to inform his own counsel of the settlement he had made with the petitioner. Neither should he be allowed to impose upon the petitioner the payment of a sum which is not only in excess of the sum for which Concannon was and still is satisfied to release the petitioner from all liability, but is also a sum which is in excess of the entire judgment in the cause when the payment in settlement is considered.

The record of the Superior Court ordering the issue of the execution is therefore ordered to be quashed.

Sweetland, J., dissents.

SOUTH CAROLINA SUPREME COURT.

EMMA JANIE CAMPBELL et al., Respts.,
v.
SEABOARD AIR LINE RAILWAY, Appt.

(— S. C. —, 65 S. E. 628.)

Carrier — wrong station — punitive damage.

1. The right of a passenger to punitive damages must be submitted to the jury, where, after having been put off the train at the wrong station, the train goes off and leaves him, notwithstanding his notice to train employees and signals from the station agent.

Master — Pullman porter — liability for act.

2. A railroad company is liable for the act of a porter of a Pullman car in putting off a passenger at the wrong station, where it relies upon him to notify sleeping passengers of the approach of the train to their stations.

(October 2, 1909.)

Case Note. — Liability of railroad company for acts of employee of sleeping or Pullman car company toward passengers.

Cases involving relations between railroad companies and employees of Pullman or sleeping-car companies where the liability of the railroad company for their acts toward passengers is not involved, as, for example, cases involving the right of such employees to recover in an action against the railroad company, are not included in this note.

The recognized doctrine upon which the solution of the question under annotation depends is aptly stated in Calhoun v. Pullman Co. 16 L.R.A.(N.S.) 575, 86 C. C. A. 387, 159 Fed. 387, where, in discussing the respective relations of the sleeping-car company and the railroad company to the passenger, the court said: "The railroad company is the carrier and is the party with whom the passenger contracts for his transportation. Among other things, it contracts to supply him with the usual conveniences for his comfort while being transported. The parlor or sleeping-car company's business is to provide the passenger with certain conveniences and comforts which are in addition to those contracted for by the railroad company. Those duties to the passenger which are incident to the carrier's contract for transportation continue to rest upon the railroad company, notwithstanding he may have another contract with the sleeping-car company for special accommodations. The use of the car for carrying the passenger is a matter for arrangement between the companies. The railroad company retains the power of control and management of its trains, including the sleeping cars as to all matters except those which are peculiarly incident to the other company's special contract with the passenger. The duties of the sleeping-car company to the passenger are coextensive with the nature of its contract. It does not undertake those which belong to the railroad company. The compass of the duties which belong to each company is defined by this demarcation."

The case of CAMPBELL v. SEABOARD AIR LINE R. Co. and that of Taber v. Seaboard Air Line R. Co. 81 S. C. 317, 62 S. E. 311, which is discussed at length in the former,

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APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Bamberg County in plaintiffs' favor in an action brought to recover damages for discharging plaintiff Emma Janie Campbell from defendant's train at the wrong place. Affirmed.

The facts are stated in the opinion.

Messrs. **S. G. Mayfield, J. A. Wyman, and Lyles & Lyles** for appellant.

Messrs. **George Bell Timmerman, J. W. Thurmond, and J. F. Carter,** for respondents:

The porter was a servant of the railway company.

Brown v. Smith, 86 Ga. 274, 22 Am. St. Rep. 461, 12 S. E. 411; Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 295, 51 Am. St. Rep. 309, 33 N. E. 469; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 402, 32 Am. Rep. 325; Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85.

Whether the plaintiff could have avoided exposure by waiting until she received proper wraps, and whether the injury resulting therefrom, and the injury she suffered by being exposed to the cold weather, was caused by her own act as a direct and proximate cause, were questions for the jury to decide, and were properly submitted to the jury.

Bickley v. Commercial Bank, 43 S. C. 529, 21 S. E. 886; Norris v. Clinkscales, 44 S. C. 315, 22 S. E. 1; Jacobs v. Gilreath, 45 S. C. 46, 22 S. E. 757; Littlejohn v. Richmond & D. R. Co. 45 S. C. 181, 22 S. E. 789; Springs v. South Bound R. Co. 46 S. C. 104, 24 S. E. 166; Girardeau v. Southern Exp. Co. 48 S. C. 421, 26 S. E. 711; Beckham v. Southern R. Co. 50 S. C. 25, 27 S. E. 611; Jenkins v. Charleston Street R. Co. 58 S. C.

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seem to indicate the proper demarcation between cases in which the railroad company is liable for acts of Pullman or sleeping-car employees, and those cases in which it is not liable. The rule may be broadly stated as follows: The railroad company is generally held liable for all breaches of duty by such employees which appertain to the carrying out of the railroad company's contract of carriage, but is not liable for breaches of duty appertaining peculiarly to the contract of the Pullman or sleeping-car company, in the absence of evidence connecting it with the special contract of such company. This rule, however, while supported in the main by the following cases, cannot be regarded as one of universal acceptance. In connection with the Taber Case see subsequent appeal thereof reported in 66 S. E. 292.

In Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 402, 32 Am. Rep. 325, which is a leading case, in holding the railroad company liable for the assault of a drawing-room-car porter upon defendant's passenger, who, upon finding no vacant seat in the ordinary coaches, had taken a seat in a drawing-room car, for which he refused to pay extra, but which he offered to vacate provided a seat was found for him in the ordinary cars owned by defendant, the court said: "The general principle is well settled, that to make one person responsible for the negligent or tortious act of another, the relation of principle and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrongdoer and the person sought to be charged. . . . The defendant relies upon the absence of this relation between the porter and the company as conclusive against its liability for his act. But we are of opinion that this defense is not available to the defendant, or rather, that the persons in charge of the drawing-room car are to be regarded and treated, in respect of their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company. . . . The public interest, and due protection to the rights of passengers, require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation."

And in Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, another much-cited case upon this question, it was held that the porter of a sleeping or drawing-room car which forms a part of the train of a railroad company under a contract with its owner, who sells separate tickets for privileges upon such cars, and who furnishes his own servants to collect tickets and assist passengers, is a servant of the railroad company, for whose acts (an assault) done in the performance of a contract to carry a passenger, it is responsible, notwithstanding any agreement which may be made upon the subject between the company and the owner of the car.

So, in Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, in holding the railroad company liable for injuries caused by the falling of a berth of a sleeping car attached to defendant's train, in which plaintiff was, at the time, riding, Mr. Justice Harlan, in delivering the opinion of the court, said: "In view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company,

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373, 36 S. E. 703; Wallingford v. Western U. Teleg. Co. 60 S. C. 201, 38 S. E. 443, 629.

The conductor knew that the plaintiff was put off at the wrong station, and failed and refused to stop the train to allow her to re-enter, for which acts the defendant is liable for exemplary damages.

Wade v. Columbia Electric Street R. Light & P. Co. 51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233; Gillman v. Florida, C. & P. R. Co. 53 S. C. 210, 31 S. E. 224; Glover v. Charleston & S. R. Co. 57 S. C. 228, 35 S. E. 510; Lewis v. Western U. Teleg. Co. 57 S. C. 325, 35 S. E. 556; Watts v. South Bound R. Co. 60 S. C. 67, 38 S. E. 240; Reeves v. Southern R. Co. 68 S. C. 89, 46 S. E. 543; Dagnall v. Southern R. Co. 69 S. C. 110, 48 S. E. 97.

Woods, J., delivered the opinion of the court:

The facts in this case are substantially the same as those in Entzminger v. Seaboard Air Line R. Co. 79 S. C. 151, 60 S. E. 441. The testimony on the part of the plaintiff tended to prove the following facts: Mrs. Campbell boarded the passenger train of the defendant, Seaboard Air Line Railway, on the night of 24th December, 1906, at Jacksonville, Florida, and took a berth on the Pullman sleeping car. Knowing that the train would reach Denmark, her destination, in the early morning, Mrs. Campbell asked the conductor of the train, as well as of the Pullman car, to wake her in time to dress and leave the car at Denmark. She was awakened by the porter of the Pullman car very early in the morning, while it was still dark, and was told that Denmark was the next station, and, when the train stopped, she was put off at Govan, a station 7 miles from Denmark. Mrs. Campbell perceived the mistake just as the train was moving off, and gave the alarm to a fellow passenger, Entzminger, who was in the same predicament. He rushed forward, and cried out to the porter, standing on the steps, to stop the train. W. A. Hays, who was acting as station agent, with his lantern tried to stop the train by signal. The Pullman conductor perceived the situation, and tried to stop it by pulling the bell cord, and the Pullman porter

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engaged in business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

Cleveland, C. C. & I. R. Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433 is to the same effect.

And in Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554, an action for alleged assault, the court laid down the broad rule that the conductor or porter of a sleeping car is a servant of the company of whose trains his car is, for the time being, a part, in all matters relating to the safety of defendant's passengers.

In Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469, a Pullman conductor who negligently directed a person who had assisted a sick person to board a Pullman car attached to defendant's train, as to when he should alight, was held the servant of the railroad company.

And in Cincinnati, N. O. & T. P. R. Co. v. Raine (Ky.) 19 L.R.A.(N.S.) 753, 113 S. W. 495, it was held that where a sleeping-car conductor undertakes, in the presence of the train conductor, to put a lady holding a railroad ticket on the right Pullman car, and tells her to remain in his car until the desired car arrives, the railroad company is liable for his neglect to do so.

In Norfolk & W. R. Co. v. Lipscomb, 90 Va. 137, 20 L.R.A. 817, 17 S. E. 809, a railroad company was held liable for the negligence and misdirection of a sleeping-car conductor, by reason of which plaintiff and a sick child were left in a sleeper upon a siding, late at night, while the plaintiff's baggage, including medicine, was carried off upon the train.

In Gannon v. Chicago, R. I. & P. R. Co. post, 1061, it was held that a passenger in a Pullman car may rely on the porter for assistance and guidance as to his conduct in entering or alighting from such cars, as a representative of the railroad company.

In Airey v. Pullman Palace Car Co. 50 La. Ann. 648, 23 So. 512, it was held that the negligence of the porter or conductor of the parlor car attached to defendant's train, in which plaintiff was riding as a passenger, in not arousing her on arrival at her destination, beyond which she was carried, was the negligence of the defendant railroad company.

In Pullman Co. v. Hoyle (Tex. Civ. App.) 115 S. W. 315, where a Pullman passenger was negligently put off from a car attached to defendant's train before it reached the station, a judgment was upheld against the railroad company, on the ground that it was at least passively negligent.

Pullman Co. v. Norton (Tex. Civ. App.) 91 S. W. 841, where a sleeping-car passenger was injured while passing from one Pullman car to another by having his fingers caught between the vestibules of the two cars, which place should have been covered by a curtain, but, owing to the negligence of the Pullman company's servants, was not so covered, is to the same effect, and is based upon almost identical reasoning.

In Houston, E. & W. T. R. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124, the railway company was held liable in damages for mental suffering by a female passenger in a sleeping car attached to defendant's

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told the conductor of the train of the mistake as soon as he could get to him, when the train had gone about three quarters of a mile. Being thus left at Govan, Mrs. Campbell and Entzminger hired a conveyance and drove through the country to Denmark. The day was very cold, and Mrs. Campbell was made sick by the exposure. The action is for actual and punitive damages resulting from her sickness and suffering. The verdict and judgment was for the plaintiff, and defendant appeals.

On the call of the cause for trial, defendant's counsel moved to strike the cause from the calendar on the ground that the complaint does not contain the proper indorsement, in that the nature of the issue, and the docket upon which the same should be placed, is not indorsed thereon. The exception alleging error in the refusal of this motion cannot be considered, for the reason that there is nothing in the record to show that the complaint was not properly indorsed.

The refusal of the circuit judge to withdraw from the jury the cause of action for punitive damages by ordering a nonsuit or directing a verdict was in accordance with the opinion and judgment of this court in Entzminger v. Seaboard Air Line R. Co. supra, on similar facts, and the point needs no further consideration. It is important to observe, however, that in that case the liability of the defendant for compensatory damages was admitted.

There was no error in refusing to instruct the jury that the recovery must be limited to $2, the sum paid by the plaintiff for the conveyance from Govan to Denmark. It is true the plaintiff would not be entitled to recover damages for the suffering resulting from the drive through the country, if, by the exercise of due care, she could have reached her destination without the exposure. Carter v. Southern R. Co. 75 S. C. 355, 55 S. E. 771; Jones v. Western U. Teleg. Co. 75 S. C. 208, 55 S. E. 318; Key v. Western U. Teleg. Co. 76 S. C. 301, 56 S. E. 962; Berley v. Seaboard Air Line R. Co. 83 S. C. 411, 65 S. E. 456; Shearm. & Redf. Neg. § 741; Indianapolis, B. & W. R. Co. v. Birney, 71 Ill. 391; Georgia R. & Bkg. Co. v. Eskew, 86

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train, caused by the language of drunken persons who were permitted by the Pullman conductor to enter and remain in such car at night, after she had retired.

In Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, the railway company was held liable for the wilful assault by the porter of a palace car upon a passenger of one of the common coaches, who entered the palace car, and asked permission to use the wash basin therein.

In Goodloe v. Memphis & C. R. Co. 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166, it was held that the railroad company was not liable for injuries received by a passenger from an accidental blow by a Pullman conductor while making a playful attempt to strike another employee. This decision, however, was based upon the ground that the act was not within the scope of the conductor's employment; and it was seemingly assumed that, had the act complained of been within the scope of such employment, the railroad company would have been liable.

A railroad company cannot escape liability for injuries inflicted upon a passenger by acts of a Pullman porter in allowing a table to fall on her hand, upon the ground that they were sustained in a sleeping car owned by another company, which furnished its own servants, notwithstanding the passenger paid an additional fare to the sleeping-car company for the privilege of riding in one of its cars, when such car forms a part of one of the railroad company's trains, since, as the railroad company undertakes safely to transport the plaintiff, the law will assume, in the absence of proof to show that the porter employed and assigned by the Pullman company to control the interior of the sleeping car in which the passenger was riding was not a servant of the railroad company, that he exercised such control with the assent of the company. Louisville & N. R. Co. v. Church, 155 Ala. 329, 46 So. 457.

In Taber v. Seaboard Air Line R. Co. 81 S. C. 317, 62 S. E. 311, it was held that the railway company was not liable for injuries alleged to have been caused by the negligent and wilful refusal of the sleeping-car porter to make down a berth for which the passenger had paid the sleeping-car company, since that was a breach of duty appertaining peculiarly to the special contract of the Pullman company.

This holding is further supported by the case of Pullman Co. v. Haight, 81 C. C. A. 287, 151 Fed. 1009, where a sleeping-car passenger was injured by having a train employee stumble over his broken leg, and in which it was held that if the injury grew out of acts relating to the operation of trains and the transportation of plaintiff, the railroad company alone would be responsible; but that, if the injury grew out of matters within the scope of the particular employment of the Pullman porter as such, the Pullman company would then alone be liable.

In Paddock v. Atchison, T. & S. F. R. Co. 4 L.R.A. 231, 37 Fed. 841, it was held that the railroad company was not liable for the wrongful expulsion of a passenger from a Pullman car attached to defendant's train by the officers of the Pullman company. This decision, however, because of lack of discussion, is of little value.

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Ga. 641, 22 Am. St. Rep. 490, 12 S. E. 1061; International & G. N. R. Co. v. Addison, 100 Tex. 241, 8 L.R.A.(N.S.) 880, 97 S. W. 1037. Had the defendant requested a charge to that effect, it would have been error to refuse it. Indeed, it is by no means clear that there was any evidence tending to show that the plaintiff was warranted in incurring the exposure of the long ride on a bitter cold day, without sufficient wraps. There was a lodging house at Govan where she might have waited for the next train, or at least until she could have procured wraps to protect her from the cold. But, if it be assumed that the exposure was unnecessary and taken without due care, in view of the admission of damages to the amount of $2, and of the evidence warranting a recovery for punitive damages, the circuit judge could not properly instruct the jury, as requested by defendant's counsel, that the recovery must be limited to $2. The plaintiff under the evidence had a right to have submitted to the jury the question of punitive damages in connection with the admitted damages.

The remaining question made by the objections to the testimony, by motion for nonsuit, and by the request to charge, is whether the Pullman company was solely liable for all damages suffered by the plaintiff, to the exemption of the defendant railway company. A railroad company is not relieved of any of the duties which it owes to a passenger by reason of the passenger making a separate contract with a sleeping-car company for special accommodations. The sleeping-car company may by its contract impose upon itself also some of the obligations that the railroad company undertakes in its contract of carriage, but that does not release the railroad company. The only effect of such a contract is to give the passenger the benefit of the care and protection and liability of both companies. There is, it is true, at least one duty ordinarily undertaken by sleeping-car companies, not embraced in the railroad's usual contract of carriage,—the duty of providing a sleeping berth. Accordingly, in Taber v. Seaboard Air Line R. Co. 81 S. C. 317, 62 S. E. 311, it was held that a railroad company, under its ordinary contract of carriage, is not liable for the failure of the porter of a sleeping-car company to make down a berth for which the passenger had paid the sleeping-car company. The court says: "Conceding that the porter was negligent, or even wilfully disregardful of plaintiff's request in this matter, the defendant company is not liable, in the absence of evidence connecting it with the special contract of the Pullman company. The delict, if any, was a breach of duty by the Pullman company, since it appertained peculiarly to the contract of that company to furnish berth accommodations, as distinguished from the defendant's contract of safe and comfortable transportation." This case is sound because it rests upon a very broad and obvious distinction as to a special comfort for the passenger, furnished by a separate company, which the fare for carriage paid to the railroad company does not cover. But there is no ground whatever for the position that a passenger, by going into a Pullman car and taking a berth, releases the railroad company from any of its duties as a carrier. The railroad company carries Pullman cars in connection with its own, and in this and in other ways shows that, so far from objecting to their use, it means to encourage and invite its passengers to use them. When, in pursuance of such invitation, the passenger takes the Pullman car, he is still entitled to the service of the railroad employees in all matters which relate to his safe and comfortable transportation to his destination. Obviously, the railroad company cannot lawfully withdraw its own employees from this service, and substitute and rely upon the employees of another company to perform the service, as persons acting apart from itself. On the contrary, it is quite plain that when it relies on such persons to perform its own public duties, it adopts them as its agents, and is responsible for their failure to perform the service to which the passenger is entitled as a part of his contract of carriage. Hence, with respect to those matters embraced in the contract of carriage which the railroad company depends upon the employees of the Pullman company to perform, such employees are agents of the railroad company. This conclusion is in accord with the current of authority. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Airey v. Pullman Palace Car Co. 50 La. Ann. 648, 23 So. 512; Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554; Pullman Co. v. Hoyle (Tex. Civ. App.) 115 S. W. 315; Louisville & N. R. Co. v. Church, 155 Ala. 329, 46 So. 457; Calhoun v. Pullman Co. 16 L.R.A.(N.S.) 575, 86 C. C. A. 387, 159 Fed. 387; Pullman Co. v. Lutz, 154 Ala. 517, 14 L.R.A.(N.S.) 907, 45 So. 675. One of the duties embraced in the contract of carriage is to give the passenger reasonable notice of arrival at his destination. Ford v. Southern R. Co. 75 S. C. 286, 55 S. E. 448. Ordinarily, this is sufficiently done by calling out the stations as the train approaches them. But where a passenger takes a berth to sleep, with the knowledge and consent of the carrier, it would be absurd to hold a call on the passenger coach reasonable notice to him. In such case the

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railroad company, when it relies on the conductor and porter of the sleeping car to give reasonable notice, adopts them as it agents, and is liable for their default. It follows that when the porter of the Pullman car assured the plaintiff that she had arrived at Denmark, her destination, and induced her to leave the car at Govan, the railroad company was responsible for any legal damages which resulted from this breach of duty to the plaintiff.

This conclusion disposes of the point under discussion, but there is another view, equally conclusive. The plaintiff's case depended mainly, not on the mere mistake of having the plaintiff to leave the car at Govan, but on the evidence tending to show a wilful failure to stop the train and allow her to get on again after the discovery of the mistake. As the train was in the control of the agents of the defendant, for any breach of duty in this respect the defendant was liable. For this reason, if there was no other, the motions for a nonsuit and for the direction of a verdict for defendant were properly refused.

There is no foundation for the seventh exception. The circuit judge explicitly charged that there could be no recovery for mental suffering unaccompanied by bodily pain or injury.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Hydrick, J., disqualified.

IOWA SUPREME COURT.

M. V. GANNON, Admr., etc., of Patrick Joseph Kiley, Deceased, Appt.,
v.
CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY.

(— Iowa —, 117 N. W. 966.)

Carrier — passenger — temporary absence — duty.

1. A railroad company which, with knowledge that a passenger has alighted from the train for exercise at the station, starts the train without reasonable warning and opportunity for him safely to re-enter the train, is liable for injuries inflicted upon him in consequence of such act.

Same — contributory negligence.

2. A passenger who, having alighted from the train for exercise, attempts to re-enter it, with the aid of the Pullman porter, after it has started, is not *per se* negligent, although the statute makes it a crime for one not employed on the train to get upon a car while it is in motion, without the consent of the one having the same in charge.

Evidence — judicial notice — authority of Pullman porters.

3. The court will take judicial notice that Pullman car porters have authority from the railroad company to assist passengers in entering and leaving the trains.

Carrier — Pullman porter — authority.

4. A passenger in a Pullman car may rely on the porter for assistance and guidance as to his conduct, as the representative of the railroad company.

(October 24, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Scott County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by McClain, J.:

Plaintiff, as administrator of the estate of one Kiley, instituted this action to recover damages to decedent's estate resulting from the death of decedent from injuries received through the negligence of defendant's employees while deceased was a passenger, attempting to get on board the train of defendant on which he was entitled to transportation. At the conclusion of the evidence, the court sustained a motion to direct a verdict for the defendant, and judgment for the defendant was entered accordingly. From the ruling on the motion, and from the judgment entered, the plaintiff appeals.

Messrs. **M. V. Gannon and Lane & Waterman**, for appellant:

Deceased and his wife were still passengers and entitled to protection as such, while they were temporarily on the depot platform for exercise.

Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455; Parsons v. New York C. & H. R. R. Co. 113 N. Y. 362, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145.

It is not negligence, as a matter of law, for a passenger to attempt to board or alight from a moving train,—especially if he acts under the advice or with the encouragement of a trainman.

3 Thomp. Neg. §§ 2931, 2932; Pence v. Wabash R. Co. 116 Iowa, 279, 90 N. W. 59; Galloway v. Chicago, R. I. & P. R. Co. 87 Iowa, 458, 54 N. W. 447.

Section 4811, Code, which imposes a penalty upon one who gets off or on a moving train, does not apply where such act is done with the consent of the person in charge of

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Note. — As to the liability of a railroad company for acts of employee of sleeping or Pullman car company toward passengers, see Campbell v. Seaboard Air Line R. Co. ante, 1056, and case note appended thereto.

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the train; and a car porter is a person so in charge.

Galloway v. Chicago, R. I. & P. R. Co. supra.

Messrs. **Carroll Wright, J. L. Parrish, J. H. Johnson,** and **Cook & Dodge** for appellee.

McClain, J., delivered the opinion of the court:

There is evidence in the record from which the jurors might have found, if the case had been left to their determination, that decedent and his wife, being passengers on a train of defendant, and riding in a Pullman car, dismounted from the train at Davenport for the purpose of resting themselves by walking on the platform during such time as the train might be stopped there, having the assurance of the Pullman conductor that there would be a stop of at least ten minutes; that, at the expiration of five minutes, the train was started without such signal or warning as to enable them with reasonable diligence to get up the steps of their car before the train was in motion; that Mrs. Kiley mounted the steps in safety, and the Pullman porter mounted after her, while the decedent, holding on the hand-hold with his left hand, ran along with the train, attempting to mount with the assistance of the porter; and that, after thus running for 25 or 30 feet, deceased lost his footing, and was dragged still further, when his body struck against the girder of a bridge over a street crossing, and he received injuries which resulted in his death. While decedent was thus being dragged along, Mrs. Kiley appealed to the Pullman porter to stop the train, and, after a second appeal from her, he did so by pulling the cord operating the air brakes; but, before the train stopped in response to this action of the porter, the injuries to deceased had occurred. The only questions we need consider in determining the correctness of the action of the court in directing a verdict for the defendant are whether there was any evidence of negligence on the part of defendant's servants or employees causing the injury to deceased, and whether there was any evidence that deceased was not guilty of contributory negligence.

1. Deceased continued to be a passenger while temporarily on the station platform, intending to continue his journey on the train, having descended from the train for a temporary and proper purpose, that of exercise and relief from the fatigue of travel while the train should be stopped. Parsons v. New York C. & H. R. R. Co. 113 N. Y. 355, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373. "We think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455, 458. If, with knowledge that the passenger thus on the platform is intending to continue his journey on the train, it is started without reasonable warning and opportunity for him to safely reenter the car, the carrier is negligent in performing its contract of transportation, and is liable for the natural consequences of such negligence, unless the passenger has contributed to his injuries so as to defeat his right of recovery.

2. The attempt of deceased to mount the steps of the car after the train was in motion was not *per se* and necessarily contributory negligence on his part. It is true that by statute it is a crime for anyone not employed on the train, or not an officer of the law in the discharge of his duty, to get upon or off a car of any railroad company while the same is in motion, without the consent of the person having the same in charge (Code, § 4811); but such act is not conclusively negligent if done with the consent, approval, or assistance of the conductor or brakeman or other employee authorized to act with reference to the transportation of the passenger on the car in question. Pence v. Wabash R. Co. 116 Iowa, 279, 90 N. W. 59; Galloway v. Chicago, R. I. & P. R. Co. 87 Iowa, 458, 54 N. W. 447. That the porter of a Pullman car is an employee of the railway company engaged in the transportation of the passengers riding in such car, in the same sense that a brakeman of a train is such employee, is well settled. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319. The cases relied upon as to this point by appellee are not pertinent. They involve the relations between the railway company and the porter of a Pullman car, as involving the right of the porter to recover in an action against the railway company. See McDer-

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mon v. Southern P. Co. (C. C.) 122 Fed. 669; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 3 A. & E. Ann. Cas. 42; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385.

It is argued for appellee that there is no evidence in the record as to the authority of the Pullman porter; but we can certainly take judicial notice of the fact that the porters on Pullman cars, with the consent of the railway company, usually assist passengers in alighting from and entering such cars, in the same way that brakemen render like assistance to persons riding in the ordinary passenger coaches, and that a passenger is justified in assuming that the Pullman porter is an employee of the railway company in such sense that he may be relied on by the passenger for such assistance or guidance as to his conduct. If the act of deceased in attempting to mount the steps of the car after it was in motion was not in itself conclusively negligent, then there was not such evidence of contributory negligence as to justify the court in taking the case from the jury on the ground of the negligence of the deceased. It does not appear just how fast the car was moving at the time when plaintiff took hold of the hand rail, and attempted, with the assistance of the porter, to mount the steps; and there is no conclusive evidence that he was negligent in not desisting from his effort after he lost his footing and was being dragged along the platform, for under such circumstances danger might have reasonably been anticipated from releasing his hold and dropping to the platform near the wheels. It does not appear from any conclusive evidence that deceased was aware of the danger from the girder toward which he was being carried. The cases relied upon in this respect for appellee are cases where a passenger was shown without question to have been aware of such danger. See Hunter v. Cooperstown & S. Valley R. Co. 126 N. Y. 18. 12 L.R.A. 429, 26 N. E. 958; Knight v. Pontchartrain R. Co. 23 La. Ann. 462. Other cases relied on for appellee, involving a finding of negligence in an attempt to get on or off a car while in motion, lack the element which is present in this case of the approval and assistance of an employee in charge of the car.

The trial court was not justified in directing a verdict for the defendant, and its ruling in that respect and in entering judgment for the defendant is reversed.

Petition for rehearing denied.

23 L.R.A.(N.S.)

VERMONT SUPREME COURT.

STATE OF VERMONT
v.
GEORGE McCLELLAN.

(— Vt. —, 73 Atl. 993.)

Larceny — unindorsed check — value.

Under a statute making checks the subject of larceny, an unindorsed check payable to order is so subject; and its value, for the purpose of determining the degree of the crime, is its face value.

(September 9, 1909.)

EXCEPTIONS by defendant to rulings of the Chittenden County Court made during the trial of an information which resulted in a verdict convicting him of grand larceny. Overruled.

The facts are stated in the opinion.

Messrs. **J. J. Enright** and **Brown & Hopkins**, for defendant:

If the check had any other than a nominal value, it was its fair market value at the time and place and in the condition in which it was found when the larceny was committed.

State v. Smith, 48 Iowa, 595; Martinez v. State, 16 Tex. App. 122; Clark v. State, 23 Tex. App. 612, 5 S. W. 178; People v. Cole, 54 Mich. 238, 19 N. W. 968.

The check having been drawn to the order of Mrs. E. O. Webb, it could have no actual market value until indorsed by her, and, except by statute, was not the subject of larceny.

State v. Musgang, 51 Minn. 556, 53 N. W. 874; State v. Hill, Houst. Crim. Rep. (Del.) 420; Whalen v. Com. 90 Va. 544, 19 S. E. 182.

Mr. **John G. Sargent**, Attorney General, and Mr. **Henry B. Shaw**, for the State:

The transfer, without indorsement, of negotiable paper payable to order, constitutes

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Case Note. — Valuation of commercial paper for purposes of graduating offense of larceny.

At common law, commercial paper was not considered the subject of larceny, for the reason, as it was said, that it had no intrinsic value. The common-law rule has been abrogated in most jurisdictions by statutes making commercial paper the subject of larceny. 18 Am. & Eng. Enc. Law, p. 515.

It is not intended here to go into the question of whether commercial paper is the subject of larceny. That is to say, this note does not include cases holding, under statutes, or otherwise, that paper of this sort has "some value" so as to be the subject of larceny. The cases considered are those in which it is held that the paper is a subject of larceny, and in which the

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the holder the equitable assignee of the paper: and the check has a value.

7 Cyc. Law & Proc. p. 818; Bigelow, Bills & Notes, 1893, p. 62; Huffcut, Elements of Business Law, p. 186; 1 Dan. Neg. Inst. 2d ed. §§ 741, 744; Whistler v. Forster, 14 C. B. N. S. 248; Osgood v. Artt, 17 Fed. 575; Lyon, P. & Co. v. First Nat. Bank, 29 C. C. A. 45, 55 U. S. App. 747, 85 Fed. 120; First Nat. Bank v. Moore, 70 C. C. A. 89, 137 Fed. 505; Clark v. Whitaker, 50 N. H. 474, 9 Am. Rep. 286; Minor v. Bewick, 55 Mich. 491, 22 N. W. 12; Jones v. Witter, 13 Mass. 304; Grover v. Grover, 24 Pick. 261, 34 Am. Dec. 319; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; First Nat. Bank v. McCullough, 50 Or. 508, 17 L.R.A.(N.S.) 1105, 126 Am. St. Rep. 758, 93 Pac. 366; O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078; Freund v. Importers' & T. Nat. Bank, 76 N. Y. 352; Meuer v. Phenix Nat. Bank, 42 Misc. 341, 86 N. Y. Supp. 701, affirmed in 94 App. Div. 331, 88 N. Y. Supp. 83, 183 N. Y. 511, 76 N. E. 1100.

Munson, J., delivered the opinion of the court:

The respondent is charged with the larceny of a private mail bag and of a bank check for $875, signed by J. P. Morgan & Company, payable to the order of E. O. Webb, and not indorsed. The respondent excepted to the admission of evidence offered to show that there were funds to meet the check, and to the charge submitting the question of value to the jury. It is contended that the check had only a nominal value, and that, if the value was more, it was its fair market value at the time and place of the larceny, while unindorsed.

Property of this class is made the subject of larceny by P. S. 5755, but without any provision regarding its valuation. No case standing like this has been brought to our attention. In State v. Hill, Houst. Crim. Rep. (Del.) 420, there was no statute applicable to the paper taken. In State v. Musgang, 51 Minn. 556, 53 N. W. 874, the statute required the instrument to be "completed and ready to be issued or delivered," and those taken lacked, among other things, a necessary signature. The charge in Whalen v. Com. 90 Va. 544, 19 S. E. 182, was the larceny of a check, which appears from the evidence recited in the opinion to have been unindorsed; but the statute provided that the amount due on or secured by the writing and remaining unsatisfied should be deemed its value. It will be well to mention a few other cases. In Phelps v. People, 72 N. Y. 334, the statute provided that the money due on the writing or secured thereby and remaining unsatisfied, or which in any contingency might be collected thereon, should be deemed its value. The writing taken was a draft which had not been indorsed by the official to whom it was made payable by the last indorser, and the defense argued that this could not be larceny, because the instrument was not effective and operative when taken; but the court said that, inasmuch as the indorsements transferred the power to use the draft to obtain the money which it called for, it was a legal and operative instrument at the time it was taken. In State v. Wade, 7 Baxt. 22, the respondent was charged with stealing cer-

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question is: What value is to be given to it, or what is the rule or criterion for determining such value?

Cases involving treasury notes, bank bills, or bank notes are not included herein, as they seem to rest on different principles, being in the nature of currency or money.

In some jurisdictions the measure of value of commercial paper is prescribed by statutes. The few cases presenting the question in other jurisdictions throw very little light on the question.

In Burrows v. State, 137 Ind. 474, 45 Am. St. Rep. 210, 37 N. E. 271, it was held that the value of a stolen check, for the purpose of determining the degree of larceny, was purely a question for the jury.

It was held in State v. Murphy, 141 Mo. 267, 42 S. W. 936, that mere proof of the amount for which a check was drawn, without showing the date or the name of the drawer or of the drawee bank, was too indefinite to be taken into consideration in determining the value of the check for the purpose of sustaining a charge of grand larceny.

In Crossland v. State, 77 Ark. 544, 92 S. W. 776, it was held merely that the stealing of a check for $15 would constitute grand larceny, under a statute which made the taking of articles valued at more than $10 grand larceny.

In People v. Silbertrust, 236 Ill. 144, 86 N. E. 203, the court seemed to think that the value of a bill of exchange as a statutory subject of larceny was its market value.

As previously stated, this question in some cases has been governed by statutes providing that the value of stolen commercial paper of specified kinds shall be the amount due thereon or secured thereby, which remains unsatisfied. State v. Pierson, 59 Iowa, 271, 13 N. W. 291; McDowell v. State, 74 Miss. 373, 20 So. 864; Phelps v. People, 72 N. Y. 334; People v. Fletcher, 110 App. Div. 231, 97 N. Y. Supp. 62; People v. Geyer, 132 App. Div. 790, 117 N. Y. Supp. 662; Whalen v. Com. 90 Va. 544, 19 S. E. 182.

In Missouri the statute provides that the amount due shall be only prima facie evidence of the value of the instrument. State v. O'Connell, 144 Mo. 387, 46 S. W. 175.

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tain coupons of the bonds of the state, and the court treated them as coupons that had been paid, but considered them valuable to the state as vouchers, and therefore the subject of larceny. This was under a statute which covered "any instrument of writing whereby any demand, right, or obligation is created, ascertained, increased, extinguished, or diminished, or any other valuable paper writing." In State v. Allen, R. M. Charlt. (Ga.) 518, the court declared it to be the holding of that state that, on an indictment for stealing a bank note, the note must be shown to have been genuine, but sustained a conviction without evidence of genuineness, on the following reasoning: "Stealing a counterfeit bill is certainly not larceny, as a general rule, because the thing stolen must be of some value. But it is not necessary that the subject-matter of the larceny should be of value to third persons, if valuable to the owner. The prosecutor, having received these bills from the bank whose notes they purported to be, . . . could have made such corporation pay specie for them, whether genuine or not, and they were therefore of the same value to him."

The respondent argues that the value of stolen property is to be determined by its condition when taken; that a check payable to order is an incomplete instrument as long as it remains unindorsed; that no one could have drawn the money on the check in question,—not even the payee,—and that consequently it was only of nominal value. This argument is opposed by several considerations. It is evident that this check was property in the hands of Mrs. Webb, of a value equal to the amount for which it was drawn. The respondent took this property from her constructive possession, with the intention of converting it to his own use. The fact that he found the property in such a condition that he could not convert it to his own use at the time he deprived the owner of it ought not to determine its value in his favor when he is called to account for his criminal act. As regards its lawful owner and holder, it was a completed paper. It gave Mrs. Webb the control of an amount of currency equal to the face of it, with the power of transferring that control by indorsement to anyone who might become the bearer. But she could have realized the substantial value of the check without indorsing it, for an indorsement was not essential to the value of the check in the hands of an honest holder. The owner of a negotiable instrument payable to his order can transfer it by a formal assignment, instead of an indorsement, or by parol with manual delivery. Freund v. Importers' & T. Nat. Bank, 76 N. Y. 352. Such an assignment will be complete and effectual, as between the assignor and assignee, without notice to the debtor; and with notice it will secure the assignee the entire interest, subject to any existing defenses. The holder of a paper thus transferred can enforce his right, by a suit in equity in his own name or by a suit at law in the name of the payee. All these considerations point to the conclusion that this check as it existed at the time of the taking was of substantial, and not nominal, value. Moreover, the law treats it as something more than a paper of nominal value in the hands of a wrong giver. If the respondent were sued for it in trover, he could not say that its value was merely nominal. He would be held for its actual value to the lawful owner, which prima facie would be the amount due on it. See Robbins v. Packard, 31 Vt. 570, 76 Am. Dec. 134. This view is certainly consistent with our statute, and is perhaps required by it. In the eye of the common law a check is but a token, representing property located elsewhere, but valueless in itself, and therefore not a subject of larceny. The statute changes this, making the instrument a subject of larceny; in other words, treating it as a thing of value in itself. And if the instrument is to be valued as a check, and not as a piece of paper, what is its value? Obviously the amount it represents if the check is good. This method of valuation is practically required by the nature of the change effected by the statute. The fact that the statutory list includes documents which afford no basis for a valuation of this character does not discredit the rule as applied to writings which furnish the basis.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

WASHINGTON SUPREME COURT.

PHILIP MILLER et al., Respts.,
v.
PETER WHEELER, JR., Admr., etc., of Peter Wheeler, Deceased, et al., Appts.

(— Wash. —, 103 Pac. 641.)

Water — appropriation — supply rights.

1. One who brings water into a watershed for his own use, after another has made an appropriation from the stream flowing therein, may impound the overflow

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Case Note. — Rights, as against other appropriators, of one who adds water to natural flow of a stream.

It seems to be the universal rule that where a person by his own exertions increases the available supply of water in a stream,—that is, adds water to a stream

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or waste upon his own land for use on other land, although it is thereby prevented from finding its way into the stream to the benefit of the prior appropriator.

Same — abandonment.

2. To effect an abandonment of water brought upon a tract of land for purposes of irrigation, intent to abandon, and an actual relinquishment, must concur.

Same — presumption — rebuttal.

3. The fact that water which had been brought onto property for purposes of irrigation had been devoted to other uses for a period of eleven years, and had been made the subject of conveyance, rebuts a presumption of abandonment.

Trial — burden of proof — abandonment of water.

4. The burden of showing abandonment of water which has been brought on land for the purpose of irrigation, which rests upon one claiming a right thereto resting upon the fact of abandonment, is not shifted by the fact that the surplus was allowed to run into a natural water course.

Water — conveyance in stream.

5. An owner of water may use the bed of an existing water course to convey it to the place where he intends to use it, without losing his right to it.

Same — spring — statutory rights.

6. A statutory provision that the person on whose lands spring water first rises shall have a prior right to it, if capable of being used upon his lands, does not apply to springs which form the fountain heads of living water courses.

Same — prescriptive right.

7. No prescriptive right to water in a stream can be secured against a prior appropriator so long as the supply is adequate for both uses.

Same — transportation in stream — waste.

8. One who turns water into a stream for purposes of transportation can take no more out than he puts in, making due allowance for loss by natural waste and evaporation.

Same — reclaiming surplus — interference with natural sources.

9. One who brings water onto his land for purposes of irrigation cannot, in reclaiming the surplus, cut off or dry up any of the original sources and springs tributary to the stream draining the watershed, the waters of which have been appropriated by a prior appropriator.

(August 11, 1909.)

APPEAL by defendants from a judgment of the Superior Court for Chelan County in plaintiffs' favor in an action brought to restrain all acts and uses of waters tending to decrease the flow of Squillchuck creek below the amount to which complainant Miller was entitled under a prior appropriation. Reversed.

The facts are stated in the opinion.

Messrs. **Reeves & Reeves**, for appellants:

The owner of land is also the owner of all percolating waters therein; and his dominion thereover is as complete as over the soil itself.

Bloodgood v. Ayers, 108 N. Y. 400, 2 Am.

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which would not otherwise have flowed there,—he, as against other appropriators, has the right to appropriate and use such water to the extent of the increase, whether such water is obtained from underground sources or from other watersheds. Hoffman v. Stone, 7 Cal. 46; Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769 (water from a different watershed); Burnett v. Whitesides, 15 Cal. 35; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Churchill v. Rose, 136 Cal. 576, 69 Pac. 416; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362 (water taken from another stream); Platte Valley Irrig. Co. v. Buckers' Irrig. Mill. & Improv. Co. 25 Colo. 77, 53 Pac. 334; Ripley v. Park Center Land & Water Co. 40 Colo. 129, 90 Pac. 75; Herriman Irrig. Co. v. Butterfield Min. & Mill. Co. 19 Utah, 453, 51 L.R.A. 930, 57 Pac. 537; Herriman Irrig. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; 3 Farnham, Waters, p. 2087.

This was also recognized in Smith v. Duff (Mont.) 102 Pac. 984.

A case closely related to MILLER v. WHEELER is Herriman Irrig. Co. v. Keel, supra, where it was held that the owner of land into which a mining tunnel has been driven, from which percolating water escapes, has the right to turn such water into the natural channel of a stream, and, after permitting it to flow therein for some distance, divert it again from such channel, after making due allowance for seepage and evaporation.

To the same effect is Ripley v. Park Center Land & Water Co. supra, where it was held that water drained through tunnels from mines, which otherwise would not have reached the stream, was subject, as against other owners of the water in the stream, to appropriation by the owners of the mines or their grantee, a statute in this case making such water the subject of appropriation.

In Churchill v. Rose, supra, it was held that the owner of land upon which was located a spring, the original flow of which he had increased threefold, was entitled, as against prior appropriators of water of a creek to which the spring was tributary, to the increased amount of water thus developed.

The case approaching most nearly MILLER v. WHEELER in facts is La Jara Creamery & Live Stock Asso. v. Hansen, 35 Colo. 105, 83 Pac. 644. In that case an owner of land sought to appropriate water which had been taken by others from a different watershed, and which, after it had been used for irrigation, by means of seepage through his and

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St. Rep. 443, 15 N. E. 433; Southern P. R. Co v. Dufour, 95 Cal. 615, 19 L.R.A. 92, 30 Pac. 783; Ellis v. Duncan, 21 Barb. 230; Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; Metcalf v. Nelson, 8 S. D. 87, 59 Am. St. Rep. 746, 65 N. W. 911; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Cohen v. La Canada Land & Water Co. 151 Cal. 680, 1 L.R.A.(N.S.) 752, 91 Pac. 584; Willow Creek Irrig. Co. v. Michaelson, 21 Utah, 248, 51 L.R.A. 280, 81 Am. St. Rep. 687, 60 Pac. 943; Herriman & Irrig. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Miller v. Black Rock Springs Improv. Co. 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27.

Percolating waters are not subject to appropriation.

Willow Creek Irrig. Co. v. Michaelson, supra; Kinney Irrigation, § 298.

Where it is not shown in the evidence that a spring is fed by a flowing stream, either surface or subsurface, it must be presumed that it is formed by ordinary percolations, and subject to the law of percolating waters.

Gould, Waters, 3d ed. § 281; Pence v. Carney, 58 W. Va. 296, 6 L.R.A.(N.S.) 266, 112 Am. St. Rep. 963, 52 S. E. 702.

Defendants are entitled to use the water of the springs on their land for stock, and for domestic and irrigation purposes.

Sullivan v. Northern Spy Co. 11 Utah, 438, 30 L.R.A. 187, 40 Pac. 709.

The fact that one permits water to pass from under his dominion for one day, or for one year or ten years, does not compel him to continue so doing; and the one capturing it after it passes from under his control does not acquire any vested right to have him continue his former course.

Dougherty v. Creary, 30 Cal. 291, 89 Am. Dec. 116; Crescent Min. Co. v. Silver King Min. Co. 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; Herriman Irrig. Co. v. Keel, supra.

Messrs. **Higgins, Hall, & Halverstadt** and **Thomas & Sorenson**, for respondents:

The right of the owner of land to do as he wishes with percolating waters is terminated as soon as the waters become spring water.

Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100, 50 Barb. 316.

Percolating waters do not constitute a part of the soil, and are not attended with every incident and right of ownership which attaches to minerals found in the soil, including the right of removal even to the last drop.

Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. 796; Smith v. Holloway, 124 Ind. 329, 24 N. E. 886; Johnstown Cheese Mfg. Co. v. Veghte, 69 N. Y. 16, 25 Am. Rep. 125; Upjohn v. Board of Health, 46 Mich. 542, 9 N. W. 845.

One making use of percolating waters is restricted to a reasonable use thereof upon his own land.

Bassett v. Salisbury Mfg. Co. supra; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec.

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other land, had reached the stream from which it was sought to be appropriated. The intending appropriator based his right of appropriation on a statute which provided in effect that all ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the state should be governed by the laws relating to priority of right to water in ditches constructed for the purpose of utilizing the water of running streams. The court, however, said: "As we read the record, the appellant does not claim seepage water which first rises on its own lands, at a point outside of the natural stream that flows through them, but waters which first rise in the bed of the stream itself, not before, but after, they actually reach the channel and form part of the volume of the stream. Nor does appellant claim that this seepage forms part of any water the right to the original or first use of which belongs to appellant as an appropriator, and has been once utilized and turned into the stream, with an intent on his part again to use it, or that it is the water that naturally percolates through its own soil. It is water the original right to use which for irrigation belongs to, and has been fully utilized by, others, and afterwards, by natural law, percolates therefrom and through appellant's lands, and reaches, and first rises in, the bed of a stream running through the same, which appellant claims the right to divert from the stream itself as against prior appropriators therefrom. We do not understand that this statute was intended to apply to such appropriations. If valid at all, it is applicable only to appropriations of waste, seepage, and springs waters, before they reach the channel or bed of a natural stream, whether by natural surface flow, by percolation, or by being artificially turned into the same." The court in this case took occasion to say further that, even if it be conceded that the statute was applicable and constitutional, the intending appropriator had failed to sustain his claim in that theory, since he failed to prove how much of the water collected, if any, was the result of seepage from that obtained from the distant watershed.

This note does not concern itself with cases dealing with the mere hastening of the flow of water in a stream, since the actual amount of water is not thereby increased, nor with cases where it appeared that the water from a foreign source was abandoned.

On the general question of use of natural stream to convey appropriated water, see subject note to Herriman Irrig. Co. v. Butterfield Min. Co. 51 L.R.A. 930

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72; Southern P. R. Co. v. Dufour, 95 Cal. 615, 19 L.R.A. 92, 30 Pac. 783; Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10; Willis v. Perry, 92 Iowa, 297, 26 L.R.A. 124, 60 N. W. 727; East v. Houston & T. C. R. Co. (Tex. Civ. App.) 77 S. W. 646; Stillwater Water Co. v. Farmer, 89 Minn. 58, 60 L.R.A. 875, 99 Am. St. Rep. 541, 93 N. W. 907.

The owner of the land has no right whatever to take percolating water beyond the lines of the land from which it is taken, and divert it from the stream, either to let it go to waste, or to use it on other lands.

Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Cohen v. La Canada Land & Water Co. 142 Cal. 437, 76 Pac. 47.

After the spring waters had passed into the gulch, off of defendants' lands, the plaintiffs were entitled to them to the extent of Philip Miller's appropriation.

De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

Even if water is only waste, upon reaching the stream it belongs to the appropriator, and cannot be sold away from him.

Creek v. Bozeman Waterworks Co. 15 Mont. 121, 38 Pac. 459; La Jara Creamery & Live Stock Asso. v. Hansen, 35 Colo. 105, 83 Pac. 644; Water Supply & Storage Co. v. Larimer & W. Reservoir Co. 25 Colo. 87, 53 Pac. 386; Southern California Invest. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767.

It is not a question of abandonment or intention, but a question of law, if the water is seepage water; and it cannot be reclaimed, no matter what may be its original source, so as to deprive the original appropriator on the stream to which it comes, of whatever may be required to make good his appropriation.

Southern California Invest. Co. v. Wilshire, supra.

If defendants have artificially increased the flow, and are entitled to the increase, the burden is upon them to show definitely the amount of that increase, and the source thereof; and if they fail in this, they fail to furnish to the court facts from which the court can award them anything.

Mayberry v. Alhambra Addition Water Co. 125 Cal. 444, 54 Pac. 530, 58 Pac. 68; Paige v. Rocky Ford Canal & Irrig. Co. 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Beaverhead Canal Co. v. Dillon Electric Light & P. Co. 34 Mont. 135, 85 Pac. 880; Churchill v. Rose, 136 Cal. 576, 69 Pac. 416; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Herriman Irrig. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Buckers' Irrig. Mill. & Improv. Co. v. Farmers' Independent Ditch Co. 31 Colo. 62, 72 Pac. 49.

Chadwick, J., delivered the opinion of the court:

In 1874 Philip Miller settled upon a tract of land now in Chelan county, Washington. At the time a prior settler, whose improvements he bought, had appropriated and diverted about 100 miner's inches of water then flowing in the Quil-toc-chin, latterly called the Squillchuck, a small stream flowing out of the mountains, across the Wenatchee valley, and into the Columbia river. Thereafter, before the intervention of other rights, he dug a larger ditch, and appropriated and put to beneficial use 320 miner's inches measured under 6-inch pressure. In the summer of 1885 Peter Wheeler and Fletcher Byrd settled on what is now known as "Wheeler Hill;" their lands lying above the point of Miller's head gate, and distant about a quarter of a mile from the Squillchuck. On the Wheeler land there were two small springs, and on the Byrd land there was a larger spring. These springs were so located that they furnished no water for irrigation for the owners of the land upon which they arose. The Wheeler and Byrd land, or a part of it, formed a natural basin culminating in a narrow gulch descending rapidly into the Squillchuck, and in the springtime, as the snow was melting, water flowed from this drainage basin into the gulch and down into the Squillchuck. The testimony is in sharp conflict as to the amount of water flowing from the springs at the time Wheeler and Byrd made settlement; the witnesses for plaintiffs fixing the flow from them at from 4 or 5 inches to 8 or 10 inches in the summer season, while the witnesses for defendants insist that no water whatever, other than the flood waters of spring, flowed from the springs into the Squillchuck. In the year 1897 Wheeler, Byrd, and others went above their lands and onto another watershed, and appropriated the waters of Stemilt creek, which they brought over and used for irrigating their lands. From this time the flow of the springs gradually increased, and marshes of considerable extent formed on the lands, an acre or two on both the Wheeler land and the Byrd place. The marshes formed by the excess waters from the Stemilt were, like the springs, so situate that neither owner could collect the waters there accumulating and put them to a beneficial use on his own land. About the year 1894 it was agreed between Wheeler and Byrd that Byrd might lay a ditch so as to drain the excess waters on the Wheeler lands, and divert the water to his land adjoining, for the purpose of irrigation, and that in consideration therefor Wheeler might have the flow of the Byrd spring and seepage from the marsh after it had passed down the gulch, into the Squill-

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chuck, and on past the Miller head gates, for use on lands owned by him lower down in the valley. In the year 1901 C. E. Morse bought the land and water right of Fletcher Byrd. That Wheeler and his grantees used water out of the Squillchuck, sold land, and conveyed water rights, from 1895 up to 1906, seems not to be denied. In July, 1906, however, the flow at Miller's head gate being less than 320 inches, he brought this action to restrain defendants from all acts and uses of the water that tended to decrease his flow below the amount to which he was entitled under his original appropriation. The gist of the complaint is contained in the following excerpt from the pleadings: "That since about the 1st day of July, 1906, the quantity of water flowing in said stream and coming down to the head gate of said ditch, which is located in section 22, township 21, range 20 E. W. M., and has been so located since the year 1870, has been less than said 320 inches, since which time the defendants have taken and diverted, and are continuing to take and divert, from said stream, above said head gate, about 20 inches of water miner's measure under a 6-inch pressure, and have prevented its returning to said stream, and have wrongfully deprived the plaintiffs thereof, said water so taken and diverted being water arising from springs located upon or near section 3, township 21, range 20 E. W. M., which are and were, at the time plaintiffs' right to take said waters became vested, feeders of said main stream and a part of plaintiffs' said water."

There is no evidence whatever tending to show that any diversion of water has been made by any of the appellants from the Squillchuck itself above Miller's head gate. Hence we conclude that the diversion complained of is the digging of the ditch which drained the marsh and spring on the Wheeler land, with the incidental right claimed by the Wheelers and their grantors to divert the overflow of the Byrd spring and marsh, after it had followed the natural path of gravitation into the Squillchuck. Confusion may be the worse confounded, however, for appellants say in their brief that respondents are seeking to restrain a diversion below the Miller head gate. No findings of fact were made by the trial court; but we think the evidence shows that the greater part of the water now flowing down the gulch into the Squillchuck from Wheeler Hill is due to the seepage from the Stemilt waters which have been turned on the lands of appellants. The question naturally occurs, whether the water from this artificial source, having naturally gravitated into the soil and percolating therein, may be ditched and drained for further use by the owners as against the right of a lower appropriator; in other words, whether percolating waters arising from an artificial source become a natural flow of an existing watershed and a part of its drainage stream. Our conclusion is that it may be or may not be so, according to the facts presented in the particular case under consideration. The Stemilt waters being the result of the landowners' energy and effort, it would seem but just to say that, so long as he used them or could impound the overflow or waste upon his own land, although for use on other land, one asserting a right of appropriation in no way dependent upon the artificial flow, but made without reference to it, should have no cause to complain. The doctrine of appropriation rests upon the theory of ownership, and, while cases going to the particular question here presented are not numerous, there are, nevertheless, some that in principle sustain the premises which we have laid down.

In Farnham on Waters, vol. 3, § 672d, the rule is stated thus: "When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase. This rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream, which would not otherwise have flowed there." If this be the rule applying to waters of the stream actually appropriated, the conclusion is inevitable that it would apply with greater force to a supply of water brought from an entirely different source and from another watershed.

We find the principle underlying the rule quoted in Burnett v. Whitesides, 15 Cal. 35, where the rights of the first appropriator were limited to the natural waters of the stream. In Platte Valley Irrig. Co. v. Buckers' Mill. & Improv. Co. 25 Colo. 77, 53 Pac. 334, it was held that one who had increased the average continuous flow of a stream by his own energy and expenditure was entitled to such increase, but would not be entitled to the original flow as against the senior appropriator. In Herriman Irrig. Co. v. Butterfield Min. & Mill Co. 19 Utah, 453, 51 L.R.A. 930, 57 Pac. 537, the court, acknowledging the principle of ownership in waters developed in excess of the natural flow, says: "We are clearly

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of the opinion that the defendant company did not acquire a right to any of the water flowing from said tunnels, except such as was developed by percolation, and that the plaintiff retains the right to all the water flowing in the natural channel of Butterfield creek, diminished only to the extent of the increase of the quantity of water which naturally flowed in the channel of Butterfield creek before said tunnels were run and said springs were dried up." While the waters of Stemilt creek, when discharged upon the Wheeler and Morse lands, and after their use for irrigation, did not become percolating waters in the full sense,—for, as we understand the term, it rests upon the theory of unknown source,—the rights to it while still upon the lands of the owners can be sustained by the same reasoning which, under the common law, gave a landowner a right to impound for his own use the water percolating through his own soil. To take it was ever held to be *damnum absque injuria* to another, for it was a component part of the soil. This proposition is too well established to require the citation of authority.

Ownership implies responsibility. If our reasoning requires further support, the fact that the appellants, Wheeler and Morse, because of the artificial augmentation of the natural flow of the Squillchuck, would be held liable for all damage done to the lower appropriators from flooding their lands, injuring the banks of the stream, or washing out their improvements, needs only to be mentioned to meet approval. Respondents' rights must be measured by the condition of the stream at the time of Miller's appropriation in 1874. If his appropriation was subsequent to the development of the Stemilt water, an entirely different question would be presented. If the natural flow of the Squillchuck increases, it is gain; if diminished from natural causes, it is his loss. He has no interest in an increased flow arising from an independent source, unless abandoned by its owner. Upon the principle that the law of appropriation as applied to the arid regions will not tolerate a waste of water, it has been held that water that is allowed to run to waste after use on the land of the appropriator is abandoned, and that lower appropriators are entitled to the surplus. Farnham, Waters, 694; Power v. Switzer, 21 Mont. 523, 55 Pac. 32; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811. But abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon, and an actual relinquishment, must concur, for courts will not lightly decree an abandonment of a property so valuable, as that of water in an irrigated region. Farnham, Waters, 691. In the instant case, when the marshes developed upon the lands of Wheeler and Morse, but at the place where the waters therein could not be used by the respective owners on their own lands, there is evidence showing that Wheeler agreed that Byrd might drain the surplus on his land in consideration of the use of the surplus flowing from the Byrd land, through the natural water ways, including the Squillchuck, upon his land down in the valley and below respondents' head gate. This contract was in itself a circumstance tending to show that it was not the intention of the parties who had developed a supply of water and carried it over from the Stemilt to abandon its use; but the fact that the water was actually so used for a beneficial purpose for a period of eleven years, and made the subject of conveyance, seems to us conclusive upon this feature of the case. The fact that the surplus is allowed to run into a natural water way to which rights of appropriation have attached is a circumstance to be considered, but does not shift the burden of proving an abandonment from respondents. Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047.

Respondents invoke the general rule that waters draining into and augmenting the natural flow of the stream and its tributaries become a part of the natural flow of the stream, and hence the property of the prior appropriator. This raises the question whether the bed of the tributary gulch and the Squillchuck itself can be used as a ditch to convey the surplus Stemilt waters from Wheeler Hill to the Wheeler lands below the Miller head gate. The law of appropriation is the creature of necessity. It is a growth peculiar to conditions unknown to the common law. It has followed custom, rather than fixed conditions, and it was held in the earlier case of Hoffman v. Stone, 7 Cal. 46, that the immense cost and waste involved in conveying water to its place of use justified the owner in taking advantage of the natural beds and channels of streams when it could be done without injury to the rights of others. In that case the court said: "It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or canyon." This rule was extended in the case of Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, wherein Mr. Justice Field, who has so ably and clearly differentiated the law of appropriation from the rules of the common law, said: "It does not necessarily follow

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that the water introduced by the defendants became subject to the use of the plaintiffs because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture,—both are entitled to take their given quantity." This doctrine is affirmed in the following cases: Parks Canal & Min. Co. v. Hoyt, 57 Cal. 44; Creighton v. Kaweah Canal & Irrig. Co. 67 Cal. 221, 7 Pac. 658; Paige v. Rocky Ford Canal & Irrig. Co. 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Malad Valley Irrigating Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; Herriman Irrig. Co. v. Butterfield Min. & Mill. Co. 19 Utah, 453, 51 L.R.A. 930, 57 Pac. 537; Platte Valley Irrig. Co. v. Buckers' Irrig. Mill. & Improv. Co. 25 Colo. 77, 53 Pac. 334; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Kinney, Irrigation, § 246.

Appellants also rely upon § 4114, 1 Ballinger's Anno. Codes & Statutes (Pierce's Code, § 5829), which provides that the person upon whose lands the seepage or spring water first rises shall have a prior right to such waters if capable of being used upon his lands. A review of the authorities will show that a clear distinction is drawn between springs rising or seeping upon lands and from which there is no outlet, and springs which form the fountain heads of living water courses. The court below has found (otherwise its decree could not be sustained) that there was a living flow from these springs. They thus became a part of the Squillchuck waters, and therefore subject to appropriation. This court has said that if the statute were given any other effect it would be held unconstitutional. Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155.

Nor do we think that any right can be predicated by the Wheelers and their grantees to use water on the valley lands by reliance upon the statute of limitations or rights acquired by prescription. Rights in water come from adverse use, rather than a permissive use, and, so long as there was an excess of water flowing past the Miller head gate, no right could accrue to the users of that surplus. It must not be inferred from what has been said that the rights of appellants are not without some qualifications, as will be seen from a perusal of the authorities cited. Having decided that appellants did not intend to, and did not in fact, abandon the Stemilt water impounded on or flowing off of their lands on Wheeler Hill, but that it was allowed to flow with intent to recapture it at a point below, it follows that its identity must be preserved. Identity in this particular is made possible by measurement. They can take no more out than they put in, making due allowance for natural waste and loss by evaporation. Burnett v. Whitesides, 15 Cal. 35; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108.

Another limitation, as will be noted in the authorities, is that in reclaiming their own they cannot cut off nor dry up any of the original sources and springs tributary to the Squillchuck, the waters of which have been appropriated by respondents, and the perennial flow of which they are entitled to. The testimony shows that there was a perennial flow of water from the springs on Wheeler Hill. The evidence as to the amount of this flow is so conflicting that we cannot definitely fix it.

Having decided that there was some flow, that this was increased by the energy and expenditure of appellants, and that the increase was not abandoned, the case will be remanded to the lower court to find the amount of the original flow from the springs on Wheeler Hill, the amount this flow has been increased by artificial means, and the amount of depreciation from natural waste and evaporation of the added flow in passing from Wheeler Hill to the Miller head gate; and that it then decree that the amount so found be allowed to pass the head gate for use on the lands of Wheeler and his grantees in the valley below. To accomplish this end the trial court may take such additional testimony as may be necessary.

Rudkin, Ch. J., and **Fullerton**, **Gose**, and **Morris**, JJ., concur.

CALIFORNIA SUPREME COURT.

ADDISON GOODING, Respt.,
v.
CHUTES COMPANY, Appt.

(— Cal. —, 102 Pac. 819.)

Master — vicious animal — notice.

1. The keepers of a camel in a place of amusement, who know that it is of vicious disposition, are bound to protect from injury fellow servants who are ignorant of that fact, and whose duties require them to be about the animal, by warning them

Case Note. — Liability of master to servant for personal injury by wild animal or animal kept for exhibition purposes.

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of the opinion that the defendant company did not acquire a right to any of the water flowing from said tunnels, except such as was developed by percolation, and that the plaintiff retains the right to all the water flowing in the natural channel of Butterfield creek, diminished only to the extent of the increase of the quantity of water which naturally flowed in the channel of Butterfield creek before said tunnels were run and said springs were dried up." While the waters of Stemilt creek, when discharged upon the Wheeler and Morse lands, and after their use for irrigation, did not become percolating waters in the full sense,—for, as we understand the term, it rests upon the theory of unknown source,—the rights to it while still upon the lands of the owners can be sustained by the same reasoning which, under the common law, gave a landowner a right to impound for his own use the water percolating through his own soil. To take it was ever held to be *damnum absque injuria* to another, for it was a component part of the soil. This proposition is too well established to require the citation of authority.

Ownership implies responsibility. If our reasoning requires further support, the fact that the appellants, Wheeler and Morse, because of the artificial augmentation of the natural flow of the Squillchuck, would be held liable for all damage done to the lower appropriators from flooding their lands, injuring the banks of the stream, or washing out their improvements, needs only to be mentioned to meet approval. Respondents' rights must be measured by the condition of the stream at the time of Miller's appropriation in 1874. If his appropriation was subsequent to the development of the Stemilt water, an entirely different question would be presented. If the natural flow of the Squillchuck increases, it is gain; if diminished from natural causes, it is his loss. He has no interest in an increased flow arising from an independent source, unless abandoned by its owner. Upon the principle that the law of appropriation as applied to the arid regions will not tolerate a waste of water, it has been held that water that is allowed to run to waste after use on the land of the appropriator is abandoned, and that lower appropriators are entitled to the surplus. Farnham, Waters, 694; Power v. Switzer, 21 Mont. 523, 55 Pac. 32; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811. But abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon, and an actual relinquishment, must concur, for courts will not lightly decree an abandonment of a property so valuable, as that of water in an irrigated region. Farnham, Waters, 691. In the instant case, when the marshes developed upon the lands of Wheeler and Morse, but at the place where the waters therein could not be used by the respective owners on their own lands, there is evidence showing that Wheeler agreed that Byrd might drain the surplus on his land in consideration of the use of the surplus flowing from the Byrd land, through the natural water ways, including the Squillchuck, upon his land down in the valley and below respondents' head gate. This contract was in itself a circumstance tending to show that it was not the intention of the parties who had developed a supply of water and carried it over from the Stemilt to abandon its use; but the fact that the water was actually so used for a beneficial purpose for a period of eleven years, and made the subject of conveyance, seems to us conclusive upon this feature of the case. The fact that the surplus is allowed to run into a natural water way to which rights of appropriation have attached is a circumstance to be considered, but does not shift the burden of proving an abandonment from respondents. Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047.

Respondents invoke the general rule that waters draining into and augmenting the natural flow of the stream and its tributaries become a part of the natural flow of the stream, and hence the property of the prior appropriator. This raises the question whether the bed of the tributary gulch and the Squillchuck itself can be used as a ditch to convey the surplus Stemilt waters from Wheeler Hill to the Wheeler lands below the Miller head gate. The law of appropriation is the creature of necessity. It is a growth peculiar to conditions unknown to the common law. It has followed custom, rather than fixed conditions, and it was held in the earlier case of Hoffman v. Stone, 7 Cal. 46, that the immense cost and waste involved in conveying water to its place of use justified the owner in taking advantage of the natural beds and channels of streams when it could be done without injury to the rights of others. In that case the court said: "It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or canyon." This rule was extended in the case of Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, wherein Mr. Justice Field, who has so ably and clearly differentiated the law of appropriation from the rules of the common law, said: "It does not necessarily follow

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that the water introduced by the defendants became subject to the use of the plaintiffs because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture,—both are entitled to take their given quantity." This doctrine is affirmed in the following cases: Parks Canal & Min. Co. v. Hoyt, 57 Cal. 44; Creighton v. Kaweah Canal & Irrig. Co. 67 Cal. 221, 7 Pac. 658; Paige v. Rocky Ford Canal & Irrig. Co. 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Malad Valley Irrigating Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; Herriman Irrig. Co. v. Butterfield Min. & Mill. Co. 19 Utah, 453, 51 L.R.A. 930, 57 Pac. 537; Platte Valley Irrig. Co. v. Buckers' Irrig. Mill. & Improv. Co. 25 Colo. 77, 53 Pac. 334; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Kinney, Irrigation, § 246.

Appellants also rely upon § 4114, 1 Ballinger's Anno. Codes & Statutes (Pierce's Code, § 5829), which provides that the person upon whose lands the seepage or spring water first rises shall have a prior right to such waters if capable of being used upon his lands. A review of the authorities will show that a clear distinction is drawn between springs rising or seeping upon lands and from which there is no outlet, and springs which form the fountain heads of living water courses. The court below has found (otherwise its decree could not be sustained) that there was a living flow from these springs. They thus became a part of the Squillchuck waters, and therefore subject to appropriation. This court has said that if the statute were given any other effect it would be held unconstitutional. Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155.

Nor do we think that any right can be predicated by the Wheelers and their grantees to use water on the valley lands by reliance upon the statute of limitations or rights acquired by prescription. Rights in water come from adverse use, rather than a permissive use, and, so long as there was an excess of water flowing past the Miller head gate, no right could accrue to the users of that surplus. It must not be inferred from what has been said that the rights of appellants are not without some qualifications, as will be seen from a perusal of the authorities cited. Having decided that appellants did not intend to, and did not in fact, abandon the Stemilt water impounded on or flowing off of their lands on Wheeler Hill, but that it was allowed to flow with intent to recapture it at a point below, it follows that its identity must be preserved. Identity in this particular is made possible by measurement. They can take no more out than they put in, making due allowance for natural waste and loss by evaporation. Burnett v. Whitesides, 15 Cal. 35; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108.

Another limitation, as will be noted in the authorities, is that in reclaiming their own they cannot cut off nor dry up any of the original sources and springs tributary to the Squillchuck, the waters of which have been appropriated by respondents, and the perennial flow of which they are entitled to. The testimony shows that there was a perennial flow of water from the springs on Wheeler Hill. The evidence as to the amount of this flow is so conflicting that we cannot definitely fix it.

Having decided that there was some flow, that this was increased by the energy and expenditure of appellants, and that the increase was not abandoned, the case will be remanded to the lower court to find the amount of the original flow from the springs on Wheeler Hill, the amount this flow has been increased by artificial means, and the amount of depreciation from natural waste and evaporation of the added flow in passing from Wheeler Hill to the Miller head gate; and that it then decree that the amount so found be allowed to pass the head gate for use on the lands of Wheeler and his grantees in the valley below. To accomplish this end the trial court may take such additional testimony as may be necessary.

Rudkin, Ch. J., and **Fullerton**, **Gose**, and **Morris**, JJ., concur.

CALIFORNIA SUPREME COURT.

ADDISON GOODING, Respt.,
v.
CHUTES COMPANY, Appt.

(— Cal. —, 102 Pac. 819.)

Master — vicious animal — notice.

1. The keepers of a camel in a place of amusement, who know that it is of vicious disposition, are bound to protect from injury fellow servants who are ignorant of that fact, and whose duties require them to be about the animal, by warning them

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Case Note. — Liability of master to servant for personal injury by wild animal or animal kept for exhibition purposes.

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of the danger, and in the performance of this duty they act as the master's representatives, so that their knowledge is imputed to the master.

Same — care of vicious animal.

2. The owner of a camel which is used for purposes of exhibition, and which is known to be vicious, is bound to keep it in such manner as will absolutely prevent the occurrence of injury, through its vicious acts, to servants whose duties require them to be about it.

(June 14, 1909.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in plaintiff's favor and from an order denying a new trial in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. **Naphtaly F. Freidenrich** and **M. L. Schmidt** for appellant.

Messrs. **Carl Westerfeld** and **R. D. Duke**, for respondent:

The knowledge of the keeper was knowledge of the defendant.

Clowdis v. Fresno Flume & Irrig. Co. 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695; Cooley, Torts, 406; Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041; Donnelly v. San Francisco Bridge Co. 117 Cal. 417, 49 Pac. 559; Brown v. Green, 1 Penn. (Del.) 535, 42 Atl. 991; McGarry v. New York & H. R. Co. 45 N. Y. S. R. 564, 18 N. Y. Supp. 195, affirmed in 137 N. Y. 627, 33 N. E. 745; Niland v. Geer, 46 App. Div. 194, 61 N. Y. Supp. 696; Corliss v. Smith, 53 Vt. 532; Keenan v. Gutta Percha & Rubber Mfg. Co. 46 Hun, 544; Harris v. Fisher, 115 N. C. 318, 44 Am. St. Rep. 452, 20 S. E. 461; George H. Hammond Co. v. Johnson, 38 Neb. 244, 56 N. W. 967; Baldwin v. Casella, L. R. 7 Exch. 325; Stiles v. Cardiff Steam Nav. Co. 33 L. J. Q. B. N. S. 310; Applebee v. Percy, L. R. 9 C. P. 647; Gladman v. Johnson, 36 L. J. C. P. N. S. 153; Soronen v. Von Pustau, 112 App. Div. 437, 98 N. Y. Supp. 431; 1 Thomp. Neg. § 878; 2 Am. & Eng. Enc. Law, 2d ed. p. 371; 2 Cooley, Torts, 3d ed. p. 406; 2 Shearm. & Redf. Neg. 5th ed. § 630; Elledge v. National City & O. R. Co. 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720.

It was the defendant's duty to inform the plaintiff that the camel was vicious.

1 Thomp. Neg. § 852; 4 Thomp. Neg. § 4041; 1 Labatt, Mast. & S. § 206; International & G. N. R. Co. v. Smith (Tex. Civ. App.) 30 S. W. 501; McGarry v. New York & H. R. Co. supra; Leigh v. Omaha Street R. Co. 36 Neb. 131, 54 N. W. 134; Knickerbocker Ice Co. v. Finn, 25 C. C. A. 579, 51 U. S. App. 256, 80 Fed. 483; Bowman v. Texas Brewing Co. 17 Tex. Civ. App. 446, 43 S. W. 808.

Even if the trait was one which manifested itself only at a certain time of the year, it was the duty of the defendant to notify the plaintiff of that trait.

2 Cooley, Torts, 3d ed. § 406; Meredith v. Reed, 26 Ind. 334; McIlvaine v. Lantz, 100 Pa. 586, 45 Am. Rep. 400; Hammond v. Melton, 42 Ill. App. 186.

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wild animal or animal kept for exhibition purpose, since the question of a servant's assumption of risk or contributory negligence in using unsafe horse or mule is discussed in a case note to Milby & D. Coal & Min. Co. v. Balla, 18 L.R.A.(N.S.) 695, and the duty of the master to warn the servant against vicious horse is discussed in a case note to Cooper v. Cashman, 3 L.R.A.(N.S.) 209, the majority of cases of injury to servant by animals being such as are set out in those notes.

The only case found coming within the scope of the note as thus limited is Bormann v. Milwaukee, 93 Wis. 522, 33 L.R.A. 652, 67 N. W. 924, where it was held that an employee who voluntarily engages to work inside of the inclosure where animals *ferœ naturœ*, such as elk and deer, are kept, assumes the risk of injury. The court in this case said: "As indicated, in the case at bar the defendant kept and maintained the animals in an inclosure, and it appears that the plaintiff was employed by the defendant to work inside of such inclosure, presumably in taking care of the park or the animals in the park. The plaintiff, therefore, as well as the defendant and its officers and agents, must conclusively be presumed to know the habits and propensities of such animals. With such knowledge or presumed knowledge, he voluntarily entered upon the service. There is nothing to indicate that he did not know as much about the habits and propensities of the animals as the officers and agents of the defendant, nor that he was induced to enter such service by any misrepresentation or statement on the part of the defendant. The rule is familiar that a servant assumes the ordinary risks incident to the business in which he engages. This is not the case of domestic animals, presumably harmless, but which the owner knows to be vicious, and the injured person does not; and hence the rule invoked, that a plaintiff, in pleading, is not required to negative his own contributory negligence, is not applicable."

The general question of liability for injury done by animals *ferœ naturœ* is discussed in the notes to Hays v. Miller, 11 L.R.A.(N.S.) 748, and Molloy v. Starin, 16 L.R.A.(N.S.) 445.

As to liability for injury by animal known to be dangerous, in the absence of negligence in restraining the same, see case note to Harris v. Carstens Packing Co. 6 L.R.A.(N.S.) 1164.

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After knowledge of the animals mischievous propensities, the defendant was bound to keep it secure, and see that nobody was hurt on account of its viciousness.

Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269.

Shaw, J., delivered the opinion of the court:

This is an action for damages caused by the bite of a camel. The defendant was keeping animals for exhibition at a place called "The Chutes." The place in which the animals were on exhibition was commonly called the "zoo." Among these animals was a camel. Plaintiff was employed by the defendant to look after, care for, and attend to the animals in the zoo, including the camel. Upon entering the camel's stall to clean it, the camel seized the plaintiff's leg with his teeth, lifted him from the ground and swung him about in the air, biting his leg so severely that the bones were crushed, rendering amputation necessary. For this injury the plaintiff brings this suit. The jury returned a verdict in his favor, and judgment was entered thereon. The defendant appeals from the judgment and from an order denying its motion for a new trial. The errors assigned are that the evidence is insufficient to justify the verdict, and that the court erred in giving certain instructions and in certain rulings upon the admission of evidence.

The answer admits that the plaintiff was employed by the defendant to look after, care for, and attend to the camel; that the plaintiff was injured; and that, at and prior to the time of the injury, the plaintiff did not know of the vicious disposition of the camel, and had not been informed thereof by the defendant. There is evidence to the effect that the camel was of a vicious disposition, addicted to biting persons attending upon it, and that the defendant's superintendent knew of that disposition at the time he hired the plaintiff. There is, therefore, no foundation for the claim that the evidence does not sustain the verdict.

The "Chutes" had several departments, each presenting different performances or means for the amusement and entertainment of the public, all within one general inclosure. The zoo constituted one of these departments. The place was under the general charge of a general manager named Levy. The zoo was under the special supervision of a superintendent named Lawrence. Several men were employed about the zoo whose duty it was to sweep out the place daily, clean the cages and stalls every morning, and throughout the day when necessary, feed and otherwise care for the animals, watch the animals and visitors, and take care that the animals were not teased by the visitors and that the visitors were not injured by the animals. These men were divided into two shifts for two different parts of the work, one of which included the care of the camel and its stall and the other did not, and they were changed from one shift to the other every week. The plaintiff was one of the men employed in this work. He was not assigned to the shift which included the care of the camel, until the day he was injured, one week after he began the service. The contract of employment was made with Lawrence, the superintendent of the zoo. It does not appear from the evidence who directed him to go upon the shift to take care of the camel. He had at that time acquired by his own observation knowledge of the fact that, when upon the new shift, it was his duty to clean the camel's stall, and he entered the stall for that purpose without being specially directed to do so, and was immediately bitten, as alleged. The evidence shows, without conflict, that two of these fellow employees of the plaintiff knew of the vicious disposition of the camel at the time plaintiff was hired. As to the knowledge thereof by Lawrence, the superintendent who hired him, the evidence was conflicting.

The court gave the following instruction: "(2) If you believe from the evidence that the care of the animals in defendant's zoo was intrusted to employees of the defendant, and that said employees were notified and knew that the camel in question had vicious propensities, the defendant had notice and knowledge of such vicious propensities of said camel."

In view of the facts above stated, the jury would naturally understand this instruction to refer to the subordinate employees aforesaid, engaged about the zoo in the actual work above described. With respect to knowledge imputed to the owner of a domesticated animal of the fact that such animal is of vicious habits or disposition, the law is that, if knowledge of such fact is brought home to an agent or servant employed about the animal, and whose duty, as such agent or servant, requires him, if he knows of the vicious character of the animal, to act in respect thereof toward third persons, or toward the animal for the protection of third persons, in any matter involving a breach of such duty, such knowledge of the servant is imputed to the master, although not imparted to him. Clowdis v. Fresno Flume & Irrig. Co. 118 Cal. 315, 62 Am St. Rep. 238, 50 Pac. 373; McGarry v. New York & H. R. Co. 45 N. Y. S. R. 564, 18 N. Y. Supp. 196, affirmed in Court of Appeals, 137 N. Y. 627, 33 N. E. 745; Brice v. Bauer,

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108 N. Y. 430, 2 Am. St. Rep. 454, 15 N. E. 695; Brown v. Green, 1 Penn. (Del.) 535, 42 Atl. 991; Niland v. Geer, 46 App. Div. 194, 61 N. Y. Supp. 696; Keenan v. Gutta Percha & Rubber Mfg. Co. 46 Hun, 546; Corliss v. Smith, 53 Vt. 532; Harris v. Fisher, 115 N. C. 318, 44 Am. St. Rep. 452, 20 S. E. 461; George H. Hammond Co. v. Johnson, 38 Neb. 248, 56 N. W. 967; Applebee v. Percy, L. R. 9 C. P. 647; Lynch v. Kineth, 36 Wash. 371, 104 Am. St. Rep. 958, 78 Pac. 923.

It was a part of the duty of these employees, while occupied about the zoo, to know whether or not the animals, or any of them, were dangerous to persons about them, and to take care that no person within the inclosure should be injured by such animals. For that purpose, they each represented the Chutes Company, and were discharging that part of the duty of the Chutes Company toward persons allowed to enter the zoo. For a failure to discharge that duty by such employees, the principal would, of course, be responsible; and if one of these employees, knowing the vicious propensity of the camel, carelessly suffered a person to go near enough to the camel to be bitten by it, and such person was so bitten, the defendant would be liable for the damages thereby caused.

The defendant's claim that the above instruction is erroneous is sustainable only on the theory that the men engaged in the zoo in the actual work of caring for the animals were not charged with the duty of protecting any person against the attacks of animals known to them to be vicious, except visitors coming there for entertainment, or other strangers, and that, consequently, their knowledge of such vicious character will not be imputed to the defendant in any matter involving danger to persons connected with the establishment. The rule cannot be thus limited. It is the duty of one who owns or keeps domestic animals known to be vicious to guard them "in such a manner as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animals as they are naturally inclined to commit." 2 Cyc. Law & Proc. p. 368. This language is used in the authority cited with respect to the duty of an owner of wild animals, which are presumed to be ferocious. The rule is the same, however, with regard to domesticated animals when they are in fact vicious, and their real nature is known to the owner or keeper thereof. Laverone v. Mangianti, 41 Cal. 139, 10 Am. Rep. 269; 2 Cyc. Law & Proc. p. 369, 2 Am. & Eng. Enc. Law, p. 352. The duty of protection against such animals is owing to the public generally, to strangers as well as to those dealing with or standing in some relation to the owner, those only being excluded from its operation who are themselves in fault. Earhart v. Youngblood, 27 Pa. 331; Marble v. Ross, 124 Mass. 44; Laverone v. Mangianti, supra; Muller v. McKesson, 73 N. Y. 199, 29 Am. Rep. 123; May v. Burdett, 9 Q. B. 101. Upon the discovery of the vicious character of the camel, these men, as its keepers, were required to keep it in such a manner as to prevent it from injuring any and all persons lawfully within the inclosure, and to warn them of the danger, regardless of the purposes of their coming. This obligation rested on them as representatives of the defendant, and in performing it they were performing a duty which the defendant owed. In all such cases, the knowledge of the servant is imputed to the master. The obligation was due from them, on behalf of the defendant, to the plaintiff, when he entered the zoo as an employee as much as to any other person allowed to enter. The fact that he then became a fellow servant is immaterial. The duty to warn the plaintiff was not at that time owing to him as a fellow servant; it was owing to him in common with all other persons in the same situation. In discharging that duty these employees would have represented their principal, the defendant, and would not have been acting as fellow servant of the plaintiff. It is correct, therefore, in contemplation of law, upon the admitted facts of this case, to say, as this instruction says, that if these employees knew that the camel had vicious propensities, then the defendant also had notice thereof.

Some rulings upon the admission of evidence are assigned as error, but they are of so insignificant a character that we do not think it necessary to discuss them. We find no substantial error in the record.

The judgment and order are affirmed.

We concur: **Sloss, J.; Angellotti, J.**

Petition for rehearing denied July 14, 1909.

OKLAHOMA SUPREME COURT.

ARDMORE NATIONAL BANK, Impleaded, etc., Plff. in Err.,
v.
BRIGGS MACHINERY & SUPPLY COMPANY et al.

(20 Okla. 427, 94 Pac. 533.)

Insolvent corporation — receiver — title acquired.

1. The receiver of an insolvent, nongoing corporation takes the property of the com-

Headnotes by KANE, J.

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pany for the creditors, subject to such equities, liens, or encumbrances, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment.

Same — time of vesting — priority of rights.

2. The receiver's title and right to possession of the property of an insolvent, nongoing corporation vests from the date of the original order for the appointment, although the proceedings may not be perfected until a later date. The receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval.

Same — liens — priority — remedies.

3. Where a vendor, after the appointment of a receiver to take charge of the property and affairs of an insolvent, nongoing corporation, files its plea of intervention, setting up all the facts in relation to certain reservation-of-title notes taken by the vendor for sales of machinery to the insolvent corporation, and further alleges that the reservation notes are liens on the property, and prays for their foreclosure, and also prays for general relief, this is not such an election as will preclude the intervener from afterwards amending its plea of intervention, and asserting title and right to possession of the property described in the reservation notes, as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attaches to the property at all, came into existence after the property fell into the hands of the receiver, notwithstanding the reservation notes were not filed as chattel mortgages.

Acknowledgment — interested notary — validity.

4. The acknowledgment of a deed of trust, executed by a corporation grantor to secure payment of certain promissory notes

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Case Note. — Acknowledgment of corporate instrument before one who is a stockholder or officer of corporation.

Upon the general question of right of interested person to take acknowledgment, see note to Havemeyer v. Dahn, 33 L.R.A. 332.

Stockholders of corporations.

It is settled by a long line of decisions, with but few exceptions, that an acknowledgment to an instrument, taken by an officer who has a direct beneficial interest in the instrument, is void; and a stockholder of a corporation is generally held, in accordance with this rule, to be disqualified to take an acknowledgment of an instrument to which the corporation is a party.

So, a mortgage running to a corporation, acknowledged before a stockholder of the corporation, is void, and will not be enforced. Ogden Bldg. & L. Asso. v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; Wilson v. Griess, 64 Neb. 792, 90 N. W. 866; Chadron Loan & Bldg. Asso. v. O'Linn, 1 Neb. (Unof.) 1, 95 N. W. 368; First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

An alleged mechanics' lien cannot be enforced where a necessary acknowledgment to the building and loan contract was taken by a stockholder in the building association. Miles v. Kelley, 16 Tex. Civ. App. 147, 40 S. W. 599; Bexar Bldg. & L. Asso. v. Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; Workman's Mut. Aid Asso. v. Monroe (Tex. Civ. App.) 53 S. W. 1029.

So, a mortgage to a loan association, acknowledged before a stockholder and profit sharer of the association, was held void in Hayes v. Southern Home Bldg. & L. Asso. 124 Ala. 663, 82 Am. St. Rep. 216, 26 So. 527, in an equitable action brought by the mortgagee.

So, in Winsted Sav. Bank & Bldg. Asso. v. Spencer, 26 Conn. 195, it was held that a deed to a private moneyed corporation, the signature of the grantor in which was attested by a stockholder thereof, could not be the basis on an action in ejectment against the grantor. In this case the acknowledgment was also made before the same stockholder, but the court said that they would base the decision solely upon the invalidity of the attestation, as the question of the invalidity of the acknowledgment might, perhaps, be attended with some difficulty.

A conditional contract of sale to a corporation, attested by a stockholder thereof, is not admissible in an action in trover brought by the corporation to recover the property embraced within the terms of the contract of sale. Betts-Evans Trading Co. v. Bass, 2 Ga. App. 718, 59 S. E. 8.

A protest of a note, made by a stockholder of the bank holding the note, was held inadmissible in evidence in an action on the note, in Monongahela Bank v. Porter, 2 Watts, 141.

The following cases recognize the general rule that stockholders of corporations are not qualified to take acknowledgments to corporate instruments, but present somewhat unusual features:

An acknowledgment of a mortgage, void because taken before a stockholder of the mortgagee, will operate as an attestation of the signature of the grantor, and a bill to redeem the premises, based upon the theory that the stockholder was disqualified as a witness, will be dismissed for want of equity. Maddox v. Wood, 151 Ala. 157, 43 So. 968.

Notwithstanding the fact that an acknowledgment to a mortgage is void as being taken by a stockholder in the association to which the mortgage runs, such invalidity cannot be set up as a defense to an action in ejectment, brought by one claiming title under the mortgage. The mortgage must be directly attacked by an action

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is a ministerial act. Where such an instrument is acknowledged before a notary public who was at the time a director and treasurer of the grantor corporation, and also indebted for unpaid subscriptions to its stock, which facts were known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, encumbrancers, or lienors.

(March 10, 1908.)

ERROR to the United States Court for the Southern District of the Indian Territory to review a judgment dismissing a claim of the intervening Ardmore National Bank, filed for precedence in a suit to wind up the affairs of the insolvent Tishomingo, Oil & Cotton Company. Affirmed.

The facts are stated in the opinion.

Messrs. **Ledbetter & Bledsoe** for plaintiff in error.

Messrs. **Stuart & Bell** for defendants in error.

Kane, J., delivered the opinion of the court:

The appellees Briggs Machinery & Supply Company, Collins & Dulaney, and Stilwell-Bierce & Smith-Vaile Company, who hereafter will be called the complainants, commenced the proceedings out of which this suit grows by filing their bill in equity, alleging that the Tishomingo Oil & Cotton Company, which will hereafter be called

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or proceeding brought expressly for that purpose. Monroe v. Arthur, 126 Ala. 362, 85 Am. St. Rep. 36, 28 So. 476.

So, after a mortgage, the acknowledgment of which was taken by a stockholder of the mortgagee, had been foreclosed and the land sold, it was held in National Bldg. & L. Asso. v. Cunningham, 130 Ala. 539, 30 So. 336, that the mortgagor could not maintain an action in ejectment against the purchaser, on the theory that the mortgage was void because of the defective acknowledgment.

But a bill to compel the determination of claims to real estate and to quiet title, which alleges that the mortgage which is the basis of the defendant's claim is void in that the acknowledgment was taken by a stockholder of the mortgagee, is a direct attack, and no decree for the enforcement of the mortgage will be rendered on a cross bill. Jenkins v. Jonas Schwab Co. 138 Ala. 664, 35 So. 649.

A deed invalid because the acknowledgment was taken before a stockholder of the mortgagee may be legalized by subsequent legislation, but not so as to cut off the intervening vested rights of third persons.

Steger v. Traveling Men's Bldg. & L. Asso. 208 Ill. 236, 100 Am. St. Rep. 225, 70 N. E. 236; Fugman v. Jiri Washington Bldg. & L. Asso. 209 Ill. 176, 70 N. E. 644; Maxwell v. Lincoln & F. W. Bldg. & L. Asso. 216 Ill. 85, 74 N. E. 804; Garlick v. Mutual Loan & Bldg. Asso. 236 Ill. 232, 86 N. E. 236.

In Greve v. Echo Oil Co. 8 Cal. App. 275, 96 Pac. 904, it was held that the acknowledgment of the signatures of the stockholders of a corporation to a deed from the corporation was not void because taken by another stockholder, who also signed the deed. The court recognized the general rule, but held that while the rule was applicable where the corporation was the grantee, it was not applicable where it was the grantor. The court said: "We have been unable to find, after diligent search, involving the examination of many cases, a single case where it has been held that an acknowledgment by grantors, taken before a grantor, is void. No reason occurs to us why such an acknowledgment should be held void, and the reason assigned in the cases for holding an acknowledgment taken before a grantee void does not exist in such case. . . . In the case at bar, the consenting stockholder who took the acknowledgment of the other stockholders held but one ninth of the stock. The consent of the other eight stockholders was sufficient to validate the conveyance without his joining therein at all. He took no beneficial interest under the conveyance, and therefore his act does not transgress the rule laid down in the adjudicated cases."

A corporator in a purely eleemosynary institution, whose only beneficial interest therein is a small daily stipend for attending the meetings of the board, is competent to take the acknowledgment of a deed conveying title to the institution. Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. 899.

—contrary view.

In a few jurisdictions it is held that the action of an officer in taking an acknowledgment is a ministerial act, and consequently a stockholder of a corporation is not disqualified to take the acknowledgment of corporate instruments.

Thus, in Read v. Toledo Loan Co. 68 Ohio St. 280, 62 L.R.A. 790, 96 Am. St. Rep. 663, 67 N. E. 729, it was held that a mortgage duly executed and attested and acknowledged is not invalid and cannot be impeached, in the absence of fraud and undue advantage, merely because the witnesses who attest the signature of the mortgagor, and the notary public taking his acknowledgment, are stockholders of, but not otherwise interested in, the corporation named as grantee. In taking and certifying an acknowledgment, the act of the notary public or other officer taking and certifying the same is a ministerial, and not a judicial, act. And to the same general effect was the decision in Horton v. Columbian Bldg. & L. Soc. 8 Ohio Dec. Reprint, 169.

So, in Kennedy v. Security Bldg. & Sav. Asso. (Tenn. Ch. App.) 57 S. W. 388, the court said: "We have several times held

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the oil company, was indebted to them severally as follows: To the Briggs Machinery & Supply Company, $7,864.64; to Collins & Dulaney, the sum of $4,580.88; to the Stilwell-Bierce & Smith-Vaile Company, in the sum of $5,546.65. All of these sums were evidenced by promissory notes. Contemporaneously with the dates of said notes, and for the purpose of securing their payment, the oil company made, executed, and delivered its certain deed of trust to J. C. Weaver, as trustee, whereby it conveyed to said trustee all the physical properties of said oil company situated at Tishomingo, Indian Territory, the same being particularly described in the complaint and said deed of trust exhibited therewith. It was further alleged that the oil company had become insolvent and unable to secure funds to operate its business, and that it was a nongoing concern, and, further, that said manufacturing establishment consists of valuable and costly machinery, and the same was liable to waste, and that it was being greatly damaged for the want of care. The complaint concludes with the following prayer: "First, that the court do forthwith appoint a receiver to take charge of the property of said respondent, Tishomingo Oil & Cotton Company, and to care for the same, and to hold the same in his custody and possession pending further order of the court; and second, for foreclosure of their trust deed and lien against said property, and that said lien be set up and declared to be a first lien upon the property; and third,

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that a stockholder or officer of a corporation, who is a notary public, is not disqualified to take acknowledgments to conveyances to it or for its benefit. The writer is of the opinion that the practice is to be reprehended, but it does not render his official act as a public officer of the state illegal or invalid."

And the fact that an acknowledgment of a deed of trust to a corporation was taken by a stockholder and director who was a notary public does not make the instrument invalid, in the absence of any improper conduct, bad faith, or undue advantage arising out of his relation to the corporation. Cooper v. Hamilton Perpetual Bldg. & L. Asso. 97 Tenn. 285, 33 L.R.A. 338, 56 Am. St. Rep. 795, 37 S. W. 12.

So, in Home Bldg. & L. Asso. v. Evans (Tenn. Ch. App.) 53 S. W. 1104, it was held that the fact that an acknowledgment to a mortgage was taken by a director and officer of the mortgagee did not invalidate the mortgage. It does not appear expressly that the director was a shareholder, but the decision is referred to the doctrine of the Tennessee courts.

And in Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680, the court said: "The mere fact that the notary in this case was an officer and stockholder in the corporation to whom the mortgage was executed would not preclude his taking the acknowledgment of the mortgagor. The taking of an acknowledgment by a notary public is a ministerial act, and may be performed by anyone qualified to act as notary."

In Watts v. First Nat. Bank, 8 Okla. 645, 58 Pac. 782, the court said, *obiter:* "We do not think that the fact alone that a person was an officer of a bank or a corporation would necessarily make him an interested person, in the meaning of the law, so as to render an acknowledgment taken by him, where the bank or a corporation was a party, necessarily void."

Record of instrument so acknowledged, as notice.

In some cases the question has arisen whether an instrument purporting to give a lien to a corporation, which is acknowledged before or attested by a stockholder of the corporation, is, upon being recorded, constructive notice to subsequent lienors.

Thus, in Kothe v. Krag-Reynolds Co. 20 Ind. App. 293, 50 N. E. 594, it was held that a chattel mortgage acknowledged before a stockholder of the mortgagee is void, and is not, although recorded, notice to subsequent innocent lien holders.

And the record of a chattel mortgage to a corporation, which was void because it was acknowledged before one of the stockholders, is not constructive notice to subsequent judgment creditors of the mortgagor. Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011.

So, the record of a written instrument, whether the same purports to create a lien, or to convey or to reserve title, which is attested by a stockholder in a corporation in whose interest such writing is executed, is unauthorized and invalid, and effects no notice of the existence or contents of such instrument. Betts-Evans Trading Co. v. Bass, 2 Ga. App. 718, 59 S. E. 8.

But, in Ogden Bldg. & L. Asso. v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049, it was held that where the disqualifying interest of the notary public was not apparent on the face of the mortgage or the certificate of acknowledgment thereof, the registration and recording thereof were effectual to charge a subsequent mortgagee with constructive notice of the prior mortgage. It will be noticed that ARDMORE NAT. BANK v. BRIGGS MACHINERY & SUPPLY CO. followed this same rule.

So, in Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661, it was held that where the disqualification of the officer before whom the acknowledgment was made is not apparent upon the face of the deed or instrument or certificate of acknowledgment, the recording of the instrument in the proper office will operate as constructive notice thereof, notwithstanding the latent defect.

Where a note and mortgage were executed and delivered to a man who was presi-

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that the court will order the sale of said property and estate for the purpose of paying the debts and satisfying the lien of the complainants; fourth, that complainants may have final judgment and a decree of foreclosure and sale in such terms and at such times as shall best protect their rights and the rights of any of their creditors who may intervene herein; and fifth, that the court do fix a time within which any persons urging claims, debts, or liens against said respondent corporation shall file their interventions herein. Complainants further pray that due and sufficient process may be issued and served with right form of law upon the respondent, Tishomingo Oil & Cotton Company, commanding it to be and appear, etc., and all other and further relief, both general and special, to which it may be entitled, complainants pray." After the complaint was filed a great many of the creditors of the oil company, probably all of them, filed their pleas of intervention, setting up their respective claims, and praying for relief. The court below took jurisdiction of the entire matter, and rendered to each creditor the relief the court found he was entitled to, disposed of all the assets of the oil company, and practically wound up its affairs. On the same day the complaint was filed, Judge Townsend appointed Kirby Purdom, of Tishomingo, receiver of the oil company, who duly qualified as such receiver. On the 3d of November following, Judge Townsend removed Kirby Purdom as receiver, and on the same day appointed B. R. Brundage, who likewise qualified as required by law, and took charge of all the assets of the defendant company. On the 24th day of November, 1903, the Continental Gin Company filed its original plea of intervention, alleging that the Tishomingo Oil & Cotton Company was indebted to the intervener on certain promissory notes; that the notes were given for the purchase price of machinery purchased by the oil company from the gin company; and that it was recited in said notes that the title, possession, and ownership to said properties does not pass from the intervener until the notes and interest are paid.

There were further allegations to the effect that the oil company was indebted to it upon four promissory notes, all payable to its order at Birmingham, Alabama, or Dallas, Texas, and aggregating the sum of $4,500, exclusive of interest and attorneys' fees, said notes being described specifically as to date and maturity; that all the notes were past due, and only $50 had been paid

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dent of a bank, and were acknowledged by the parties executing the same before the cashier of the bank, who was a notary public, and there was nothing upon the face of the instrument which disclosed any interest therein by any third person, it was held in Kee v. Ewing, 17 Okla. 410, 87 Pac. 297, that the mortgage was entitled to record and such record operated as notice, although, as a matter of fact, the bank was interested in the mortgage.

Officers of corporation.

The fact that the person taking the acknowledgment of a corporate instrument is an officer of the corporation will not disqualify him and render the acknowledgment void, if he is not also a stockholder therein.

Bank of Woodland v. Oberhaus, 125 Cal. 320, 57 Pac. 1070 (bank cashier); Florida Sav. Bank v. Rivers, 36 Fla. 577, 18 So. 850 (vice president); Bardsley v. German-American Bank, 113 Iowa, 216, 84 N. W. 1041 (bank cashier); Banking House of A. Castetter v. Stewart, 70 Neb. 815, 98 N. W. 34 (cashier); Horbach v. Tyrrell, 48 Neb. 514, 37 L.R.A. 434, 67 N. W. 485 (secretary and treasurer).

So, in Sawyer v. Cox, 63 Ill. 130, it was held that a secretary of a corporation could take the acknowledgment of a deed from the corporation, although he also attested the signature of the vice president, who signed the deed in behalf of the corporation, where such attestation was not required by law in order to make the deed valid.

And in Ogden Bldg. & L. Asso. v. Mensch, supra, the court said, *obiter:* "It is well, as it seems to us, to here remark that an attorney or agent of a party who is beneficially interested in a deed or mortgage, or one who is a director or other officer, or an agent, but not a stockholder, in a corporation which is interested in the instrument to be acknowledged, is not disqualified to take and certify to an acknowledgment in an official capacity."

In a few cases falling within the scope of this note it has been held that the mere fact that a man is an officer of a corporation does not furnish the presumption that he is a stockholder in the corporation, so as to disqualify him from taking the acknowledgment of a corporate instrument.

Thus, in Florida Sav. Bank v. Rivers, 36 Fla. 578, 18 So. 850, it was held error to assume that because the person taking the acknowledgment of a mortgage running to a bank was vice president thereof, he must necessarily be a stockholder, and consequently disqualified to take such acknowledgment.

And in Horbach v. Tyrrell, supra, it was held that the fact that one is shown to be a secretary and treasurer of a corporation will not authorize the presumption that he is a stockholder of such corporation, and disqualified to take the acknowledgment of corporate instruments.

Cases involving the right of mere employees or agents of the corporation to take acknowledgments of corporate instruments have not been included.

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thereon; that two of the notes, dated January 1, 1902, were executed by the defendant for 6–106 Continental linter feeders and condensers, Inv. No. Br. 559, D. S. P., 239; and that it was recited in said notes that the title, possession, and ownership of the property should not pass from the intervener Continental Gin Company until the notes were paid in full, and that the two notes dated July 31, 1902, were executed for one 3–70 Saw Munger Sliding Idler Gin outfit complete, with engine, boiler, pump, feeder, and connections, and it was recited in said notes that the title, possession, and ownership should not pass from the intervener the Continental Gin Company until said notes were paid in full. Copies of the four notes were attached to the plea of intervention. It was also alleged that in all four of the notes it was provided that the intervener should have full power to declare the same due and take possession of the property at any time it deemed itself insecure, even before the maturity of the notes, and that the intervener deemed itself insecure, and had exercised the option given in the notes, which matured January 1, 1904, and it declared the same due and payable; that it had become necessary, for the collection of said notes and the preservation of the intervener's right in said property for suit to be brought; and that thereby the defendant became liable to the intervener in the sum of 10 per cent of the amount of the notes for attorneys' fees, and that the intervener had sued on the notes and employed counsel for that purpose. The prayer for relief read as follows: "Now this intervener asks that it be given judgment against respondents for the amount due on said notes executed by respondents, and that also an order be entered herein establishing an indebtedness against the property described in said two mortgages executed by said J. D. Ray, who is hereby prayed to be made a party hereto, for the amount still due, including principal, interest, and attorneys' fees, on the four notes thereby secured, and that this intervener's lien and claim upon the property described in said four notes executed by respondent, and said mortgage executed by said J. D. Ray, to be superior to the lien and claim of all other persons, firms, and corporations upon said property. And intervener further prays that it have final judgment and a decree of foreclosure and sale in such terms and at such times as shall best protect the rights of this intervener and all other creditors holding liens upon said property above described. And this intervener further prays for all other general and special relief to which it may be entitled in the premises in any way." There is no controversy in relation to the four notes executed to J. D. Ray or the mortgages given to secure their payment, above mentioned, so they need not be taken into account in this case.

The gin company also joined the complainants in a motion which was presented to Judge Townsend, wherein it was alleged that the "complainants in said original bill and intervener the Continental Gin Company, being the movants herein, are the only creditors holding liens upon the said physical effects, and that any deterioration in the value of said property and any expense incurred in keeping the same will occasion loss and charges that will diminish their security; that they hold valid first liens upon said physical properties, and that they have brought their appropriate bill to foreclose the same; and that said security is likely to be, and will most certainly be, deteriorated and diminished in value if the same is held in charge of the receiver until the end of the litigation. Movants further show the court that it is now a seasonable time to sell said physical property, and that they are advised and believe that the same can be sold to better advantage within the next thirty days than at a later date, and that such sale will prevent the diminution of their security by waste or expenses of keeping. Wherefore movants pray that the court grant an order directing the sale of the physical property of respondent (defendant) as set out in complainants' original bill, and appoint a commissioner to make said sale in accordance with the deed of trust of the complainants, and all the liens and mortgages of the intervener, set out *in extenso* in complainants' original bill, and that the court do fix an upset price for which the property may be sold, and designate the time and place of sale, and for such other and further orders as, in the discretion of the court, may be necessary or proper to fully protect the movants' rights and equities herein." On the 2d day of March, 1904, the gin company filed its second amended plea of intervention, stating the facts as to the reservation notes practically as in its former plea, but stating that without in any way waiving its rights under its reservation-of-title notes, it was willing to let the court foreclose them as chattel mortgages if it would inure to the benefit of all the creditors of the oil company. The prayer for relief in relation to the reservation notes was as follows: "Now this intervener asks that an order be entered herein establishing an indebtedness against the property described in said two mortgages executed by J. D. Ray, who is hereby prayed to be made a party hereto, for the full amount still due, including principal, interest, and attorneys' fees, on the four notes thereby secured, and,

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if the court should deem it best and equitable to treat the conditional sale evidenced by said four notes as a mortgage, to give this intervener judgment for the amount due on said four notes executed by respondent, including principal and interest, together with a foreclosure of the lien securing said four notes on the property therein described; and if the court should deem it best not to treat said conditional sale as a mortgage, that this intervener be given judgment establishing its ownership to said property described in said four notes, and ordering the receiver herein to deliver possession of the same to this intervener, and that this intervener's lien upon the property described in said mortgages executed by said J. D. Ray be adjudged superior to the lien and claims of all other persons, firms, and corporations upon said property described in said mortgages, and that no other person, firm, or corporation be allowed to acquire any right, title, interest, or claim in and to, or lien upon, said property described in said notes executed by respondents until this intervener's claims upon said property and rights to said property shall have been fully protected. And this intervener further prays that it have final judgment, and a decree of foreclosure and sale as to the property described in said mortgages executed by J. D. Ray, and a decree protecting this intervener's rights in and to said property described in said four notes executed by respondent, and that this court enter such orders as will best protect the rights of this intervener and of all other creditors holding claims to or liens upon said property above mentioned. This intervener prays for all other relief, both general and special, to which he may be entitled to in the premises in any way."

On the 19th day of February, 1904, the plaintiff in error, the Ardmore National Bank, filed its original plea of intervention, claiming a lien on the property in controversy under and by virtue of a judgment against the oil company, and execution issued thereon, and liens established by equitable proceedings in the nature of bills of discovery. On the 30th day of March it filed its amended plea of intervention. The judgment of the Ardmore National Bank against the oil company, on which it bases its right to a lien, was rendered on the 31st day of October, 1903, and execution was issued thereon on the 2d day of February, 1904, and returned unsatisfied.

There is no dispute between the parties to this suit in regard to the amounts due from the oil company to the various creditors. Nor is there any dispute as to the execution and delivery of the instruments under which the appellees claim liens, nor that they were prior in time to the judgment and proceedings under which the appellant claims a prior lien. The appellant contends: First: That the gin company, by its original plea of intervention, and by joining the complainants in their motion to sell the property, had waived its rights under the reservation-of-title notes; that the gin company treated the notes as chattel mortgages, and attempted to foreclose them as a lien upon the property by its original plea of intervention, and the title and ownership thereto became thereby devested out of the gin company and passed to the oil company; and that the gin company having treated the reservation notes as chattel mortgages in its original plea, it was estopped from reasserting title by amended plea, and the notes being unrecorded, they were not available as prior liens against the liens asserted by the appellant. Second. That the deed of trust attempted to be foreclosed by the complainants was illegal and void, because it was never legally acknowledged and recorded; that the notary who took the acknowledgment was disqualified and incompetent to take such acknowledgment, for the reason that he was beneficially and financially interested in said deed; that at the time he took the acknowledgment he was a stockholder and a director and treasurer of the oil company, the grantor, and owed a considerable sum of money on unpaid stock subscriptions. The foregoing were substantially the issues presented below, and the trial resulted in a judgment in favor of the complainants and the intervener of the gin company, and against the appellant, the Ardmore National Bank.

The general jurisdiction of equity over corporate bodies does not extend to the power of dissolving corporations or winding up their affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. But in most of the states of this country the general jurisdiction of courts of equity has been enlarged to the extent of authorizing the appointment of receivers in behalf of creditors and shareholders. These statutes greatly enlarge the powers of courts of equity over property and management of insolvent, nongoing corporations. Section 3488 of the Indian Territory Annotated Statutes of 1899, the statute in force in the Indian territory when this proceeding was commenced, provides as follows: "Whenever, in any case, a receiver shall be appointed for a corporation or the trustees thereof, or any copartnership or joint-stock company, and the order or decree of the court, judge, or chancellor shall be that the lands, tenements, goods, chattels, funds, assets, moneys, credits, choses in action, rights and interests of every kind, name, and

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nature, either in law or equity, or any part thereof, belonging to the same, shall be placed in the hands of such receiver, he shall from thenceforward, until the further order or decree of the court, judge, or chancellor, have full possession, custody, and control thereof, and shall be vested with the title, so far as it shall be necessary to collect debts, preserve the assets and property for the benefit of creditors and all persons interested, and may and shall bring and prosecute and defend all suits in his own name that may be necessary for that purpose." It has been held by the supreme court of Wisconsin, in Atchison v. Davidson, 2 Pinney (Wis.) 48, under a statute similar to the above, that receivers of corporations are appointed for the benefit of the creditors, with power and authority to collect and pay over to them the assets. The choses in action of the corporation are in the possession of the receiver for the creditors, and are, to all intents and purposes, the property of the creditors. The receiver of an insolvent corporation stands as the representative both of the creditors and the corporation and of its shareholders. He is not, therefore, the agent or representative of the corporation exclusively, but is regarded rather as a trustee for both creditors and shareholders. Gillet v. Moody, 3 N. Y. 479; Talmage v. Pell, 7 N. Y. 347; Libby v. Rosekrans, 55 Barb. 202; Alexander v. Relfe, 74 Mo. 495; Angell v. Silsbury, 19 How. Pr. 48. The receiver of an insolvent, nongoing corporation takes the property of the company for the creditors, subject to such equities, liens, or encumbrances, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment.

It is admitted by all the parties to this suit that, at the time the receiver was appointed, the oil company was an insolvent, nongoing corporation, and that the property described in the reservation notes was the property of the gin company. The appellant concedes this, but insists that, after the receiver was appointed, the gin company lost its place of vantage by treating its reservation notes as chattel mortgages, and not complying with the registration law governing such instruments. Under the laws of Arkansas an unrecorded chattel mortgage is good between the parties, and, if we are right on the proposition that the possession of the receiver is the possession of the creditors, it must follow that even treating these reservation notes as chattel mortgages after the property came into the hands of the receiver would avail the appellant nothing. "A chattel mortgage, though not filed for record, is a valid security between the parties; and when, by virtue of it, the mortgagee takes possession of the mortgaged property after condition broken, this is an appropriation of it to the debt secured, and his title is good against a creditor of the mortgagor who subsequently attaches the property in his possession." Applewhite v. Harrell Mill Co. 49 Ark. 279, 5 S. W. 292. The receiver's title and right to possession of the property of an insolvent, nongoing corporation vests from the date of the original order for the appointment, although the proceedings may not be perfected until a later date. The receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval. High, Receivers, § 136; Rutter v. Tallis, 5 Sandf. 610; Steele v. Sturges, 5 Abb. Pr. 442. We do not believe, however, that the acts of the gin company amounted to a waiver of any of its rights under its reservation notes. It was within the power of the court to grant the gin company the relief it did under its original plea of intervention. In both pleas it stated the facts in substantially the same language, showing to the court the exact circumstances surrounding the transaction. It is true that in the original plea the gin company asked to have its lien under its reservation notes foreclosed. But it also asked for such other and further orders, as in the discretion of the court, may be necessary and proper to protect its rights and equities, which, in effect, amounted to a prayer of general relief. In its amended plea it expressed a willingness to have the property covered by its notes sold and the notes treated as chattel mortgages, if the court found that it would be to the advantage of all the creditors to do so, and closes its plea with a prayer for general relief. Under a prayer for general relief, the court may grant any relief that the facts stated will warrant, although such relief be inconsistent with the special relief prayed for. Cook v. Bronaugh, 13 Ark. 187; Kelly v. McGuire, 15 Ark. 555; Shields v. Trammell, 19 Ark. 62; Chaffe v. Oliver, 39 Ark. 531. In Cook v. Bronaugh, supra, the supreme court of Arkansas says: "Where there is a prayer for specific relief, and also a general prayer for relief, if the state of case as presented by the bill should not be sustained in evidence, or the court should, upon principles of equity, refuse the specific relief, it may, notwithstanding, give to the complainant under his general prayer any relief warranted by the facts as set forth in this bill." From an examination of the record, it is quite obvious why the gin company and the other lien holders, including

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the appellant herein, were willing to have the property sold in bulk by the receiver. The following is taken from an agreed statement of facts signed by the attorneys for the complainants, the attorneys for the gin company, and the attorneys for the Ardmore National Bank (this part of the agreement has relation only to the property in dispute between the gin company and the appellant): "Ninth. It is agreed that the property described in said four notes executed by the defendant to the Continental Gin Company was used in the proper operation of an oil mill, and that it is usual and customary for an oil mill to own gins in connection with their business, and that the property of the defendant, taken as a whole, was worth more than would have been the aggregate value of the different portions of said property taken separately. Tenth. It is agreed that all the property described in the complainants' amended complaint and in said plea of intervention of the Continental Gin Company has been sold in this case under an order of the court, and that it was purchased by Sam Davidson, and that said property brought more at said sale than it would have brought had the property described in said two notes for $1,500 each been sold separately, and had the property described in said two $750 notes been sold separately, and had the other property described in complainants' bills been sold separately, and that it was for the benefit of said defendant that the property described in complainants' complaint and mortgage and in said second amended plea of intervention of Continental Gin Company was sold together and as a whole. . . . Fourteenth. It is agreed that, in the sale to Sam Davidson, above mentioned, the property described in said two notes executed by defendant to the Continental Gin Company for principal sum of $1,500 each brought $3,500, and the property described in said two notes for principal sum of $750 each brought $2,000, and that, in the event the Ardmore National Bank shall prevail in this suit, said sums may be taken as a basis in determining the priority of the liens and rights thereto." Under the circumstances disclosed by the agreed statement of facts, it was natural that all parties who hoped to establish liens against the property should insist on it all being sold together. It cannot be said that the gin company, by agreeing to this arrangement, which would have the effect of being to the advantage of the other creditors, would work a forfeiture of its own rights. Where a vendor, after the appointment of a receiver to take charge of the property and affairs of an insolvent, nongoing corporation, files its pleas of intervention, setting up all the facts in relation to certain reservation-of-title notes taken by the vendor for sales of machinery to the insolvent corporation, and further alleges that the reservation notes are liens on the property, and prays for their foreclosure, and also prays for general relief, this is not such an election as will preclude the intervener from afterwards amending its plea of intervention, and asserting title and right to possession of the property described in the reservation notes, as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attached to the property at all, came into existence after the property fell into the hands of the receiver, notwithstanding the reservation notes were not filed as chattel mortgages.

On the question of the illegality of the acknowledgment to the deed of trust, we are of the opinion that the acknowledgment of a deed of trust executed by a corporation grantor to secure payment of certain promissory notes is a ministerial act. Where such an instrument is acknowledged before a notary public who was at the time a director and treasurer of the grantor corporation, and also indebted for unpaid subscriptions to its stock, which facts were known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, encumbrancers, or lienors.

The correct rule is laid down in National Bank v. Conway, 1 Hughes, 37, Fed. Cas. No. 10,037 where it is held that, where the acknowledgment is regular and fair on its face, no hidden interest of the notary can be proved to impeach its validity. It is against the policy of recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effect should be to prevent rather than allow hidden defects in the evidence of public records.

The same question was involved in Morrow v. Cole, 58 N. J. Eq. 203, 42 Atl. 673. In this case (Morrow v. Cole) the chancellor, in his opinion, says: "It is held in a number of cases that, if it appear on the face of the deed that the officer is either a party thereto, or a *cestui que trust* named therein, the acknowledgment is void and the record not notice. Wilson v. Traer, 20 Iowa, 231; Bowden v. Parrish, 86 Va. 68, 19 Am. St. Rep. 873, 9 S. E. 616; Wasson v. Connor, 54 Miss. 351. Some *dicta* go further, and assert that the interest of the acknowledging officer, whether it appear upon the face of the deed or not, will render the acknowledgment a nullity. Groesbeck

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v. Seeley, 13 Mich. 345; Wills v. Woods, 28 Kan. 411. These *dicta* cannot be supported. Aside from the case of a married woman, as to which it is not necessary to express an opinion, it appears to me very plain that if the interest does not appear on the face of the deed the record is notice. The complainant's contention is that the officer who takes an acknowledgment performs a judicial act, and that, as no man can be a judge in his own case, such act, if done by one interested, is void. This contention is unsound. The act is no more judicial than ministerial. A judicial act ordinarily has reference to some controversy. There is nothing suggestive of controversy in an acknowledgment. It is said that the officer must be satisfied that the person who appears before him is the grantor, and that his determination that he is is a judicial act. But the duty of identifying people, of being satisfied that they are what they claim to be, is discharged by all sorts of administrative officers,—for example, by a treasurer who pays out money,—and not only by officials, but at times by every member of the community. It may as well be predicated of the act, then, that it is ministerial as that it is judicial. Nothing else that the officer does has even the semblance of judicial action. He makes known the contents of the paper; he hears the grantor say that he signs it as his voluntary act and deed; and then he makes a written certificate of the facts. If the act of the officer is not judicial, the doing of it is not adjudging one's own case. If the grantor takes his own acknowledgment, it is of no effect, because it is obviously contrary to the provisions of our statute on the subject. If the grantee takes the grantor's acknowledgment, it cannot be said, perhaps, that any express provision of the statute is violated, but the act nevertheless is void, not because we have here an instance of a judge deciding his own case, but because the same public policy which prevents an interested judge from acting will (with certain reservations) prevent an interested master or commissioner. The distinction is important in this respect. The decisions of judges should always be above suspicion. To insure this result, the judges themselves should be absolutely free from the bias of self-interest, and the rule of public policy should be rigidly enforced. To apply it as rigidly to the case of commissioners, whose public functions are so different, would work little benefit, and would lead to results antagonistic to the policy of the registry laws. It may be safely asserted that it would be much more injurious to public interests to hold that extraneous proof of an undisclosed or secret interest (almost always slight) would avoid acknowledgments, and thus render the record of conveyances unreliable, than it would be to hold the contrary. Says Chief Justice Waite, in National Bank v. Conway, supra: 'It is against the policy of the recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effort should be to prevent, rather than allow, hidden defects in the evidence of public records.' Accordingly, he held the acknowledgment under review in that case to be a ministerial act and the record notice. Such was also the decision in Lynch v. Livingston, 6 N. Y. 422, and Kimball v. Johnson, 14 Wis. 674. Both reason and authority concur in declaring, where the interest of the acknowledging officer does not appear on the face of the deed, that the acknowledgment is not void, and that the registry of the deed is notice. In Wells v. Wright, 12 N. J. L. 132, Marsh v. Mitchell, 26 N. J. Eq. 497, affirmed in 27 N. J. Eq. 631, and Homœpathic Mut. L. Ins. Co. v. Marshall, 32 N. J. Eq. 110, the question related to the effect to be given to the declarations contained in the acknowledgment of a married woman,—how far they were disputable. In the last of these cases, Chancellor Runyon, dissenting, in a measure, from the view expressed in the previous cases, was of opinion that the act of the officer in ascertaining whether the married woman executed the conveyance of her own free will, without threats and coercion, was a judicial act. Perhaps with more accuracy it might be designated quasi judicial. Hitz v. Jenks, 123 U. S. 302, 31 L. ed. 158, 8 Sup. Ct. Rep. 143. Whether judicial or not, it is manifest that these decisions do not touch the present case. They do not deal with the question of notice. I think the registry of the mortgage was notice, and that therefore it is a lien prior to the judgment."

Another case (Read v. Toledo Loan Co. 68 Ohio St. 280, 62 L.R.A. 790, 96 Am. St. Rep. 663, 67 N. E. 729) to the same effect is probably more in point. In the Ohio Case the mortgage was witnessed by two stockholders of the corporation grantee, and acknowledged before a notary public, also a stockholder of the grantee corporation. The supreme court of Ohio says: "In the case at bar it is admitted that Cary D. Lindsay, the assignor, at the time he acknowledged this mortgage, knew of the relation the notary, Grant Williams, sustained to the Toledo Loan Company, and knew that he was then the holder of two shares of stock in said company; and there is in this case no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or

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relationship, nor is there any claim but that the acknowledgment was freely and fairly made, in the honest belief that it was in all respects authorized and sufficient. To hold, then, under such circumstances, that the mortgage here in controversy was invalid, unless impelled thereto by statutory requirement or the plainest considerations of public policy, would, it seems to us, be a subversion of justice, and would be contrary to the plainest principles of equity and fair dealing."

In the case of Cooper v. Hamilton Perpetual Bldg. & L. Asso. 97 Tenn. 285, 33 L.R.A. 338, 56 Am. St. Rep. 795, 37 S. W. 12, the court says: "There is quite a conflict of authority and diversity of holding in the different states upon the question of whether the act of taking an acknowledgment to a deed or other instrument is a ministerial or judicial act. It has been held to be a ministerial act in the United States courts and in the courts of Arkansas, Georgia, Illinois, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New York, Maryland, and Ohio. In these states it is held that an officer may take acknowledgment though related, or interested, or a party."

In Penn v. Garvin, 56 Ark. 513, 20 S. W. 410, the supreme court of Arkansas holds that the formality of acknowledgments is designed for the protection of grantors, and that relationship to the grantor on the part of the officer taking the acknowledgment of the grantor does not invalidate the acknowledgment.

The case of Leonhard v. Flood, 68 Ark. 162, 56 S. W. 781, is quite distinguishable from the case at bar. In the Flood Case, the notary taking the acknowledgment was a surety on the note secured by the mortgage he acknowledged. In such a case, the interest of the notary is proximate and obvious, whereas, in the case at bar, the interest of the notary, if interest he had, was remote and speculative. Besides, the Flood Case as authority on this point is considerably weakened by a strong dissenting opinion by Mr. Chief Justice Bunn, who, after a review of the authorities, says: "The only case I have been able to find which definitely carries the rule beyond the parties to the instrument is Wilson v. Traer, 20 Iowa, 231, and that has little or no support, even from the authorities cited."

Finding no substantial error in the proceedings of the court below, its judgment is affirmed.

Dunn, Hayes, and Turner, JJ., concur. Williams, Ch. J., not sitting.

23 L.R.A.(N.S.)

OKLAHOMA SUPREME COURT.

E. C. BALLEW, Plff. in Err.,
v.
P. K. YOUNG et al.

(— Okla. —, 103 Pac. 623.)

Service by publication — affidavit — sufficiency.

1. Where it is stated, in an affidavit to obtain service by publication, that a defendant is a nonresident of the state, and service cannot be had upon him within the state, and such affidavit is otherwise sufficient, it is not void or voidable because facts are not stated therein showing that plaintiff, by the use of due diligence, was unable to make service of summons upon the defendant.

Same — statement of cause of action.

2. Where the affidavit for publication does not state directly, inferentially, or in any other way that the action brought is one of those mentioned in § 4276, 2 Wilson's Rev. & Anno. Stat. 1903, providing in what cases service by publication may be had, the affidavit is fatally defective, and service by publication cannot be obtained thereon.

Same — attachment — publication notice — sufficiency.

3. In an action for attachment against a nonresident defendant whose land has been levied upon, a publication notice which fails to describe the land attached, and fails to state inferentially, or in any other manner, the nature of the judgment which will be taken, is fatally defective.

Attachment proceeding — intervener — grounds of attack.

4. Any party who, under § 4244, 2 Wil-

Headnotes by HAYES, J.

Case Note. — Right of intervener in attachment to attack validity of service of process.

As to rights of creditor to question validity of attachment in general, see subject note to Glaser Bros. v. First Nat. Bank, 35 L.R.A. 765.

The doctrine of BALLEW v. YOUNG, namely, that an interested creditor intervening in an attachment proceeding may attack the validity of the service of process for jurisdictional defects, by motion to set aside the attachment, but that amendable irregularities are open only to the attachment defendant, is supported by the decided weight of authority.

Thus, in Hawkins & Co. v. McAlister, 86 Miss. 84, 38 So. 225, it was held that an intervening claimant could not move to vacate a default judgment entered against an attachment defendant on a mere informality in the service of process, which did not render such service void.

And in Dollins v. Pollock, 89 Ala. 351, 7 So. 904, it was held that an intervening

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son's Rev. & Anno. Stat. 1903, intervenes in an attachment proceeding, and claims the property attached or levied upon, can make only such objections to the irregularity of the proceedings as he could make in attacking them in an independent collateral action.

Judgment — void service — collateral attack.

5. A judgment rendered in an attachment proceeding wherein the service was by publication, which was so defective as to be not merely voidable, but void, is void upon collateral attack, and one who intervenes in an attachment proceeding, and claims the real estate attached, may attack such judgment after it is rendered, or may attack such service before the rendition of judgment, by motion to vacate and set aside such judgment or such service.

Attachment — void service — discharge.

6. In an action against a nonresident, in which an order of attachment was issued at the time of the filing of the petition, and on the same date an affidavit for service by publication was filed, and the first publication was made within sixty days from the date of the filing of the petition, but the affidavit for service by publication and the publication notice were so defective as to be absolutely void,—held, that a motion to dissolve and discharge the attachment and dismiss the action, made more than eight months after the filing of the petition, levy, and return of the order of attachment, was properly sustained, for the reason that the action had not been commenced.

(July 13, 1909.)

ERROR to the District Court for Custer County to review a judgment dismissing an action brought to recover commissions for the sale of real estate and vacating an attachment issued therein. Affirmed.

Statement by Hayes, J.:

This is an action commenced in the district court of Custer county, Oklahoma territory, on June 27, 1907, by E. C. Ballew, plaintiff in error, against P. K. Young and Flora Young, defendants in error, for the recovery of the sum of $200, alleged to be due him from the defendants as a real-estate commission for the sale of certain real estate. On the same day plaintiff filed his petition he filed an affidavit for attachment, alleging that defendants were nonresidents of the territory of Oklahoma, and that they were disposing of their property with the intent to defraud their creditors. An order of attachment was issued by the clerk,

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claimant could not, on a trial of the right to property, assail the validity of the service of process as to a mere irregularity in the designation of the parties, which defect was perfectible by amendment.

And in Darby v. Shannon, 19 S. C. 526, it was again held that the attachment defendant was the only person who could take advantage of an alleged insufficient service of process, at least where the defect was not jurisdictional.

In Ferguson v. Gilbert, 17 S. C. 26, it was held that a junior attachment creditor may move to vacate an attachment on property of an absent debtor who was never served in any way, since the absence of service is not a mere amendable irregularity, but a jurisdictional error, which renders the judgment void.

And in Iroquois Furnace Co. v. Wilkin Mfg. Co. 181 Ill. 582, 54 N. E. 987, reversing 77 Ill. App. 59, it was held that a garnishee in an attachment proceeding could not take advantage of an alleged defect in the publication notice (that the notice did not set up facts showing the residence of the defendant), which was subject to amendment, as mere irregularities affect the attachment defendant only, and must be raised by him; but the court said that an inquiry could have been had, had the defect been one which rendered the whole proceeding void.

A failure to serve the defendant in attachment with a copy of the writ cannot be taken advantage of by interested creditors, where such defect was waived by defendant's appearance, Elliott v. First Nat. Bank, 2 Colo. App. 164, 30 Pac. 53.

And in Noyes v. Canada, 30 Fed. 665, it was held that garnishees claiming to own certain goods attached were entitled to set aside the attachment for jurisdictional defects in the service of process, and that such defects could not be waived by personal appearance to the prejudice of such garnishees.

But in First Nat. Bank v. Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421, where certain interested creditors who were treated as interveners, although in substance and legal effect the proceeding was an equitable action, sought to set aside a senior attachment on grounds of defective service, it was held that such defective service could not avail such creditors even though the defects were jurisdictional where they had been waived, as permitted by statute, by personal appearance of the attachment defendant.

In Dolan v. Topping, 51 Kan. 321, 32 Pac. 1120, it was held that interested creditors could move to discharge an attachment on the ground that service of process in attachment proceeding was made by a special officer, illegally appointed for such purpose, although such defect was one evidently not going to the jurisdiction of the court. However, as is noted in BALLEW v. YOUNG, the doctrine of Dickenson v. Cowley, 15 Kan. 269, which upholds the general rule as illustrated by the foregoing cases is approved in the later case of Standard Implement Co. v. Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638.

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which was placed in the hands of the sheriff on the 28th day of June, 1907, and by the sheriff levied on lots numbered 20, 21, 22, 23, and 24 in block 66 in the town of Clinton, and due return made thereof on the date it was received. At the time the petition was filed a summons was issued, directed to the sheriff of the county, who made due return thereon on June 28th, showing that the defendants could not be found in the county. At the time of filing his petition, plaintiff also filed an affidavit to obtain service by publication, and on that date an order of publication was issued by the clerk, which was published in the Custer County News. Defendants failed to appear and answer, or otherwise plead within the time required by law, but wholly made default. After the institution of the suit defendant in error W. I. Brannon, hereafter referred to as intervener, having been granted leave by the court to interplead, filed his plea of intervention, alleging that he was the owner of the real estate levied upon under the order of attachment, and that he claimed same under a deed executed by defendants to him on June 20, 1907, and recorded by him in the office of the register of deeds of Custer county on July 3, 1907, which was five days after the issuance of the attachment writ. He further alleges that plaintiff had notice of his deed and claim to the property at the time the order of attachment was sued out. To this interplea plaintiff filed his verified answer, in which he denies that intervener has any interest or claim in the property levied upon or any valid deed thereto, and, pleading in the alternative, says that if he has any claim or interest, he acquired such with full knowledge and notice of plaintiff's right and claim in the property under the attachment, with the purpose and object to defeat the rights of plaintiff. Intervener thereupon filed a motion to dissolve the attachment for irregularities in the attachment proceedings. Upon hearing this motion the court sustained same, and dismissed plaintiff's action. From the judgment of the court vacating the attachment and dismissing the action, this proceeding in error is brought.

Mr. **M. L. Holcombe**, for plaintiff in error:

The court had jurisdiction.

Central Loan & T. Co. v. Campbell Commission Co. 5 Okla. 396, 49 Pac. 48; 2 Black, Judgm. §§ 794, 801; Cooper v. Reynolds, 10 Wall. 316, 19 L. ed. 932; Maxwell v. Stewart, 22 Wall. 77, 22 L. ed. 564; Megee v. Beirne, 39 Pa. 50; Woodruff v. Taylor, 20 Vt. 65; Peterson v. Willard, 17 La. Ann. 93; National Bank v. Peters, 51 Kan. 62, 32 Pac. 637; Johnson v. Stockham, 89 Md. 368, 43 Atl. 943; Sale v. French, 61 Miss. 170; McGehee, Due Process of Law, pp. 87, 107; Boswell v. Otis, 9 How. 336, 13 L. ed. 164; Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134; Grignon v. Astor, 2 How. 319, 17 L. ed. 283; McNitt v. Turner, 16 Wall. 366, 21 L. ed. 348; Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 519, 34 L. ed. 531, 10 Sup. Ct. Rep. 1037; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; Pennoyer v. Neff, 95 U. S. 734, 24 L. ed. 572; Windsor v. McVeigh, 93 U. S. 279, 23 L. ed. 916.

The affidavit was sufficient.

Raymond v. Nix, 5 Okla. 656, 49 Pac. 1110; Ogden v. Walters, 12 Kan. 282; Pierce v. Butters, 21 Kan. 124; Long v. Fife, 45 Kan. 271, 23 Am. St. Rep. 724, 25 Pac. 594; Shippen v. Kimball, 47 Kan. 173, 27 Pac. 813; Foreman v. Carter, 9 Kan. 674; Bannister v. Carroll, 43 Kan. 64, 22 Pac. 1012; Larimer v. Knoyle, 43 Kan. 338, 23 Pac. 487; Smith v. Whittlesey, 19 Ohio C. C. 412; Green v. Green, 7 Ind. 113; Wescott v. Archer, 12 Neb. 345, 11 N. W. 491, 577; 1 Bates, Pl. & Pr. pp. 585, 684; Rapp v. Kyle, 26 Kan. 89.

An intervener cannot attack the jurisdiction of the court.

Raymond v. Nix, supra; 1 Shinn, Attachm. § 429; 4 Shinn, Attachm. § 433; Leppel v. Beck, 2 Colo. App. 390, 31 Pac. 185; Greenville Nat. Bank v. Evans-Snyder-Buel Co. 9 Okla. 353, 60 Pac. 249; 4 Cyc. Law & Proc. p. 606; J. I. Case Threshing Mach. Co. v. Merrill, 68 Iowa, 540, 27 N. W. 742.

Mr. **George T. Webster** for defendants in error.

Hayes, J., delivered the opinion of the court:

No trial was had upon the issues of fact made by intervener's interplea and plaintiff's answer thereto. The judgment of the court vacating the attachment and dismissing the action was upon intervener's motion to dissolve and set aside the attachment. The grounds of this motion are stated in general and somewhat indefinite terms. The motion in substance is that intervener moves the court to dismiss and vacate the attachment, for the reason that the court was without jurisdiction of either the person or property attached. The motion further recites that it is based upon the pleadings, records, and files in the cause. The alleged irregularities complained of, and upon which the judgment of the trial court was based, appear from the record to have

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occurred in the affidavit filed by plaintiff for publication of notice, and in the publication notice. Plaintiff's original affidavit to obtain service by publication, filed on the day of the filing of his petition, states the names of the parties to the action, and that plaintiff has filed his petition in the district court of Custer county against the defendants for the recovery of the sum of $200, due him from the defendants as a commission for the sale of real estate described in his petition; that defendants, and each of them, are not residents of the territory of Oklahoma, and service cannot be had upon them, or either of them, within the territory, although due diligence has been made, and that plaintiff desired to obtain service on the defendants by publication. Plaintiff, with the consent of the intervener, afterwards filed an amended affidavit to obtain service by publication, in which, in addition to the facts stated in the original affidavit, he states that, at the time of the filing of the original affidavit, defendants were the owners of the lots attached, and describes them; that an attachment order had been issued in the action by the clerk of the court, which had been levied upon said real estate according to law, on June 28, 1907; that defendants were at the times of the filing of the original affidavit and the amended affidavit nonresidents of Oklahoma, residing in the state of Nebraska; that he knew such facts to be true from letters received from them; that he had made diligent search for defendants in Custer county at the time of the filing of the original affidavit, and knows that they were not in Custer county nor in Oklahoma, and that they have been absent therefrom ever since, and that service of summons could not have been had upon them in Oklahoma.

These affidavits are attacked upon several grounds. It is first urged that they are void for the reason that they fail to state facts to show wherein due diligence was used to find the defendants. Section 4277, 2 Wilson's Rev. & Anno. Stat. 1903, being § 79 of the Civil Code, provides: "Before service can be made by publication, an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication." While it is stated in the original affidavit that diligence was used, and while it is stated in the amended affidavit that diligent search was made by plaintiff for defendants in Custer county, in neither the original nor the amended affidavit are facts constituting such diligence fully set out. But we think sufficient facts are set out in these affidavits to render them valid, if they are regular in all other respects. In Washburn v. Buchanan, 52 Kan. 417, 34 Pac. 1049, construing the same statute, the court held an affidavit for publication in which it was stated that defendants were nonresidents of the state, and that service could not be made upon them within the state, was not sufficient, because plaintiff had failed to state therein what diligence had been used by him to obtain service. See also Roberts v. Fagan, 76 Kan. 536, 92 Pac. 559.

Intervener relies upon Cordray v. Cordray, 19 Okla. 36, 91 Pac. 781, as supporting his contention upon this proposition. In that case the affidavit as a basis for publication was in the following form: "Salia M. Cordray, being first duly sworn, upon oath says she is the plaintiff in the above-entitled cause, and that defendant J. W. Cordray is not a resident of the territory, but to the best of her knowledge and belief is a resident of ———, and that service of summons in this case cannot be had upon the said defendant in the territory of Oklahoma." It was held that this affidavit did not comply with the provisions of the statute, and that judgment rendered thereon was void for want of jurisdiction over the defendant; because, first, the affidavit was defective in that it failed to state what, if any, diligence was used to secure personal service upon the defendant; second, it failed to state the nature of the action; third, it failed to state that at the time of making the affidavit the defendant was out of the territory of Oklahoma. We think the rule announced by the court in the third syllabus, wherein it was held that said affidavit was defective for the reason that it failed to state any facts showing that diligence was used, is correct as applied to the facts of that case. In that case, plaintiff did not state that service of summons could not be had upon the defendant in the territory of Oklahoma, but her allegation with reference thereto was that to the best of her knowledge and belief defendant was a resident of ———, and that service of summons upon him could not be had in the territory. This is not equivalent to saying that defendant was absent from the territory, or that service could not be had upon him therein. She may have stated the truth when she stated that, to the best of her knowledge and belief, service could not be had upon him, but that knowledge and belief may not have been based upon such information as was the result of diligence. It could not be said from that affidavit that defendant was

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absent from the territory of Oklahoma at the time the affidavit was made, or that service could not be had upon him in said territory. Affiant did not so state. She said only that her information and belief was that such were the facts. An affidavit upon information and belief that defendant is a nonresident, or that service cannot be had upon said defendant in the state, is insufficient. Romig v. Gillett, 10 Okla. 186, 62 Pac. 805. But in the case at bar plaintiff states positively that defendant is not a resident of the territory, and that service cannot be had upon him therein. If such statement is true, no amount of diligence would have enabled plaintiff to obtain service upon him; and, if service could have been had by due diligence, then affiant could not have stated in his affidavit that it could not be made within the territory. In Cordray v. Cordray, supra, plaintiff did not say that service could not be had within the territory; and, having failed to say so, it was incumbent upon her to show what diligence she had used to ascertain whether service could be had upon him within the territory at the time of her making her affidavit.

Nor is the conclusion we here reach in conflict with Nicoll v. Midland Sav. & L. Co. 21 Okla. 591, 96 Pac. 744. In that case defendant was a foreign corporation who, under § 1227, 1 Wilson's Rev. & Anno. Stat. 1903, was required to appoint an agent who should reside at some accessible point in the territory, in the county where the principal place of business of said corporation was carried on, or at some place within the territory, if such corporation had no principal place of business, which agent should be duly authorized to accept service of process, and upon whom service of process might be made in any action in which the corporation was a party. The affidavit for publication in that case recited that defendant is a foreign corporation, and is a nonresident of the territory of Oklahoma, and has not complied with the laws by designating a person on whom to serve process in Noble county, Oklahoma, and has no office or place of business in said county, and that plaintiffs, with the exercise of due diligence, are unable to procure service of summons on the said defendant within the territory of Oklahoma. This affidavit fails to state that no agent has been appointed in the territory upon whom service of summons could be had, but only that no agent had been designated upon whom service of process could be had in Noble county. Nor does the affidavit state that service cannot be had upon the company in the territory. There is no allegation that it has no place of business in other parts of the territory than in Noble county, or that it has no agent in such other counties of the territory. In the absence of such allegation, the mere statement that plaintiff had exercised due diligence to obtain service, and had been unable to procure it, was insufficient without stating what diligence they had used.

Section 4277, supra, requires that the affidavit for publication shall show that the case is one of those mentioned in the preceding section. The preceding section to which reference is made reads as follows: "Service may be made by publication in either of the following cases: In actions brought under the 48th and 49th sections of this Code, where any or all of the defendants reside out of the territory, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the territory; in actions brought to establish or set aside a will, where any or all of the defendants reside out of the territory; in actions to obtain a divorce where the defendant resides out of the territory; in actions brought against a nonresident of the territory or a foreign corporation having in this territory property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way; in actions which relate to, or the subject of which is, real or personal property in this territory, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the territory or a foreign corporation; and in all actions where the defendant, being a resident of this territory, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keep himself concealed therein with the like intent." These sections of the statute have been repeatedly before the supreme court of the state of Kansas for construction, both before and since the adoption of our Code from that state by the territorial legislature. A failure to make proper averments in the affidavit of such facts as show that the case is one of those provided for by § 4276 renders it insufficient to support service by publication. Leavenworth, T. & S. W. R. Co. v. Stone, 60 Kan. 57, 55 Pac. 346; Garrett v. Struble, 57 Kan. 508, 46 Pac. 943; Long v. Fife, 45 Kan. 271, 23 Am. St. Rep. 724, 25 Pac. 594. An allegation in the affidavit that the case is one of those mentioned in § 4276 is not such a statement of fact as is required by the section to be made in the affidavit. Lieberman v. Douglass, 62 Kan.

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784, 64 Pac. 590. The original affidavit in this case fails to aver facts sufficient to show that it is one of the cases in which service by publication is authorized. It in no manner sets out any facts to indicate the character of the case or judgment sought therein. In the amended affidavit filed it is alleged that at the commencement of the action an order of attachment was caused to be issued by plaintiff, and levied upon certain real estate of the defendants, describing it, which alleged facts inferentially indicate the character of the judgment sought in the action. But the trial court evidently took the view that the original affidavit was so defective in this respect that it could not be cured by amendment. Affidavits for publication are amendable as to some defects. Foreman v. Carter, 9 Kan. 674; Pierce v. Butters, 21 Kan. 125; Harrison v. Beard, 30 Kan. 532, 2 Pac. 632; Long v. Fife, supra. But where the affidavit fails to state directly, inferentially, or in any other way any matter required by statute to be stated therein, it is fatally defective, and service by publication cannot be obtained thereon. Harris v. Claflin, 36 Kan. 543, 13 Pac. 830. Where the jurisdictional facts necessary to warrant service upon defendant by publication were in existence at the commencement of the action, and the affidavit for publication is defective only in that it states inferentially a matter required to be alleged therein, it is amendable even after judgment. Pierce v. Butters, supra; Wilkins v. Tourtellott, 28 Kan. 825; Harrison v. Beard, supra. But where there is a total want of averment in the affidavit of some material fact, as in this case, it is void. Harris v. Claflin, supra. The original affidavit filed herein fails to allege directly, inferentially, or otherwise any facts showing that it is one of the actions in which publication may be had under the provisions of § 4276, supra, and it was therefore incapable of being amended so as to support a service by publication thereon, and it is therefore unnecessary to consider whether the amended affidavit contains the necessary averments.

The notice by publication does not describe the property attached, nor state the nature of the judgment that plaintiff will take against the defendants. Section 4278, 2 Wilson's Rev. & Anno. Stat. 1903, provides what the publication notice shall contain. It shall state the court in which the petition is filed, the names of the parties, and must notify the defendants thus to be served that he or they have been sued, and must answer the petition filed by the plaintiff on or before a time to be stated, which shall not be less than forty-one days from the date of the first publication, or the petition will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly. Where land has been attached under order of attachment against a nonresident defendant, the publication notice should contain a description of the land, and failing to do so renders it defective. Cohen v. Trowbridge, 6 Kan. 385; Cackley v. Smith, 38 Kan. 450, 17 Pac. 156. And where the publication notice fails to contain a description of the real estate attached, and omits entirely to state the nature of the judgment which is sought, as required by § 4278, 2 Wilson's Rev. & Anno. Stat. 1903, it is not voidable only, but void. Garrett v. Struble, 57 Kan. 510, 46 Pac. 943. The failure of plaintiff to state in his affidavit for service by publication facts showing that the case is one of those provided for in § 4276, supra, and his failure to have the publication notice describe the real estate attached, or to state in any manner the nature of the judgment sought, are such defects as would make any judgment rendered thereon at least void, and a motion to set aside such service or to vacate a judgment based thereon would have to be sustained.

This leaves for consideration whether such irregularities in an attachment proceeding can be availed of by an intervener by motion to dissolve the attachment. The section of the statute providing that third persons claiming or having interest in property attached may intervene in attachment proceedings, and by a plea of intervention set up their claim, reads as follows: "Any person claiming property, money, effects, or credits attached may interplead in the cause, verifying the same by affidavit made by himself, agent, or attorney, and issues may be made upon such interpleader and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay." 2 Wilson's Rev. & Anno. Stat. 1903, § 4244. The supreme court of Kansas in an early case, in which the opinion was written by Mr. Justice Brewer, lays down the rule that an intervener in an attachment under this statute can attack the attachment proceedings for only such irregularities therein as would render the same subject to attack in an independent collateral action. In that case the affidavit for attachment failed to set forth any grounds for attachment. It was held that such affidavit was fatally defective, and failed to confer upon the court jurisdiction to issue the writ of attachment, and was therefore such an error as would render the attachment subject to collateral attack, and was ground for a motion to dissolve by an intervener interpleading in the attachment proceeding. Mr. Justice Brewer, in discuss-

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ing this question, referring to the interveners, said: "They did not, by coming in, waive all objections to the proceedings, and concede their regularity; nor did they place themselves in the shoes of the defendant in the action, and acquire his right to object to errors in the proceedings. They could not avail themselves of such irregularities as were simply errors sufficient for reversal, but only of such as were fatal to the process and the jurisdiction." Dickenson v. Cowley, 15 Kan. 269. The doctrine of this case was never, so far as we are informed, expressly overruled by reference thereto in any subsequent case from the supreme court of Kansas; but the following cases appear for a time to have established a rule in that jurisdiction, if not in direct conflict, at least not entirely in harmony, with the rule in Dickenson v. Cowley, supra: Long v. Murphy, 27 Kan. 375; Ashton v. Clayton, 27 Kan. 626; Wichita Wholesale Grocery Co. v. Records, 40 Kan. 119, 19 Pac. 346; Dearborn v. Vaughan, 46 Kan. 506, 26 Pac. 1038; Wm. W. Kendall Boot & Shoe Co. v. August, 51 Kan. 53, 32 Pac. 635; P. Cox Mfg. Co. v. August, 51 Kan. 59, 32 Pac. 636; Dolan v. Topping, 51 Kan. 321, 32 Pac. 1120; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 566, 33 Pac. 363.

But this question came directly before the court for consideration again in Standard Implement Co. v. Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638, where the court cited and followed Dickenson v. Cowley, supra, and again held that the interplea of the intervener is to be treated in the nature of a collateral attack, and that an intervener cannot defeat a prior attachment by showing irregularities in the attachment proceedings that would only be grounds for reversal on appeal by defendant, but would not be grounds for attack in a collateral proceeding. See Wichita Nat. Bank v. Wichita Produce Co. 8 Kan. App. 40, 54 Pac. 11. The doctrine of the court in Dickenson v. Cowley and Standard Implement Co. v. Lansing Wagon Works is, we think, in harmony with the weight of authority, governed by statutes the same or similar to the one controlling in this case, and is the correct rule. The supreme court of Arkansas, in a well-reasoned case under a similar statute, announces the rule to be: "A junior attaching creditor may intervene in a prior attachment suit, and there contest his rights with the plaintiff in that suit; but he cannot be let in to defend the suit and dispute the grounds of the attachment in lieu of the defendant, nor to defeat the attachment for mere errors or irregularities in the proceedings, but only for imperfections which are unamendable and render the proceedings void." Sannoner v. Jacobson, 47 Ark. 31, 14 S. W. 458. Other cases announcing the same doctrine are: Leppel v. Beck, 2 Colo. App. 390, 31 Pac. 185; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Moresi v. Swift, 15 Nev. 215. See also 1 Shinn, Attachm. § 429.

Plaintiff insists that, although the affidavit for publication and the publication notice are defective, such defects do not defeat the court's jurisdiction over the property attached, so as to render a judgment thereon a nullity and subject to collateral attack. Upon this question there is some conflict among the authorities, but the doctrine of the Kansas cases seems to be that such defects render the judgment in any subsequent proceedings in that action void. In Garrett v. Struble, supra, it is said in the syllabus: "In obtaining service by publication, if there is a total failure to state in the notice any material matter required by § 74 of the Civil Code, the service is void, and subject to a collateral attack; but, where there is not such an entire omission of a material matter from the notice, and it is inferentially or insufficiently set forth therein, the service is merely voidable, and can be succesfully attacked only in a direct proceeding." In Harris v. Claflin, supra, Horton, Ch. J., speaking for the court, said: "The affidavit for publication was filed June 5, 1861, but omitted to state 'that the case is one of those mentioned in the preceding section.' . . . Within the authority of Shields v. Miller, 9 Kan. 390, the affidavit is fatally defective, and therefore the attempted service by publication a nullity. Without a valid service in such a case every subsequent proceeding, including the judgment, the execution, or order of sale, the sale, and the deed, must necessarily be void." This case is commented upon by the court in Garrett v. Struble, supra, in the following language: "In Harris v. Claflin, supra, it was held that if there is a total want of evidence upon a vital point in the affidavit for publication, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable. The same principle, as nearly as may be, should be applied as the test of the sufficiency of a publication notice. If there is a total failure to state in the notice any material matter required by § 74 of the Civil Code [2 Wilson's Rev. & Anno. Stat. 1903, § 4272], the service is void; but if there is not an entire omission of such material matter, and it is inferentially or insufficiently set forth, the notice is merely voidable, and not void. Following this rule, we hold that the notice in the case of

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Garrett against Struble was irreguluar, defective, and voidable, but that it was not void, and therefore must be held sufficient as against a collateral attack." See also Shinn, Attachm. § 217. Under the doctrine of these cases a judgment rendered upon the affidavit for service by publication, and the service thereof had in this case, would have been void upon collateral attack, and intervener could attack the same in this proceeding by proper motion. Of the cases holding the contrary doctrine Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931, is a leading case. In that case it was held that the basis of the court's jurisdiction in an attachment proceeding is the seizure of the property under a valid writ, and that defects and irregularities in the publication notice, or the entire absence of publication notice, will not make a judgment rendered in the action absolutely void, although such facts might be grounds for reversal in direct attack. Other cases which follow Cooper v. Reynolds, or which approve the doctrine therein announced, are: Freeman v. Thompson, 53 Mo. 183; Kane v. McCown, 55 Mo. 181; Field v. Dortch, 34 Ark. 399; Gregg v. Thompson, 17 Iowa, 107; Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; Beech v. Abbott, 6 Vt. 586; Paine v. Mooreland, 15 Ohio, 436, 45 Am. Dec. 585; Darnell v. Mack, 46 Neb. 740, 65 N. W. 805; Brown v. Bose, 55 Neb. 200, 70 Am. St. Rep. 379, 75 N. W. 536. Commenting upon the conflict among the authorities upon this question, it is said in 4 Cyc. Law & Proc. p. 814: "In some jurisdictions it has been held that the court acquires jurisdiction over the property by a valid levy thereupon, and its judgment in regard thereto is binding until reversed on appeal, or set aside in some direct proceeding for that purpose, but the weight of authority, if not of reason, is to the effect that the jurisdiction acquired by the seizure of the property is not to pass absolutely upon the rights of the parties, but only to pass upon such rights after defendant has been given an opportunity to appear and defend; and where this view is maintained, a judgment rendered without the notice prescribed by law against a defendant who has not appeared is deemed absolutely void, and open to collateral attack"—citing authorities. The doctrine of the Kansas cases is in harmony with this expression of the rule in Cyc. Law & Proc., and they are controlling upon us.

But it may be asked, since no judgment has been rendered in this action, and the attack of intervener is not upon a judgment, but upon the order of attachment, whether, although the affidavit for publication and the service by publication are fatally defective and void, if such facts destroy the order of attachment and the lien upon the attached property in favor of plaintiff, created by the levy of the writ thereon, and constitute grounds for dissolving the attachment. Section 4365, 2 Wilson's Rev. & Anno. Stat., provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant upon the grounds thereinafter stated. Section 4257 provides that a civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing summons to be issued thereon. Section 4218 provides that an action shall be deemed commenced at the date of the summons which is served upon the defendant, and, where service by publication is proper, the action shall be deemed to have commenced at the date of the first publication; and said section further provides that an attempt to commence an action shall be deemed equivalent to the commencement thereof when the party faithfully, properly, and diligently endeavors to procure service, but that such attempt must be followed by the first publication or service of summons within sixty days. This section of the statute was held, in Dunlap v. McFarland, 25 Kan. 488, to have no application to the commencement of actions in order to authorize the issuance of an attachment therein, but to apply only to the statute of limitations. But in Bannister v. Carroll, 43 Kan. 64, 22 Pac. 1012, the court, in discussing these various provisions of the statute, says: "Now in view of these various provisions it would be an absolute absurdity to hold that, before an attachment can issue against an absent defendant, on the ground that he is a nonresident of the state, an effort must be made by the sheriff of the county in which the order of attachment is issued to personally serve a summons upon such nonresident. In view of all these complications and absurdities, we think the proper construction to be given to § 57 of the Code is that, when a petition is filed and a summons served, or the first publication is made within sixty days, such service or first publication relates back to the time of the filing of the petition and præcipe and other necessary papers, and by such relation the suit is to be deemed to have been commenced at the date of their filing." Jones v. Warnick, 49 Kan. 63, 30 Pac. 115, is in point. In that case it is held that where, in an attachment proceeding, the service was obtained by publication, if the first publication was not made within sixty days from the date of the filing of the

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petition and other necessary papers, an order of attachment cannot be issued and served, for the reason that no action had been commenced.

Under this construction of these provisions of the statute, the attachment proceeding in the action in the case at bar has failed; for, although plaintiff has a summons issued on the day of filing his petition, no service has ever been made of such summons, and although he filed the affidavit for publication service, and publication service was attempted to be made, each was so defective as to be a nullity, and plaintiff now stands in the same position as if no affidavit for publication service, and no service by publication, had ever been attempted to be made. When the motion of intervener was filed, and the court rendered judgment thereon, nearly a year had elapsed since the filing of plaintiff's petition. No service of summons had been made, and no legal summons by publication had been begun. Had the defects in the affidavit for publication service and in the publication notice been such as to render them only voidable, instead of void, having been filed or begun within the time provided by statute, such defects could be cured by amendment, and the first publication would then have related back to the time of the filing of the petition, and intervener's motion should have been overruled.

But under the facts as shown by the record we think the trial court committed no error for which the judgment should be reversed, and the judgment is therefore affirmed.

Dunn, Williams, and Turner, JJ., concur. Kane, Ch. J., not sitting.

VIRGINIA SUPREME COURT OF APPEALS.

CITIZENS' BANK OF NORFOLK, Appt.,
v.
SCHWARZSCHILD & SULZBERGER COMPANY.

(109 Va. 539, 64 S. E. 954.)

Bank — payment of coupons — recovery.

A bank which pays coupons made payable to bearer, on bonds of one of its depositors, under the mistaken belief that there were funds on deposit to meet them, cannot compel the payee to return the amount so paid.

(June 10, 1909.)

APPEAL by plaintiff from a judgment of the Law and Chancery Court for the City of Norfolk in defendant's favor in an action brought to recover money paid upon certain coupons under the misconception that the plaintiff bank held funds on deposit to meet them. Affirmed.

The facts are stated in the opinion.

Mr. A. B. Seldner for appellant.

Mr. Robert W. Shultice, for appellee:

A bank at which coupons are payable cannot recover from the payee upon showing that such coupons were paid under a misapprehension of the state of the maker's account.

Morse, Banks & Banking § 455; Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. App. 674, 74 Fed. 276; Bolton v. Richard, 6 T. R. 139; Aiken v. Short, 1 Hurlst. & N. 210; Levy v. Bank of United States, 4 Dall. 236, 1 L. ed. 814; Peterson v. Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Manufacturer's Nat. Bank v. Swift, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336; First Nat. Bank v. Burkham, 32 Mich. 328; Price v. Neale, 3 Burr. 1355; Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 190; First Nat. Bank v. Ricker, 71 Ill. 439, 22 Am. Rep. 104; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 26 L.R.A. 289, 43 Am. St. Rep. 247, 38 N. E. 739; Deposit Bank v. Fayette

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Case Note. — Right of bank to recover amount paid on check or other paper drawn upon or payable at it, under mistaken belief that there were sufficient funds to meet it.

This note does not include cases involving the right of a bank to withdraw its certification of checks or other paper upon discovery that there are not sufficient funds to meet the same, nor cases involving the right of one bank to recover money paid in the absence of funds to another bank upon check or other paper drawn upon it, where the decision turns merely upon the effect of the regulations of the clearing house.

It is a general rule that, in the absence of fraud, the payment of a check or note by a bank upon which it is drawn or at which it is payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay it, cannot be recovered by the bank.

In addition to the several cases fully set out in the foregoing opinion, a number of other cases assert the same general rule.

Thus, in First Nat. Bank v. Devenish, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177, the court said: "Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If, from negligence or inattention to their own affairs, banks improvidently pay when

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Nat. Bank, 90 Ky. 10, 7 L.R.A. 849, 13 S. W. 339; Commercial & F. Nat. Bank v. First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; Star F. Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442; Iron City Nat. Bank v. Peyton, 15 Tex. Civ. App. 184, 39 S. W. 223; Bank of St. Albans v. Farmers' & M. Bank, 10 Vt. 141, 33 Am. Dec. 188; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Germania Bank v. Boutell, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327; 5 Am. & Eng. Enc. Law, p. 1071.

Buchanan, J., delivered the opinion of the court:

This is an action of assumpsit to recover money paid by the plaintiff under an alleged mistake of fact. Upon the issue of nonassumpsit, the whole matter of law and fact was submitted to the court and a judgment rendered in favor of the defendant.

The material facts of the case are that, on the 4th day of November, 1907, the defendants, the Schwarzschild & Sulzberger Company, a corporation, presented through the Norfolk National Bank of Norfolk for payment, fifteen coupons of $70 each, due on the 1st day of that month, taken from bonds held by the defendant. The bonds from which the coupons were taken were issued by the Jamestown Hotel Corporation and held by the defendant. The coupons were in the following words:

$70.00.

The Jamestown Hotel Corporation will pay to bearer, at the Citizens' Bank of Nor-

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the account of the customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid."

So, in Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. App. 674, 74 Fed. 276, it was held that the payment of a check or of a note by a bank at which it is made payable, although made under misapprehension of the state of the customer's account with the bank, concludes the bank as against the holder of the paper.

And in Boylston Nat. Bank v. Richardson, 101 Mass. 287, where the plaintiff's teller was not misled in any way and had no reason to suppose that the drawer's account was other than it was, but merely saw fit to pay the check without taking the precaution to inform himself of the state of the account, it was held that there was nothing in the transaction which bore the character of a mistake of facts in a legal sense, but only that of laches.

So, in Chambers v. Miller, 13 C. B. N. S. 125, the cashier of the bank, having discovered that the drawer had not funds sufficient to pay the check, took the money by force from the payee's messenger, who had not finished counting it. In an action by the latter for assault, the court said that the moment the person presenting the check put his hand on the money, it became irrevocably his. Although this was not an action by the bank to recover the money, the language of the court clearly implies that such an action would not lie.

A bank cannot recover, in an action for money paid by accident and mistake, the amount of a check paid under the mistaken impression that the drawer had funds, to a messenger of the payee, who had in good faith paid the money over to the payee. Penacook Sav. Bank v. Hubbard, 58 N. H. 167.

The same question frequently arises where the bank, instead of paying a check drawn upon itself in cash, receives it as a deposit, and afterwards attempts to charge it back

against the account of the person depositing it. There is considerable difference of opinion upon the question whether the mere receiving of a check or even the receiving and crediting it to the depositor is a payment thereof; but, of course, this note is not concerned with that question. Cases involving that question are taken only where such a receipt is treated as a payment, and the right of the bank to recharge the check is considered. As to title of bank to check drawn upon another bank, which has been credited to depositor, see case note to Fayette Nat. Bank v. Summers, 7 L.R.A.(N.S.) 694.

It is generally held, following the rule as stated above, that a bank cannot recharge the account of the depositor of a check drawn upon it which it has paid by crediting the depositor's account with it merely because its cashier or other officer was not aware at the time the credit was given that the drawer had not sufficient funds to meet the check. 22 Am. & Eng. Enc. Law, p. 623.

Thus, it was held in City Nat. Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138, where the amount of the check had been credited to the depositor's account, that the bank could not recall or repudiate the payment because, on examination of the account of the drawer, it was ascertained that he was without funds to meet the check, although when the payment was made the officer making it labored under a mistake that there were funds sufficient.

So, in National Gold Bank & T. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697, the court said that there could be no doubt that if the bank, through its teller, expressly or by reasonable implication from his acts and declarations at the time, agrees to accept the check as cash and to enter a credit to the depositor for the amount, it will be bound by the agreement, whether the drawer of the check has funds to his credit or not.

And in Bryan v. First Nat. Bank, 205 Pa. 7, 54 Atl. 480, it was held that a bank, having credited the account of one depositor

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folk, Virginia, upon surrender of this coupon, $70 in gold coin of the United States, on the 1st day of November, A. D. 1907, for one year's interest then due on its bond No. 1. Chas. M. Barnett, Treasurer.

At the time the coupons were presented for payment at the plaintiff bank, the Jamestown Hotel Corporation, the maker thereof, had on deposit with the plaintiff the sum of $1,898.97; but, on the 16th day of the preceding month, an execution creditor of the hotel corporation whose judgment amounted to more than $14,000 caused a summons on suggestion to be served upon the plaintiff bank. When the summons was served upon the president of the plaintiff bank, he notified the other officers of the bank and the bookkeeper in charge of the account not to pay out any part thereof except by order of the court. Subsequently, and before the coupons in question were paid, the existing account of the hotel corporation, which had been garnished in the hands of the plaintiff, was transferred from the active ledger of the bank to the inac-

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with the amounts of certain checks upon itself drawn by another depositor, could not charge such amounts back to the first depositor, for the transaction was the equivalent of an actual cash payment, and it could not be pretended that, if an actual cash payment had been made by the bank, there could be a recovery back from him, if unwilling to pay it. And to the same effect was the decision in Consolidated Nat. Bank v. First Nat. Bank, 129 App. Div. 538, 114 N. Y. Supp. 308, where the facts were very similar.

The language used in First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766, is to the same general import, but the decision turns upon the question whether the check was received as a deposit or not.

In Pepperday v. Citizens' Nat. Bank, 183 Pa. 519, 39 L.R.A. 529, 63 Am. St. Rep. 769, 38 Atl. 1030, the court said, *obiter*, that if the bank had paid the payee the amount of the check in bank notes, and he had put them in his pocket and gone about his business, the bank could never have recovered back the money.

In a few cases where the holder knew that there were no funds, or where there had been some fraud practised on the drawee bank, a recovery has been allowed if the interests of third persons would not be prejudiced.

Thus, in Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89, where the drawer of the check had deceived the drawee bank by depositing in his own name a large sum of money which should have been paid to the bank, thus giving him an apparent fund to pay the check, and it was paid through a clearing house to the defendant bank, with which it had been deposited, it was held that the drawee bank could recover where it notified the defendant bank of the lack of funds as soon as the drawer's fraud was discovered, and where the defendant bank had not changed its position because of the receipt of the payment.

And in Martin v. Morgan, 1 Brod. & B. 289, where defendant presented for payment a post-dated check, with knowledge that the drawer had no funds to meet it and was insolvent, it was held that the drawee bank could recover the amount of the check where it was not aware that the drawer was insolvent, and had previously honored overdrafts of the drawer, which had been promptly paid.

So, in Peterson v. Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146, it was held that where a depositor knew that a check on the same bank was not good, as the drawer had no funds, he could not recover the amount of the check from the bank, although the check had been actually credited to the depositor on the books of the bank and had been charged against the drawer, and subsequently charged back. The court held that there had been no payment of the check, as the presentment of the check with knowledge that there were no funds to meet it was a fraud upon the bank, which vitiated the transaction.

The decision in National Park Bank v. Steele & J. Mfg. Co. 58 Hun, 81, 11 N. Y. Supp. 538, seems to be contrary to the general rule as set forth above. In this case it was held that, while the act of the teller in certifying a note without consulting the state of the account of the makers of the note with the bank was carelessness, yet that circumstance would not prevent a recovery of the amount from the holders where the latter had not changed their condition in any respect by reason of the certification and payment. This case, however, presents some distinguishing features. While the certification was made by the teller under a misapprehension of the condition of the drawers' account with the bank, the payment was not made until after the true condition of their account had been discovered, but was made apparently to comply with the rules of the clearing house, or by the clearing house itself in deducting the amount of the note from the balance due to the plaintiff bank from the bank with which the note had been deposited. After the discovery that the drawers had not sufficient funds to meet the check, the bank attempted to prevent payment thereof, but these attempts were ineffectual on account of its inability to discover the party who was the holder of the note. The decision, however, is recognized as opposed to the general rule, and repudiated by the court in Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. App. 674, 74 Fed. 276.

As to right of drawee of forged check or draft to recover money paid thereon, see note to First Nat. Bank v. Bank of Wyndmere, 10 L.R.A.(N.S.) 49.

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tive department, and marked "Corp.," and a new account opened with the hotel corporation, then in a failing condition and being operated under the direction of the court. When the coupons were presented for payment, the plaintiff bank had changed its clerks, and a new clerk misread the word "Corp." for "coupons," and, thinking that the hotel corporation's account marked "Corp." was set apart for the payment of coupons, as the bank's habit was, paid them, and charged them to that account. The mistake was not known until some two weeks afterwards, when the president of the plaintiff bank, in looking over the hotel corporation's account, to ascertain the amount to its credit when the summons on suggestion was served upon him, discovered it. The plaintiff bank at once notified the defendant of the mistake, offered to return the coupons, and requested repayment, which after some months of correspondence was refused. The plaintiff bank was compelled to pay the whole $1,898.97 in its hands when garnished to the execution creditor, and will lose the $1,050 paid the defendant, unless it can recover it from the defendant, as the hotel corporation is insolvent.

The general rule is that money paid under a mistake of fact may be recovered; but the payment of a check or note by a bank upon which it is drawn or at which it is made payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note, seems to be an exception to the general rule. The cases do not seem to be entirely agreed upon what principle this exception is based, but the great, if not the overwhelming, weight of authority, maintains this exception to the general rule. Some place it upon the ground that there is no privity between the holder of the check or note and the bank; others upon the ground that, since the bank always has the means of knowing the state of the depositor's account by simply looking at its own books, the payment is not a payment by mistake within the meaning of the legal rule which permits a recovery; others still place their decision upon both grounds.

In Hull v. Bank of South Carolina Dud. L. 259, one of the earliest American cases that we have found, the supreme court of South Carolina said that "this question is to be decided rather by authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and imposition, but they may against mistakes depending on an inspection of their own books and accounts. . . . They accepted and paid the check presented by the defendant for and on account of Hopton, the drawer, whose money they kept for his convenience and accommodation. The privity of contract was between them and their customer. Hopton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hopton."

In First Nat. Bank v. Burkham, 32 Mich. 328, 331, Judge Cooley said in discussing this question: "But we think it would be an exceedingly unsafe doctrine in commercial law that one who has discounted a bill in good faith and received in its payment the strongest possible assurance that it was drawn with proper authority should afterward hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability. They would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motive which influenced the latter to honor the paper."

In Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160, the court of appeals of New York (Chief Justice Church) in discussing this question said: "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in Pratt v. Foote, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. . . . The bank always has the means of knowing the state of the account of the drawer, and, if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise."

In Manufacturers' Nat. Bank v. Swift, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336, it was said that, if any other rule prevailed, "no one could know when he could safely receive payment of a check." It is further said: "It is the duty of a bank to know the state of its depositor's account, and, if it makes a mistake, . . . it must abide the consequences. The presentation of a check is a demand for payment. If it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would for-

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ever destroy the character of a bank in all commercial circles, if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality, and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

In National Bank v. Berrall, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 A. & E. Ann. Cas. 630, it was held that where a payee of a a check, after indorsing it generally, deposits it to his account in his own bank, by which it is forwarded to the bank upon which it is drawn for collection, and the latter bank pays it by mistake, there is no privity between the paying bank and the payee, to support an action by the former against the latter to recover the amount of the check as for money paid by mistake. It was further held in that case that, aside from the question of privity, the payment cannot be said to have been made by mistake, where the alleged mistake consists in having overlooked the fact that payment of the check had been stopped; for a bank is under no legal obligation to the holder thereof to pay a check drawn upon it, and, the bank being bound to know the state of its depositor's accounts, if it does make payment of a check to a bona fide holder, who is without notice of any infirmity therein, the transaction is closed as between the parties to the payment.

Morse in his work on Banking says without qualification that, if a bank pays or accepts a check under the misconception that it has funds, it cannot recover from the holder, but it must look to the drawer alone for redress, except that under the clearing house rules a check paid through the clearing house may be returned within a certain time if the funds are found insufficient. 2 Morse, Banks & Banking, § 455. See also, generally, Bentinck v. Dorrien, 6 East, 199; Levy v. Bank of United States, 4 Dall. 234, 1 L. ed. 814; First Nat. Bank v. Devenish, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177; Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. App. 674, 74 Fed. 276; 5 Cyc. Law & Proc. pp. 534, 535.

The coupons which were paid were payable to bearer at the plaintiff bank and possessed all the qualities and incidents of commercial paper. Arents v. Com. 18 Gratt. 750, 766, 767, and cases cited. Their payment, under the facts disclosed by the record, would no more entitle the plaintiff bank to recover from the defendant than if the paper paid had been the hotel corporation's check, bill, or note. The same reasoning that applies in the one case is equally applicable in the other. If there be no privity in the one case, there is none in the other, and, if the misapprehension as to the state of the maker's account is not a mistake within the meaning of the legal rule which permits a recovery in the one case, it is equally not such a mistake in the other.

While the reasoning of the courts in the cases quoted from, that there can be no recovery in a case like this, is not altogether satisfactory, the conclusion reached by them is sustained by the great current of authority, and seems to be in accord with commercial usage.

We are of opinion, therefore, to affirm the judgment complained of.

COLORADO SUPREME COURT.

ROBERT V. BROWN, Appt.,
v.
EDWARD BELL, Sheriff of Toller County.

(— Colo. —, 103 Pac. 380.)

Limitation of action — execution.

1. Where execution on a judgment is a matter of right without any further proceeding before the court, the expiration of the limitation period for the enforcement of the judgment by action will not bar the right to issue an execution thereon.

Judicial sale — redemption — sheriff's mistake.

2. The mistake of the sheriff as to the amount necessary to be tendered to a purchaser at judicial sale to effect a redemption will not defeat the redemption right of one who places in his hands sufficient money to effect the redemption, where the statute provides that the redemption may be effected by paying the necessary amount to the officer.

(July 6, 1909.)

Case Note. — Effect of bar of statute of limitations against action to enforce judgment upon right to issue execution thereon.

The time within which an execution may be issued upon a judgment is regulated by statute in many states. This note, however, is confined to the question whether, in the absence of such legislation, the right to issue an execution is at an end where the right of action upon the judgment is barred by the statute of limitations.

It is expressly provided by statute in some states that an execution shall not issue after the right of action upon the judgment is barred by the statute of limitations. See Harrier v. Bassford, 145 Cal. 529, 78

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APPEAL by plaintiff from a judgment of the District Court for Teller County in defendant's favor in a suit to restrain him as sheriff of Teller County from selling certain lands under an alleged void execution, and to compel the conveyance of such lands to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. **Rogers, Shafroth, & Gregg, William H. Malone, and S. S. Abbott,** for appellant:

The judgment of the justice's court was, in the language of the statute of limitations, a judgment "rendered in any court not being a court of record," more than six years prior to issuing execution, and was expressly barred by such statute.

Seymour v. Haines, 104 Ill. 557; Dieffenbach v. Roch, 112 N. Y. 621, 2 L.R.A. 829, 20 N. E. 560; Adams v. Guy (N. C.) 10 S. E. 1102; Wilcox v. Lantz, 107 Mich. 1, 64 N. W. 735; Brown v. Wuskoff, 118 Ind. 569, 19 N. E. 463, 118 Ind. 574, 21 N. E. 243; Hughes v. Cummings, 7 Colo. 138, 2 Pac. 289.

No appearance for appellee.

Musser, J., delivered the opinion of the court:

It appears from an agreed statement of facts that, on February 24, 1905, the sheriff of Teller county sold the Franklin lode claim for $356.42, under an execution against the Franklin Gold Mining Company, and issued a certificate of purchase, which by assignment became the property of the appellant,

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Pac. 1038; Water Supply Co. v. Sarnow, 1 Cal. App. 479, 82 Pac. 689; Mudge v. Livermore (Iowa) 123 N. W. 199; Stahl v. Roost, 34 Iowa, 475.

It was held in Brown v. Wuskoff, 118 Ind. 569, 19 N. E. 463 (see same case on rehearing, 118 Ind. 574, 21 N. E. 243) that, under a statute declaring that a judgment shall be a lien upon the defendant's realty for ten years, and no longer, the enforcement of an execution thereafter levied would be enjoined.

It was held in Adams v. Guy (N. C.) 10 S. E. 1102, that a statute providing that an action upon a judgment rendered by a justice of the peace must be brought within seven years after the date thereof, or else it will be barred, and that the docketing thereof in the superior court shall create a lien upon the debtor's realty, bars a motion for an execution upon a docketed judgment after the lapse of that period.

It was held in Lyon v. Russ, 84 N. C. 588, which was an action to recover land sold under execution, that an execution issued more than ten years after the rendition of judgment was void under a statute declaring that a judgment should be a lien upon the defendant's realty for ten years after the docketing thereof. The court said the judgment alone created a lien, and that the office of the execution was to enforce the lien by the sale of the property.

It was held in Peters v. Vawter, 10 Mont. 201, 25 Pac. 438, which was an application for leave to issue an execution, that the right thereto, after action is barred upon the judgment by a statute limiting the life thereof to six years, is not created by another statute permitting the issuance of an execution, upon leave of the court, after five years, as the latter act applies only to the sixth year, and after that the judgment is dead, as the statute of limitations is an absolute limitation to the life of the judgment.

It was said in Scammon v. Swartwout, 35 Ill. 326, that a statute providing that a judgment of a court of record may be revived by scire facias or that an action of debt may be brought thereon within twenty years from the rendition thereof, and not after, would seem to imply that an execution cannot be issued at any time because, if it could, there would be no necessity for such a provision; and the presumption is that after the lapse of twenty years the judgment has been extinguished, which can be rebutted only by bringing an action of debt thereon or suing out such writ, and that it would be absurd to suppose that the law designed to give to a writ of fieri facias more vitality than the judgment on which it is issued.

It was held in People ex rel. Parsons v. Circuit Judge, 37 Mich. 287, which was a motion to set aside a writ of execution, that a statute permitting the issuance of such writ indefinitely is by implication modified by a subsequent statute barring actions upon judgments after ten years, so as to prevent the issue of an execution upon a judgment upon which the right of action is barred. In BROWN v. BELL the court assumes that this case was based upon the statute of limitations of 1857, while in fact it was based upon the act of 1869, which provides that actions upon judgments or decrees shall be brought within ten years, and not afterward.

So, in McGrew v. Reasons, 3 Lea, 485, a writ of supersedeas was granted to prevent the issuance of an execution upon a judgment barred by a statute providing that actions upon judgments and decrees shall be brought within ten years after the cause of action accrues. The court said that a statutory limitation of action upon a judgment is intended to be a bar to its enforcement, as, in order to give it any effective operation, it must be held that the issuance of an execution after ten years is an action upon the judgment; otherwise the bar of the statute might be avoided, and the execution issued at any time after the judgment is barred.

And a writ of supersedeas was also granted in Cannon v. Laman, 7 Lea, 513, where an execution had been issued upon a judgment upon which the right of action was barred by the statute of limitations. The court, however, here said that an execution

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Brown. Under the statute a deed might issue to the holder, if no redemption was made within nine months. On March 16, 1899, one Sherman obtained a judgment against the same company before a justice of the peace. A transcript of this judgment was duly filed with the clerk of the district court, as provided by statute, on December 12, 1900, and on November 23, 1905, more than six years after the rendition of the judgment by the justice of the peace, an execution was issued out of the district court on this judgment, and placed in the hands of the appellee, as sheriff of Teller county, together with $500, for the purpose of redeeming the property, as provided by statute, from the sheriff's sale aforesaid. This was more money than was necessary for that purpose. Several days later the sheriff returned to the redeeming creditor the balance of the $500 left after deducting some sheriff's costs and $377.80 for the use of appellant, who held the certificate of purchase, and sent to the appellant the said sum of

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is not, in legal contemplation, an action, but the result of one, and is awarded by the judgment, which must be alive.

It was held in Lockhart v. Yeiser, 2 Bush, 231, that the lapse of fifteen years without issuance of execution will bar further proceedings upon a judgment, and that an execution thereafter issued will be quashed.

So, it was held in Coward v. Chastain, 99 N. C. 443, 6 Am. St. Rep. 533, 6 S. E. 703, that an execution issued upon a judgment upon which an action was barred by the statute of limitations would confer no right to sell, and that if sale was made it would be ineffectual to pass title, and that proceedings thereunder would be enjoined.

It was said in Hanly v. Carneal, 14 Ark. 524, although the remark was a *dictum*, that the spirit of a statute declaring that judgments and decrees shall, after ten years, be presumed paid and satisfied, would seem to require that an execution should be quashed if issued after the expiration of ten years, as having been improperly issued upon a dormant claim.

It was held in Price v. Wade, 14 Ont. Pr. Rep. 351, that an execution cannot, in the absence of payment or acknowledgment, be issued upon a judgment upon which the right of action is barred by the statute of limitations.

It was held in Quinnin v. Quinnin, 144 Mich. 232, 107 N. W. 906,—a proceeding to vacate the levy of an execution,—that such a writ could not issue upon a deficiency decree arising upon a mortgage foreclosure sale, when the decree was barred by a statute declaring that actions upon decrees in courts of record should be brought within ten years after entry.

And under such statute the same rule was applied in Smith v. Pegg, 111 Mich. 232, 69 N. W. 488, which was a proceeding, brought after the expiration of such statutory period, for a deficiency decree and an execution thereon.

The New York cases cited in the opinion to BROWN v. BELL (as well as the following), to the effect that, notwithstanding the right to maintain an action upon a judgment rendered by a justice of the peace is barred after six years, where the judgment has been docketed in the office of the county clerk an execution may be issued after the expiration of that period, do not determine the question whether the bar of the statute of limitations will prevent the issuance of execution, as such cases were decided under a statute declaring that such judgments shall create a lien upon the defendant's real estate in the same manner and with like effect as judgments of the court of common pleas, and in each of these cases the execution was issued before the right of action upon the judgment as one of the court of common pleas was barred by the statute of limitations. Waltermire v. Westover, 14 N. Y. 17; Rose v. Henry, 37 Hun, 397; Kincaid v. Richardson, 25 Hun, 237; Townsend v. Tolhurst, 57 Hun, 40, 10 N. Y. Supp. 378; Herder v. Collyer, 22 Abb. N. C. 461, 6 N. Y. Supp. 513; Anderson v. Porter, 7 Misc. 218, 27 N. Y. Supp. 646; Becker v. Porter, 17 App. Div. 183, 45 N. Y. Supp. 296.

This point was expressly passed upon in Kennedy v. Mills, 4 Abb. Pr. 132, where it was held, under a statute providing that every judgment is presumed paid after twenty years from its date, unless such presumption is repelled by proof of payment or written acknowledgment within that time, that without such proof a motion for leave to issue an execution after the expiration of twenty years will be denied.

And it was held in Herrman v. Stalp, 17 N. Y. Civ. Proc. Rep. 333, 6 N. Y. Supp. 514, that, after the repeal of the statute under consideration in Waltermire v. Westover, supra, a judgment of the district court of the city of New York, when docketed in the office of the county clerk under a statute declaring it shall then be a judgment of the court of common pleas, will not authorize the issuance of an execution thereon, even by leave of the court, after the right of action on the judgment is barred by the statute of limitations. The court said it would be anomalous to allow the judgment to be enforced by execution after the loss of the right to maintain an action upon it for any purpose, and that when a judgment is practically dead a live execution cannot be issued upon it.

And in Waltermire v. Westover, supra, the court said that the lien of a judgment of the court of common pleas ceased, as against purchasers in good faith and subsequent encumbrances, at the end of ten years from the time of docketing, while it continued, as against the defendant himself, until the statutory presumption of payment arose at the end of twenty years.

Attention is also called to other cases cited in BROWN v. BELL.

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$377.80. The appellant returned this amount to the sheriff. The amount necessary to redeem was $383.15 or $5.35 more than was sent by the sheriff to appellant. The sheriff was proceeding to sell the property under this second execution, when this action was brought to restrain the sale, and to compel the sheriff to issue a deed to appellant upon his certificate of purchase. On the same day that the appellant returned the money to the sheriff the redeeming creditor tendered to appellant the sum of $5.35. The judgment was against the plaintiff, and he appeals.

The appellant claims that, though the judgment obtained before the justice of the peace had been taken on transcript to the district court, it was still a judgment of the justice of the peace, and that the execution issued thereon out of the district court, by means of which the redemption was attempted, was void because issued more than six years after the rendition of the judgment by the justice of the peace. Our statute provides that, when a transcript from a justice of the peace is filed and recorded in the office of the clerk of the district court, the judgment "shall thenceforward have all the effect of a judgment of the said district court, and execution shall issue thereon out of that court as in other cases." The appellant asserts that, notwithstanding the language of our statute, the judgment remains a judgment of the justice of the peace, and cites numerous authorities tending to sustain that position. Without deciding, it will be assumed, for the purposes of this case, that the appellant is right, and that the judgment was still a judgment of the justice of the peace, and not of the district court, when the execution issued. Appellant says that § 2900, Mills's Anno. Stat., provides expressly for a limitation of six years on any judgment rendered in any court not a court of record, and that therefore the execution under which the redemption was attempted to be made was null and void, and there was no redemption. Appellant cites no authorities to support this position, but assumes it.

Section 2900, Mills's Anno. Stat. (§ 4061, Rev. Stat. 1908), so far as pertinent, is as follows: "The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterward. . . . Second. All actions upon judgments rendered in any court not being a court of record." Appellant seeks to annul the execution indirectly through § 2900, and raises no other question as to the life of the judgment or the issuance of the execution. The question thus presented is: Does this section limit the time within which an execution, otherwise issuable as of right, may issue on a justice's judgment? If it does, it must do so upon the theory that this statute of limitation extinguishes the judgment, wipes it out, and leaves nothing upon which an execution may rest. Especially must this be true in this case, for it must be remembered that appellant is not the judgment debtor. He is a stranger to the judgment and the execution. If he has the right to question the execution as he does, as to which right no opinion is expressed, it must be upon the theory that the running of the statute against an action on the judgment made it nothing in the sight of all men. Statutes of limitation have given rise to much discussion, and there is some contrariety of opinion about them, but the authorities are quite generally agreed, and it is the declared law of this state, that a statute like § 2900 acts upon the remedy only, and not upon the debt. It does not extinguish a debt, but simply puts to repose the remedy for its enforcement. Holmquist v. Gilbert, 41 Colo. 113, 14 L.R.A.(N.S.) 479, 92 Pac. 232; Foot v. Burr, 41 Colo. 192, 13 L.R.A.(N.S.) 1210, 92 Pac. 236.

In order to get the benefit of the statute as a defense, a debtor must plead it specially in his answer; or, if it appears on the face of the complaint that the statute has run, he may plead it in bar of the action, by way of special demurrer. If he fails to plead the statute specially, one way or the other, the defense is not available, for it is deemed waived, and the plaintiff may recover as in other cases, notwithstanding the statute has run. Hexter v. Clifford, 5 Colo. 168; Hunt v. Hayt, 10 Colo. 278, 15 Pac. 410; Adams v. Tucker, 6 Colo. App. 393, 396, 40 Pac. 783. A debt—and a judgment is a debt—is as much a moral obligation after the bar of the statute has fallen as before. The statute may be employed as a defense by the debtor, if he chooses to do so. It is a personal privilege granted to him. Foot v. Burr, 41 Colo. 197, 13 L.R.A.(N.S.) 1210, 92 Pac. 236. All these decisions of our courts are directly at variance with the idea that a judgment is extinguished when the statute has run.

Under § 3755, Rev. Stat. 1908, a party obtaining a judgment before a justice of the peace is of right entitled to the remedy by execution immediately after rendition of judgment. No action or proceeding of any kind before the court after judgment is necessary to obtain an execution. This fact should be borne in mind, for in some states, whose decisions will hereafter be referred to, executions are issued upon motion or some proceeding before the court. An execution is plainly a remedy afforded by law

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for the enforcement of the judgment. A party has another remedy looking toward the enforcement of his judgment. He may bring an action thereon in some other court. This is frequently done. He must bring this action, however, within six years after the rendition of the judgment, else there is great probability that his adversary may plead the statute of limitations (§ 2900, supra), and thus this remedy by action will be lost. Thus has our legislature left the matter, and we will have to accept it as it was left. If a party has two remedies for the enforcement of a right, the one he chooses is not barred because the other, if chosen, would have been. Foot v. Burr, supra. Having seen that a judgment otherwise alive is not extinguished because the statute of limitations has run against an action thereon, how can a statute which only limits the time within which an action can be brought on a judgment limit the time within which an execution may issue on it? It is difficult to comprehend how the issuance of an execution as of right, without an appeal to, and an order of, court, can be an "action" such as is meant in § 2900. From the foregoing observations it appears from our statutes and former decisions of this court that there is no escape from the conclusion that an execution otherwise issuable as of right may issue on a justice's judgment and be of force after the six-year statute of limitations has run against an action on the judgment. It is pleasing to note that this conclusion has support in the decisions of other states.

Waltermire v. Westover, 14 N. Y. 16, speaks of a statute providing, in substance, that all actions upon justices' judgments "shall be commenced within six years next after the cause of such action accrued." It is true that in that case the execution issued a short time before, and the sale took place about a year after, the six years had expired. The reasoning of the court is as applicable as though the execution issued later. After saying that the statute operated on the remedy, not the debt, the court, on pages 21 and 22, said: "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held that this statute, which is in terms confined to the remedy by action, operates to annihilate the remedy by execution? The statute is in derogation of a clear common-law right. It does not operate, according to the recent cases, by producing any presumption of payment, but is a mere statutory bar, founded in principles of public policy. It would be contrary, therefore, to all just rules of construction to extend its operation beyond the fair and reasonable interpretation of its language. The reasoning which has so fully established that statutes of this sort act upon the remedy only, and not upon the debt, equally proves that the operation of the statute in question here is confined to the particular remedy by action. Indeed, the statute could only be held to reach and subvert the remedy by execution, by holding that the debt itself is discharged, or by interpolating language not expressly or by any fair implication contained in the statute." To the same effect is Kincaid v. Richardson, 25 Hun. 237, 239.

In Williams v. Mullis, 87 N. C. 159, it is said that there is a general concurrence of opinion that the statute of limitations does not annihilate the judgment; that it acts upon the remedy, and not the debt; and that if the judgment is kept alive by issuing execution every three years, execution may issue though the statute has run. In that case it is pointed out that, under the statute of that state, if the judgment creditor allowed three years to elapse without issuing execution, he would have to apply to the clerk of the court for leave to issue, and that, the application for leave being in the nature of a scire facias, the defendant may oppose the motion by pleading the statute, but as long as the execution issued as of right, the statute could not be interposed. It might be said that the following decisions cited by an eminent writer induce the belief that this view is at variance with the general current of authority; but it seems to us, upon examination, that the said decisions, save one, are not opposed to that view:

Jerome v. Williams, 13 Mich. 521, was a proceeding before a court to renew an execution. The court said it was a substitute for a scire facias, and did not differ from a formal action, and that, where the delay in issuing execution rendered it necessary to apply for leave, it cannot be granted if the statute has run. This is far from saying that an execution as of right might not issue.

In People ex rel. Parsons v. Circuit Judge, 37 Mich. 287, it was pointed out that at a certain time the statute in force did not limit the time within which a suit might be brought on a judgment, but provided that the judgment should "be presumed to be paid and satisfied at the expiration of ten years" after it was entered. Another section of the statute provided for the issue of execution without any limitation of time, and for alias executions. It would seem that, if ever a judgment is extinguished by a limitation statute, it would be by one that said the judgment should be deemed paid and satisfied, yet as eminent a lawyer as Chief Justice Cooley said that, under such

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statutes, there is reason for saying that an execution might be taken out notwithstanding the lapse of the ten-year period, and that the court would not be justified in setting the execution aside without proof of actual payment. It is not intended to be understood by mentioning this, that this court would go so far as to hold that a judgment would or would not be extinguished under such a statute. It is not necessary to do so under the statute which we are now considering. The case is mentioned to show that the decisions in Michigan are not opposed to the view that we have taken.

McDonald v. Dickson, 85 N. C. 248, was a proceeding before a court for leave to issue an execution, and the defendant set up the statute as a defense. The proceeding was held to be in the nature of an action. The later case of Williams v. Mullis, supra, in the same court, points out this difference in McDonald v. Dickson.

Peters v. Vawter, 10 Mont. 201, 25 Pac. 438, was upon statutes so essentially different from ours that it cannot be considered in point here, and, besides, the case was a motion for leave to issue an execution.

Thomson v. Beveridge, 3 Mackey, 170, was upon a statute which did not bar an action, but which declared that a judgment was not good and pleadable or admissible in evidence after twelve years. The court held that this reduced a judgment to a nullity, and destroyed the cause of action entirely, and distinguished it from a statute that barred an action.

In Ludeman v. Hirth, 96 Mich. 17, 35 Am. St. Rep. 588, 55 N. W. 449, it appears that judgment was rendered on April 2, 1878, and execution issued the same day. On March 29, 1888, nearly ten years thereafter, the land was advertised for sale, and was sold on May 16, 1888. The court held the sale good, notwithstanding the expiration of the ten-year period of limitation before the sale, because the execution had been issued and the sale advertised before the period had expired. This is not in point. True, the court says that executions cannot be issued and levied after the statute has run, but this *dictum* is no doubt intended to be taken in the light of the Michigan statute, and is supported by the citation of Jerome v. Williams and People ex rel. Parsons v. Circuit Judge, mentioned above, which logically sustain our view under the Colorado statute.

Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244, is not opposed to our view. It seems therefrom that, under the laws of that state, no action on a judgment can be brought, and no execution can be issued, after ten years, and that the judgment ceases to be a lien at the expiration of that period. The court thought that all these statutes showed the legislative purpose to destroy the judgment after ten years. It would seem that this is true, for, the action, execution, and lien being barred, it is difficult to see what would remain. The court mentioned the New York cases cited above, and said: "It is apparent that in New York the statute was levied at only a particular remedy, and therefore the courts rightly held that all other remedies remained unimpaired."

McGrew v. Reasons, 3 Lea, 485, seems to hold that the running of the statute of limitations against an action on a judgment likewise barred the remedy by execution, so that an execution on a justice's judgment might be quashed in the circuit court upon petition for certiorari and supersedeas. The age of the judgment, nearly twenty years, no doubt appealed to the court in that case. No authorities are cited by the court. The conclusion in that case is not supported by the former reasoning of our own court on the statute of limitations, and to follow it now would be subversive of former decisions in this state.

The appellant also says that there is no redemption in this case because there was not enough paid to effect the redemption. Our statute (§ 3653, Rev. Stat. 1908) provides that after the expiration of six months, and at any time before the expiration of nine months, from the sale a judgment creditor may redeem by placing an execution on his judgment in the hands of the proper officer to execute, and paying to the officer the amount of money for which the premises were sold, with ten per cent per annum interest thereon from the date of the sale. This the redeeming creditor did. Before, and for several days after, the period of redemption expired, the sheriff had sufficient money in his hands to effect the redemption, paid to him by the redeeming creditor for that purpose. If the sheriff made a mistake in distributing this money, it was a matter between appellant and the sheriff. True, the sheriff returned money to the redeeming creditor, but the latter did not ratify the mistake of the sheriff, for he tendered $5.35 seasonably to appellant.

As it appears from the foregoing that appellant is wrong in his contentions, the judgment is affirmed.

Steele, Ch. J., and Campbell, J., concur.

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FLORIDA SUPREME COURT.

FLORIDA FINANCE COMPANY, Plff. in Err.,
v.
J. M. SHEFFIELD.

(— Fla. —, 48 So. 42.)

Ejectment — title — sufficiency.

1. A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. He cannot recover as against one without title, unless he prove title or prior possession.

Same — requisites.

2. A plaintiff in ejectment cannot recover merely on the strength of a deed to himself, without showing that his grantor had a prima facie right to recover, and a mere deed unaccompanied by evidence of the grantor's seisin is not prima facie evidence of the grantor's title. He must trace his title back to the ultimate source of title or to a grantor in possession at or near the time of his grant.

Evidence — deeds — certified copy — admissibility.

3. Certified copies of deeds should not be admitted in evidence until the party offering them makes it to appear that the original deeds were not within his custody or control.

Ejectment — adverse possession — tax deed — void assessment.

4. Where the defendant in an action of ejectment, or those under whom he claims, goes into actual possession of land purchased at tax sale under a tax deed regular on its face, but based upon a void assessment, such actual possession for the period of four years, prescribed by § 591 of the General Statutes of 1906, prior to the bringing of the action, will bar the suit.

Headnotes by PARKHILL, J.

(December 19, 1908.)

Case Note. — Effect upon special statute of limitations, which begins to run from time actual possession is taken under tax deed, of fact that such deed was void or irregular.

This note is limited to those cases where, as in FLORIDA FINANCE CO. v. SHEFFIELD, it appeared that the special statute of limitations commences to run from the time actual possession is taken under the tax deed, and does not include those cases from jurisdictions where, by the terms of the statute, limitations commence to run from the date of sale or from the date of delivery or recording of the deed.

But few jurisdictions have a special statute of limitations which begins to run from the time of possession. It would seem from the cases gathered that the question here annotated is not altogether free from difficulties, and even within the same jurisdiction presents some difference of opinion.

In Mississippi, § 539 of the Code 1880 declared that actual occupation for three years after one year from the day of sale, of any land held under a conveyance by a tax collector, in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of such land for taxes, or in any precedent step to said sale.

This statute was held in Patterson v. Durfey, 68 Miss. 779, 9 So. 354, to bar a suit to recover land sold for taxes, although it was claimed that part of such land, at the time of the sale to the levee board, was not delinquent for taxes, and the other part was then assessed to the liquidating levee board, and thus not subject to sale for taxes.

So, in Carlisle v. Yoder, 69 Miss. 384, 12 So. 255, where the same statute was under consideration it was said: "It may be conceded that the assessment roll was not returned by the assessor at the time required by law, wherefore the sale of March, 1882, under which the defendant claims, was invalid, and that the lands, having been the property of the liquidating levee board during the year 1881, were not subject to taxation and sale; and yet the defendant, by reason of actual occupation, has secured title to the land he claims. . . . The title of the defendant to the land claimed under the tax sale has been perfected by the lapse of the statutory period, without regard to any defect of power in the collector to sell the land for taxes. An actual payment by the landowner of the taxes for which the sale was made would not serve to defeat the title of the occupant of land claimed under a tax sale, who has held possession for the period prescribed by the statute. The title becomes perfect by lapse of time, whatever its original infirmity may have been."

In Brougher v. Stone, 72 Miss. 647, 17 So. 509, it was held that a purchaser from the state of land sold for taxes, who actually occupies the same under his purchase more than three years after one year from the time of sale for taxes, cannot be deprived of his property, although the sale was made on the wrong day and under a law not applicable to the land.

However, in Hoskins v. Illinois C. R. Co. 78 Miss. 768, 84 Am. St. Rep. 644, 29 So. 518, overruling Patterson v. Durfey and Carlisle v. Yoder, supra, it was held that the three years' statute of limitations applied only to sales of lands that were taxable and salable, and in which there was some defect in the proceedings relating to the assessment or sale, and not where the land was not taxable; the land being in this case a homestead, the right to a patent of which had not yet been perfected.

So, in Eastland v. Yazoo Delta Lumber Co. 90 Miss. 330, 43 So. 956, it was held that the statute did not apply to a tax sale void because the assessment was made under an unconstitutional law. The court in

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ERROR to the Circuit Court for Taylor County to review an order granting a new trial after verdict for plaintiff in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. H. J. McCall for plaintiff in error.

Messrs. **Hendry & McKinnon**, for defendant in error:

When a tax deed is valid upon its face and the statute of limitation has fully run, the former owner will not be permitted to show that the deed is in fact invalid by reason of irregularities in a prior proceeding.

Tyler, Ejectment & Adverse Enjoyment, pp. 864, 873; Black, Tax Titles, §§ 492, 493, 497, 498; 27 Am. & Eng. Enc. Law, p. 985; Butts v. Ricks, 82 Miss. 533, 34 So. 354; Russell v. Lang, 50 La. Ann. 36, 23 So. 113; Pipes v. Farrar, 64 Miss. 514, 1 So. 740; Terry v. Heisen, 115 La. 1076, 40 So. 461.

Parkhill, J., delivered the opinion of the court:

On the 1st day of January, 1908, the plaintiff in error instituted an action of ejectment against the defendant in error in the circuit court for Taylor county to recover the N. E. ¼ of N. W. ¼ and S. W. ¼ of N. W. ¼ of section 35, township 2 S., range 6 E., containing 80 acres, and mesne profits. The defendant pleaded the general issue. On the 24th day of March, 1908, a trial was had, and the jury rendered a verdict for the plaintiff, being directed by the court so to do. Upon motion of defendant the court granted a new trial, and the plaintiff sued out a writ of error, as authorized by § 1695 of the General Statutes of 1906.

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this case said: "It is certainly fortunate that the legislature, in adopting § 3095 of the Code of 1906, has declared that that section shall not apply when the sale is absolutely void; fortunate as the legislative declaration that the intent of the legislature never had been, as misinterpreted in Carlisle v. Yoder; Patterson v. Durfey; and Brougher v. Stone,—supra, that such a statute of limitations should cure a pretended sale for taxes when there never had been in truth and in fact any power to sell for taxes at all. That legislative provision was merely declaratory of what this court has already announced to have been the legislative intent in § 539 of the Code of 1880 and the other related statutes of limitation."

So, in Saddler v. Smith, 54 Fla. 671, 45 So. 718, 14 A. & E. Ann. Cas. 570, the statute set out in FLORIDA FINANCE CO. v. SHEFFIELD was held not to apply to a suit to set aside a tax deed, where the calls in the deed are materially different from the lands described on the assessment roll and sold by the collector. But see the comment on this case in the SHEFFIELD CASE.

In Pence v. Miller, 140 Mich. 205, 103 N. W. 582, a similar statute at the suit of one in adverse possession, for the required time, of property under a void tax deed, was held to be a statute of limitations, and to vest in him an absolute title.

In Arkansas, Mansfield's Dig. § 4475 (Sandels & H. Dig. § 4819), provides that "no action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or commissioner of state lands for nonpayment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the nonpayment of taxes, or who may hold such lands under a donation deed from the state, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the lands in question within two years next before the commencement of such suit or action."

This statute was held to apply in Finley v. Hogan, 60 Ark. 499, 30 S. W. 1045, where, although the tax deed was regular on its face, the sale was void for the reason that the owner had previously paid the taxes for which it was sold.

In Ross v. Royal, 77 Ark. 324, 91 S. W. 178, it was said: "Actual possession of land taken and held continuously for the statutory period of two years, under a clerk's tax deed or donation deed issued by the commissioner of state lands, bars an action for recovery, whether the sale be merely irregular or void on account of jurisdictional defects." To the same effect is Dickinson v. Hardie, 79 Ark. 364, 96 S. W. 355.

So, in Carpenter v. Smith, 76 Ark. 447, 88 S. W. 976, it was recognized that open, continuous, and adverse possession, although under a void tax title, is sufficient to give the one in possession title.

This was also recognized in Gannon v. Moore, 83 Ark. 196, 104 S. W. 139 (erroneous designation of land in reciting clause).

And see Cooper v. Lee, 59 Ark. 460, 27 S. W. 970, sufficiently reviewed in FLORIDA FINANCE CO. v. SHEFFIELD.

Adverse possession for two years under this statute is a bar to recovery, although the deed is void on its face. Woolfork v. Buckner, 60 Ark. 163, 29 S. W. 372. The tax deed showed that two pieces of land were sold together.

However, in Caldwell v. Barrett, 71 Ark. 310, 74 S. W. 748, it was held that an overdue tax sale based on a judgment rendered by a special judge at an adjourned term of the court held on a day when the regular judge was holding court in another county in the same circuit is a nullity, and possession thereunder will not set in operation the statute of limitations of two years.

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The motion for new trial is as follows:

"Now comes the defendant in the above-stated cause by his attorneys, and moves the court to set aside the verdict in said cause and to grant him a new trial therein upon the following grounds, to wit:

"(1) Because said verdict is contrary to law:

"(2) Because said verdict is contrary to the evidence.

"(3) Because the court erred in admitting in evidence, over the defendant's objection, certified copy of deed from Jno. Alexander Graham to J. W. Lyman, dated June 9, 1890.

"(4) Because the court erred in admitting in evidence certified copy of deed, dated January 26, 1901, from J. W. Lyman to G. S. Van Buskirk, over the objection of the defendant.

"(5) Because the court erred in admitting in evidence, over the defendant's objection, final decree of foreclosure, dated 11th day of August, A. D., 1898, and signed by John W. Malone, judge.

"(6) The court erred in admitting in evidence, over the objection of the defendant, master's deed from T. M. Puleston to Florida Finance Company.

"(7) The court erred in admitting in evidence certain transcripts of the tax records.

"(8) The court erred in instructing the jury that it was their duty to return a verdict for the plaintiff in so far as the ownership and right of possession of the land in dispute was concerned.

"(9) And for other good and sufficient reasons."

There was an entire failure in this case to prove plaintiff's title. The plaintiff deraigned its title from John A. Graham, and introduce in evidence, over defendant's objection, a deed from Graham to Lyman, dated June 9, 1890, another deed from Lyman to Van Buskirk, and a deed from Puleston, as master in chancery in foreclosure proceedings against Van Buskirk and others, to the plaintiff. There was no evidence to show what right Graham had to convey the

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So, in Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83, a case arising in Arkansas, it was held that a deed of land sold for nonpayment of taxes, in which it appeared that the sale was made on a day which was not the day authorized by law, is void on its face, and not admissible in evidence to support an adverse possession under the statute.

To the same effect is Alexander v. Gordon, 41 C. C. A. 228, 101 Fed. 91, where the sale was void because made for the collection of a tax in excess of the amount which the county court was authorized by the statutes to levy, and because the officer who made the sale was without jurisdiction or authority to effect it. The court in Ross v. Royal, supra, in review of this case said: "The conclusion appears to have been reached on the ground that the requisite period of occupancy under the statute is so short as to be unreasonable, and to amount in effect to the taking of the owner's property without due process of law. That decision is in obvious conflict with several decisions of the Supreme Court of the United States, and cannot be regarded as an authority on the question. Upon the facts involved in that case the decision was undoubtedly correct, because no deed had been executed pursuant to the tax sale, and therefore the statute did not begin to run." It should be noted that in the Ross Case no mention whatever was made of Redfield v. Parks, supra.

Under this statute it was held in Gates v. Kelsey, 57 Ark. 523, 22 S. W. 162, that two years' adverse possession is necessary to constitute a bar, and that holding under a tax title which is in fact void, though valid on its face, where the lands are not in fact occupied or in the actual possession of anyone after the tax sale, is not sufficient. The court in this case said: "Under the general rule the holder of a tax deed is not in constructive possession of the land in case it is unoccupied or not in the actual possession of anyone, if it can be shown that the sale is void. Does the statute relied on by appellant make an exception? . . . Only two classes of persons are affected by it,—the defendant 'who may hold,' and the plaintiff who is disseised or dispossessed. No date, as the day of sale or record, is specified from which it must run. There is only one fact mentioned in it which can defeat the recovery of land illegally sold for taxes, and that is the fact that the plaintiff, his ancestor, predecessor, or grantor was not seised or possessed of the lands in question within two years next before the commencement of such suit or action. The statute necessarily implies that, if he was seised or possessed within the two years, he can recover. In other words, it makes the disseisure and dispossession of the true owner for two consecutive years a bar. It is the only fact, under the statute, which can defeat him in an action to recover. There is nothing in the statute which constitutes any act disseisin. The general rule governs, and constructive possession follows the title. There is only one way in which he can be disseised or dispossessed by an illegal sale for taxes, and that is adverse possession. Two years' adverse possession is, therefore, necessary to constitute a bar under the two years' statute."

For cases on effect of an invalid tax deed as color of title within general statutes of limitations, see subject note to Bradbury v. Dumond, 11 L.R.A.(N.S.) 772.

For statute limiting time for attack on tax sale, or creating a conclusive presumption as to its validity, as applied to a sale under proceedings void for jurisdictional defects, and under which possession has not been taken, see case note to Nind v. Myers, 8 L.R.A.(N.S.) 157.

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land, and the evidence did not show that plaintiff's grantors ever had possession of the land. The evidence tended to show possession in the defendant and those under whom he claimed.

A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. He cannot recover as against one without title, unless he prove title or prior possession. Burt v. Florida Southern R. Co. 43 Fla. 339, 31 So. 265. The plaintiff cannot recover merely on the strength of a deed to himself, without showing that his grantor had a prima facie right to recover, and a mere deed, unaccompanied by evidence of the grantor's seisin, is not prima facie evidence of the grantor's title. He must trace his title back to the ultimate source of title, or to a grantor in possession at or near the time of his grant. Lake v. Hancock, 38 Fla. 53, 56 Am. St. Rep 159, 20 So. 811; Dubois v. Holmes, 20 Fla. 834; Florida Southern R. Co. v. Burt, 36 Fla. 497, 18 So. 581.

The certified copies of the deeds from Graham to Lyman, and from Lyman to Van Buskirk, should not have been admitted in evidence until the plaintiff made it to appear that the original deeds were not within its custody or control. Bell v. Kendrick, 25 Fla. 778, 6 So. 868; Johnson v. Drew, 34 Fla. 130, 43 Am. St. Rep. 172, 15 So. 780.

The defendant relied upon a tax deed to W. G. Sheffield of May 12, 1902, and on mesne conveyances from Sheffield, and on actual possession of the land by himself and those under whom he claimed for more than four years before this suit was brought. Section 591 of the General Statutes of 1906 provides: "When the purchaser of land at a tax sale goes into actual possession of such land, no suit for the recovery of the possession thereof shall be brought by the former owner or claimant, his heirs or assigns, or his or their legal representatives for the recovery of the possession of such land, unless such suit be commenced within four years after the purchaser at such tax sale goes into possession of the land so bought."

The plaintiff introduced evidence tending to show that the tax deed was void because the assessment of the land was void, and claims that the foregoing statute of limitations does not apply for that reason.

Even though the tax deed be void because the assessment of the land was void, if the defendant or those under whom he claims went into actual possession of the land purchased at the tax sale, such actual possession for the statutory period prior to the origin of this suit will bar this suit. The court properly granted a new trial because of his error in striking the tax deed and withdrawing it from the consideration of the jury.

The tax deed under which the defendant claims is not void on its face. It gives the name of the grantee, the number of the tax certificate, the date of the tax sale for unpaid taxes for a stated year, the name in which the property was assessed, the amount paid for the certificates, a description of the land, besides the other recitals prescribed by the statute, and the execution thereof is in the prescribed form. Cowan v. Skinner, 52 Fla. 486, 42 So. 730, 11 A. & E. Ann. Cas. 311.

Section 591 of the General Statutes of 1906 is a statute of limitations and begins to run, not from the date of sale nor from the recordation of the tax deed, but from the time actual possession of the land is taken under the deed.

In considering the provisions of a similar statute, the supreme court of Arkansas had this to say: "But it does not follow because the sale was without notice and void that the plaintiff can now recover. . . . It has never been seriously doubted that, in cases where the purchaser at a sale of land for the nonpayment of taxes takes actual possession of the land purchased, under a proper deed conveying said land to him, the legislature may prescribe a period of limitation after the expiration of which the title of the original owner is barred. By the adverse possession of the purchaser, the owner is excluded from the possession of his premises, and notified that an adverse claimant, hostile to his interests, holds the land. Public policy no less than justice to the tax purchaser requires that he should bring his suit within a reasonable time, in order that all contested questions may be put at rest while the facts are recent and susceptible of proof." Cooper v. Lee, 59 Ark. 460, 27 S. W. 970. See also Cofer v. Brooks, 20 Ark. 542.

In Pillow v. Roberts, 13 How. 472, 14 L. ed. 228, the Supreme Court of the United States said: "In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show that he and those under whom he claimed held under a deed from a collector of the revenue of lands sold for the nonpayment of taxes. He was not bound to show that all the requisitions of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he

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could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title."

Some courts hold that the special statute of limitations only applies where the tax deed is valid upon its face. Mason v. Crowder, 85 Mo. 526; Taylor v. Miles, 5 Kan. 498, 7 Am. Rep. 558; Larkin v. Wilson, 28 Kan. 513; Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; Kilpatrick v. Sisneros, 23 Tex. 113; McGavock v. Pollack, 13 Neb. 538, 14 N. W. 659; Sheehy v. Hinds, 27 Minn. 259, 6 N. W. 781; King v. Lane, 21 S. D. 101, 110 N. W. 37.

Other courts hold that an action cannot be maintained by the original owner of land sold for taxes, against one who has been in possession of it for the statutory period, claiming title in good faith under a tax deed, although the deed is void upon its face. Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473; Oconto County v. Jerrard, 46 Wis. 317, 50 N. W. 591; McMillan v. Wehle, 55 Wis. 685, 13 N. W. 694.

This court has held that the statute of limitations prescribed by § 61, chap. 3413, p. 39, Acts 1883, and § 20, chap. 1887, p. 44, Acts 1872, and § 63, chap. 1976, p. 27, Acts 1874, will not apply to a suit to set aside a void deed or to recover possession of land attempted to be conveyed thereby. McKeown v. Collins, 38 Fla. 276, 21 So. 103; Carncross v. Lykes, 22 Fla. 587; Grissom v. Furman, 22 Fla. 581; Sloan v. Sloan, 25 Fla. 53, 5 So. 603; Townsend v. Edwards, 25 Fla. 582, 6 So. 212. Under these statutes the limitation ran from the recording of the tax deed. They required no actual possession of the land by the holder of the tax title. As these statutes depended merely upon the recording of the tax deed for a certain period, when the deed fell because it was void, there was nothing left for the statute to rest upon, and the statute fell with the deed. But a void tax deed may be color of title. Townsend v. Edwards, supra. As the limitation prescribed by § 591 of the General Statutes of 1906 rests upon the actual possession of land purchased at a tax sale, when the tax deed falls because it is void, the statute does not fall with the deed, because it rests upon the possession of the land, and the deed becomes merely the color of title. The statute would not apply if the tax deed were void, and no title by adverse possession was shown. See Saddler v. Smith, 54 Fla. 671, 45 So. 718, where the defendant was not in possession and did not claim title by adverse possession under the void tax deed.

23 L.R.A. (N.S.)

By the enactment of § 64, chap. 4322, p. 39, Acts 1895, now § 591 of the General Statutes of 1906, a radical departure has been made by our lawmakers in the policy of quieting tax titles. Under statutes that made the limitation to run from the recording of a tax deed for a stated period, and that required no notice to the former owner by the purchaser's actual possession of the land, speculators flourished to the annoyance and injury of the landowners and taxpayers of the state. And so it would seem our lawmakers designedly adopted the provisions of § 591 of the General Statutes of 1906, encouraging thereby the buyer who in good faith would go into actual possession of the land, and affording, by such actual possession of the land, a notice of higher order to the delinquent taxpayer of the passing of his right to object to the irregularities and illegalities in the tax proceedings. This legislation may be commended in the language of this court in Florida Sav. Bank v. Brittain, 20 Fla. 507, as the endeavor of the lawmaker "to give some force to a tax title, thereby securing bidders other than those notoriously for speculation; and also advising the citizen that he must pay his taxes, like all good citizens should do, or his property will be sold to some purpose."

Much more may be said in support of the policy of a statute that bars the former owner's right to recover by proof of adverse possession for four years by the holder of a void tax deed than may be said in behalf of the statute that bars the former owner's right to recover by proof of adverse possession for seven years under any other color of title. When the state sells land at tax sale, gives the purchaser a deed regular on its face, takes his money, and requires him to go into the actual possession of the land so purchased for four years, causing the purchaser thereby to improve the land at his expense before he can claim the protection of the statute of limitations, and the purchaser has complied with all the requirements of the law, the former owner, who is in default, should not be permitted to oust the purchaser because of the dereliction of the officials of the state. The lawmakers have declared this should not be done, good policy proclaims its wisdom, and the courts should give effect to this legislation.

The court did not err in granting the motion for a new trial; and the judgment is affirmed.

Taylor and Hocker, JJ., concur.

Shackleford, Ch. J. and Cockrell and Whitfield, JJ., concur in the opinion.

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GEORGIA SUPREME COURT.

S. T. BREWER, Plff. in Err.,
v.
J. M. CASWELL.

(132 Ga. 563, 64 S. E. 674.)

Innkeeper — guest — evidence — sufficiency.

Where an innkeeper provided a lot and stables in which his guests were permitted to keep their horses without charge, but it was customary to charge for feed for horses if furnished by the innkeeper, it was not sufficient evidence of the relation of innkeeper and guest that one drove into the lot, unhitched his mule from his buggy, and placed the mule in a stable pointed out by a boy in charge of the lot and stables, and then left the premises without entering the inn or having any agreement with the innkeeper or his authorized agent that he would be a guest, or that the innkeeper should furnish any feed for the mule, or doing anything further towards becoming a guest, though the owner stated to the boy that he would return and would himself feed his mule at dinner time, and though he testified that he intended to take dinner at the inn with another person who accompanied him, and who dined there, but did not do so, because before the dinner hour he learned of the injury to the mule.

(May 12, 1909.)

Headnote by ATKINSON, J.

ERROR to the Superior Court for Liberty County to review an order granting a nonsuit in an action brought to recover damages for injuries to property for which defendant was alleged to be responsible as an innkeeper. Affirmed.

Statement by Atkinson, J.:

S. T. Brewer instituted suit in the superior court of Liberty county against J. M. Caswell for the recovery of $150, the value of a mule, the property of the plaintiff, which was lodged by him in the stable of the defendant, and was stung by certain bees kept by the defendant behind the stable and in close proximity thereto, from the effects of which the mule died.

In his own behalf the plaintiff testified, among other things, as follows:

The defendant keeps a hotel or inn at Hinesville, and, in connection therewith, conducts this stable and lot. On the day named in the declaration I came to Hinesville with Middleton. We drove my mule, and upon arrival in town drove into the lot of defendant. There was a boy in charge of the lot and stable who showed us a stall, the only one not occupied, in which we placed the mule. I instructed the boy that the mule was young and excitable, and that I would come back at dinner and feed him. I had no feed in my buggy, and expected to get the feed from the stable. Mr. Middleton, who came with me, took dinner

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Case Note.—What acts, with respect to baggage of an intending guest, will initiate the relation of innkeeper and guest so as to create liability for its loss or injury.

Cases in which it appears that the owner of chattels left in the care of the innkeeper had no intention of himself becoming a guest are not to be included in this note. This of course excludes cases where one leaves his horse at an inn, with no intention of stopping there himself, and losses of property by persons who are at the inn for some special purpose not connected with passage or travel. Likewise, cases are excluded in which the intention to become a guest was clearly consummated, before any injury or loss, by acts other than a mere dealing with the guest's property. In other words, this note is limited to cases where the loss or injury to the goods occurred before the intending guest had registered, eaten a meal, procured a room, or, by acts other than delivering his personal property to the innkeeper, carried his intention into effect.

In Eden v. Drey, 75 Ill. App. 102, where it appeared that two boxes, bearing the owner's name and containing merchandise for sale, were received by the innkeeper, and the owner delivered them with the intention of becoming a guest, and two or three hours afterward did register and become an inmate of the hotel,—it was held that the relation of innkeeper and guest was established by the reception of the baggage, and that the responsibility of the innkeeper for the safekeeping of the boxes began at that time, and that he was liable for the loss of part of the merchandise prior to the time when the owner came personally *infra hospitium*.

In Oriental Hotel Asso. v. Faust, 38 Tex. Civ. App. 573, 86 S. W. 373, it appeared that a traveler left his valise at a hotel in the evening, and at noon of the next day returned to the hotel, registered, and ate lunch, and when he thereafter called for his valise it was discovered that it was missing. It was contended that he was not a guest at the time he left his baggage at the hotel, but the court refused to decide this question, holding that the fact that the hotel received the baggage was some evidence that it still retained possession when the traveler registered the next day, and that this was sufficient to justify the verdict against the hotel, in the absence of any proof to the contrary.

In Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32, 58 Am. Rep. 785, 4 N. E. 398, where it appeared that at 2 o'clock in the morning one went to a hotel in advance of his actual present need of entertainment, and for the sole purpose of making it a depository for his money that he might be free to follow the promptings of his own will and pleasure for the balance of that night, with no risk of its loss; that he did not register,

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at the hotel, and I expected to take dinner with him. Just on the outside of the stable, and immediately against the rear of the stable in which my mule was placed, was a row of beehives. I was notified after leaving the stable that my mule had been stung by the bees. I hurried down to the hotel, and found the mule covered with them. I began to doctor the mule, and did everything for him I could. This was about dinner time, and when dinner came on I was busy with attending to the mule, and could not stop to eat dinner. The mule died from the effects of the stings, when I got home. The mule was four years old, and reasonably worth $150. I did not know anything about the bees being at the back of the stall. If I had, I would not have allowed the mule to be placed in the stall. I did not make any contract with the boy as to the pay for keeping the mule, but expected to pay the usual charge. If the mule had not been stung, I would have taken dinner with Middleton at the hotel, and would also have fed my mule at the stable, and expected to pay for it. I was prevented from taking dinner there because of the injury to the mule. I told Mr. Caswell's agent that I would come back at dinner, but did not tell him or anybody else that I would come back and take dinner at the hotel.

Martin, sworn for the plaintiff, testified:

Mr. Caswell keeps a hotel in Hinesville, and charges guests for stopping with him. He keeps no book for his guests to register in when stopping there.

Lang testified he had always paid for the feed of his horse when he stopped at the Caswell Hotel and placed his horse in the stables, but did not pay for stable room. Mr. Caswell never made any charge for a man who simply left his horse in the stable.

The plaintiff closed, and, upon motion for nonsuit, the judge passed the following order: "After argument, . . . the plaintiff's counsel stating, 'The plaintiff does not rely for recovery upon § 3821 of the Civil Code of 1895,' it is ordered that said motion for nonsuit be and is hereby sustained, and said case is dismissed." The plaintiff excepted to the order granting the nonsuit, and assigned error thereon, on the ground that the judgment was contrary to law and evidence. In his brief, counsel for plaintiff in error took the position that the defendant was liable to the plaintiff only because the defendant was an innkeeper and the plaintiff was his guest, and the evidence was sufficient to carry the case to the jury on the question as to whether the relation of innkeeper and guest, and the consequent liability arising therefrom, existed.

Mr. Donald Fraser for plaintiff in error.

Messrs. **Garrard & Meldrim, Edwin A. Cohen, and B. A. Way** for defendant in error.

Atkinson, J., delivered the opinion of the court:

Under the contention of the plaintiff, the question is whether the defendant was liable, as an innkeeper, to the plaintiff as his guest. All persons entertained for hire at the inn are guests. Civil Code 1895, § 2934. "It is not necessary to show actual delivery to the innkeeper. Depositing goods in a public room set apart for such articles or leaving them in the room of the guest, or placing a horse in the stable, is a delivery to the innkeeper. If, however, the guest de-

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and refused to be shown a room, stating that he would be back in half an hour and then take a room, but did not return till three hours later, during which time the clerk with whom the money had been deposited absconded with the money,—it was held that these facts did not initiate the relation of innkeeper and guest at the time the money was deposited, and that the clerk, knowing the facts, had no power to bind the proprietor of the hotel by the receipt of the money, and that no liability for its loss attached to the innkeeper. In the lower court (8 Ohio Dec. Reprint, 570) an opposite view was taken.

Where a hotel keeper sends his porter to a railway station to solicit guests and to receive their baggage, and baggage or a check for baggage is delivered to the porter by a traveler who enters the conveyance indicated to him by the porter, and goes directly to the hotel, where he is received as a guest, the liability of the innkeeper, as such, begins on the delivery of the baggage or

check to the porter, and he is liable for the value of the baggage, although it never reached the hotel. Coskery v. Nagle, 83 Ga. 696, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491; Dickinson v. Winchester, 4 Cush. 114, 50 Am. Dec. 760.

But if, after delivering his baggage to the porter, he changes his mind and does not go to the hotel or inn, the proprietor is not liable, as an innkeeper, for the loss of the baggage. Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 105 Am. St. Rep. 930, 79 S. W. 113, 2 A. & E. Ann. Cas. 345.

And so it was held in Strauss v. County Hotel & Wine Co. L. R. 12 Q. B. Div. 27, where, after going to the hotel, one received a telegram which caused him to change his mind and leave the hotel without registering.

The duty of an innkeeper as to the effects of one who has ceased to be a guest is discussed in the case note to Clark v. Ball, 2 L.R.A. (N.S.) 100.

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livers his goods to a servant, under special charge to him to keep the same, the innkeeper is not liable therefor." Section 2936. The expressions, "depositing goods in a public room set apart for such articles," and "placing a horse in the stable," as used in the section of the Code last cited, are to be understood as relating to such acts of a guest as distinguished from such acts by a mere intruder or stranger having no relation of guest to the innkeeper, and at no time establishing such a relation. It was held in York v. Grindstone, 1 Salk. 388 (Yorke v. Grenaugh, 2 Ld. Raym. 866), that if a traveler leave his horse at an inn and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest, because, it was said, it "must be fed, by which the innkeeper has gain; otherwise, if he had left a trunk or a dead thing."

There has been some diversity of opinion as to when the relationship of innkeeper and guest was impliedly established by the mere leaving of a horse at the stable of an innkeeper, at least so far as affected the safekeeping of the horse and the liability for any injury to it. But the authorities which have held that the relation of innkeeper and guest was thus established have had, as their underlying reason, the existence of a state of facts "by which the innkeeper has gain," as it is expressed in the quotation above made; that is, that there should be such an express or implied contract between the person who leaves the horse and the innkeeper as would authorize a charge by the latter as such for the service. See note to Calye's Case, 1 Smith, Lead. Cas. 9th ed. 250; Healey v. Gray, 68 Me. 489, 28 Am. Rep. 80; Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409; Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; Id. 28 Vt. 387, 67 Am. Dec. 720; Gelley v. Clerk, Cro. Jac. 188; Beale, Innkeepers & Hotels, §§ 121, 122, 131, 132; Strauss v. County Hotel & Wine Co. L. R. 12 Q. B. Div. 27.

Here the plaintiff did not expressly or impliedly place his horse with the innkeeper or his servant to be fed and cared for. He stated to the latter that he intended to return at dinner time and feed the horse himself. He gave no intimation of any intention to obtain the feed from the innkeeper. The evidence showed that there was no custom to charge where a person provided his own feed for his mule. There was lacking, therefore, the establishment of any situation which created a right to profit on the part of the innkeeper. The plaintiff, though on the premises, did not go to the inn, or give any intimation to the proprietor of his presence or intention to become a guest, or even of his expectation to return for dinner. He testified that his companion took dinner at the inn, and that he intended to take dinner with his comrade; but whether this was to be as the guest of the latter or as the guest of the innkeeper is not clear. At any rate, whatever was his private intention on this subject, it was in no way shown to have been communicated to the innkeeper or any authorized agent of his. The plaintiff left the premises. Where he went or how long he stayed does not appear. But, before the dinner hour had arrived, he heard that his mule had been stung by bees, and went to its relief. So that he never, in fact, took dinner at the inn, nor did anything else tending to establish the relation of innkeeper and guest. These facts were not sufficient to show that, when his mule was injured, he was the guest of the inn, and that the defendant was liable as an innkeeper for such injury. This ruling does not in any way conflict with that in Coskery v. Nagle, 83 Ga. 696, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491, and similar cases, where a traveler delivered his baggage to a porter of an inn at a station for the purpose of having it carried to the inn where he was proceeding to become a guest, and did so become. See on the general subject Tulane Hotel Co. v. Holohan, 2 A. & E. Ann. Cas. 345, and note (112 Tenn. 214, 105 Am. St. Rep. 930, 79 S. W. 113).

Judgment affirmed.

All the Justices concur.

IDAHO SUPREME COURT.

H. L. TATUM et al., Appts.,
v.
COAST LUMBER COMPANY, Respt.

(— Idaho, —, 101 Pac. 957.)

Contract — mistake — rescission.

1. A unilateral mistake in the making of a contract, of which the other contracting party is entirely ignorant, and to which he in no way contributes, will not affect the contract or afford grounds for its avoid-

Headnotes by AILSHIE, J.

Case Note. — Rights and liabilities under contract for sale of personalty as affected by vendor's mistake in fixing price.

As to the effect of the retention of goods after notice of a mistake in the quoted price, see Cunningham Mfg. Co. v. Rotograph Co. 15 L.R.A. (N.S.) 368, and the case note appended thereto.

As to mistake in computation by a con-

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ance or rescission, unless it be such a mistake as goes to the substance of the contract itself.

Sale — mistake — amount of recovery.

2. Where a prospective purchaser of goods submits a list of the goods he proposes to purchase and asks the price for which the owner will sell such articles, and the vendor submits a bid in the aggregate for the entire list of goods without setting out the price of each article, and the purchaser accepts the proposition and orders the goods shipped, and thereafter receives and accepts the goods, the vendor will not be allowed to recover a greater sum than that called for by his bid, on the ground that he made an error or mistake in computing the various items, and for that reason submitted his bid greatly below the price for which the goods should have sold.

Same — rescission.

3. The negligence and mistake of the vendor of property in computing the prices of various articles he is selling, or in computing the profits he expects to or should realize on the goods, is no ground for avoidance or rescission of the contract, where the other party acted in good faith and is free from any knowledge of the mistake or of any fraud or deception in the transaction.

(May 6, 1909.)

APPEAL by plaintiffs from a judgment of the District Court for Ada County in defendant's favor and from an order denying a new trial in an action brought to recover a balance of the alleged purchase price of certain property sold and delivered. Affirmed.

The facts are stated in the opinion.

Mr. D. D. Williams, for appellants:

The vendee became liable to the vendors for the machinery bought at the prices shown in the invoices, because it received the goods as its own property after receiving notice of the price at which it must receive them, or not at all.

Mummenhoff v. Randall, 19 Ind. App. 44, 49 N. E. 40; Mitchell v. McBee, 1 McMull. L. 267, 36 Am. Dec. 264.

Mr. Alfred A. Fraser for respondent.

Ailshie, J., delivered the opinion of the court:

This action was instituted by the appellants for the recovery of $1,060 claimed to be due them as a balance for certain merchandise sold to the respondent between the 10th day of October and the 17th day of November, 1905. The defendant denied the indebtedness, and the case was tried to the court without a jury, and findings and judgment were entered in favor of the defendant. The appeal is from the judgment and an order denying a motion for a new trial.

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tractor as a ground for relief, see the case note to Steinmeyer v. Schroeppel, 10 L.R.A. (N.S.) 114.

As to the right of a purchaser of personalty to rely upon the seller's computation of price or estimate of quantity, see case note to Dalhoff Constr. Co. v. Block, 17 L.R.A. (N.S.) 419.

A supposed contract of sale when there is a mutual misunderstanding between the parties as to the price to be paid will impose no liability upon either party. West v. De Wezele, 4 Fost. & F. 596; Wilkinson v. Williamson, 76 Ala. 163; Rovegno v. Defferari, 40 Cal. 459; Greene v. Bateman, 2 Woodb. & M. 359, Fed. Cas. No. 5,762.

Where, upon default by the purchaser under a conditional sale contract, the vendor agreed to sell personalty to a third person for $525, under the mistaken impression that the amount remaining unpaid was but $650, when in fact it was $950, the vendor, who immediately gave notice of the mistake upon discovering it, may obtain relief in equity where he renounced the agreement and returned what had already been paid thereon, and the vendee had not acted so that he would be prejudiced by a rescission. Scott v. Hall, 58 N. J. Eq. 42, 43 Atl. 50.

Where a lumber dealer, in response to a request to designate a lump sum for which he would supply a designated number of pieces of timber of varying sizes, submitted a written statement of the number of feet in each item and the price of each, and the purchaser, looking only at the gross amount of the bill, accepted the offer without being aware of the fact of the vendor's mistake in computing the number of feet in one item, the latter will not, after the vendee has used the lumber in constructing a building, be entitled to relief in an action of assumpsit, as the mistake was not mutual, and it has become impossible to place the parties *in statu quo*, notwithstanding the statement submitted by the vendor contained a provision that "errors in extensions and footings are subject to correction." Boeckeler Lumber Co. v. Cherokee Realty Co. 135 Mo. App. 708, 116 S. W. 452.

And the facts presented in the case of Chapline Realty & Constr. Co. v. Philip Gruner & Bros. Lumber Co. (Mo. App.) 118 S. W. 665, are identical with those of the last case, excepting that the vendor, upon discovering his error in computation after his offer had been accepted and the vendee had entered into a contract with a third person upon the strength thereof, refused to carry out his contract; and it was held that the vendor was liable in damages as the mistake was not mutual and the vendee was unaware thereof.

But where, by a mistake or as the result of oversight or error in computation, a vendor quotes a price below the true one, which is accepted by the vendee with knowledge of the mistake, the latter cannot enforce the contract. Everson v. International Granite Co. 65 Vt. 658, 27 Atl. 320.

So, where, by a mistake, the word "less"

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This action is the result of a dispute which arose between the appellants and respondent over the purchase of a bill of machinery. The facts essential to the determination of this case are as follows: In the month of October, 1905, the appellants furnished respondent with a list of tools and machinery for a planing mill and sash and door factory, which they proposed to sell to respondent for $2,825 f. o. b. Portland. The respondent on the same day appears to have accepted the offer. Later, and on November 3d, respondent's manager, George Clithero, wrote appellants at Portland ordering a 48-inch 3-drum sander at $1,250 f. o. b. Portland, to come with the car of machinery previously ordered. Clithero, as manager for the respondent company, seems to have been figuring on the purchase and installation of machinery for operating a mill and factory in Boise, and, subsequent to the previous orders, appears to have concluded that they would need still other machinery, and that it would also be necessary to change the previous order as to some of the machinery, getting different and heavier material in some instances. He accordingly prepared a list of the tools, machinery, and furnishings his company wanted to purchase, and went to Portland, and called on the appellants' salesman at their place of business, and submitted the complete list, which included most of the articles and machinery covered by the previous orders and such changes as were desired. This list contained some fifty or sixty items. He requested the appellants' salesman to go over the list and give him the total price for which appellants would sell respondent the entire bill of goods. On the afternoon of November 17th, appellants' salesman, one Mark Colby, delivered to Clithero a communication which is as follows, omitting the list of goods scheduled in the letter:

Nov. 17, 1905.

Coast Lumber Company,
George Clithero, Mgr.,
Boise, Idaho.

Dear Sir:—

Your order for machines and extras as it now stands with us comprises the following list of machinery: . . . The above equipment totals approximately $5,134.80. On our original contract we estimated and charged you for 24,000 lbs. of freight to bring same f. o. b. Boise. The additions which you have just made will bring the weight approximately 40,000 lbs., but whatever the exact weight is in excess of the 24,000 we will charge you at the carload rate. We would suggest that you pay

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was omitted from an offer to furnish cloth which was worth from $2 to $6 per yard, 'at 5 cents a yard than Gale would ch'g.," the vendee, knowing of the ambiguity of the offer and that there was a mistake therein, will be liable for the real value of what he orders and uses. Butler v. Moses, 43 Ohio St. 166, 1 N. E. 316.

And where the vendor of flour, by reason of a typographical error in a letter, quoted a lower price than he intended, an acceptance thereof by an experienced buyer, who must have been aware of the error, will not result in a contract which he can enforce. Buckberg v. Washburn-Crosby Co. 115 Mo. App. 701, 92 S. W. 733.

Where merchandise of greater value than that advertised at a certain figure is included by a salesman as a portion of the cheaper lot, the owner thereof, upon discovering the error before delivery of the goods, may rescind the sale. Goodrich v. Strawbridge, 5 Pa. Co. Ct. 427.

In Shelton v. Ellis, 70 Ga. 297, a temporary injunction was granted and a receiver appointed pending the determination of the facts by a jury, where the defendants, who were ticket buyers, upon discovering a mistake in the published rate sheet issued by a railway company, purchased a large number of tickets at less than the regular rate of fare.

Attention is called to the case of Rowland v. New York, N. H. & H. R. Co. 61 Conn. 103, 29 Am. St. Rep. 175, 23 Atl. 755, which holds that no contract resulted where, by reason of a noise made by a passing train, a carrier's clerk misunderstood the destination mentioned by one desiring to ship freight, and quoted him a less rate to a nearer point, which the shipper paid, immediately leaving the city, so that the clerk, upon discovering the mistake, was unable to find him, whereupon the goods were despatched with instruction to collect the difference in the charge, and, as there was no meeting of the minds, the carrier was entitled to demand the correct rate at the point of destination.

And it was held in Hartford & N. H. R. Co. v. Jackson, 24 Conn. 514, 63 Am. Dec. 177, that no contract was created where a carrier's clerk asked a shipper how many bundles a quantity of lath which he desired to ship would make, and, the latter not knowing, a third person to whom the question was referred erroneously stated 100 bundles, when in fact there would be 500, and the shipper without notice of the error paid the amount demanded for carrying 100 bundles.

If the carrier, after discovering such error, transported the goods conscious of the fact that the shipper was not aware of the error, in an action to recover the price of transportation at the usual rate, such fact may be sumbitted to the jury merely as evidence of the carrier's assent to the price as understood by the shipper, and will not prevent the carrier from showing the mistake. Ibid.

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the freight at your end of the line as goods arrive, thus obviating any chance of a misunderstanding, and when it comes to settlement that you charge us back with the 24,000 lbs. of freight at 79c. Any points that are not entirely clear to you should be glad to have you take same up at any time.

Yours truly,
Tatum & Bowen,
by M. R. C.

Clithero testifies that he asked Colby at the time what he meant by the use of the word "approximately," and Colby answered: "The only thing we cannot figure out is the size of the pulleys." That he thereupon asked Colby: "How much difference will that make?" And Colby answered: "From $3 to $4." Clithero thereupon replied: "That is all right. You can ship these goods." Clithero returned to Boise, and on December 13th received one car load of machinery. The other car load was received in Boise on December 28th. On December 18th, five days after the first car load of machinery reached Boise, Clithero received several invoices from Tatum & Bowen, aggregating about the sum of $6,194.84. Clithero testifies that he did not take the time to figure up these several invoices to see if they corresponded with his contract until some time from the 21st to the 30th of December. However, he evidently computed this on or before December 23d, because on that date Clithero wrote Tatum & Bowen as follows:

Boise, Idaho, Dec. 23, 1905.

Messrs. Tatum & Bowen,
Portland, Oregon.

Dear Sirs:—

Please find our check for	$3,890 09
Discount at 3 per cent	120 51
Freight on 24,000 lbs. at 79c. ..	189 60
	$4,200 00

Total credit to our account, $4,200. There seems to be an overcharge in your invoice. Please refer to your estimate of November 17th. As soon as you get this straightened out and the balance of machinery, etc., here, we will send you balance of our account.

Geo. Clithero, Mgr.

It would seem from the reply of Tatum & Bowen under date of December 27th that Clithero or his company must have also written appellants on December 22d. The reply of December 27th is as follows:

Portland, Oregon, Dec. 27, 1905.

Coast Lum. Co.,
Boise, Idaho.

Gentlemen:—

We beg to acknowledge receipt of your letter of the 22d and 23d inst., and have placed to your credit the several items aggregating $4,200. In regard to our estimate of November 17th, would state that we have looked the same over, and it is evident that our Mr. Colby did not get all the items, or what we think by reference to his papers, which he has kept, is that he made an error in his addition when making up the approximate price as per ours of the 17th of November. If you will refer to our invoices, you will find that we have not charged you with anything that does not belong there, and that the prices charged are those agreed upon and quoted you. The invoices were made from the original entries and therefore cannot be wrong. We think, if you will look everything over, you will see that our invoices were correct. Our letter of the 17th of November in any event was only an approximation. As regards the rate, the correct rate to Boise is 85c. 79c is the rate Mr. Colby obtained to Caldwell, and we think he must have made an error, as he told you the rate to Boise was the latter amount.

Yours truly,
Tatum & Bowen,
By E. F. F. S.

In answer to Tatum & Bowen's letter of December 27th, Clithero wrote them on December 30th, in part, as follows:

Boise, Idaho, Dec. 30, 1905.

Tatum & Bowen,
Portland, Oregon.

Dear Sirs:—

In your letter of the 27th inst., you state that, if we will refer to your invoices, we will find that you have not charged us for anything that does not belong there, and at prices agreed and quoted us. Now the fact is, that you never quoted us on but two or three machines in the entire purchase. In the first bill sold to us by Mr. Colby, I did not know the price of a single machine. I asked Mr. Colby to carry out the prices, but he refused to do so, and said that he was making me better prices than he would if he had to itemize the bill. . . .

The letter from Tatum & Bowen of December 27th appears to have been written by someone other than Colby. Later all the papers and correspondence appear to have been referred to Colby, and on Janu-

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ary 2, 1906, he wrote Mr. Clithero personally a letter of considerable length, parts of which are as follows:

Portland, Oregon, Jan. 2, 1906.

Mr. George Clithero, Manager Coast Lum. Co., Boise, Idaho.

Dear Sir:—

The firm has turned over to me the letters and papers pertaining to the goods which the writer sold you, in an effort to trace out the very unfortunate mistake which was evidently made in closing with you the time you were in Portland. It, of course, goes without saying that we on both sides did everything possible to have the matter thoroughly understood, and so many of the items were changed or altered, and heavier machines substituted to meet conditions which arose after the original contract was signed, that we used special pains to keep the matter straight. We have taken all the papers pertaining to this subject, which fortunately we had kept, from my first estimates to you at Boise down to our final signing at Portland. We have gone over these papers carefully from beginning to end, and find that the mistake lies, undoubtedly, in the fact that the writer made mistake in his addition, not carrying a certain figure to the next column when he should. . . .

The appellants have prosecuted this action on the theory that their salesman, Colby, made a mistake in computing the prices of the various articles included in the bill, and that, instead of being $5,134.80, it should have been $6,194.80, and that on account of such mistake the minds of the contracting parties never met on the contract price, and that respondent was therefore liable to pay appellants the price at which the machinery was invoiced to it. Respondent, on the contrary, contends that an express contract was entered into whereby the bill of goods was to be sold to it for approximately $5,431.84, and that it was thoroughly understood that the word "approximately," as used in this contract, should not make a difference or variance of more than "$3 or $4." It is also worthy of note at this point to observe that Colby does not absolutely deny stating to Clithero that, by the use of the word "approximately," he did not mean that there would be a difference of more than $3 or $4." He testifies, however, that he does not remember making such a statement. Counsel for appellants, in support of their contention, place special reliance on Mummenhoff v. Randall, 19 Ind. App. 44, 49 N. E. 40; Mitchell v. McBee, 1 McMull. L. 267, 36 Am. Dec. 264; and Rupley v. Daggett, 74 Ill. 351.

In the first case above cited, Randall wrote Mummenhoff Company from Oxford, Michigan, quoting prices on vegetables, and, among other things, quoted potatoes at 55 cents per bushel. The stenographer, however, who took the dictation, quoted the price of potatoes at 35 cents instead of 55 cents. On receipt of the letter, Mummenhoff Company wired Randall to ship two or three cars of potatoes at price quoted. Randall accordingly shipped the potatoes and sent invoice at 55 cents. The invoice reached the purchaser before he received the potatoes. The purchaser immediately wired Randall as follows: "You offered potatoes at 35 cts.; billed at 55 cts.; explain." Up to this time Randal had never seen the letter after it had been written by the stenographer and did not know that the price had been quoted at 35 cents, instead of 55 cents. After looking the matter up in the copy book, he immediately wired Mummenhoff Company as follows: "My quotation was 55 cts. delivered; potatoes cost 45 cts. here. Second car on road. If cannot use as billed will give directions." Notwithstanding these telegrams and this information, Mummenhoff Company received and accepted the potatoes, and then refused to pay more than 35 cents. The supreme court of Indiana held that Randall had never been apprised of the mistake made by the stenographer and never in fact knew himself that any offer or proposition had been made to sell the potatoes at 35 cents, and that the purchaser was so advised before receiving and accepting the potatoes, and that he was therefore liable to pay the price as Randall had dictated to his stenographer and had notified them by wire. In Mitchell v. McBee, a firm in South Carolina ordered goods from a New York firm. When the goods came they were not all of the class or kind of goods that had been ordered. At the time of the receipt of the goods, the purchasers also received an invoice stating the prices charged for the articles. The purchasers received and accepted the goods, and the court held that, having received the goods and appropriated them to their own use, they would be liable for the goods at the invoice price. In Rupley v. Daggett, the parties were attempting to make a trade for a horse. The owner of the horse asked the purchaser $165 for the horse. The purchaser understood him to make the price $65. He did not take the animal away at that time, but a few days later returned, and the owner of the horse was absent; but he took the animal, and someone present informed him that there was evidently some mistake, as the owner would not sell the animal for

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$65. He took the animal away with him. As soon as the owner of the animal learned that the would-be purchaser only intended to pay $65 for the animal, he commenced an action in replevin to recover him, on the ground that there had been no meeting of the minds of the contracting parties, and consequently no sale. The supreme court of Illinois held with the plaintiff, to the effect that there was no meeting of the minds of the contracting parties, and that no sale was ever consummated.

It will at once be seen that these cases are not applicable to the facts of the case at bar. In the Indiana and Illinois cases the owners of the property never in fact quoted the price to the purchasers for which they sought to hold the goods. In the one case the stenographer had misquoted the price to the purchaser, and the purchaser was so informed before receiving or accepting the goods. To have received them after being informed of such mistake and retained them without paying the true price quoted would have been a fraud on the vendor. In the other case the owner of the horse actually quoted the price at $165, and he was not responsible for the vendee's misunderstanding, or not wanting to understand, the price as really given. In the South Carolina case the purchasers received and accepted the goods and appropriated them to their own use, although they were not the goods ordered. They were held bound by the invoice price; the court saying that they might have returned the goods if they did not want them at the invoice price, but that they would not be allowed to compel the owner to part with his goods at a price unsatisfactory to him. In the case at bar the appellants' salesman, who stood in the place of appellants themselves, actually quoted the price to respondent, and the contract was made on the figures thus given. There is no pretense made that the respondent was aware that any mistake in calculation had been made, or that he had any reason to suspect that any mistake or error had been committed on the part of the appellants, nor had respondent in any way contributed to the cause which led to such mistake, if, indeed, a mistake was really made.

This action is not prosecuted for the correction of a mistake in a contract, but is rather brought on the theory that the contract was not actually made, and that the goods were rather sold by appellants and received by respondent on general invoice. The evidence, however, shows that they did make a contract, or at least attempted to make one, and the decisive question to be determined here is: Did their minds meet on the price of this order of goods? For the purposes of this case, it may be conceded that a mistake was made by appellants' salesman in computing the prices of the several items, and that, had he discovered the mistake at the time, he would have quoted a higher price than the price given on November 17th. It must also be admitted that the respondent was not aware of any mistake, and had no reason whatever to suppose that any error or mistake had been made by the appellants or their salesman. Prof. Lawson in his article on Contracts (9 Cyc. Law & Proc. p. 394) says: "A mistake of one of the parties only in the expression of his agreement, or as to the subject-matter, not known to the other, does not affect its binding force, and is no ground for its rescission even in equity, unless it is such a mistake . . . that there is a complete difference in substance between what is supposed to be and what is taken, so as to constitute a failure of consideration." In Steinmeyer v. Schroeppel, 226 Ill. 9, 10 L.R.A. (N.S.) 114, 117 Am. St. Rep. 224, 80 N. E. 564, the vendor of lumber, in footing up the different items of a bill, made the total of $1,446, instead of $1,867, which it would have been had he correctly added the amounts. His bookkeeper copied the list on one of the company billheads without giving the prices of each item, and at the bottom of the list wrote the following words: "Above for $1,446." The lumber was delivered, and the purchaser paid the $1,446, and refused to pay any more. The vendor sued for the difference. The court in passing on the matter said: "A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity, or amount, and there was neither belief in the existence of a fact which did not exist, or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be, and it expressed what it was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part." In Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255, the Texas court of civil appeals held quite recently that where a person makes an offer to erect a building for a certain amount, and the other party accepts it, there is a consummated and binding agreement, although the bidder in adding up the items of his estimates made a mistake in the total, and consequently made

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the bid $10,000 less than it should have been. Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833, was substantially a similar case, and the court held that the contract was consummated and binding. These cases proceed on the theory that a purchaser has a right to know the price he is expected to pay for an article before accepting it, so that, if he considers the price higher than he can afford to pay or than he wants to pay, he may decline to accept it. A purchaser cannot be made to suffer or be held responsible because a vendor has committed an error or mistake in computing the value of his goods or the expected profits to be derived from the sale thereof. A rescission of the contract has sometimes been allowed where the purchaser was informed of the error and mistake prior to receiving and accepting the goods, and prior to his changing his position and attitude with reference to the contract and property so as to injure or prejudice him. No court, however, so far as we are advised, has ever held a contract void or invalid on account of a unilateral mistake of which the other party was not aware, and which did not go to the subject-matter of the contract itself. 2 Addison, Contr. p. 1182; Crane v. McCormick, 92 Cal. 176, 28 Pac. 222; Moffett, H. & C. Co. v. Rochester, 33 C. C. A. 319, 62 U. S. App. 392, 91 Fed. 28; 15 Am. & Eng. Enc. Law, p. 628. In the latter authority, the text, in dealing with the right of a court of equity to reform a contract on account of such a mistake, says: "In order that a mistake may come within the cognizance of a court of equity, it must be shown to be: First, material, or the moving cause of the complaining party's action; second, mutual, or shared in by both parties to the transaction; third, unintentional; and, fourth, free from negligence."

Contracts are the deliberate and voluntary obligations of parties capable of contracting, and they must be accorded binding force and effect. Those who enter into them must understand that they have a meaning and that they cannot be lightly tampered with. If a vendor can be heard to come into court and repudiate his contract on the ground that it had never been really consummated for the reason that he made a mistake in computing the prices of the various articles involved in the transaction, he might with equal reason insist that he had made a mistake in computing the profit he expected to realize out of the transaction. No such proposition can be tolerated. The owner of property is supposed to know what it is worth, and at least know what he is willing to take for his property. The purchaser may likewise exercise his free will and choice as to whether he will purchase property at a given price. After he has received the property understanding that he is to pay a fixed price for it, he cannot be compelled to pay a different and greater price simply because the vendor was careless or negligent in the transaction of his own business.

The findings and judgment of the trial court in this case are eminently correct. The appellants have failed to make a case.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, Ch. J., and Stewart, J., concur.

KANSAS SUPREME COURT.

J. McCABE MOORE, District Judge,
v.
JAMES M. NATION, State Auditor.

(— Kan. —, 103 Pac. 107.)

Public officer — duties.

1. The duties of a public office include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental and collateral, are germane to or

Headnotes by BURCH, J.

Case Note. — Power of legislature to impose upon judges the duty to assist in drawing jurors.

The general rule that the legislature has no power to impose upon judges or courts the duty of performing nonjudicial acts is based upon the fundamental separation, established by the Constitution, of the three branches of the government; and in order to answer the question embraced in the subject of this note, it is necessary first to determine whether, in the work of drawing a jury or in preparing jury lists, a judge is performing judicial or nonjudicial functions. In discussing this question, some cases not strictly within the scope of the note have been included because of their value upon the more general question indicated.

An examination of the cases bearing upon this subject conveys the impression that the courts consider that the act of drawing a jury or preparing a jury list is a mixed judicial and ministerial function, properly performed by either judicial officers or executive officers.

This view is expressly taken in State ex rel. Gubbins v. Anson, 132 Wis. 461, 112 N. W. 475, where the court said: "It may be conceded that, generally, the appointment to office is within the executive function; but there remains the exception that within the duties of both the judicial and legislative branches of the government are certain administrative acts, in aid and execution of

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serve to promote or benefit the accomplishment of the principal purposes. All such duties are official, and the incumbent is obliged to perform them. Duties not so related to an office are unofficial, cannot rightfully be attached to it, and the incumbent is not obliged to perform them.

Jury — selection — court function.

2. To make effectual the constitutional guaranty of the right of trial by jury, the district court possesses, by virtue of the sovereignty reposed in it, inherent power to provide itself with a jury. The legislature may aid and regulate the exercise of this power; but the selecting of jurors from the inhabitants of the proper territory, to determine issues of fact in court, is a court function, cognate with that of hearing and deciding, and is not administrative in origin, purpose, or character, in the true sense of that term.

Judge — duties — nature.

3. Chapter 232, p. 374, Laws 1907, requires the judge of the district court in certain counties to perform the duties of jury commissioner, and authorizes him to appoint a jury clerk to assist him in the performance of such duties. Held, the duties prescribed are not administrative in character, fall within the scope of the office of judge of the district court, and do not appertain to another office, within the meaning of § 13, art. 3, Const., forbidding a judge of the district court to hold any other office of profit or trust.

Public officer — duties — increased service — compensation.

4. When a public official takes office, he undertakes to perform all its duties, although some of them may be called into activity for the first time by legislation occurring after he enters upon his term. In such an event he must perform the increased service without increased compensation, unless the legislature has the power and sees fit to grant him additional pay.

Judge — duties — compensation.

5. The act of 1907 (Laws 1907, chap. 232, p. 374) referred to contains a provision increasing the salaries of district judges performing the services specified, from $3,000 to $3,500 per annum. Section 13, art. 3, Const., provides that judges of the district courts shall receive such compensation for

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the judicial and legislative functions, which need to be performed by means of assistants, and that, as either the legislature or the judiciary might, nay, must, constitutionally perform such acts, they may select those who are to aid them in such performance."

The majority of the cases in which the question arises involve the office of commissioner of jurors; and the statutes providing for such an office are generally upheld, whether the power of appointment is vested in the courts or judges, or in the executive branch of the government.

Thus, in State ex rel. Gubbins v. Anson, supra, a law imposing upon the circuit judges the duty of appointing jury commissioners was sustained against the contention that the law imposed executive power upon judicial officers. The court said: "Having concluded that the legislature has, within its rightful discretion, deemed wise to impose the selection of jurors upon the circuit courts of the state as a function thereof, we can entertain no serious doubt that appointment of jury commissioners to aid in so doing very legitimately falls within the principle just discussed. The courts cannot proceed to judgment, which is the consummation of their judicial function, without the aid of jurors; and we can see no reason to doubt that the machinery for obtaining such jurors with promptness and certainty and of suitable quality is so germane to the judicial function that there is no imposition of executive power in authorizing the courts or the judges thereof to select or direct such machinery."

And in State v. Miles, Man. Unrep. Cas. (La.) 180, as cited in 4 Decen. Dig. Const. Law, ¶ 74, it was held that a statute which conferred on district judges the power to appoint jury commissioners was constitutional, as the duty to appoint such commissioners was judicial.

So, in State v. Kendle, 52 Ohio St. 346, 39 N. E. 947, a law authorizing the judges of the courts of common pleas to appoint commissioners of jurors in each county was held valid against the contention that it was repugnant to the provisions of the Constitution requiring all county officers to be elected by the people. This case is quoted at length in MOORE v. NATION.

In Re Brenner, 35 Misc. 212, 70 N. Y. Supp. 744, it was held that a jury commissioner in the county of Kings was merely a local officer acting in aid of the court in the administration of justice, within a prescribed territorial limitation, in obtaining qualified jurors; he was not a county officer within the meaning of the Constitution, so as to render the law giving the appellate division of the supreme court the power to appoint a person to such office repugnant to the provision of the Constitution requiring "county officers" to be appointed by the board of supervisors, or by some other county authority.

But the court of appeals in 170 N. Y. 185, 63 N. E. 133, held that he was a county officer, and the fact that he aided in the administration of justice was immaterial to the question at bar, as he could be classified only as a county officer, and was clearly within the peculiar wording of the Constitution in regard to such officers, irrespective of his duties. The same law as applied to New York county, however, was upheld in Allison v. Welde, 172 N. Y. 421, 65 N. E. 263, upon the ground that the jury commissioner in that county was a city official, the city and county being territorially identical, and consequently the office did not fall within the provision of the Constitution violated in the Brenner Case.

On the other hand, in State v. McNay, 100 Md. 622, 60 Atl. 273, it was held that a law requiring the jury to be drawn by

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their services as may be provided by law, which shall not be increased during their terms of office, and that they shall receive no fees or perquisites. Held, that district judges in office when the statute took effect were obliged to render the increased service, without increased compensation, for the remainder of their term.

(July 3, 1909.)

APPLICATION for a writ of mandamus to compel the state auditor to issue warrants on the state treasurer for a portion of plaintiff's salary as district judge for Wyandotte County. Denied.

The facts are stated in the opinion.

Mr. C. F. Hutchins, for plaintiff:

The duties imposed do not constitute or create another office.

People v. Hall, 169 N. Y. 184, 62 N. E. 174; People ex rel. Washington v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Daily Register Printing & Pub. Co. v. New York, 52 Hun, 542, 6 N. Y. Supp. 10.

If the legislature has the power to add to the duties of the office, it has power to provide compensation for the performance of the additional duties, as the constitutional provision only fixes compensation for the class of duties therein enumerated.

Miami County v. Collins, 47 Kan. 419, 28 Pac. 175; Love v. Baehr, 47 Cal. 368; Burroughs v. Norton County, 29 Kan. 199.

The Kansas Constitution does not prohibit the legislature from imposing extra services of an administrative character on justices or judges, when such extra services are incidental to the exercise of judicial powers, or are to aid in the administration of justice, such as the selection of proper jurors and the appointment of a jury clerk.

Re Davies, 168 N. Y. 89, 56 L.R.A. 855, 61 N. E. 121; Peeling v. York County, 113 Pa. 108, 5 Atl. 67; Barrett v. Falmouth, 109 Ky. 151, 58 S. W. 521; Cooley, Const. Lim. 2d ed. pp. 159, 171–176; Endlich, Interpretation of Statutes, § 527, p. 744; Com. ex rel. Wolfe v. Butler, 99 Pa. 535; Roulo v. Board of Auditors, 74 Mich. 129, 41 N. W. 879; State ex rel. Wagner v. McDowell,

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commissioners appointed by the governor was constitutional. The court said that if the selecton of jurors had ever been considered as a judicial function which could not be delegated to executive officers specially designated for that purpose, the existence of so many statutes in the different states establishing that practice would be remarkable in itself.

And the governor making appointments to the office of jury commissioner performs an executive function; and the fact that an officer so appointed by him wil have to perform judicial duties does not make the governor's act in appointing him a judicial act. State v. Pierre, 121 La. 465, 46 So. 574.

And in Geiger v. State, 25 Ohio C. C. 742, it was held that the objection that an act providing for the appointment of jury commissioners was unconstitutional and void in that it sought to confer judicial powers was without merit.

A statute giving the special jury commissioner power to exclude from the panel of special jurymen for criminal trials unfit persons who must or ought to be rejected by either the prosecution or the defendant was upheld in People v. Dunn, 157 N. Y. 528, 43 L.R.A. 247, 52 N. E. 572, against the contention, among others, that it delegated judicial duties to an executive officer.

The decision in Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, seems to be opposed to the view taken by the other cases, although the particular question presented to the court may tend to distinguish it. It was held that a county judge was liable in a Federal court for violation of acts of Congress in excluding negroes from the jury list the making up of which was his duty under the statute. It was claimed in his behalf that Congress had no power to punish a state judge for his official acts, and in selecting a jury the county judge was performing judicial functions. But it was held that the selection of jurors was not a judicial act, but merely ministerial, as much so as the act of a sheriff holding an execution in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads.

In a dissenting opinion, however, Mr. Justice Field took the opposing view: "The duties of the county judge in the selection of jurors were judicial in their nature. They involved the exercise of discretion and judgment. He was to determine who were qualified to serve in that character, and, for that purpose, whether they possessed sound judgment and were free from legal exceptions. The law under which he acted had been in force for many years, and had been always considered by the judicial authorities of Virginia to be in conformity with its Constitution, which inhibits the legislature from requiring of its judges any other than judicial duties. A test as to the character of an act is found in the power of a writ of mandamus to enforce its performance in a particular way. If the act be a judicial one, the writ can only require the judge to proceed in the discharge of his duty with reference to it; the manner of performance cannot be dictated. Here the writ could not command the county judge to select as jurors any particular persons, black or white, but only to proceed and select such as are qualified; its command in that respect being subject to the limitation incident to all commands of such writs upon judicial officers."

Attention is also called to People v. Hall, 169 N. Y. 184, 62 N. E. 170, and State v. Mounts, 36 W. Va. 179, 15 L.R.A. 243, 14 S. E. 407, both of which are fully set out in MOORE v. NATION, and which fully support that opinion.

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19 Neb. 442, 27 N. W. 433; Mechem. Pub. Off. § 858; People v. Hall and Daily Register Printing & Pub. Co. v. New York, supra.

Messrs. **Fred S. Jackson**, Attorney General. **John Marshall**, and **Charles D. Shukers**, for defendant:

The legislature cannot, directly or indirectly, increase the salary of the judges of the district court during the term of office of such judges; nor can it cast other and additional burdens upon them, and provide additional compensation therefor.

State ex rel. Goodin v. Thoman, 10 Kan. 191; State ex rel. Little v. Wentworth, 55 Kan. 303, 40 Pac. 648; Peters v. State Canvassers, 17 Kan. 365; Wilson v. Clark, 63 Kan. 510, 65 Pac. 705; Smith v. Holt, 24 Kan. 772; Abry v. Gray, 58 Kan. 150, 48 Pac. 577.

Burch, J., delivered the opinion of the court:

The plaintiff was judge of the district court of Wyandotte county for the four-year term ending in January, 1909. When he entered upon the term his salary was fixed by law at $3,000 per annum. Afterward the legislature imposed upon the judge of the district court for that county the duty of preparing and revising lists of qualified jurors, and of drawing therefrom the names of persons to serve on juries, and authorized him to appoint a jury clerk to assist him in the performance of such duty. Laws 1907, chap. 232, p. 374. The same act increased the salary of the office to $3,500 per annum. The plaintiff performed the additional service required of him for the remainder of his term; but the defendant, the state auditor, refused to audit vouchers for the increase in compensation and to issue warrants on the treasurer in payment therefor. The plaintiff asks for a writ of mandamus to compel him to do so.

Section 13, art. 3, of the Constitution, reads as follows: "The justices of the supreme court and judges of the district court shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be increased during their respective terms of office; provided, such compensation shall not be less than $1,500 to each justice or judge each year; and such justices or judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state or the United States during the term of office for which such justices and judges shall be elected, nor practise law in any of the courts in the state during their continuance in office." The plaintiff argues that the statute did not create another office, as that of jury commissioner, and make him the incumbent, but that it merely imposed upon him as judge certain additional duties in aid of the discharge of his judicial duties; and it is said that this could be done because the new duties have an ultimate judicial purpose, are incidental to the exercise of judicial power, and are closely connected with and are germane to the judicial function. Excellent authorities are cited for these propositions.

In passing upon a statute conferring upon justices of the appellate division of the supreme court the power to appoint special jury commissioners, the New York court of appeals said: "The Constitution of 1846 provided that judges of the court of appeals and justices of the supreme court should not 'exercise any power of appointment to public office;' but this provision was omitted in the revision of the judiciary article in 1870, and it does not appear in our present revised Constitution. Const. 1846, art. 6, § 8; Rev. Const. art. 6. The omission of the express prohibition excludes one by implication; but, while a justice of the supreme court is no longer prohibited absolutely from appointing to public office, a limitation is placed upon his powers in this regard by the provision that 'he shall not hold any other office or public trust.' Article 6, § 10. The power to appoint a special jury commissioner is a public trust, because it is intrusted to public officers, to be exercised in behalf of the public, by clothing a private citizen with the powers and duties of public office. Unless, therefore, it has some reasonable connection with a judicial purpose, it is not a part of a judicial office, and cannot be imposed upon a justice of the supreme court. Re Davies, 168 N. Y. 89, 56 L.R.A. 855, 61 N. E. 118. What, however, is more germane to the judicial function than the selection of proper jurors to aid in the administration of justice? The right of the jury to decide all issues of fact presented to the court at which they attend makes their selection a judicial purpose of the highest importance. It is an invaluable aid to the discharge of judicial duties, and hence may be attached by the legislature to the judicial office, as incidental to the exercise of the usual powers of that office. The appointment of a jury commissioner rests on the same principle as that of stenographers, judges' clerks, and the like. The appointment of such officers is authorized because the discharge of their duties aids the judges in the performance of their judicial functions, and so the appointment of a special jury commissioner to select jurors aids the judges in transacting the usual business of their courts." People v. Hall, 169 N. Y. 184, 62 N. E. 170.

In the case of Daily Register Printing & Pub. Co. v. New York, 52 Hun, 542, 6 N.

23 L.R.A. (N.S.)

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Y. Supp. 10, the opinion reads: "There is nothing in the point as to the prohibition of justices of the supreme court from holding other offices or public trusts. The duty imposed upon the presiding justice, of designating (with others) a law journal in which the calendars of the courts should be published, is nothing more than an additional duty attached to the judicial office. Having made that designation, certain other incidents follow under the act, such as the requirement with respect to legal notices generally; but the designation of the journal is, primarily, for the thorough dissemination of the court calendars. This is important in securing preparation for trial and prompt atendance upon the call of the calendars. It would certainly be a very narrow and strained construction of the Constitution to hold that a duty having such results for its object was foreign to the judicial office. The illustrations of similar duties imposed upon the presiding justice and his associates by other laws, furnished by Mr. Justice Patterson in his opinion at special term, suffice to show a general legislative intent not to confine the judicial duty to the bare hearing and decision of cases, but occasionally to impose upon the judges, in the line of their vocation, duties bearing upon the general administration of justice."

If the reasoning of these decisions be unsound, the plaintiff cannot recover. If the duties of jury commissioner cannot be assigned to the judicial office, they belong to another office of trust, which the Constitution forbade the plaintiff to hold. For present purposes it will be assumed that the duties specified in the statute fall within the scope of the office of judge of the district court.

Having thus bound up the function of selecting and drawing jurors for the trial of causes with the function of adjudicating such causes, the plaintiff proceeds to sever the ligature so that he may receive an increase in pay, in the following manner: The function of jury commissioners is not judicial, but is administrative in its nature. It does not pertain to the office of district judge as such. The framers of the Constitution had in mind compensation for the services of a judge as such when acting in a judicial capacity only, and the constitutional provision quoted has no reference to extra pay for extra services of an administrative character like those required by the statute. "One class of services or duties belong to the office, and a compensation for such class cannot be increased during the term. Another class does not belong, but can be attached by the legislature to the office, and for which services compensation can be given during the term, if the purpose and result is to aid in the discharge of the usual judicial duties." If this be true, extra pay to a judge for appointing a special jury commissioner, as in People v. Hall, or for designating a paper for the publication of the court calendar, as in Daily Register Printing & Pub. Co. v. New York, or for numberless other things which he does to speed and prosper his usual and ordinary work of hearing and deciding causes, would not be compensation for services as judge in the sense of the Constitution. More than this, whenever a judge of the district court acts as jury commissioner *pro tempore*, and superintends the drawing of jurors to fill a depleted panel, or selects jurors for the term, and causes a venire to issue because jury lists have not been returned or the panel has been vitiated (Gen. Stat. 1905, §§ 3996, 4002), he steps outside the scope of his duties as judge, acts as an administrative officer, and may be given extra pay for the work without receiving an increase in compensation contrary to the Constitution. Some authorities are cited to sustain this novel position; but they seem to the court to fall short of doing so.

In the case of Love v. Baehr, 47 Cal. 364, the legislature imposed upon the attorney general the duty of acting with a board of examiners to approve or reject claims against the state, examine the books of the comptroller and treasurer, count the money in the treasury, and invest school funds, giving him a salary of $1,500 per annum as a member of the board. It was held that such services were foreign to and outside the scope of the office of attorney general, could be declined without a breach of duty as attorney general, and hence that no constitutional impediment existed precluding a person in office when the act was passed from taking compensation for them. The court said: "From the earliest period of our history as a nation, almost every state in the Union had a secretary of state, comptroller, treasurer, and attorney general; and the general nature of the duties pertaining to each was perfectly well known to the framers of our Constitution. It is clear beyond controversy that, in establishing similar offices here, the framers of that instrument had reference to the same general class of duties, which it was well known pertained to such offices elsewhere. The Constitution provides for the election of a superintendent of public instruction, whose duties are not defined, and might have provided for the election of a state geologist. Can it be claimed, with any show of reason, that the legislature could compel either of them to become *ex officio* warden of the state prison or superintendent of the state lunatic asylum? It is not usual in state Constitutions

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to define the particular duties of subordinate officers; that being the peculiar province of the legislature, which, it is to be presumed, will prescribe only such duties as in their nature have heretofore appertained to similar offices elsewhere. In the performance of this duty, the legislature may rightfully exercise a wide discretion. It may assign to each of these officers any duties which, by the most liberal interpretation, can be held to come within the general scope of that class of duties which have usually appertained to such offices, as they were understood by the framers of the Constitution. . . . Some of these services have not the slightest relation, even upon the most liberal construction, to the duties of an attorney general, as such duties were generally understood at the adoption of the state Constitution, and as they were doubtless understood by the framers of that instrument. The business of counting money in the treasury, examining books of account, requiring the skill of an expert accountant, rather than the professional learning of a lawyer, and the investment of public money in bonds, is wholly foreign to the duties of an attorney, and is no more cognate to them than the management of a state prison or lunatic asylum." Certainly, there is nothing here to comfort the plaintiff. The court distinguished the two offices as separate, independent, and unrelated, by looking at the duties commonly affixed to them as they exist in the governmental schemes of states having similar institutions; but the main theme was double salary, and with this in mind the court said the legislature may assign to an office any duty which, by the most liberal interpretation, falls within its scope. No light whatever is thrown upon the question whether the framers of our Constitution understood judicial services to include all the incidental things germane to and in aid of the function of hearing and deciding.

In San Luis Obispo County v. Felts, 104 Cal. 60, 37 Pac. 780, county assessors were entitled to receive 15 per cent of all amounts collected by them for poll taxes. Road overseers collected road poll taxes and received 15 per cent of the amount for their services. While Felts was in office the law was changed so that the county assessor collected road poll taxes, and it was held he had the right to retain the prescribed percentage of those also, although the gross receipts of his office were increased. The court said the rule was the same from first to last, a certain sum for a certain service,—compensation in proportion to duty,—and it made no difference that the field for rendering the service was enlarged. Compensation for services rendered, 15 per cent of whatever was collected, remained unchanged. If in this case the plaintiff's compensation had been $10 per day for time employed, which usually was twenty days in the month, and an act of the legislature had increased the work until it required twenty-five days of each month, his compensation would have remained unchanged. It still would have been a certain sum for a certain service ($10 for each and every day); but if the legislature had raised the rate to $15 per day, an increase in compensation for the same service would appear.

In the case of Roulo v. Board of Auditors, 74 Mich. 129, 41 N. W. 879, an act of the legislature required registers of deeds to report mortgages to assessing officers and to registers of deeds of other counties for purposes of taxation, and gave them compensation for the work. The court said: "The legislature, by the act of 1887, imposed a new duty upon the register,—one that never belonged to his office before, and one which was not contemplated, and could not have been, when his salary was fixed by the auditors under the law of 1879. The act imposing this new duty, which he must perform under a penalty, imposed also a great responsibility upon him. For the performance of this duty, and the responsibility necessarily attending it, the legislature saw fit to give him an additional compensation over and above that heretofore received in the performance of the ordinary duties of his office. Our previous decisions are to the effect that he is entitled to it." In effect this act simply created a new office to carry out the provisions of the new tax law, and made the register of deed the incumbent. The duties were separate from and independent of those of a register of deeds; but, since the two positions were not incompatible, the register could hold both and receive pay for both.

The case of Bruce v. Dickey, 116 Ill. 527, 6 N. E. 435, distinguishes itself. The question was whether a judge could engage in the private practice of law for fees. The opinion reads: "The words that 'no judge of the supreme or circuit court shall receive any other compensation, perquisite, or benefit, in any form whatsoever,' are not depended upon for the alleged inhibition, as manifestly they should not be; but it is the last clause, 'nor perform any other judicial duties to which may belong any emoluments,' which is relied upon as containing the prohibition. These words naturally refer to official services, or to services required by law to be done, and not to work done by employment under a private contract. It is the performance of duties which is prohibited,—a term which is suggestive of office. It is duties to which belong emoluments.

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The word 'emoluments' is peculiarly appropriate to office, denoting, in its most ordinary signification, the profit 'which is annexed to the possession of office, as salary, fees, and perquisites.' And it is emoluments which belong to the performance of duties; —the word 'belong' implying fixed, prescribed by some regulation, as are the emoluments attached to office, and not something contracted to be paid by agreement between private parties. This analysis of the language of this clause shows its fitness as prohibiting the performance of any official duties, or duties imposed by law, to which any emoluments are attached, and that it is quite inappropriate language in which to couch a prohibition to conduct a lawsuit, or to perform any other work than judicial duties, under a private contract for a compensation to be paid. Had it been the intention to prohibit judges from doing any other work for pay, it could easily have been so said in plain terms, and we cannot conceive that the cumbersome and inapt phraseology in question would have been used to express that purpose."

In the case of United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439, it was said that the ordinary rule, in the absence of legislation, is that, if a statute increase the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation. Seizing upon the words "in the absence of legislation," the plaintiff argues that, if there is legislation giving him extra pay, he may recover it. That, of course, depends upon whether some paramount law stands in the way.

Some cases are cited to the effect that, if the compensation of an officer be not fixed at the beginning of his term, it may be fixed during the term, which doubtless is true, but unimportant here.

In Missouri the Constitution provides that judges of the supreme, appellate, and circuit courts and all other courts of record receiving a salary shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they are elected. A statute of that state enacted in 1895 requires a deposit of $10 to accompany an application for a change of venue, which, if the change be granted, goes to the judge of the circuit to which the case is transferred for trial. In the case of Cunningham v. Current River R. Co. 165 Mo. 270, 65 S. W. 556, an order granting a change of venue was set aside for noncompliance with this statute, the case was tried in the initial court, and judgment was rendered against the party who sought the change and who refused to appear at the trial. On appeal he contended that the statute is unconstitutional. In reviewing the record the supreme court of Missouri said: "The $10 whose payment is required to be made on the presentation of an application for a change of venue from the circuit where the cause is at the time pending is not intended and is in fact in no sense an increase in the salary of the judge to whom it is to be paid, but compensation for extra labor imposed upon him by the person on whose application the venue is changed, by reason of the cause being sent to him from another circuit. The compensation mentioned in the Constitution means compensation paid by the state, or some subdivision thereof, in the way of an increase of salary or compensation, which cannot be increased by legislation during the period for which the judge is elected, but does not mean that he may not be paid for extra services and expenses incurred in the performance thereof, even out of the state treasury." The plaintiff says this case decides that, during his term of office, a judge who receives a salary as compensation for the service performed and labor devoted to the trial of cases in his circuit can be granted extra pay for the labor of trying cases coming to his circuit on change of venue, without increasing his compensation in the sense of the constitutional provision recited. If that be the decision, it is anomalous, and this court declines to follow it.

The case of Miami County v. Collins, 47 Kan. 417, 28 Pac. 175, is cited, in which this court said: "If the legislature has the power to add to the duties of the office, it follows that it has power to provide for compensation for the performance of the additional duties; the constitutional provision only fixing compensation for the class of duties therein enumerated." The court here referred to the duty of issuing liquor permits, cast upon the person holding the office of probate judge. The words "add to the duties of the office" were not used as the plaintiff interprets them. No addition had been made to the duties of the office of judge of the probate court. As shown in Intoxicating-Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284, the person holding that office was virtually invested with the separate and independent office of commissioner of licenses. The Constitution does not prohibit the probate judge from holding other offices of trust and profit, and he could therefore accept the new office and its emoluments.

In the case of Burroughs v. Norton County, 29 Kan. 196, the court merely held that the term "such services," used in a statute fixing the compensation of county commissioners, referred to services at meetings particularly specified in the context, and that

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remuneration for services in attending other meetings held for other and different purposes was not forbidden.

Such are the authorities which the plaintiff has selected from the wilderness of precedent to support his claim, and they are unpersuasive. A brief independent search has revealed none better adapted to serve the plaintiff's purpose, and the court is inclined to regard the distinction between duties which "belong" to an office and duties which may be "attached" to it as artificial and unsubstantial. The duties of an office include all those that fairly lie within its scope; not merely those which are necessarily involved in the accomplishment of the main purpose of the office, but those also which, although incidental and collateral, naturally and properly serve to promote and benefit the performance of the principal duties. Constitutions and statutes seldom define with precision the scope of any office. The place it usually occupies in political systems of like character is some guide. The common law is relied upon to supply many incidents, and others are left to inclusion by necessary implication. In time the need becomes apparent for further or better definition, and it is said new duties are added, or "attached," germane to those already in existence. In reality the true scope of the office already included such duties. All that is accomplished is to make active that which before was latent. If the office do not potentially embrace the duty, the duty appertains to another office. Before any duty can be classified as falling within the scope of an office, it must belong there, and nothing can be added or attached to an office that does not belong there. Whatever the standard of classification—in aid of the usual functions, incidental, collateral, appertaining, or germane to or connected with the principal duties, in line with the main purpose, or other test—when tested the duty belongs to the office, is official, and the incumbent must perform it, or it does not belong to the office, is unofficial, cannot lawfully be attached to the office, and need not be performed if an attempt to attach it to the office be made. If, however, the distinction which the plaintiff makes were sound generally, it cannot be allowed in this case. All the statute did was to authorize the plaintiff to exercise directly a power which already inhered in the court over which he presided, but which ordinarily is exercised mediately. The Constitution of this state guarantees the right of trial by jury; and every court charged with the duty of trying jury causes possesses, by virtue of its very establishment as such court, the power to provide itself with a jury, in order that it may accomplish the purpose for which it was created. This power is not merely "attached" to the court as something extra to its ordinary functions, but it "belongs" to the court in the most vital and integral sense. The New York court was correct in saying, in People v. Hall, that the right of the jury to decide all issues of fact presented to the court makes their selection a judicial purpose of the highest importance; but its grasp of the fundamental principle somewhat relaxed when it made the selection of jurors merely an aid and incident to the exercise of the usual powers of the judicial office. That function is one of the powers of the judicial office, cognate with that of hearing and deciding, an essential element of the sovereign power reposed in the court, to be exercised precisely as all its authority is manifested.

For many years the Congress of the United States made no provision for summoning grand juries or defining their powers, yet they were regularly summoned and regularly acted. In the case of United States v. Hill, 1 Brock. 156, Fed. Cas. No. 15,364, Chief Justice Marshall, sitting as circuit justice, justified this display of judicial authority as follows: "It has been justly observed that no act of Congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are therefore given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is coextensive with that jurisdiction to which it is essential." Whenever the statutory measures for obtaining petit jurors have failed or have been exhausted, the court itself issues an open venire and brings in a jury as a measure indispensable to the exercise of its jurisdiction. Clawson v. United States, 114 U. S. 477, 29 L. ed 179, 5 Sup. Ct. Rep. 949, and cases cited in the opinion; 12 Enc. Pl. & Pr. p. 274; 24 Cyc. Law & Proc. p. 230. And if every law on the statute books relating to the selecting and summoning of jurors was repealed, the courts would go on selecting and summoning them without any interruption of the administration of justice. The twelve jurors who are finally sworn to try the cause are in fact selected for the purpose by the court as a court, and the assembling of a larger number from which to choose is merely an earlier stage of the same process. At common law, when the issues were made up the judicial precept, venire facias, issued

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to bring in a jury. The selection and the summons were made at the same time. If the sheriff and the coroner were both disqualified, the court itself appointed elisors to make the selection (3 Bl. Com. 354); and here may be found the common-law prototype of the judicial power to appoint jury commissioners; but the decisions identify this power with that of the court to select the jury.

In the case of State v. Mounts, 36 W. Va. 179, 15 L.R.A. 243, 14 S. E. 407, the question was whether the appointment of jury commissioners by judicial officers contravened the Constitution, which forbade the legislature to confer upon any court or judge the power of appointment to office. The opinion reads: "The question here presented is whether the jury commissioners created by the act now under consideration are officers of the state, or whether they are in fact, like jurors themselves, mere officers of the court, such as commissioners in chancery, and, in a general sense, attorneys. We think there can be no doubt that such commissioners belong to the latter class and go to make up a part of the judicial machinery, such as commissioners in chancery, general and special receivers, and other similar officers. Jurors are themselves, in a certain sense, officers of the court; and this special commission is only a legislative device intended to aid the court in selecting them." In the case of State v. Kendle, 52 Ohio St. 346, 39 N. E. 947, it is said: "So as to these jury commissioners; they are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables. They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes and the presentment of indictments. . . . It is not doubted but that the judges might be authorized to select the jurors to be returned in all cases, as they are in some. As, then, the duty might properly be performed by the court, no good reason is perceived why the court may not be authorized to appoint suitable persons to assist it in performing the duty, as is done in many similar cases." True, the legislature usually intervenes, as it may rightfully do, and provides machinery for supplying the court with jurors. Sometimes the judges themselves are made members of the body designated to select jurors. See Com. v. Manfredi, 162 Pa. 144, 29 Atl. 404; State v. Squaires, 2 Nev. 226. Frequently it is left to the judges to make the selection personally when other measures are inadequate or fail, as indicated in State v. Kendle, and as they do in this state; but whatever regulations the legislature may make, and whatever aids the legislature may furnish, the selecting of persons from the inhabitants of the proper territory to sit as jurors for the trial of issues of fact in court forms a department of the business of the court, coordinate with that of hearing and deciding, and consequently cannot be classified as "administrative" in origin, purpose, or character, in the true sense in which that term is employed in constitutional law.

After his term had commenced, the plaintiff was called upon to exercise a power which already inhered in his office. Could he receive extra compensation for the service? When a public official takes office, he does so understanding that every dormant duty lying within the scope of his office may be awakened to full vigor at some time within his term. Should that which is always within the range of possibility occur, he must perform the service required without additional compensation, unless the legislature has the power and sees fit to allow him extra pay. The law is so understood by all the courts and text writers, and was so established before the convention met which framed the Constitution of Kansas.

In the case of People ex rel. Phœnix v. New York, 1 Hill, 362, decided in 1841, the opinion reads: "But should it be conceded that the statute imposed a new and onerous duty upon the district attorney, it does not follow that he is entitled to any additional compensation on that account. By charging the attorney with the duty of suing for fines, without making provision for the payment of costs, the legislature has in effect declared that the salary of the officer is to be deemed the compensation for these as well as for other services. It is impossible for a salaried officer to make title to an increased compensation, on the sole ground that a new duty has been cast upon him by the legislature. There are few state officers, whether executive or judicial, who have not often been charged with new duties, and yet no one has, I presume, ever thought that this gave him a legal title to increased compensation."

In the case of Andrews v. United States, 2 Story, 202, Fed. Cas. No. 381, decided by Mr. Justice Story in 1842, while on circuit duty, it is said: "But where duties are required to be performed by a collector or other public officer, strictly official, and falling within the ordinary range thereof, there, although they may be conferred by laws subsequently passed, after he came into office, or may be cumulative upon the original duties of the officer, he must be deemed to take and hold the office *cum onere*."

In the case of Evans v. Trenton, 24 N. J. L. 764, decided in 1853, it is said: "It is

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a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office for the compensation stipulated, whether these duties are diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign. . . . This rule is of importance to the public. The successful effort to obtain office is not unfrequently speedily followed by efforts to increase its emoluments, while the incessant changes which the progressive spirit of the times is introducing effects, almost every year, changes in the character and additions to the amount of duty in almost every official station; and to allow these changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices, and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."

In order to preclude all possibility of mischief of this character, the framers of the Kansas Constitution provided that the compensation of justices of the supreme court and of judges of the district courts should not be increased during their respective terms of office, prohibited the granting to them of fees and perquisites outside of or additional to salary, and forbade them to hold any other office of profit or trust under the state or under the United States. Beyond this, they were forbidden to practise their profession in any of the courts of the state during their continuance in office, so that, so far as remuneration for services beyond salary is concerned, there is written above the portal of the judicial office in Kansas the inscription which Dante read at the top of the gate of hell: "Leave every hope, ye who enter!"

In the case of Hall v. Hamilton, 74 Ill. 437, the legislature had empowered circuit judges to interchange with each other and to hold branch courts in other circuits, and had provided a compensation of $10 per day for the service, additional to the salary received,—a clear case of extra pay for extra labor performed by judges in disposing of business not belonging to their circuits. The opinion reads: "The 16th section of the judiciary article of our Constitution is this: 'From and after the adoption of this Constitution, judges of the circuit courts shall receive a salary of $3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law they shall not be increased or diminished during the terms for which said judges shall be respectively elected; and from and after the adoption of this Constitution no judge of the supreme or circuit courts shall receive any other compensation, perquisite, or benefit, in any form whatsoever, nor perform any other than judicial duties, to which may belong any emoluments.' This language is as full, clear, and comprehensive as could be well conceived to prevent supreme and circuit judges from receiving any other compensation than their salaries, under any name or pretense whatever, for the discharge of any duty pertaining to their offices; and it is prohibitory on the judges from receiving the compensation for the performance of such duties except their salary. It also prohibits the General Assembly from providing any other." See also Bailey v. Kelly, 70 Kan. 869, 79 Pac. 735.

The statute of 1907 is constitutional, and obliged the plaintiff to render the services indicated; but the provision for an increased salary did not apply to him, because the statute took effect while he was serving an unexpired term.

The writ is denied.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

B. F. PATTON, Exr., etc., of Sophia Patton, Deceased, et al., Appts.,
v.
T. J. SMITH.

(— Ky. —, 114 S. W. 315.)

Husband and wife — husband's earnings — liability for debts.

1. Land purchased with money produced by a man's industry and good management

Case Note. — Right of husband's creditors to reach fruits of his management of, or services in connection with, wife's separate estate or business.

The earlier cases upon this subject will be found collected in the note appended to

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of a farm belonging to his wife is subject to his debts, although the title to it is taken in her name.

Surety — subrogation — amount of execution.

2. A surety who has satisfied a judgment against his principal may issue execution for the amount so paid, with interest, and is not limited to the amount specified in the judgment, under a statute giving a surety who satisfies a judgment against his principal the right to control the judgment so far as to obtain satisfaction for the whole amount paid by him, with interest.

Limitation of action — assigned judgment.

3. The rights of a surety who secures an assignment of a judgment which he satisfies for his principal are governed by the sections of the statute of limitations applying to judgments, and not by that relating to implied promises to pay.

(December 11, 1908.)

APPEAL by defendants from a judgment of the Circuit Court for Garrard County in plaintiff's favor in a proceeding to subject to the payment of a debt of B. F. Patton land the title to which was in his wife. Affirmed.

The facts are stated in the opinion.

Mr. Lewis L. Walker for appellants.

Messrs. Smith & Smith and R. H. Tomlinson for appellee.

Carroll, J., delivered the opinion of the court:

In this action the appellee, Smith, sought to subject to the payment of a judgment in his favor appellant B. F. Patton's land, the title to which was in the wife of appellant. The lower court granted the relief sought, and this judgment we are asked on this appeal to reverse.

There is no serious dispute as to the facts. In 1892 appellant and his wife pur-

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the case of Mayers v. Kaiser, 21 L.R.A. 629, this note being merely supplemental thereto.

This note is expressly confined to cases where a married woman's property, or a business conducted in her own name, is managed by her husband so that his labor and skill result in an increment thereof.

Cases where a wife's money is used by her husband in a business carried on in his own name, as well as where he uses his own money or property in the business of his wife, although carried on in her name, are excluded herefrom.

As herein shown, the preponderance of authority is against PATTON v. SMITH.

Profits accruing from corporate stock owned by a married woman, as well as property purchased therewith, are not rendered liable for her husband's debts by reason of the fact that such profits result from his successful management of the corporate business. First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; Taylor v. Wands, 55 N. J. Eq. 491, 62 Am. St. Rep. 818, 37 Atl. 315; First Nat. Bank v. Rice, 22 Ohio C. C. 183; Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063, affirming 110 Ill. App. 166.

The creditors of a married man, having no legal right to require that he devote his personal services to the extinguishment of their claims, cannot object because his time, labor, business skill, and sagacity in the management of his wife's separate estate result in an increase thereof. Lister v. Vowell, 122 Ala. 264, 25 So. 564; Martin v. Banks, 89 Ark. 77, 115 S. W. 928; Shircliffe v. Casebeer, 122 Iowa, 618, 98 N. W. 486; Deere, W. & Co. v. Bonne, 108 Iowa, 281, 75 Am. St. Rep. 254, 79 N. W. 59; Hibbard v. Heckart, 88 Mo. App. 544; Young v. Hurst (Tenn. Ch. App.) 48 S. W. 355; Martin v. Davis, 30 Pa. Super. Ct. 59.

And the foregoing doctrine is not affected by the fact that the husband is insolvent.

Shircliffe v. Casebeer; Deere, W. & Co. v. Bonne; and Hibbard v. Heckart,—supra.

Likewise, in order that this doctrine may be applied, it is unnecessary that the husband should receive compensation for his services. Lister v. Vowell and Deere, W. & Co. v. Bonne, supra.

The court said in Shircliffe v. Casebeer, supra, that it might be conceded as a proposition of morals, that under ordinary circumstances a debtor is bound to devote his labor to the satisfaction of the just demands of his creditors; yet there is no law which can compel such action on his part, and, as far as creditors are concerned, he need not labor at all, or may give his labor to strangers without compensation. Nay, more, he may do all this with the express purpose not to accumulate anything which may be subject to seizure by his creditors, and there will be no fraud in law or in fact, for he has neither withheld, concealed, nor disposed of anything on which they have any claim at law or in equity. But this rule is not to be construed as an abandonment or departure from the well-established rule that these transactions between an insolvent husband and his wife will be closely scrutinized when questioned by his creditors, and, if it is found that she holds the title to property as a mere trust for the use of the husband, or as a mere device by which it may be placed beyond the reach of process, equity will decree its subjection to their claims.

And it was said, in Deere, W. & Co. v. Bonne, supra, that, whatever the obligation of the husband to work for the benefit of his creditors, there is no rule in law or equity preventing him from voluntarily or gratuitously devoting his labor and skill to the business of his wife; and there is no magic in the husband's touch by which he may acquire an interest in her separate property from his mere supervision or labor; and if he is entitled to anything, it must be compensation, owing to an express agreement.

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a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office for the compensation stipulated, whether these duties are diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign. . . . This rule is of importance to the public. The successful effort to obtain office is not unfrequently speedily followed by efforts to increase its emoluments, while the incessant changes which the progressive spirit of the times is introducing effects, almost every year, changes in the character and additions to the amount of duty in almost every official station; and to allow these changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices, and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."

In order to preclude all possibility of mischief of this character, the framers of the Kansas Constitution provided that the compensation of justices of the supreme court and of judges of the district courts should not be increased during their respective terms of office, prohibited the granting to them of fees and perquisites outside of or additional to salary, and forbade them to hold any other office of profit or trust under the state or under the United States. Beyond this, they were forbidden to practise their profession in any of the courts of the state during their continuance in office, so that, so far as remuneration for services beyond salary is concerned, there is written above the portal of the judicial office in Kansas the inscription which Dante read at the top of the gate of hell: "Leave every hope, ye who enter!"

In the case of Hall v. Hamilton, 74 Ill. 437, the legislature had empowered circuit judges to interchange with each other and to hold branch courts in other circuits, and had provided a compensation of $10 per day for the service, additional to the salary received,—a clear case of extra pay for extra labor performed by judges in disposing of business not belonging to their circuits. The opinion reads: "The 16th section of the judiciary article of our Constitution is this: 'From and after the adoption of this Constitution, judges of the circuit courts shall receive a salary of $3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law they shall not be increased or diminished during the terms for which said judges shall be respectively elected; and from and after the adoption of this Constitution no judge of the supreme or circuit courts shall receive any other compensation, perquisite, or benefit, in any form whatsoever, nor perform any other than judicial duties, to which may belong any emoluments.' This language is as full, clear, and comprehensive as could be well conceived to prevent supreme and circuit judges from receiving any other compensation than their salaries, under any name or pretense whatever, for the discharge of any duty pertaining to their offices; and it is prohibitory on the judges from receiving the compensation for the performance of such duties except their salary. It also prohibits the General Assembly from providing any other." See also Bailey v. Kelly, 70 Kan. 869, 79 Pac. 735.

The statute of 1907 is constitutional, and obliged the plaintiff to render the services indicated; but the provision for an increased salary did not apply to him, because the statute took effect while he was serving an unexpired term.

The writ is denied.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

B. F. PATTON, Exr., etc., of Sophia Patton, Deceased, et al., Appts.,
v.
T. J. SMITH.

(— Ky. —, 114 S. W. 315.)

Husband and wife — husband's earnings — liability for debts.

1. Land purchased with money produced by a man's industry and good management

Case Note. — Right of husband's creditors to reach fruits of his management of, or services in connection with, wife's separate estate or business.

The earlier cases upon this subject will be found collected in the note appended to

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of a farm belonging to his wife is subject to his debts, although the title to it is taken in her name.

Surety — subrogation — amount of execution.

2. A surety who has satisfied a judgment against his principal may issue execution for the amount so paid, with interest, and is not limited to the amount specified in the judgment, under a statute giving a surety who satisfies a judgment against his principal the right to control the judgment so far as to obtain satisfaction for the whole amount paid by him, with interest.

Limitation of action — assigned judgment.

3. The rights of a surety who secures an assignment of a judgment which he satisfies for his principal are governed by the sections of the statute of limitations applying to judgments, and not by that relating to implied promises to pay.

(December 11, 1908.)

APPEAL by defendants from a judgment of the Circuit Court for Garrard County in plaintiff's favor in a proceeding to subject to the payment of a debt of B. F. Patton land the title to which was in his wife. Affirmed.

The facts are stated in the opinion.

Mr. Lewis L. Walker for appellants.

Messrs. Smith & Smith and R. H. Tomlinson for appellee.

Carroll, J., delivered the opinion of the court:

In this action the appellee, Smith, sought to subject to the payment of a judgment in his favor appellant B. F. Patton's land, the title to which was in the wife of appellant. The lower court granted the relief sought, and this judgment we are asked on this appeal to reverse.

There is no serious dispute as to the facts. In 1892 appellant and his wife pur-

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the case of Mayers v. Kaiser, 21 L.R.A. 629, this note being merely supplemental thereto.

This note is expressly confined to cases where a married woman's property, or a business conducted in her own name, is managed by her husband so that his labor and skill result in an increment thereof.

Cases where a wife's money is used by her husband in a business carried on in his own name, as well as where he uses his own money or property in the business of his wife, although carried on in her name, are excluded herefrom.

As herein shown, the preponderance of authority is against PATTON v. SMITH.

Profits accruing from corporate stock owned by a married woman, as well as property purchased therewith, are not rendered liable for her husband's debts by reason of the fact that such profits result from his successful management of the corporate business. First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; Taylor v. Wands, 55 N. J. Eq. 491, 62 Am. St. Rep. 818, 37 Atl. 315; First Nat. Bank v. Rice, 22 Ohio C. C. 183; Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063, affirming 110 Ill. App. 166.

The creditors of a married man, having no legal right to require that he devote his personal services to the extinguishment of their claims, cannot object because his time, labor, business skill, and sagacity in the management of his wife's separate estate result in an increase thereof. Lister v. Vowell, 122 Ala. 264, 25 So. 564; Martin v. Banks, 89 Ark. 77, 115 S. W. 928; Shircliffe v. Casebeer, 122 Iowa, 618, 98 N. W. 486; Deere, W. & Co. v. Bonne, 108 Iowa, 281, 75 Am. St. Rep. 254, 79 N. W. 59; Hibbard v. Heckart, 88 Mo. App. 544; Young v. Hurst (Tenn. Ch. App.) 48 S. W. 355; Martin v. Davis, 30 Pa. Super. Ct. 59.

And the foregoing doctrine is not affected by the fact that the husband is insolvent. Shircliffe v. Casebeer; Deere, W. & Co. v. Bonne; and Hibbard v. Heckart,—supra.

Likewise, in order that this doctrine may be applied, it is unnecessary that the husband should receive compensation for his services. Lister v. Vowell and Deere, W. & Co. v. Bonne, supra.

The court said in Shircliffe v. Casebeer, supra, that it might be conceded as a proposition of morals, that under ordinary circumstances a debtor is bound to devote his labor to the satisfaction of the just demands of his creditors; yet there is no law which can compel such action on his part, and, as far as creditors are concerned, he need not labor at all, or may give his labor to strangers without compensation. Nay, more, he may do all this with the express purpose not to accumulate anything which may be subject to seizure by his creditors, and there will be no fraud in law or in fact, for he has neither withheld, concealed, nor disposed of anything on which they have any claim at law or in equity. But this rule is not to be construed as an abandonment or departure from the well-established rule that these transactions between an insolvent husband and his wife will be closely scrutinized when questioned by his creditors, and, if it is found that she holds the title to property as a mere trust for the use of the husband, or as a mere device by which it may be placed beyond the reach of process, equity will decree its subjection to their claims.

And it was said, in Deere, W. & Co. v. Bonne, supra, that, whatever the obligation of the husband to work for the benefit of his creditors, there is no rule in law or equity preventing him from voluntarily or gratuitously devoting his labor and skill to the business of his wife; and there is no magic in the husband's touch by which he may acquire an interest in her separate property from his mere supervision or labor; and if he is entitled to anything, it must be compensation, owing to an express agreement.

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chased from Robinson a tract of land in Garrard county, Kentucky, containing 253 acres, for the sum of $10,600. The title was made to the wife, who paid $7,000 of the purchase price in cash with her own money. For the balance of the purchase price two notes were executed for $1,828, due in one and two years from date. In 1897 they bought 82 acres of land from McGrath for $4,000 one third of which was paid in cash; and for the balance two notes of equal amounts, due in one and two years, were executed. The title to this land was also conveyed to the wife. It is these two tracts of land that the lower court adjudged a lien upon to secure the payment of appellee's judgment, upon the ground that, excepting the $7,000 of her own money invested in the land, and about $1,200 yet due on the purchase price of the McGrath land, the remainder was paid by the labor, services, and good business management of the husband. When the Robinson land was purchased they moved on it, and engaged in the business of farming; and the balance due on that tract, as well as the purchase price of the McGrath tract, except the amount yet due, was paid with the proceeds of crops and stock from these farms. Patton was an industrious, thrifty, money-making farmer, and was assisted in the management of the farm by his sons, who were industrious and prudent young men. They raised large crops of hemp, tobacco, corn, and other produce, and handled and fed mules, cattle, sheep, and hogs,

as there is no implied obligation on the part of the wife to pay her husband for services thus rendered.

It was said in Taylor v. Wands, supra, that under the married woman's act it is thoroughly settled that a married woman may embark her own capital in any separate business or trade, and may employ her husband as her agent, to make it successful, and that earnings upon or increase of her capital therein, although due in part to the services rendered by her husband, will still belong to her, and will not be liable to seizure by the husband's creditors as his property.

The doctrine that the profits, or the property acquired with the income, of a business, will not be liable for the husband's debts has been applied where a husband acts as his wife's agent in managing a business in which she has an interest (Lister v. Vowell, supra); where, by reason of an insolvent husband's services and energy, a large and lucrative business is built up upon capital, part of which is borrowed by, and the balance belongs to, his wife, the business always being considered as belonging to her (Shircliffe v. Casebeer, supra); where a married woman upon her husband's failure in business, with her own means begins a new business, which by reason of his management, labor, and business sagacity, results in a considerable profit (Deere, W. & Co. v. Bonne, supra); where a man gives his time and attention to the management of his wife's business (Hibbard v. Heckart, supra).

And this will be true, notwithstanding the profits arising from the business by reason of the husband's labor are in part used in paying for it. Lister v. Vowell, supra; Wheeler v. Biggs (Miss.) 15 So. 118.

So, a mill which is purchased by a married woman upon credit is not rendered liable for her husband's debts by reason of the fact that the profits arising from his management thereof are used in paying for it. Wheeler v. Biggs, supra.

And it was held in Martin v. Banks, supra, that the creditors of a married man cannot reach his wife's property, which represents the increase of her money which the husband has invested and managed for her in her own name, without mingling it with his own property. The court said there was no obligation on the husband's part to devote his wife's property to the payment of his creditors, nor to use his skill, judgment, and business sagacity in the management of her property in order that his creditors might reap the benefits, and that there was no law forbidding him to devote his own earnings to the support of his family, instead of using his wife's property therefor, and they were each within their legal rights when he devoted a reasonable amount of his skill, sagacity, time, and labor to the augmentation of her capital, during which he earned a living for his family from his own exertions as a traveling salesman.

It was held in Catlett v. Alsop, 99 Va. 680, 40 S. E. 34, that a statute empowering a married woman to engage in trade and carry on business upon her separate account, for her separate use and benefit, and providing that the earnings and products thereof shall be her separate estate, and not subject to the use, control, or disposal of her husband, or be liable for his debts or liabilities, will permit a husband to devote his time, energy, and skill to the management of his wife's business, without subjecting the proceeds to the claims of his creditors, unless it appears that her title is merely colorable and fraudulent as against them.

In Young v. Hurst, supra, where it was sought in equity to subject certain property to a husband's debts, the title to which was alleged to have been placed by the debtor in the name of his wife for the purpose of defrauding his creditors, which was used in a business carried on by him as his wife's agent, the court said: "We take it that the law is reasonably well settled that a married woman with separate estate may barter and trade with reference thereto, by her husband as agent, and will be entitled to the increase thereof. In other words, the marital relation does not disqualify the husband from acting as his wife's agent with reference to her separate estate; and the fact that he is agent will not render

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and in their various operations were very successful. The wife took no part in the conduct or management of the farm, leaving this entirely to her husband, who did all the buying and selling, and in other respects conducted the farm as if it were his own. The accounts in the banks in which they did business were kept in the name of the wife, but all the transactions were conducted through Patton, who deposited the money and drew it out on checks in the name of his wife, but signed by him. The two tracts of land when purchased cost approximately $40 per acre, but when the judgment appealed from was rendered they were worth $80 per acre. This great increase in the value of the land was due to the natural enhancement in the value of lands generally in the neighborhood where this land was located, and also to the fact that it was well and prudently taken care of. In May, 1908, when Mr. Patton gave his deposition in the case, he testified that there was on the farm 51 head of cattle, worth about $32.50 a piece; that he had 27 or 28 head of horses and colts worth $2,200; 4 mules worth $550; 205 sheep and 200 lambs worth $3.50 a piece,—making the value of the stock in round numbers about $5,000. So that the value of the land is now $26,800, and the personalty $5,000, making a total of $31,800. Assuming that the land purchased by Mrs. Patton with $7,000 is now worth $14,000, and that this should be deducted from the present value of the

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her property or its profits liable to his creditors. . . . This grows out of the principle that the husband is bound to support himself and family, including his wife, and she is not bound to support him, or herself for his relief, even if she have a separate estate."

A married woman may accept the labor of her husband in conducting or managing a farm owned by her, without subjecting the profits or increment therefrom to the payment of his debts. Alsdurf v. Williams, 196 Ill. 244, 63 N. E. 686; Foreman v. Citizens' State Bank, 128 Iowa, 669, 105 N. W. 163; Phillips v. Hall, 160 Pa. 60, 28 Atl. 502.

A farm which is the separate property of a married woman is not liable for her husband's debts because of the augmentation of the rents and profits or the enhancement of its value by a reasonable contribution of his time, labor, or skill in the management thereof. Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929. However, the court said that it was not prepared to say that there were no limitations upon the right of the husband to expend his time, labor, skill, and expense in managing or improving the separate property of his wife, and to deny his creditors the fruits of the same in the enhancement of the value of the land and in the increase of rents, and profits by reason of such contribution.

So, cotton raised upon land belonging to a married woman, is not subject to the claims of her husband's creditors merely because he has performed a small portion of the labor necessary to produce it. Dollar v. Busha, 124 Ga. 521, 52 S. E. 615. The court said that it could see no objection, in law or morals, to an insolvent husband contributing his labor to assist his wife in making her separate estate productive; and, as the husband cannot be forced to apply his labor to the extinguishment of claims of his creditors, property thus acquired by the wife is beyond their reach.

And where a married woman's money purchases and stocks a farm which her husband cultivates, the personalty and profits cannot be seized for the latter's debts, where credit has not been obtained or indebtedness incurred upon the strength of his ownership thereof. McDonald Mfg. Co. v. Williams, 96 Ill. App. 395.

The products of a married woman's farm are not rendered liable for her husband's debts merely because he gives some help thereon, and to some extent assists her in the superintendence and management thereof. Trapnell v. Conklyn, 37 W. Va. 244, 38 Am. St. Rep. 30, 16 S. E. 570.

The fact that a husband works with his wife, and thus aids her in paying for her farm, will not give his subsequent creditors a right to subject it to the satisfaction of their claims. King v. Wells, 106 Iowa, 649, 77 N. W. 338.

So, crops raised upon a farm which is rented and managed by a married woman who possesses a separate estate are not rendered liable for her husband's debts merely because he may have contributed his labor to the farm work. Frost v. Knapp, 10 Pa. Super. Ct. 296.

And this is true, notwithstanding the wife expects to pay the rent of the farm from the profits arising therefrom. Ibid.

Lands of the wife are not subject to the claims of her husband's creditors, where it does not appear that his labor in relation thereto was more than he was by law bound to contribute to the support of his family. Brown v. Brown, 20 Ky. L. Rep. 690, 47 S. W. 758.

It was held in Carson v. Jones, 14 Ky. L. Rep. 667, that if a married woman who has been empowered to trade as a *feme sole* can in any case shield the profits from a business carried on in her own name by her husband, he alone giving his time and attention therto, it is only where, with some degree of certainty, she traces her money into the business.

But, on the other hand, it has been held in several states that a married woman will not be permitted to hold the fruits of her husband's skill and labor to the exclusion of his creditors.

In a number of the foregoing cases it is said that, "in the absence of fraud," the fruits of the husband's management of his wife's separate property or business will

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personalty and real estate, it would leave a balance of $17,800, which amount represents the value of the industry, energy, and skill of Mr. Patton during these years. He testified that his indebtedness at the time he gave his deposition was in round numbers $7,550. This, subtracted from the $17,800, would leave a balance of say $10,000. One thousand two hundred dollars of this indebtedness represents the balance of the purchase price due on the McGrath land; the remainder being incurred for borrowed money and other purposes. In estimating the profit made on the original purchase, counsel for appellant insists that the reasonable rental of the land purchased by Mrs. Patton should be taken into consideration, and that this rent ought to be deducted from the difference between the value of the estate at the time of the purchase of the Robinson tract and the value of the real and personal estate now, upon the ground that the wife was entitled to the reasonable rent of her land, free from coercive subjection for the payment of her husband's debts.

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not be liable for his debts, although the courts do not say what will, in such a case, actually constitute fraud. In none of them is it said that the mere management of a married woman's property, notwithstanding the increment thereof is due to the husband's skill and labor, will constitute fraud as against his creditors.

In Catlett v. Alsop, supra, the court said that the fact that the wife had neither experience in the business nor a separate estate when she embarked therein was a circumstance to be considered in determining the question of fraud, but that it alone was not sufficient to establish that the agreement between her and her husband was colorable merely, or that the business really belonged to the husband, and that it was merely a fraudulent device resorted to, to defeat the rights of his creditors.

So, the court, in Young v. Hurst (Tenn. Ch. App.) 48 S. W. 355, citing Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478 and Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98, which hold that large profits accruing from an insolvent married man's management of a business carried on in his wife's name with her separate estate over and above what will compensate her for what she has invested therein, are subject to his creditors, said: "Courts, however, will not allow the husband and wife to use this right to cloak fraud against creditors; and courts, where property traceable to the skill and labor of the husband is found to exist, will make a just apportionment between the wife and her husband's creditors." To the same effect see also Trapnell v. Conklyn and Boggess v. Richards, infra.

As it is the duty of a married man to devote his skill and energy to the support of his family, and as all his creditors can reasonably expect is that his earnings beyond what is sufficient for that purpose should be applied in satisfaction of his debts, where the services rendered by him in the management of his wife's business are more than sufficient for the support and maintenance of himself and family, a court of equity will consider the excess as a debt due him from his wife, and justly apportion it between her and her husband's creditors. Catlett v. Alsop, supra; Boggess v. Richards, 39 W. Va. 567, 26 L.R.A. 537, 45 Am. St. Rep. 938, 20 S. E. 599; Trapnell v. Conklyn, 37 W. Va. 242, 38 Am. St. Rep. 30, 16 S. E. 570.

And in the absence of an express agreement between husband and wife as to his compensation, the law will imply that he was to receive a reasonable amount therefor. Catlett v. Alsop, supra.

Several Kentucky cases upon this subject will be found sufficiently set out in the opinion to PATTON v. SMITH.

It was held in Pease v. Barkowsky, 67 Ill. App. 274, that the capital and income from a business carried on by a married man in his wife's name with her funds, when due to his labor and skill, will be liable for his debts. The court said that, as a man's labor and skill in any trade or branch of business is valuable capital, it is as unlawful for him to appropriate the results thereof to the exclusive use of his wife as her separate property as it would be to thus appropriate his money to the detriment of his creditors, and that if the wife furnishes the original capital, and through the husband's labor and skill it is largely increased, the addition is not her property, but the proceeds of the husband's labor and skill, which the creditors have a right to claim, and if it is so interwoven with the capital of the wife as to render identification quite impossible she will lose her claim to the capital and the transaction may be regarded, as far as the creditors are concerned, as a loan by her to her husband, by means of which he engages in trade.

And to the same effect, see also Murphy v. Nilles, 166 Ill. 99, 46 N. E. 772, affirming 62 Ill. App. 193.

While a married woman may make her husband her agent for the management of her property, and he may perform ordinary and reasonable services for her without compensation, without subjecting her property to the claims of his creditors, yet she cannot, under the guise of such agency, appropriate to herself the results of the time, labor, and skill of her husband to the exclusion of his creditors. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703.

Where a husband as his wife's agent, carries on a business with her property for her benefit, it will be liable for his debts, unless she has filed the certificate required by statute where a maried woman carries on a business on her separate account, in order that she may secure her property from her husband's creditors. Desmond v. Young, 173 Mass. 90, 53 N. E. 151.

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Upon this state of facts the legal question arises, should this McGrath land, and so much of the Robinson tract as may be necessary, be subjected to appellee's debt? At the prevailing prices the McGrath land will sell for more than enough to satisfy this debt, after first paying the vendor's lien upon it of $1,200, and the judgment directs that this land be first sold. It is argued that the money with which she paid the purchase price of the land, except $7,000, and the amount yet unpaid, was the reasonable and usual profit derived from the money the wife invested in the land. It is very clear that, as the land of the wife cannot be subjected to the payment of the husband's debts, unless it has been set apart for that purpose in the manner provided in the statute, neither can the rent received by her from the land be subjected by his creditors. But that question does not present itself in this case. There is no attempt here made to subject either the land bought by the wife or the rent of the same. The right of recovery is rested upon the ground that the property sought to be subjected was accumulated solely by the industry, energy, and skill of her husband; and, this being so, it is subject to his debts. As there can be no doubt, from an examination of this record, that much more property in value than is necessary to satisfy the appellee's debt was on hand when the judgment was rendered, and that it represented and was produced by the industry and good management of Mr. Patton, we see no escape from the conclusion that the judgment of the lower court was correct. There is no substantial difference between the facts of this case and those in Blackburn v. Thompson, W. & Co. 23 Ky. L. Rep. 1723, 56 L.R.A. 938, 66 S. W. 5. There the attempt was made to subject to the husband's debts a house and lot conveyed to the wife, upon the ground that it was purchased and paid for by the husband, and the title taken to the wife with the fraudulent purpose of cheating his creditors. The evidence disclosed that Blackburn, the husband, was an admirable business man, that he had entire charge of the business, and that the property purchased was paid for out of profits of the business, although it was conducted in the name of his wife. The court, in an opinion holding that the property was liable for the debts of the husband, said: "It was held in Gross v. Eddinger, 85 Ky. 168, 3 S. W. 1, where the facts were very similar to those in the case at bar, that the husband's creditors were entitled to subject to the payment of their debt a lot purchased with the profits of a business conducted by the husband as agent for the wife, the title to which was in the wife. And in Brooks Waterfield Co. v. Frisbie, 99 Ky. 131, 59 Am. St. Rep. 452, 35 S. W. 106, it was held that the creditors of an insolvent husband were entitled to subject to the payment of their debts the increase in the value of the wife's property, which was chiefly due to the skill, energy, and labor of the husband. In Moran v. Moran, 12 Bush, 303, it was held that the creditors of an insolvent husband were entitled to subject all that he might be able to earn, in excess of what was necessary for the reasonable support of himself and family, to the payment of their debts, notwithstanding the fact that it had been invested in property in the wife's name. And the same ruling was followed in Edelmuth v. Wybrant, 21 Ky. L. Rep. 931, 53 S. W. 528." This case, and those cited in the quotation from it, are conclusive of the correctness of the judgment here appealed from.

It is also argued that the judgment is erroneous because the execution returned "no property found," and which was the basis of this action, did not follow the judgment. The facts are these: On March 28, 1892, Barnett procured a judgment against appellant Patton and the appellee, Smith, who was his surety, for $1,200, with 6 per cent interest from the 1st day of April, 1887, until paid; and on the 1st day of March, 1893, appellee, as his surety in said judgment, was obliged to and did satisfy the same by paying to the judgment creditor the sum of $1,421.06, which amount represented the judgment debt, less 13 per cent of it that was paid to the judgment creditor by the assignee of Patton between the date of the judgment and its payment by the surety. Thereupon, the judgment was assigned to the surety. When the surety came to have the execution that is the basis of this action issued upon this judgment, the execution specified as the amount to be collected under it the sum that he had paid, *viz.*, $1,421.06, with interest from March 1, 1893. When the surety satisfied the judgment, Ky. Stat. 1903, § 4666, gave him the right to control the judgment for his own benefit, and to have execution issued thereon. It provides, in part, that "if the surety pays the whole or part of a judgment, he shall have a right to an assignment thereof from the plaintiff or the plaintiff's attorney, in whole or in part; and when the plaintiff has been fully satisfied, such assignment shall give him the right to sue out or use any existing execution, or otherwise control the judgment for his own benefit against the other defendants, so far as to obtain satisfaction from the principal for the whole amount so paid by the surety, with interest." It will be observed that the statute gives to the surety the right to so control the judgment as "to

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obtain satisfaction from the principal for the whole amount so paid by the surety, with interest;" the purpose of the statute being to afford full relief to the surety by enabling him to collect the whole amount paid, with interest thereon. If the surety could only issue an execution for the sum specified in the judgment, it might not afford him full satisfaction for what he had paid, and so he may have execution issued for the sum actually paid by him, with interest thereon from the date of payment. This case furnishes a good illustration of the necessity for permitting the surety to have execution issued for the amount paid by him, with interest, although in this particular the execution may not follow the judgment. If Smith could only have execution issued for the amount of the judgment, or $1,200, with interest from April 1, 1887, he could only collect that sum from Patton; but this would not fully reimburse him for what he had paid, as he would lose the interest on $221.06, the difference between the principle sum for which the judgment was rendered and the amount paid by him in satisfaction of it. So that there was no error in the execution.

The statute of limitations is also relied on in the answer, but this point is not pressed by counsel for appellant in his well-considered brief. If Smith had not obtained an assignment of the judgment, then his right of recovery against Patton would be upon an implied promise to pay, and be barred by the five-year statute of limitations; but, as he obtained an assignment of the judgment, he was substituted to all the rights of the judgment creditor, and the fifteen, and not the five, year statute applied. Joyce v. Joyce, 1 Bush, 474; Duke v. Pigman, 110 Ky. 756, 62 S. W. 867.

There being no error in the judgment, it must be affirmed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY, by Revenue Agent, Appt.,
v.
ROBERT PEEBLES, Exr., etc., of J. G. Peebles, Deceased.

SAME, Appt.,
v.
ROBERT PEEBLES, Exr., etc., of W. H. Peebles, Deceased.

(— Ky. —, 119 S. W. 774.)

Tax — foreign stocks.

1. Stocks in a foreign corporation, owned by a foreign testator, are not taxable in the hands of a resident executor, who was appointed by the courts of testator's domicil, and has not qualified under the laws of his residence, nor physically removed the stocks to his domicil.

Same — statute.

2. A statute requiring an executor to list for taxation property belonging to the estate applies only to an executor who has qualified in the state, and has within it property in his custody which he is investing or using so as to bring it within the jurisdiction of the state for purposes of taxation.

(May 28, 1909.)

APPEALS by plaintiff from judgments of the Circuit Court for Boyd County in defendant's favor in actions to compel defendant, as executor of J. G. Peebles, deceased, and of W. H. Peebles, deceased, to assess and pay taxes on certain shares of stock belonging to the estates of such deceased persons. Affirmed.

The facts are stated in the opinion.

Messrs. **John W. Woods and S. S. Willis** for appellant.

Messrs. **Hager & Stewart** for appellee.

Carroll, J., delivered the opinion of the court:

These two appeals, involving the same question of law, will be heard and disposed of together. They are proceedings by a revenue agent against the executor, to require him to assess and pay taxes on shares of stock owned by the testators, respectively, in the Bellfonte Iron Works Company and the Scioto Fire Brick Company, Ohio corporations. The testators died residents of

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Note. — An extensive search has failed to disclose any other case in which it can be confidently said that there was presented for adjudication the question whether or not a resident executor or administrator of a nonresident decedent, who qualified in the state in which his testator died, but not in the state of his own domicil, can be required to list property for taxation legally in his custody, but which he has never physically removed from the state in which his decedent died, nor invested in any manner in his own state.

Attention, however, should be called to Rand v. Pittsfield, 70 N. H. 530, 49 Atl. 88, in which it was held that the personal estate of a nonresident intestate, rightfully taxed in the state where it was situated, was not taxable in the state in which the administrator resided. The authority of this case, however, upon the question presented in COM. v. PEEBLES, is weakened by the fact that, while the statement of facts preceding the opinion shows that the administrator was appointed in the decedent's state, it fails to show whether or not he ever qualified in the state of his own residence.

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the state of Ohio. At the time of their respective deaths they each owned stock in the before-mentioned corporations, which were located in the state of Ohio. The laws of Ohio permit a nonresident to qualify as executor, and Robert Peebles, who is now and was, when the testators died, a citizen and resident of Boyd county, Kentucky, qualified in the probate court of Scioto county, Ohio, as executor of the two estates. The decedents did not own any property or estate in Kentucky, nor did Robert Peebles qualify in the courts of this state as executor. All his power and authority to administer the estates comes from his appointment by the probate court of Ohio. It further appears that the executor has never brought to or invested in this state any part of the estate held by him as executor. The actual custody and physical situs of all the stocks held by him and sought to be assessed have always been in Ohio. As executor, he has never been required by the laws of Ohio to assess or pay taxes on these stocks, because the corporations pay the taxes. It will thus be seen that the only question involved in the case is whether or not a resident executor of a nonresident decedent, who qualified in the state in which his testator died, can be required to assess for taxation and pay taxes on stocks legally in his custody as executor, but which he has never physically removed from the state in which his testator died, and in which the corporations issuing the stock have their place of business, or invested in any manner in this state.

It is the contention of the commonwealth (1) that certificates of stock in corporations, like bonds and notes, are merely evidences of ownership of property,—muniments of title,—and what may be called intangible property, and the physical location of the paper evidence is immaterial as affecting the legal title to the property or its situs for purposes of taxation; (2) that the executor of an estate is the absolute legal owner thereof for the time being, and stands in the shoes of the decedent with reference to the personal property, tangible and intangible, succeeding to all his rights and responsibilities with reference thereto; (3) that the situs for taxation of intangible personal property is the domicil of the owner thereof, and hence, under the laws of this state, an executor residing in this state, and having the legal custody and control of intangible personal property, should assess it for taxation here while the estate is being administered and until distribution is made, regardless of where or how or by whom he was appointed, or the physical situs of the property. It is generally recognized that a certificate of stock in a corporation is merely the representative of property, and not the property itself, occupying very much the same status as promissory notes, bonds, or other choses in action. Thomp. Corp. § 2348. It may be further said that, generally speaking, the situs of personal property of this kind follows the owner. Where he is, it is. Where he is taxable, it is taxable. But to this rule there are important exceptions that will be noticed in the course of the opinion. It is also well settled that the personal representative of an estate is the legal owner, for the time being, of all the personal assets of the decedent, and succeeds to all his rights and responsibilities with reference thereto for purposes of assessment and taxation. Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164; 1 Desty, Taxn. § 68. But it does not follow from this that the residence of the personal representative is, in all cases, deemed the situs of the personal estate in his hands for purposes of taxation. The residence of the personal representative or the person holding any fiducial relation with an estate may be at one place, and the situs of the property of the estate, for purposes of taxation, although legally in his custody, may be in another place. This principle is well illustrated in the cases referred to in Higgins v. Com. 126 Ky. 211, 103 S. W. 306, in which case the court said, supporting the proposition by a number of authorities, that "for many purposes the domicil of the owner is deemed the situs of his personal property, but this is only a fiction from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should, and is not allowed to be a controlling feature in matters of taxation." Especially is this true when it cannot be given any other situs in the state for revenue purposes. When intangible property having a situs within this state for purposes of taxation would escape taxation unless assessed at the residence of the fiduciary in whose legal custody it is, it has often been held that his residence fixes its situs. This rule was applied in Higgins v. Com. supra, because the estate had no other situs in this state except the residence of the trustee. It has also been ruled in many cases, both in and out of this state, that when money, choses in action, or other intangible personal property, is in the actual custody of an agent or fiduciary within this state, who manages and controls it, by lending it out, investing it, collecting interest, and the like, that it is subject to taxation at the place where the agent or fiduciary resides, although the beneficial owners may be nonresidents of the state. Com. v. R. G. Dun & Co. 126 Ky. 108, 10 L.R.A.(N.S.) 920. 102

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S. W. 859; Bristol v. Washington County, 177 U. S. 144, 44 L. ed. 706, 20 Sup. Ct. Rep. 585; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Higgins v. Com. supra; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 112 Am. St. Rep. 275, and note (115 La. 564, 2 L.R.A.(N.S.) 637, 39 So. 601); Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8. The right to tax in this class of cases is rested upon the general principle that "persons are not permitted to avail themselves for their own benefit, of the laws of the state in the conduct of business within its limits, and then escape their due contribution to the public needs through action of this sort, whether taken for convenience or design." If the real and beneficial owner of property resides in this state, he is protected by our laws and has all the benefits and advantages enjoyed by our citizens, and so we demand that he must contribute his share towards defraying the expenses of the government whose protection he receives. In exacting this contribution, we do not stop to inquire where the evidences of the debts that he owns are located, or where his intangible property is situated. He is the owner of it; and, as it cannot well have a situs for taxation in this state at any other place than his residence, at that place it must be assessed for taxation. But our laws do not end at exacting this contribution from the real owner. They require all fiduciaries and agents qualified or appointed in this state, who have in their custody any estate that has come to them by virture of their office, to list it, because it is also protected by our laws and should bear its share of the public burden.

In Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164, strongly relied upon by counsel for appellant, a phase of the question under consideration was involved, but an examination of the case will show that it does not sustain the contention of counsel. It appears from the opinion that Robert B. Bowler died domiciled in Hamilton county, Ohio, the owner of a large estate in both that state and this. Administration was granted in the state of Ohio, and afterwards administration was also granted in this state. The Kentucky administrator, after his qualification in this state, had the estate appraised, and an inventory thereof filed in the court in this state in which he qualified, and continued for several years to act as administrator, finally settling his accounts in the Kenton county court in this state. In a proceeding by a revenue agent to subject to taxation the estate in the hands of the Kentucky administrator during the years that it was in the custody of the administrator, and before its distribution by him, one of the defenses made was that the assets in his hands, being mere indebtedness, had no actual situs, and must be treated as constructively located with the owners at their domicil in Ohio, and hence were not subject to taxation in this state. In answer to this the court said:

"It is true that debts have no place independent of the domicil of the owner. While specific articles of personal property permanently located in this state, and belonging to nonresidents, may be listed even to the possessor, yet evidences of indebtedness have no actual situs here, and must be treated as located with the nonresident owner; but that case is not this one. The word 'owner' in the statute refers to the person in whom the title is vested, either absolute or qualified. Here the estate was taken in charge by the Kentucky administrator. The legal title was in him. The estate followed him, and was annexed to his person, thereby having an actual situs in this state, by the law of which it was protected. Moreover, it was under the charge of, and had to be distributed through, a court of this state. These facts clearly show that the second ground of complaint is untenable." That there is a marked difference between that case and the one at bar is manifest. It is evident from the opinion that the court was largely, if not altogether, influenced by the fact that the property sought to be taxed had an actual situs in this state, in the custody of the personal representative who lived in and was appointed by the courts of this state, and whose official residence was in this state. To the same effect is Boske v. Security Trust & S. V. Co. 22 Ky. L. Rep. 181, 56 S. W. 524. In Com. v. Williams, 102 Va. 778, 47 S. E. 867, 1 A. & E. Ann. Cas. 434, also relied on by counsel, we find the following state of facts: Mrs. Williams, a citizen and resident of Amhurst county, Virginia, died in that county, and there her executor qualified. At the time of her death she owned a large personal estate, consisting, in the main, of stocks and bonds, a part of which were in a safety vault in the city of New York. After her death, these stocks and bonds were permitted by the executor to remain in New York. In considering the right of the state to require the executor to pay taxes on this property, the court said: "The property, real and personal, which had belonged to her during her lifetime, continued to be the subject of taxation after her death. It passed under her will and therefore it comes within the terms

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of the statute. To the moment of the death of Mrs. Williams it was, as we have seen, properly taxable in Amhurst county. By her will, title to all her personalty passed to her executor. He was not in possession on the 1st of February, 1901, of the paper evidences of this New York personalty, nor was his testatrix in such possession at the moment of her death. That fact did not exempt it from taxation in this state during her lifetime. Why should it operate to shield it from taxation after her death, when, by her will, the title to this property passed to the executor?" And, citing in suport of its conclusion a number of cases, it held that the estate was subject to taxation. To the same effect is Gallatin v. Alexander, 10 Lea, 475. But in these, as in the Baldwin Case, supra, the effort was made to tax the property at the residence of the personal representative in the state in which he qualified, and the court held that, for purposes of taxation, the situs of the intangible personal property was at the place of the executor's official residence.

Counsel for appellant have not cited us to, nor have we, after diligent search, found, any authority that would sustain the right to subject this property to taxation in this state. To hold it liable to taxation, it would be necessary to go far beyond the general principles that usually control in cases of this character. We would be obliged to say that, merely because an individual who happens to be the personal representative resides in this state, he must assess for taxation at the place of his residence the property held by him in an official capacity, although such property was never at any time in this state for any purpose. A tax like this could not be sustained upon the ground that the property taxed derived any protection from the laws of this state, because it does not, nor upon the ground that the personal representative, in his official capacity, receives any benefits or advantages under our laws, because he does not. Of course, the fact that the corporation pays the taxes on the property in another state does not affect the right or power of this state to require the owner, if he were living, to list the stocks for taxation in this state; and so, if the executor had qualified in this state and had what may be termed an official or executorial residence in this state, he would also be obliged to list them for taxation before they were distributed among the beneficiaries of the estate, as he would occupy the same relation to the property as the decedent did when living.

Nor do we attach controlling importance to the fact that the paper evidences of the stock sought to be assessed was at all times actually in a safety vault or in the custody of some person out of this state. The mere physical location of the stock is not the test of its liability for assessment. The adoption of this rule would often defeat the collection of taxes that were justly due, and put it in the power of fiduciaries and others to escape taxation upon intangible personal property by simply removing it from the state during the time that our laws require its assessment, or, for that matter, permanently, as it could, although in another state, be as well managed and controlled by the executor as if it were in a vault in this state. But the presence of these evidences of property might, in some instances, aid in fixing the place in this state at which they must be assessed if a question was made as to the place in this state at which the property should be subject to taxation. But, except in this particular, and as furnishing some evidence of the situs of the property in this state for taxation, it is not material whether the evidences of debt are in or out of the state. The real question in this case, and the one by which the right to tax must be tested, is: Did the property, by virtue of its legal ownership by the executor, have a situs for taxation in this state? If the executor had qualified in this state, and had thereby obtained an official residence in this state, or if the estate in his hands was invested in this state, we would not have any doubt about its liability for taxation. But here the attempt is to require the executor to pay taxes upon property that he holds by virtue of his appointment in another state, and when no part of the property legally in his custody is within the jurisdiction of this state. A person may occupy the two relations of individual and executor; and, as individual, be subject to the laws and jurisdiction of one state, and in his official capacity be subject to the laws and jurisdiction of another state. He might, as executor, have the legal ownership of property over which our courts would have no jurisdiction. As illustrating this view, attention may be called to Gallup v. Schmidt, 154 Ind. 196, 56 N. E. 443, in which the facts were these: Gallup died testate in Marion county, Indiana, the owner and in possession of a large personal estate in that county. His will was admitted to probate in the probate court, and a resident of the state of New Hampshire qualified in the Indiana court as executor. An effort was made by the fiscal authorities of Marion county to tax the estate of the decedent. In considering the case, the court said in part: "The official residence of the executor, so far as the taxation and administration of the assets in his possession were concerned, was in Marion county. As a trustee of the property, he had his creation by the Marion circuit court,

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and had no existence or authority outside of said county, except as he drew it from the court of his appointment. In contemplation of law, he is ever present and officially resident in the Marion circuit court during the pendency of his trust, and required, without notice, other than presentation, to answer to every sort of claim or demand within the jurisdiction of the court, asserted against the assets in his hands for administration." And so we may say that a personal representative is not the owner of the estate in his hands, in the full sense that the decedent was. People ex rel. Darrow v. Coleman, 119 N. Y. 137, 7 L.R.A. 407, 23 N. E. 488. It is true that he is the legal owner for the time being, but this is only by virtue of his appointment. The estate does not follow him into every place he may happen to have a residence, as it would the owner. His official domicil is the state of his appointment. To the laws of that state he owes allegiance in his fiducial or official capacity, and to its laws he is answerable for the conduct of the estate coming to his care. Nor is there any sound reason why the fiction that intangible personal property follows the person of the owner should be extended to embrace, in all its aspects, the legal ownership of the fiduciary. The estate of the decedent is attached to the person of the personal representative in the place where he qualifies. It is there that he, in legal contemplation, resides. His official home is in the state under whose laws he derives all his authority. What he does in other states is under and by virtue of this appointment.

A case very much like the one we are considering, and that supports the conclusion we have reached, is Goodsite v. Lane, 72 C. C. A. 281, 139 Fed. 593, 2 A. & E. Ann. Cas. 849, in which the United States circuit court of appeals had before it the question, "Whether personal property consisting of stocks, bonds, etc., held in New York on deposit with a bank and trust company by a trustee appointed by a court of Connecticut, under the will of a resident of Connecticut, for the benefit of an heir and legatee residing in Connecticut, and which had never been brought into or invested in Ohio, was taxable in the latter state for the sole reason that such trustee was a resident of Ohio." In considering the case, the court said: "The question here is: Was either this Connecticut estate, or its trustee, as such, within the jurisdiction of Ohio? The statute of Ohio provides that 'all property, whether real or personal, in this state . . . and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation.' Rev. Stat. 1890, § 2731. As construed by the supreme court of Ohio, 'the first clause evidently embraces the tangible property, real or personal, situated in this state, irrespective of the residence of the owner, and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated.' Myers v. Seaberger, 45 Ohio St. 232, 235, 12 N. E. 396. Applying the rule mentioned supra, the state of Ohio taxes tangible property located in the state because of its jurisdiction of the property; and it taxes intangible property located without the state because of its jurisdiction of the persons residing in the state who hold it. The property involved in this case had never been brought within the state of Ohio, and therefore could not be taxed upon the ground that it was tangible property within the state. The tax must be sustained, if at all, upon the ground that the estate was the property of a person residing in Ohio, who, being within the jurisdiction of the state, and owing it an obligation, might be compelled to contribute to its support out of his property, wherever located. . . . The exaction must find its justification in the privileges and protection enjoyed in the state under its laws by the person taxed, in the capacity in which taxed. The person taxed must therefore be in the jurisdiction of the state not only personally, but officially, in the capacity in which he is taxed, and in that capacity must be enjoying the benefits referred to. In the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay. An examination of the cases will show that, where this tax has been sustained, either the trust estate or the beneficiary or the trustee, as trustee, was receiving benefits from the state, for which it was only fair the trustee should pay. . . . But where the estate and beneficiaries were outside the state, and the trustee only resided, and did not act as trustee, within the state, the tax was not sustained. . . . In the present case, neither the trust estate nor the beneficiary nor the trustee, in any proper sense, was within the jurisdiction of the state of Ohio. The trust estate was in New York. The trustee was appointed in Connecticut, and acted wholly outside of Ohio. The fact that as an individual he resided in Ohio could not authorize the taxation of this foreign estate, which had received no benefit whatever from the laws of Ohio."

Further illustrating this view is the case of Bonaparte v. State, 63 Md. 465, where the court said, in speaking of an executor, where the question involved was the right

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to subject the estate in his hands to taxation: "But he held it in the special character of an officer of the law, for the specific and temporary purpose of the administration of the property under the supervision and direction of the court from which he received letters testamentary. The domicil of a testator when living determines the situs of his personal property of an intangible nature not permanently located elsewhere for purposes of taxation, and his place of domicil at the time of his death determines the place of administering his estate. The situs of the personal property, generally speaking, and the residence of the administrator, for the purposes of administration, place them, in legal contemplation, in the city or county of the court exercising jurisdiction. The personal property, therefore, of an intangible nature, not permanently located elsewhere, such as bonds and stocks, must be deemed to remain within the jurisdiction of the court pending the settlement of the estate, and be there liable to taxation. When distribution has been made, and the fact of its transfer has been communicated to the tax authorities, the administrator's or executor's liability to pay the taxes upon it, of course, ceases." And so, in Burroughs on Taxation, § 98, it is said: "The personal property of decedents is taxed at the domicil of the decedent to the person having the legal title, and not in the name of the deceased person. During the settlement of the estate, it must have a situs somewhere, and none so appropriate as where the decedent lived. When the estate is settled and paid to the heirs or legatees, it is then assessed to such persons at their residence." Supporting this principle are the cases of Spalding v. Com. 88 Ky. 135, 10 S. W. 420; Youtsey v. Com. 110 Ky. 555, 62 S. W. 262.

Nor does the fact that § 4058 of the Kentucky statutes (Russell's Stat. § 5950) requires all persons to answer this interrogatory, "Are you or were you, on the 1st day of September of the present year, executor of the will or administrator or curator of the estate of any deceased person, or guardian; committee, or assignee, commissioner, receiver, or trustee of any person, or have you in your possession or under your control any property, money, or other thing of value belonging to any other person or corporation? Answer ———. If the answer is 'Yes,' the person is required to list such property separate from his own, and in the name of the real owner, and show by whom listed,"—militate against the conclusion we have reached. This statute manifestly applies to an executor or other fiduciary who has qualified in this state, or who has within this state money or property in his custody that he is investing or using in business in such a manner as to bring the estate within the rule laid down in the Higgins and Dun Cases, supra. In our opinion, it would be unsound in principle and unjust in practice to subject to taxation these estates.

Wherefore the judgment in each case is affirmed.

MARYLAND COURT OF APPEALS.

CHARLES S. HOLLANDER et al., Appts.,
v.
CENTRAL METAL & SUPPLY COMPANY OF BALTIMORE CITY.

(109 Md. 131, 71 Atl. 442.)

Specific performance — nonresident defendent — publication of notice.

1. Under a statute authorizing the appointment of a trustee to convey land in an action for specific performance, where the defendants are nonresidents, the proceeding is *in rem*, and notice may be given the nonresidents by publication.

Same — notice of property — sufficiency.

2. A notice to nonresidents of the land a conveyance of which is sought to be enforced

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Case Note. — May jurisdiction of suit for specific performance of a contract for the conveyance of land within the territorial jurisdiction rest upon constructive service of process against a nonresident.

The general principle is well settled, in the absence of any statutory modification, that a suit to compel the specific performance of a contract to convey real property is a suit *in personam*, and not *in rem*. It has frequently been applied by holding that the venue of a suit for specific performance of such a contract is not necessarily in the county in which the land is located.

See, among other cases to that effect, Coon v. Cook, 6 Ind. 268; Dehart v. Dehart, 15 Ind. 167; Bethell v. Bethell, 92 Ind. 318; Davis v. Parker, 14 Allen, 94; Close v. Wheaton, 65 Kan. 830, 70 Pac. 891; Johnston v. Wadsworth, 24 Or. 494, 34 Pac. 13; Hearst v. Kuykendall, 16 Tex. 329; Morgan v. Bell, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925. These cases are merely referred to as furnishing a specific illustration of the principle that such a suit is regarded as *in personam*, and not *in rem*. The list is by no means exhaustive, and, of course, so far as the question of local venues is concerned, the matter is subject to statutory regulation, and the rule may be changed by statute. See, for example, Parker v. McAllister, 14 Ind. 12; Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816; Bradford v. Smith, 123 Iowa, 41, 98 N. W. 377; Collins v. Park, 93 Ky. 6, 18 S. W. 1013.

As shown in the notes to Proctor v. Proc-

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is sufficient which describes the lease under which it is held by reference to the record, and the interest of the defendant in the same manner, and refers to a deed tendered for execution, and letter requesting that it be executed.

Appeal — petition to quash — presumption.

3. A granted motion to set down for hearing on petition and answer a petition to quash a proceeding to compel specific performance of a contract to sell real estate will be assumed, on appeal, to have been filed by petitioner, in the absence of anything in the record to the contrary, so that the truth of the answer denying the residence of defendant, which would invalidate the service of process, must be taken as admitted and the service upheld.

Pleading — enforcement of covenant — assignments.

4. To entitle an assignee of a leasehold running to the lessee, his executors, administrators, and assigns, to the benefit of a covenant for conveyance of the fee, it is not necessary to set out in the bill all the assignments, from the original lessee to the present holder of the lease.

Lease — assignment — executor — covenant — enforcement.

5. That an assignment of a leasehold running to the lessee, his executors, administrators, or assigns, with a covenant at the request of the lessee, his heirs and assigns, to convey the property to the lessee, his heirs and assigns, was made by the administrator of one of the assignees, does not deprive the one claiming under it of the right to enforce the conveyance.

Same — covenant — counsel fee.

6. A lessee who undertakes to pay the cost and charge of a conveyance to him of the fee, which is provided for by the terms of the lease, is not bound to pay a counsel fee for the investigation of his right to a conveyance.

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tor, 69 L.R.A. 673, and Fall v. Eastin, ante, 924, the principle has also frequently been applied by upholding the jurisdiction of a court of equity, having personal jurisdiction of the parties by personal service within the state or appearance, to entertain a suit for the specific performance of a contract to convey real property situated in another state, and so beyond the territorial jurisdiction of the court.

And, in the absence of statutes changing the rule, the principle has been applied conversely so as to prevent a court from acquiring jurisdiction of a suit for the specific performance of a contract to convey land within its territorial jurisdiction upon service by publication, or personal service out of the state, upon a nonresident who did not appear. Worthington v. Lee, 61 Md. 530; Spurr v. Scoville, 3 Cush. 578; Silver Camp Min. Co. v. Dickert, 31 Mont. 488, 67 L.R.A. 940, 78 Pac. 967, 3 A. & E. Ann. Cas. 1000.

A general statutory provision for service by publication on nonresidents does not permit such service in a suit against a nonresident for the specific performance of a contract to convey land within the state. Silver Camp Min. Co. v. Dickert, supra.

The court in Sander-Boman Real Estate Co. v. Yesler, 2 Wash. 429, 27 Pac. 269, seems to have assumed that publication of notice to the administrator of the estate and all persons having an interest therein, pursuant to a provision of the Code, was sufficient as a basis of jurisdiction to render a decree for the specific performance of a contract executed by the decedent to convey real estate. So far as appears, however, none of the parties in interest were nonresidents; and, as shown in the note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577, there is considerable authority, if not the weight of authority, to the effect that even in a suit *in personam* jurisdiction may be acquired by constructive service of process upon a resident.

McGaw v. Gortner, 96 Md. 489, 54 Atl. 133, was simply to the effect that a bill not originally brought for specific performance of a contract to convey land in Maryland could not, as against nonresidents served by publication only, be amended by changing its scope so as to make it one for specific performance.

In Worthington v. Lee, supra, the court said that such a decree would be valid in the state in which it was rendered, but not in other states; thus falling into the error reprehended by Mr. Justice Field in the celebrated case of Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577), of assuming that constructive service of process against a nonresident, while not sufficient to sustain the jurisdiction to render a judgment *in personam* entitled to recognition in other states, is sufficient to sustain the judgment in the state in which it was rendered.

It will be observed that the decision in HOLLANDER V. CENTRAL METAL & SUPPLY CO. rests upon the ground that, under the statute authorizing the appointment of a trustee to convey the land, a suit for specific performance is *in rem* or quasi *in rem*, at least, so far as to sustain the jurisdiction on service by publication against a nonresident, and not upon the ground that a decree *in personam*, upon service by publication against a nonresident, is valid in the state where rendered.

Conceding that, upon general principles, a suit for the specific performance of a contract to convey real estate is to be regarded as a suit *in personam*, and not *in rem*, with the result that a court having personal jurisdiction of the parties may entertain the suit in respect of land beyond the territorial jurisdiction, and that a court without personal jurisdiction of the parties may not entertain the suit in respect of land within its territorial jurisdiction, it does not follow that it is incompetent for the legislature of the state within which the land is situated to give such a suit the character of a suit *in rem* or quasi *in rem*,

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Covenant — conveyance — running with land.

7. A covenant by a lessor to convey a fee to the lessee, his heirs and assigns, upon the performance of certain conditions, runs with the land.

Perpetuity — covenant to convey.

8. A covenant for conveyance of the fee in a lease which runs to the lessee, his heirs and assigns, does not place the property *extra commercium*, and is therefore not invalidated by the statute against perpetuities, although the covenantor may not be called upon for performance until after the time limited by that statute.

Action — nonresident — temporary absence.

9. One who has been out of the state for eighteen months, with no intention of returning, or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit, may be proceeded against as a nonresident, although he may not intend to abandon his domicil in the state.

Same — motion to dismiss — irregularity.

10. Although a plaintiff in a case has no right to have a petition for dismissal of the action because of invalid service of process set down for hearing on petition and answer, if he does so, it will be assumed that it was with the consent of the petitioner, to whom the right belongs, and the latter, therefore, cannot complain if the petition was properly disposed of on the facts stated in his petition.

(December 2, 1908.)

APPEAL by defendants from a decree of the Circuit Court of Baltimore City specifically enforcing a contract to convey real estate. Affirmed.

The facts are stated in the opinion.

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so as to sustain the jurisdiction upon constructive service against a nonresident. Upon the contrary, the power of the state in this respect has been expressly affirmed in cases which have recognized the general principle that such a suit is *in personam*, and not *in rem*.

Thus, in Boswell v. Otis, 9 How. 336, 13 L. ed. 164, where the local statute expressly provided for service by publication in a suit to compel specific performance of a contract relating to land, the court said: "A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a procedure is authorized by statute on publication without personal service of process, it is substantially of that character." This, however, was *obiter*, as the question in the case related to land not included in the original bill for specific performance, and, as to that land, the decree, on service by publication, was, of course, held to be in excess of jurisdiction.

The decree involved in Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, was rendered in a suit to remove a cloud on title. The court, however, after stating that such a suit, like a suit to compel the specific performance of a contract for the conveyance of land, was *in personam*, and not *in rem*, and that the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, said that it would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or cancel a deed, that that should be done in his behalf by a trustee appointed by the court for that purpose; and that, in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam* by compelling a deed to be executed or canceled by or in behalf of the party. In that case, however, the decree, having been rendered on service by publication against the nonresident, was held to be beyond the jurisdiction, since it was in the ordinary form of a decree for the removal of a cloud on title.

So, in Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, involving the jurisdiction of a court of a state in which real property is situated of a suit to quiet title upon service by publication against a nonresident, the court, while conceding that the propositions that an action to quiet title is a suit in equity, and that equity acts upon the person, and that the person is not brought into court by service by publication alone, were doubtless correct as statements of general rules, said in effect that they do not preclude the state, in the exercise of its control over property within its limits and the condition of ownership of real estate therein, whether the owner be stranger or citizen, to determine the extent of a nonresident's title to real estate within its limits after service by publication. The Nebraska statute, which was held in that case to sustain the jurisdiction upon service by publication against a nonresident, provided generally for such service in actions "which relate to or the subject of which is real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the state, or a foreign corporation." It may be that this language would not have been sufficient to embrace a suit for specific performance; but the principle laid down in this case seems broad enough to sustain the jurisdiction in such a suit upon constructive service by publication against nonresidents, if the local statute providing for that mode of service is sufficiently specific to include suits for specific performance.

So, in reliance upon the language above quoted from Boswell v. Otis, supra, the

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Messrs. **Arthur W. Machen** and **Arthur W. Machen, Jr.**, for appellants:

In an action brought by the assignee of a term, all the assignments of the term down to himself should be specifically stated, for he, being privy to them, cannot be allowed to plead generally that the estate of the lessee of and in the demised premises came to him by assignment.

1 Chitty, Pl. 16th Am. ed. *382; Gould, Pl. § 32; Alexander's British Statutes, p. 348; 1 Dan. Ch. Pl. & Pr. 1st Am. ed. 369–371; Miller, Eq. Proc. p. 117, note 10; Davis v. James, L. R. 26 Ch. Div. 778.

The words "cost and charge" require the person claiming the right to the conveyance to pay the reasonable counsel fees of the landlord, incurred in examining the title of the applicant who claims the benefit of the covenant, in order to make sure that the applicant is indeed the person legally entitled to the benefit of any covenants that run with the lease.

Re Baylis [1907] 2 Ch. 54; Fitzsimmons

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court in Single v. Scott Paper Mfg. Co. 55 Fed. 553, held that, in view of the Ohio statute expressly providing for service by publication or personal service out of the state upon a nonresident defendant in a suit to compel specific performance of a contract to convey land in Ohio, and the further provision that when a party against whom a judgment for the conveyance is rendered does not comply therewith the judgment shall have the same operation and effect, and be available as if the conveyance had been executed conformable to the judgment,—a Federal court sitting in Ohio may acquire jurisdiction in such a suit upon service by publication against a nonresident, under U. S. Rev. Stat. § 738, providing that when any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing the absent defendant to appear, and that such order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, shall be published in such manner as the court shall direct.

In Adams v. Hecksher, 80 Fed. 742, s. c. subsequent appeal, 83 Fed. 281, service by publication against a nonresident was held insufficient to confer jurisdiction upon a Federal court sitting in Missouri of a suit for the specific performance of a contract to convey real estate in Missouri; but the decision was upon the ground that the bill not only prayed for a conveyance, but for other relief, including a money judgment and a decree requiring the defendant to perfect the title and furnish abstracts according to the contract. In the later of the two opinions it was conceded that service by publication is sufficient to sustain the jurisdiction in a suit for specific performance of a contract for the conveyance of real estate where the decree may operate *in rem* and transfer the title to the property from the defendant to the complainant, under a provision of the Missouri statute authorizing service by publication in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction.

In Clem v. Givens, 106 Va. 145, 55 S. E. 567, upon the authority of Arndt v. Griggs, supra, it was held in effect that it was competent for the state of Virginia to provide that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication; and, in effect, that jurisdiction in a suit for a specific performance upon service by publication against a nonresident was justified by the provisions of the Virginia Code, to the effect that a court of equity, in a suit wherein it is proper to decree or order the execution of any deed or writting, may appoint a commissioner to execute the same, and that the execution thereof shall be as valid to extinguish the right of the party on whose behalf it is executed as if he had executed it himself, and the further provision for service of process by publication, notwithstanding that these provisions were not specifically or in terms made applicable to suits for specific performance. HOLLANDER v. CENTRAL METAL & SUPPLY Co. is to the same effect.

In Felch v. Hooper, 119 Mass. 52, under a statute providing that when a person seised of an estate upon a trust, express or implied, is out of the commonwealth, or not amenable to the process of any court therein having equity powers, the court may order a conveyance to be made in order to carry into effect the objects of the trust, and appoint some suitable person in place of the trustee to convey the same, it was held that the court had jurisdiction, upon service upon a nonresident defendant out of the state, to entertain a bill by the purchaser of land, who, by the owner's permission, had entered upon the land and made improvements, to enforce the implied trust in his favor arising from the circumstances, and, to that end, appoint a trustee to convey the land. The court said that the question was not whether a contract for the conveyance of land in Massachusetts can be specifically enforced against a defendant upon whom no service is made within the state, and who is not, and never has been, a resident: that that question was decided in the negative by Spurr v. Scoville, 3 Cush. 578; but that the question was whether, under such a contract, the plaintiff, who has paid or tendered the consideration, and has, by defendant's permission, entered upon the land and made improvements thereon, may, by virtue of the statute, enforce his

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v. Mostyn [1904] A. C. 46, affirming [1903] 1 K. B. 349.

Personal representatives had no interest under this lease which they could convey.

Kingdon v. Nottle, 1 Maule & S. 355.

The alleged covenant is not one which runs with the land.

Woodall v. Clifton [1905] 2 Ch. 257; Glenn v. Canby, 24 Md. 127; Whalen v. Baltimore & O. R. Co. 108 Md. 11, 17 L.R.A. (N.S.) 130, 69 Atl. 390; 1 Poe, Pl. p. 334; Alexander's British Statutes, p. 346.

The alleged covenant cannot be enforced specifically against an assignee of the reversion, because of the rule against perpetuities.

Graham v. Whitridge, 99 Md. 248, 274, 66 L.R.A. 408, 57 Atl. 609, 58 Atl. 36; London & S. W. R. Co. v. Gomm, L. R. 20 Ch. Div. 562; Trevelyan v. Trevelyan, 53 L. T. N. S. 853; Winsor v. Mills, 157 Mass. 362, 32 N. E. 352; Re Tyrrell [1907] 1 Ir. Ch. 292; Gray, Rule against Perpetuities, 2d ed. §§ 230b, 275, 275a; Woodall v. Clifton, supra; Worthing

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equitable title to the land in any form. The court said that the decision in the Spurr Case was placed expressly on the ground that the suit was a proceeding *in personam* merely, in which no decree was sought against the property, and added that "no allusion is made to statutory provisions which, upon proper allegations, might, perhaps, have afforded relief."

In the subsequent case of Merrill v. Beckwith, 163 Mass. 503, 40 N. E. 855, the court, while holding that the Massachusetts statute referred to in the last case was, in any event, inapplicable to a suit by the vendor against the purchaser, and that the court has no power under it to compel the purchaser to accept a conveyance, where the court cannot bind him personally by its decree, intimated that the statute did not apply even to a suit by the purchaser against the vendor, unless the purchaser had been in possession.

It would seem from the foregoing review of the cases that, notwithstanding the general principle that a suit for the specific performance of a contract to convey real property is a suit *in personam*, and not *in rem*, so that jurisdiction cannot rest upon constructive service of process against a nonresident who does not appear, yet that such a suit may by statute be given the character of a suit *in rem* or quasi *in rem*, so as to sustain the jurisdiction upon this mode of service, even as against a nonresident. It may be, as held in Silver Camp Min. Co. v. Dickert, 31 Mont. 488, 67 L.R.A. 940, 78 Pac. 967, 3 A. & E. Ann. Cas. 1000, that a statute which merely provides in general terms for service by publication upon nonresidents, without specifying the class of actions in which such service is permissible, does not have the effect to impress a suit for specific performance with the character of a suit *in rem* or quasi *in rem*, so as to authorize this mode of service, unless, as in Clem v. Givens, supra, there is in addition a statutory provision for a decree in the alternative, contemplating a conveyance by some person appointed by the court for that purpose, or some other decree which, in effect, operates *in rem*, and not *in personam*. Even in the absence of a provision of the latter kind, it would seem that, if the local statute providing for service by publication upon nonresident defendants specifically named suits for specific performance, or described the class of actions in which such service might be had in terms which would clearly embrace suits for specific performance, that in itself would be sufficient to characterize the suit as one *in rem*, or quasi *in rem*, for this purpose.

There is no necessary inconsistency on the part of the courts in assuming jurisdiction of suits for the specific performance of contracts in respect of real property beyond the territorial jurisdiction, if the parties are personally subject to the jurisdiction, upon the theory that such suits are *in personam*, and not *in rem*, and, at the same time, assuming jurisdiction of such suits in respect of land within the territorial jurisdiction upon constructive service against nonresidents, upon the theory that such a suit has, by virtue of statute, become, *pro hac vice*, a suit *in rem* or quasi *in rem*. In other words, as was said in Burrall v. Eames, 5 Wis. 260, involving a question of local venue, a suit for specific performance may be of a twofold character, —partly *in personam* and partly *in rem*; and the court may enforce the contract either by operating upon the person to compel a conveyance, or may pass the title of the land by decree.

In view of the conceded power of the legislature of a state, by virtue of the location within its boundaries of the property to which the suit relates, to enable its courts to take jurisdiction upon constructive service of process against a nonresident, it is doubtful whether a court of equity might not, without coming in conflict with the rule that a decree *in personam* upon constructive service against a nonresident is contrary to due process, take the view that, as to a nonresident served constructively only, the suit for specific performance proceeds *in personam*, and conform its decree to that theory, even in the absence of any statute bearing on the subject, other than the general provision for service by publication on nonresidents. As yet, however, the cases have not gone quite to that extent.

In conclusion: As shown in notes previously referred to, a court having personal jurisdiction of the defendant, in order to grant specific performance of a contract to convey land in another state, must mould its decree in a form *in personam*. But a court not having personal jurisdiction of the defendant, in order to grant specific performance of a contract to convey land within the state must mould its decree in a form *in rem*.

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v. Heather [1906] 2 Ch. 532; Starcher Bros. v. Duty, 61 W. Va. 373, 9 L.R.A.(N.S.) 913, 123 Am. St. Rep. 990, 56 S. E. 524.

No suit *in personam* can constitutionally be prosecuted in any state court without personal service of process.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; Scott v. McNeal, 154 U. S. 354, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

A suit in equity for specific performance is a proceeding *in personam*.

Dorsey v. Omo, 93 Md. 74, 48 Atl. 741; Penn v. Baltimore, 1 Ves. Sr. 444; Fry, Spec. Perf. §§ 123, 124.

A suit for specific performance cannot be maintained against a nonresident on service by publication merely, although the land may lie within the state; at least, unless the state, by express legislation, has given jurisdiction to the court to proceed *in rem* with respect to the land, in the exercise of a statutory jurisdiction differing from the exercise of the ordinary jurisdiction in suits for specific performance.

Spurr v. Scoville, 3 Cush. 578; Worthington v. Lee, 61 Md. 530; Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165.

Messrs. John G. Schilpp and R. E. L. Marshall, for appellee:

While a decree for specific performance of a contract operates primarily *in personam*, in a limited and qualified sense it may also be said to operate *in rem* when the property is within the jurisdiction of the court, but the defendant is absent in a foreign state or country.

26 Am. & Eng. Enc. Law, 2d ed. p. 132; Worthington v. Lee, 61 Md. 530; White v. White, 7 Gill & J. 211; Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816; Burrall v. Eames, 5 Wis. 260; Rourke v. McLaughlin, 38 Cal. 196.

Notice by publication was sufficient.

Comegys v. State, 10 Gill & J. 175; Miller, Eq. Proc. p. 154; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Hart v. Sansom, 110 U. S. 155, 28 L. ed. 103, 3 Sup. Ct. Rep. 586; Brannon, 14th Amend. p. 247.

A covenant for redemption in a ninety-nine-year lease runs with the land.

11 Cyc. Law & Proc. pp. 1080, 1081; 20 Cyc. Law & Proc. p. 1384; Glenn v. Canby, 24 Md. 131; Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88.

Mr. H. M. Brune also for appellee.

Thomas, J., delivered the opinion of the court:

The Central Metal & Supply Company of Baltimore City, "a corporation duly incorporated under the laws of the state of Maryland," having purchased the leasehold estate in a certain lot of land in Baltimore city, brought this suit on the 31st day of May, 1907, against the appellants, as the present owners of the reversion in said lot, for a specific performance of the covenant in the lease of the lessor, "her heirs and assigns," upon payment of the amounts specified therein, to convey the fee to the lessees, their "heirs and assigns." The bill alleges that the defendants, Charles Hollander and Elsie Hollander, his wife, and Lee M. Hollander, are nonresidents, and that the plaintiff, in January, 1907, addressed a letter to these defendants, notifying them of its desire to redeem the ground rent under the lease, and prepared and forwarded to them for execution a deed from them to the plaintiff of the fee in said lot, which they refused to execute on the ground that "the said rent is not redeemable." After an order of publication had been passed against the nonresident defendants, Charles S. Hollander and wife filed a motion to rescind the order and to quash the proceedings, on the ground (1) that a suit for the specific performance of a contract is a suit *in personam*, and cannot be maintained against a nonresident on service by publication, and (2) that the order of publication in this case does not contain a sufficient description of the property to inform the defendants of the property involved in the suit. Some time after this motion was filed, Lee M. Hollander filed a similar motion, alleging, as an additional reason for rescinding the order as against him, that, at the time of the bringing of the suit, he was a resident of the state of Maryland.

The case of Worthington v. Lee, 61 Md. 530, was for specific performance of a covenant for a renewal of a lease for ninety-nine years, renewable forever, and for an injunction to restrain an action of ejectment for the recovery of the premises. Some of the nonresident defendants appeared and pleaded to the jurisdiction of the court to grant relief, while against others interlocutory decrees were entered in default of appearance and answer. The notice to nonresidents was by publication, and the court, in dealing with the case as against the nonresident defendants, said: "If the application was for a sale of the property, or for a simple conveyance thereof, those objects could be accomplished by the appointment of a trustee, as provided by the Code Pub. Gen. Laws 1904, art. 16, §§ 67, 135. But those provisions of the statute do not apply in a case like the present, where the object of the decree is to secure to the plaintiff the specific execution of the covenant, whereby she is entitled to obtain a renewed lease, with imper-

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tant and valuable personal covenants of the lessors, and without which it would not be an instrument of the character contemplated by the covenant decreed to be performed. The court could direct a lease for ninety-nine years to be made by a trustee, but not with covenant for renewal, and other personal covenants, to bind personally the owners of the reversion, their heirs and assigns. The court could, through the instrumentality of a trustee, direct the conveyance of an estate, or the transfer of a right, but not the making of personal covenants, in the absence of the parties, to bind them personally, and those who may stand in privity with them. The court possesses no such power as that inherently, and the statute does not confer it."

In the case of Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, cited and relied on in Worthington v. Lee, supra, the court said: "It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose."

And in the case of Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, in passing upon a Nebraska statute, and dealing with the right of the state to provide for notice to nonresident defendants, the court said that the state had "control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice." Section 117, art. 16, Code Pub. Gen. Laws 1904, is as follows: "If in any suit in chancery, by bill or petition, respecting, in any manner, the sale, partition, conveyance, or transfer of any real or personal property lying or being in this state, or to foreclose any mortgage thereon, or to enforce any contract or lien relating to the same, or concerning any use, trust, or other interest therein, any or all of the defendants are nonresidents, the court in which such suit is pending may order notice to be given to such nonresidents of the substance and object of such bill or petition, and warning them to appear by a day therein stated." Section 127 of article 16, provides how the notice shall be given, and § 91 authorizes the court, whenever the execution of a deed of any kind is decreed, to appoint a trustee to execute it. The prayer of the bill and the covenant here sought to be enforced is for conveyance to the appellee of the lot described in the lease; and, while the court could not enforce a decree requiring a nonresident to execute a deed for the property, its decree may be made effective, under the provisions of the Code, by the appointment of a trustee to convey the title of the appellants, and to that end the proceedings are *in rem* and not *in personam*. Miller, Eq. Proc. § 120; White v. White, 7 Gill & J. 208; 22 Am. & Eng. Enc. Law, p. 917; Phelps, Juridical Eq. §§ 85, 223.

The order of publication, which is set out in the record, in addition to describing the land as the "lot of ground on the east side of a 10-foot alley in the rear of Lombard and Frederick streets, in the city of Baltimore," and as being subject to the annual ground rent of $36 "created by the lease from Charlotte Bolgiano to Robert Bolton and others, dated July 18, 1835, and recorded in Liber T. K. No. 262, folio 294," etc., states that an undivided one-third interest in the reversion in said lot is vested in Edward Hollander, trustee for Amelia Hollander, for life, remainder to Charles S. and Levi M. Hollander, and that the remaining two-thirds interest is vested in said Charles S. and Levi M. Hollander, "as by reference to Liber R. O. No. 2243, folio 93, will appear," and that the plaintiff notified the defendants by letter of its desire to redeem said rent, and prepared and had sent to them for execution a deed from them to the plaintiff for their interest in said lot, which they declined to execute and returned. The reference to the lease under and by virtue of which the defendants received the annual rent of $36, to their interest in the reversion, and to the letter and deed sent to them, could have left no doubt in their minds as to the land referred to, and we think was sufficient notice to the defendants of the subject-matter of the suit. Mewshaw v. Mewshaw, 2 Md. Ch. 12; Phelps, Juridical Eq. 313.

The petition of Lee M. Hollander was answered by the plaintiff, denying that he was a resident of the state of Maryland, and again alleging that he was a nonresident. The matter, as stated in the opinion of the court below, was submitted, without proof, on the petition and answer, and his motion, and the motion of Charles S. Hollander, were and we think properly, overruled. Where a case is submitted on petition and answer, the truth of the facts alleged in the answer is taken to be admitted, but the privilege of having a case so heard belongs only to the petitioner. The record does not disclose who set this motion down for hearing, but

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as the plaintiff in this case had no right to do so on the petition and answer, we must assume that it was done at the instance of the petitioner. Miller, Eq. Proc. § 255, and notes.

After these motions were overruled, the defendants demurred to the bill on the following grounds: (1) That the bill does not show plaintiff's right to take advantage of the covenant in the lease; (2) that the plaintiff does not offer to comply with the terms of the covenant; (3) that the covenant is not one running with the land, and cannot be enforced by the assignee of the lessees against the assignees of the lessor; and (4) that the covenant cannot be enforced against the assignee of the reversion, because it violates the rule against perpetuities.

The bill charges that the plaintiff, on the 9th day of January, 1907, obtained by deed from Benjamin Krulewitch, administrator, the leasehold property, a description of which is set out in the bill and in the plaintiff's deed filed with the bill; that the lot of ground so obtained by the plaintiff is subject to an annual ground rent of $36, created by a lease from Charlotte Bolgiano to Robert Bolton and others, dated July 18, 1835, and recorded among the Land Records in Liber T. K. No. 262, folio 294, etc., and a certified copy of which is filed with the bill; "that the said lease contains a covenant on the part of said lessor, her heirs and assigns, that at any time during the continuance of said demise, at the request and cost of said lessees, their heirs or assigns, and on their paying $600, with all rent accrued and accruing, said lessor, her heirs and assigns, would cause to be delivered to said lessees, their heirs and assigns, a good and sufficient deed in fee simple, of and for the said property;" and that the plaintiff bought said property "upon the express condition that the said rent could be extinguished at its option at any time;" "that the reversion in and to said lot, with the right to collect the annual rent of thirty-six dollars, is now vested in said defendants, as follows: (a) Edward Hollander, trustee, one of the above-named defendants, and trustee in the case of Edward Hollander v. Amelia Hollander et al., in the circuit court of Baltimore city (docket 24a, folio 245), holds a one undivided third interest therein, for Amelia Hollander, another of the above-named defendants, for life, with remainder to Charles S. Hollander and Lee M. Hollander, other above-named defendants, absolutely; (b) said Charles S. Hollander and Lee M. Hollander hold the other two-thirds undivided interest therein, as would appear by reference to the deed to said named defendants of said lot of ground, dated May 10, 1905, and recorded among the said Land Records in Liber R. O. No. 2143, folio 93," etc.; that the plaintiff notified the nonresident defendants by letter of its desire to redeem said ground rent, and in January, 1907, prepared and had sent to them for execution a deed to the plaintiff of their interest in said lot, which deed they refused to execute on the ground that, by the terms of said lease, the rent was not redeemable; that on the 20th of May, 1907, the plaintiff tendered to Edward Hollander trustee, $210.30, it "being one third of the said redemption money, together with the proportionate part of the accruing rent to the date thereof, and likewise, on May 31, 1907, tendered to Arthur W. Machen, Jr. Esq., solicitor of the defendants, Charles S. Hollander and Elsie Holander, his wife, and Lee M. Hollander, the sum of $420.60, being their two-thirds share of said redemption money, together with their proportionate part of the accruing rent to said date;" and that at the same time plaintiff handed to said trustee and said solicitor a draft for a new deed, "requesting them, and each of them, to have the same properly executed so as to vest" the plaintiff "with an absolute fee-simple title in and to the property," which deed is filed with the bill, and which they refused to execute or to have executed; and that said Machen was the solicitor of the defendants "in this matter." The prayer of the bill is for leave to bring into court the sum of $630.90 so tendered, and that a trustee may be appointed to convey to the plaintiff the reversion in said lot, etc.

1. The general rule is that the bill must state clearly plaintiff's right to the relief prayed, and counsel for the appellants insist that, in compliance with this rule, the bill should have set out all of the assignments, from the original lessees down to the plaintiff, in order to show the right of the plaintiff, as assignee of the leasehold estate, to the benefit of the covenant sought to be enforced. The leasehold interest was conveyed by the lease to the lessees, their executors, administrators, and assigns, and the bill charges that the plaintiff is the owner of the leasehold property described in said lease by virtue of the deed from Benjamin Krulewitch, administrator. If the covenant is one that runs with the lease, in favor of the assignee of the lessees, the right to the leasehold interest created by the lease entitles the owner to the benefit of the covenant. In Spencer's Case, 5 Coke, 16, 1 Smith. Lead. Cas. 11th ed. 77, "it was resolved that the assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of

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every assignee; for all are comprised within this word (assignees), for the same right which was in the testator or intestate shall go to his executors or administrators." The bill in substance alleges that the plaintiff is the assignee of the leasehold interest or estate created by said lease. It was not necessary to allege all the circumstances tending to prove that fact. While "every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises, for otherwise he will not be permitted to offer or require any evidence of such fact, a general charge or statement, however, of the matter of fact is sufficient; and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs." Story, Eq. Pl. 5th ed. § 28; Miller, Eq. Proc. § 92; Phelps, Juridical Eq. §§ 49, 55; Mewshaw v. Mewshaw, supra; Dennis v. Dennis, 15 Md. 73. The covenant is, at the request, etc., of the lessees, "their heirs and assigns," to convey to the lessees, their heirs and assigns, etc., yet the manifest intention of the parties to the lease, as gathered from the whole instrument, was to give to the lessees and those claiming under them, *viz.*, "their executors, administrators, and assigns," the benefit of the covenant. This, however, is not an action at law for a breach of the covenant, and the doctrine of specific performance does not depend upon such technical distinctions. Wherever, and without regard to the form and technical character of the contract, performance of a covenant in respect to lands would have been decreed between the parties to it, it will, in the absence of controlling intervening equities, "be decreed as between persons claiming under them in privity of estate, or of representation, or of title." 2 Story, Eq. 5th ed. §§ 788–790, 714, 715, 791; Worthington v. Lee, 61 Md. 530.

2. The second objection to the bill is that the plaintiff does not offer to bear the "cost and charge" of the conveyance of the fee to him, which, it is claimed, include a counsel fee to the defendants for the examination of plaintiff's title in order to ascertain if he is legally entitled to the benefit of the covenant. In the case of Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 21 L. ed. 43, the court held that counsel fees were not recoverable in a suit on an injunction bond, the condition of which was to satisfy and pay "all costs, damages, and charges" which should be occasioned by such writ of injunction, and said that the disallowance of such fees "rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy." This case was cited and relied on in Wood v. State, 66 Md. 61, 5 Atl. 476, where, in a suit on an injunction bond, the court held that the plaintiff could not recover fees paid counsel for procuring a dissolution of the injunction. In Johnson v. Glenn, 80 Md. 369, 30 Atl. 993, a provision in a mortgage authorizing "the payment of all expenses incident to such sale" was said to include services of an auctioneer, cost of advertising, etc., but not an allowance for commissions. Counsel fees "are not allowable" as costs "in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof." 11 Cyc. Law & Proc. p. 104. While parties must be left to contract as they please, in the absence of a clear undertaking to do so, one party to a contract should not be required to pay for services rendered for the benefit of the other, and, whatever may have been held on the subject elsewhere, under the decisions in this state the "cost and charge" which the plaintiff under the lease is required to pay cannot be held to include a counsel fee to the defendants for examination of the plaintiff's title.

3. The next ground of the demurrer is that the covenant to convey the fee to the lessees, "their heirs and assigns," is not a covenant running with the land. In Glenn v. Canby, 24 Md. 127, the court stated, as the established doctrine, "that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it; there must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it." This is the doctrine asserted by Mr. Poe in 1 Poe Pl. & Pr. 1st ed. 253, and reiterated by this court in Whalen v. Baltimore & O. R. Co 108 Md. 11, 17 L.R.A.(N.S.) 130, 69 Atl. 390. In Taylor's Landlord and Tenant, 7th ed. § 261, it is said that "in order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment. It must not only concern the land, but there must also be a privity of estate between the contracting parties." "In order that a covenant may run with the land,—that is, that its benefit or obligation may pass with the ownership,—it must respect the thing granted or demised, and the act covenanted to

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be done or omitted must concern the land or estate conveyed. Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied; for, if this be the case, every successive assignee of the land will be entitled to enforce the covenant." 11 Cyc. Law & Proc. p. 1080. "Such covenants, and such only, run with land as concern the land itself, in whosesoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee." Washb. Real Prop. § 1205. That the covenant in this case is within these requirements, as affecting the interest in the land demised, as enhancing the value thereof, and as forming a part of the consideration for the acceptance of the lease by the lessees, would seem to be free of doubt. The learned counsel for the appellants contend, however, that the performance of the covenant would defeat the estate of the lessor, and change the character of the estate of the lessee, and that it therefore falls within the restrictions of Glenn v. Canby, supra. But in Taylor's Landlord and Tenant, § 262, it is said: "The right of renewal constitutes a part of the tenant's interest in the land, and a covenant to renew is consequently binding upon the assignee of the reversion. So the grant of an additional term, or the right to purchase, is, for many purposes, to be considered a continuation of the former lease; and, if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, they will inure to his assignees or executors, without being particularly named." In the case of Maughlin v. Perry, 35 Md. 352, the covenant on the part of the lessor was as follows: "And the said party of the first part, for himself, his heirs and assigns, doth hereby covenant and agree with the party of the second part, his heirs and assigns, to sell and convey unto the party of the second part, his heirs and assigns, the above-described property and premises for the sum of $1,500 at any time before the expiration of this lease or tenancy." The lessor died after having sold the property, and suit was brought by the assignees of the lessee against the assignee of the lessor for a specific performance of the covenant, and the court, in affirming a decree requiring the defendant to convey the property to the plaintiff, in accordance with the terms of the covenant, said: "As a part of the consideration of the lease constituting the contract between the parties, Wells, the lessor, covenanted to sell the property to Hyson, his lessee, for $1,500, at any time during the existence of the lease. This was a continual obligation, running with the lease, on the part of the lessor, with the option in the tenant to accept the same, or not, within that time. But it seems Wells, before the right of Hyson to make his election had determined, made sale of the property to Maughlin, and died. Maughlin, with notice of the recorded contract between the parties, can acquire no greater right than possessed by Wells." The certain and definite rule deducible from the authorities cited, then, is that, if the covenant, as in this case, touches and concerns the land or estate demised, enhances the value thereof, and forms a part of the consideration for the acceptance of the lease by the lessee, a court of equity will decree specific performance, not only as between the parties to the contract, but, in the absence of intervening equities controlling its conscience, also as between those claiming under them in privity of estate. 24 Cyc. Law. & Proc. p. 1026; Gear, Land. & T. § 84; Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; Spencer's Case, 5 Coke, 16, 1 Smith, Lead. Cas. 75.

4. The remaining ground of the demurrer is that the covenant cannot be enforced because of the rule against perpetuities. The nearest approach to a correct definition of a perpetuity is found, this court said, in Graham v. Whitridge, 99 Md. 248, 66 L.R.A. 408, 57 Atl. 609, 58 Atl. 36, in Lewis on Perpetuities [p. 164] and is as follows: "A future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property subject to the future limitation except with the concurrence of the individual interested under that limitation." In Gray on Rule against Perpetuities, 2d ed. § 230, the author says that covenants for perpetual renewal are treated as an exception to the rule against perpetuities, but that it is "hardly necessary to create any exception to meet the case,—the covenant to renew is part of the lessee's present interest;" and, in § 230b, that "an option to a tenant for years to purchase the fee, exercisable at a remote time, is bad as violating the rule against perpetuities. . . . The only reason for considering the rule against perpetuities as inapplicable to such

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an option is the analogy to covenants for renewal, treated in the two preceding sections. But the exemption from the rule in the case of covenants for renewal is either an exception which there is no reason to extend, or is to be explained, as it is in § 230, on the ground that the covenant to renew is part of the present interest,—a ground which cannot well be taken when the present interest is a tenancy for years, and the interest to be purchased is a fee." While the statement of Mr. Gray, that the option to a tenant to purchase is bad, is supported by the authorities cited by the appellants, the distinction he makes between such an option and a covenant for renewal is not altogether satisfactory. The application of the rule is not determined by the character of the estate or interest conveyed, but by the answer to the question, Will it necessarily vest within the time fixed by the rule? If the fee covenanted to be conveyed in the covenant under consideration is to be regarded as a future limitation, it may not, of course, necessarily vest under the terms of the covenant within the prescribed time. Likewise, the estate to be conveyed to the lessee under the covenant for a renewal of the lease, at the option of the lessee, and upon payment of a fine, etc. If the covenant to renew is a part of the lessee's present interest, so is the covenant for a conveyance of the fee. The estate acquired under the new lease, while of the same character, is for a different term, and just as much a new and distinct estate as the estate acquired under the covenant for the conveyance of the fee. If the estate conveyed to the lessee, and the lessee's present interest, is, in the one case, not a term for ninety-nine years, but a term for ninety-nine years with the right of renewal, so, in the other case, the estate conveyed to the lessee, and the lessee's present interest, is not a definite term, but the term coupled with the right to acquire the fee. In this connection we may again refer to the statement in Taylor's Landlord and Tenant, supra, that "the grant of an additional term, or of a right to purchase, is, for many purposes, to be considered a continuation of the former lease." But, however this may be, our predecessors, in view of the fact that titles to property of great value in Baltimore city, and elsewhere in the state, are held under leases of the character of the one in this case (the forms of which, generally used, are suggested in Latrobe's Justices' Practice, 7th ed. pp. 463, 464, and Carey's Forms and Precedents, pp. 364, 365), have somewhat relaxed the technical rules applicable to such estates, for the purpose of enforcing the contracts of the parties thereto. In Banks v. Haskie, 45 Md. 207, where a bill was filed for specific performance of a covenant for renewal in a lease for ninety-nine years, renewable forever, the court, in discussing the character of estates created by such leases, said: "This character of tenure is, so far as we know among the states, peculiar to Maryland. It has not been generally adopted, so far as we are informed, in any other state. It was introduced here in colonial times, and has been a favorite system of tenure from a very early period. A large city has been built and improved, and a vast majority of the real estate in Baltimore is now held under it. It is not open to any of the objections against perpetuities. Property is not thereby placed *extra commercium*. On the contrary, these leasehold interests devolve upon the personal representatives of the owner, are in terms made assignable, and they, as well as the ownerships in fee, under the denomination of 'ground rents,' are subjects of daily transfer, and are constantly sought for as safe investments of capital. It is a peculiar description of tenure, which has been sustained by our courts, and approved and fostered by our people. While the ground rents, from their nature, are usually of a fixed value, the leasehold interests are more or less fluctuating. In many, and indeed in most, cases, they have largely increased in value with the growth of the city. And most extensive and costly improvements have been and are daily made by owners of such interests on grounds thus leased." Again, in the case of Myers v. Silljacks, 58 Md. 319, speaking of leases of this character, Judge Alvey said: "We all know that estates dependent upon leases like the one before us are exceedingly common in this state, and particularly so in the city of Baltimore. Both the reversionary freehold and the leasehold estates are the subjects of daily transfers and assignments, and they constitute a considerable portion of the substantial wealth of the people. While the one estate is subject exclusively to the law that governs real property, the other is mainly controlled by the law that governs personalty; the one estate passing by descent, and being subject to the law of partition among heirs, while the other is the subject of administration, and is governed by the law that directs distribution of the personal estate. Both estates alike are the subjects of mortgage and judgment liens, and are constantly being sold and transferred in the enforcement of such charges. It is of the utmost importance, therefore, that the tenure be maintained with entire certainty; that the true relation of the parties to the property be at all times fully recognized, so that their exact rights may be known and enforced, and that third parties may know how to

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deal with respect to those rights." And again, in the case of Worthington v. Lee, 61 Md. 530, the court said that the above cases fully state the reasons why this court "has applied a more liberal doctrine to these cases than that applied in the English courts; and it has done so with special reference to the peculiar nature and condition of the local titles that exist in the city of Baltimore." Without detracting from the great weight and respect to which the authorities cited by appellants are justly entitled, we must adhere to the previous decisions of this court, and hold that the lease in question did not place the property *extra commercium*, and that the rights of the parties under the covenants therein are "not open to any of the objections against perpetuities."

It follows, from what we have said, that the decree of the court below must be affirmed.

Decree affirmed, with costs, and cause remanded.

The following supplemental opinion was delivered by **Thomas, J.**, on February 11, 1909:

Since the filing of the opinion in this case, our attention has been called to the agreement of counsel and the certificate of the clerk of the circuit court of Baltimore city, filed in this court on the day of the argument, whereby it appears that the petition and motion of Lee M. Hollander were set down for hearing by the plaintiff.

In the case of Paul v. Nixon, reported in a note to Jones v. Magill, 1 Bland, ch. 177, Chancellor Hanson said: "If, indeed, the defendant was entitled to have the cause set down for final hearing on bill and answer, it must be on terms similar to those of the complainant's setting down; *viz.*, that everything contained in the bill is true; that is to say, the rule must be reversed. But there is no such practice." Miller, Eq. Proc. p. 319, note 4.

Who is a nonresident is a mixed question of law and fact. The petitioner states in his petition "that he has lately been in Scandinavia for a year and a half, for the purpose of studying philology, and is now in the city of New York, for the purpose of using libraries there situated, but that your petitioner has never abandoned his residence and citizenship in the state of Maryland." It therefore appears that he has been out of the state at least a year and a half. The petition does not say when he expects to return to Maryland, or whether he intends to return at any certain time, and it may be that he intends to remain out of the state indefinitely. If he has been out of the state for a year and a half, with no intention of returning, "or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit," he is a nonresident within the meaning of § 123 of art. 16 of the Code, and may be proceeded against as such, notwithstanding he may not intend to abandon his domicil in this state; for, as was said in Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617, "In contemplation of the attachment law, the domicil may be in this state, while the actual residence is in another." The term "nonresident," in § 123 of art. 16 of the Code, means a "person who doth not reside in this state," as defined in the law relating to attachment. Dorsey v. Dorsey, 30 Md. 531, 96 Am. Dec. 633; Miller, Eq. Proc. sec. 123, p. 160.

In the case of Dorsey v. Dorsey, supra, the defendant stated in his petition that he left his home in Maryland to visit his wife, who was then sick at her father's in Winchester, Virginia, with the intention of returning in a few days, but, owing to the position of the armies about Winchester and Harper's Ferry, he was unable to do so, and was forced to wait for the close of the Civil War, although at all times intending to return. While he was absent from the state, he was proceeded against as a nonresident, and the court held that he was a nonresident within the meaning of the provision of the Code.

In the case of Risewick v. Davis, 19 Md. 82, in disposing of an exception to evidence offered to show the intention of the defendant to return to the state at some indefinite time, the court said: "Residence and domicil are sometimes distinct things. In Re Thompson, 1 Wend. 43, it was decided that residence out of the state, for the purpose of being subject to foreign attachment, did not import that domicil should be out of the state also. Frost v. Brisbin, 19 Wend. 14, 32 Am. Dec. 423. In Haggart v. Morgan, 5 N. Y. 428, 55 Am. Dec. 350, the defendant offered to prove that, at the time of taking out the attachment, he was not a nonresident, but a resident of the city of New York; that he had been absent about three years, attending a lawsuit at New Orleans, and returned in the spring of 1848; the judge excluded the evidence, on the ground that the offer itself showed the debtor to be a nonresident, within the spirit of the act. In the case at bar, the defendant had been absent four or five years, and *non constat* but he might be absent as many years longer. The evidence, being foreign to the issue, should have been excluded."

Mr. Poe says: "It may be stated, as the result of the authorities, that where a citizen of this state, domiciled here, goes abroad on business or pleasure for a brief period, without any intention of abandoning

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or changing his domicil, and with a fixed purpose to return at a definite or specified time, retaining and intending to retain, in the meantime, both his domicil and political citizenship, he cannot properly be treated as a nonresident within the meaning of the attachment law, simply because of his temporary absence from his residence and home. Where, however, he leaves the state and remains absent for any considerable period, without any intention of returning, or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit, he will be liable to be proceeded against as a nonresident, notwithstanding he may not have acquired a fixed resident in any other state or country." 2 Poe, Pl. & Pr., 3d ed. § 506.

On the facts stated in the petition, we think the plaintiff had a right to proceed against the petitioner as a nonresident, and that therefore there was no error in the order of the court, overruling the motion to quash the proceedings against him. As we have said, the plaintiff had no right to have the matter set down for hearing on the petition and answer, but, as it appears he did so, we must assume that it was done with the petitioner's consent, and he, therefore, has no right to complain if the motion was properly disposed of on the facts stated in his petition.

MASSACHUSETTS SUPREME JUDICIAL COURT.

BOSTON CO-OPERATIVE BANK, Appt.,
v.
AMERICAN CENTRAL INSURANCE COMPANY.

(201 Mass. 350, 87 N. E. 594.)

Insurance — mortgage — sale — loss — payable clause.

A sale of mortgaged property for breach of condition, under a power contained in the mortgage, to the mortgagee, is within the terms of a clause in the policy avoiding it if the property shall be sold without the consent of the insurer, although the policy is made payable to the mortgagee, as his interest may appear.

(March 1, 1909.)

APPEAL by plaintiff from a judgment of the Superior Court for Suffolk County in defendant's favor in an action brought to recover the amount alleged to be due under a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. **Walter Soren**, for appellant:

The foreclosure proceedings made by the plaintiff did not constitute a "sale," within the meaning of the condition in the policy, so as to render the same void both as to insured and as to mortgagee.

Clinton v. Norfolk Mut. F. Ins. Co. 176 Mass. 486, 50 L.R.A. 833, 79 Am. St. Rep. 325, 57 N. E. 998; Foote v. Hartford F. Ins. Co. 119 Mass. 259; McKinney v. Western Assur. Co. 97 Ky. 474, 30 S. W. 1004; Jones, Mortg. §§ 424a, 425, 1893; Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 10 N. E. 518; Heaton v. Manhattan F. Ins. Co. 7 R. I. 502; Powers v. Guardian F. & L. Ins. Co. 136 Mass. 108, 49 Am. Rep. 20; Bailey v. American Cent. Ins. Co. 4 McCrary, 221, 13 Fed. 250; May, Ins. § 275; Stuart v. Reliance Ins. Co. 179 Mass. 434, 60 N. E. 929; Hall v. Bliss, 118 Mass. 554,

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*Case Note. — **Acquisition by mortgagee of title to property covered by policy protecting mortgagee's interest, as breach of condition against sale or transfer of title.***

This note includes cases where the policy was issued to the mortgagor, loss payable to mortgagee, and also cases where the policy issued directly to the mortgagee.

As to effect of breach by mortgagor on rights of mortgagee where policy originally issued in name of mortgagor, and was by him assigned, with the consent of the insurer, to the mortgagee, or where loss was made payable to mortgagee, see case note to Brecht v. Law Union & Crown Ins. Co. 18 L.R.A. (N.S.) 197.

Policies issuing to mortgagor.

The courts are not agreed upon the question where the policy issues to the mortgagor. It is held by some courts, in accord with BOSTON CO-OP. BANK v. AMERICAN CENT. INS. CO. that a transfer of the property to the mortgagee is a sale, within the meaning of provisions prohibiting sale and transfers, and that it therefore avoids the policy.

Thus, a policy issued to a mortgagor, payable to the mortgagee, as his interest might appear, and containing a provision making it void in case of any change in title or possession, has been held avoided by foreclosure, whereby the property vested in the mortgagee. McKinney v. Western Assur. Co. 97 Ky. 474, 30 S. W. 1004. The court said: "It is furthermore held by the courts quite generally, and we think correctly, that the property must remain the property of the insured; that whether there be a mortgage on it at the time the policy is issued, and a clause then inserted in the policy that, in case of loss, the insurance is to be paid to the mortgagee, or whether a mortgage be placed upon the property after the insurance is effected (with the consent of the insurance company), and an indorsement is then made by the company on the policy (as in this case) 'that loss, if any, is payable to the mortgagee,' it is one and the same thing. The property remains

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19 Am. Rep. 476; Jackson ex dem. Walsh v. Colden, 4 Cow. 266.

Messrs. F. W. Brown and Walter L. Came, for appellee:

The conveyance without the assent of the company rendered the policy void.

Brown v. Cotton & Woolen Mfr's. Mut. Ins. Co. 156 Mass. 587, 31 N. E. 691; Foote v. Hartford F. Ins. Co. 119 Mass. 259; Essex Sav. Bank v. Meriden F. Ins. Co. 57 Conn. 335, 4 L.R.A. 759, 17 Atl. 930, 18 Atl. 324; McKinney v. Western Assur. Co. 97 Ky. 474, 30 S. W. 1004; Attleborough Sav. Bank v. Security Ins. Co. 168 Mass. 147, 60 Am. St. Rep. 373, 46 N. E. 390; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400; Brunswick Sav. Inst. v. Commercial Union Ins. Co. 68 Me. 313, 28 Am. Rep. 56.

Knowlton, Ch. J., delivered the opinion of the court:

This action is upon a policy of fire insurance in the Massachusetts standard form, containing a condition that "this policy shall be void if . . . without the assent in writing or in print of the company . . . the said property shall be sold," etc. The policy was upon a building, and was issued to one Lane, who then owned the property, subject to a mortgage to the plaintiff, and the policy was made payable to the plaintiff, "mortgagee, as its interest may appear." The mortgage contained a power to sell the property for a breach of the condition, and to convey to the purchaser an absolute title in fee simple, such that the mortgagor would be forever barred "from

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the property of the original owner, and that there is no insurance by the mortgagee of his interest in it. Nor does the indorsement, as made in this case, transfer or assign the policy to the mortgagee, but the legal effect of the indorsement, 'loss, if any, payable to the mortgagee,' is only a contingent stipulation to so pay, or a contingent application by the company, with consent of the insured, that the money, in case of loss, shall be so paid. And this interest of the mortgagee is further limited by the words, 'as his interest shall appear,'—meaning, of course, his interest as mortgagee, not as owner. He must possess such an interest when the indorsement is made to make it a valid contract. And he must possess such an interest when the loss occurs, to entitle him, by the plainest principles of his contract and of the law, to recover. And this right of recovery is also limited and made to depend further on the continuance and validity of this mortgage as between the insurance company and the insured (the owner) at the time of the loss. And the courts hold that this mortgagee must take notice of, and is bound by, the stipulations contained in the policy between the company and the owner. And that any act done or any change in the title made by the owner, whether voluntary or by judgment of a court, whereby the title to the property passes to another, destroys this right of the mortgagee to recover under this stipulation to pay to him in case of loss. . . . So, in this case, on the 7th day of October, the time of the loss, McKinney had no interest in this property as mortgagee, which the defendants had contracted to protect. His interest as mortgagee had been merged in his perfect legal title. Neither was Parrish [the mortgagor] any longer the owner. His right and title were then vested in another owner. So that, by the plain, unequivocal conditions and stipulations of the parties to this contract of insurance, as embraced in the policy, there was no longer existing either condition of the property, ownership, or interest that defendant undertook to insure."

And under a like provision the same conclusion has been reached where a quitclaim deed was given by the mortgagor to the mortgagee, although a bond for reconveyance was taken. Foote v. Hartford F. Ins. Co. 119 Mass. 259.

So, foreclosure of a mortgage, and a purchase of the property by the mortgagee, have been held a transfer or change in title within the meaning of an insurance policy issued to the mortgagor, and payable, in case of loss, to the mortgagee, although the latter became the owner by virtue of the foreclosure. Brunswick Sav. Inst. v. Commercial Union Ins. Co. 68 Me. 313, 28 Am. Rep. 56.

And a policy issued to the mortgagor, loss payable to mortgagee, containing a provision of avoidance if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, has been held avoided by foreclosure proceedings under which the mortgagee became the owner. Hagaman v. Allemania F. Ins. Co. 38 Phila. Leg. Int. 375.

And a policy taken by a mortgagor upon his interest, though assigned to the mortgagee with the insurer's consent, has been held avoided by a quitclaim deed by the mortgagor to the mortgagee, where the charter provided that policies should become void upon alienation by "sale or otherwise." Hoxsie v. Providence Mut. F. Ins. Co. 6 R. I. 517.

So, a policy issued to the mortgagor and assigned to the mortgagee has been held avoided by a conveyance of the fee to the mortgagee, where it contained a provision that it should become void in case of any transfer or termination of the interest of the insured. Bilson v. Manufacturing Ins. Co. 3 Phila. 547, Fed. Cas. No. 1,410.

And a policy issued to the mortgagor, but, upon its face, payable to the mortgagee, providing that it should become void if the property "should be sold," was held avoided by a conveyance, absolute in form, and containing no mention of the mortgage, made by the mortgagor's heirs to the mortgagee. Dailey v. Westchester F. Ins. Co. 131 Mass. 173.

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all right and interest in the granted premises, whether at law or in equity." Afterwards the plaintiff foreclosed the mortgage for a breach of the condition, and sold the property under the power, and became the purchaser at the sale. This was done without the knowledge or consent of the defendant, and the plaintiff has since held the estate under the title acquired by the sale. The question is whether this was a sale within the meaning of the word as used in the policy.

We see no good reason for doubt in regard to it. Coupled with the interest conveyed to the mortgagee was an independent power to make an absolute sale of the property, which should convey all the title, both of the mortgagor and the mortgagee. If any other person than the mortgagee had bought at the sale, there can be no question that the transfer would have been of a perfect title. The transaction is not changed in character or legal effect by the fact that the mortgagee became the purchaser.

Nor are the rights which the mortgagee would have had under the policy if the fire had occurred before the foreclosure of any consequence in the case. These rights were terminated and the ownership entirely changed and a new title created by the exercise of the power of sale. There was a sale of the property, within the meaning of the policy, without the consent of the defendant, and thereupon all rights under the policy came to an end.

Judgment affirmed.

And it has been held that a mortgagee is entitled to recover only as appointee of the mortgagor, where a policy issued to the latter contains slips making the loss payable to the mortgagee, and his right of recovery has been held defeated by an absolute conveyance to him by the mortgagor, where the policy contained a provision making it void in case of change in interest, title, or possession. Brecht v. Law Union & Crown Ins. Co. 18 L.R.A.(N.S.) 197, 87 C. C. A. 351, 160 Fed. 399.

The holding in the foregoing cases, however, is not acquiesced in by all courts.

Thus, it has been held that a policy issued to the mortgagor, loss, if any, payable to the mortgagee, and providing for notice to the insurer in case of change of ownership, was not avoided by failure to give such notice when the mortgagee became the purchaser on foreclosure. Dodge v. Hamburg-Bremen F. Ins. Co. 4 Kan. App. 415, 46 Pac. 25. The court said: "When an insurance company insures a mortgage lien, it must anticipate that, upon default, the lien holder will begin foreclosure proceedings, obtain judgment, and secure a sale of the mortgaged property. There can be no question but that the mortgagee is protected by the terms of the contract with the insurance company until the sale is confirmed and the money ordered by the court to be paid to the mortgagee. Is the purchaser also protected by the terms of the contract, and does it make any difference whether the mortgagee or a stranger is the purchaser? If a stranger is the purchaser, there is a change of ownership. If the mortgagee is the purchaser, his interest is changed from a lien holder to an owner in fee. Counsel for defendant in error contend that the interest of 'John L. Dodge, mortgagee,' was insured, and not the interest of 'John L. Dodge, owner,' and that, in order to have held the insurance in force, Dodge should have notified the company of the change of the fee title, and obtained the consent of the company to the change. They argue that the company might have been willing to have insured the property if Mrs. Cowley was the owner, but not if Dodge was the owner. The property was occupied by a tenant as a dwelling when it was insured and when it burned. It cannot be said that the hazard was increased by the transfer of the interest of Dodge from a lien holder to a judgment creditor, and then to an owner in fee. The insurance company was willing to insure Dodge as the assignee of the mortgagee. The contention of counsel for the insurance company is that Dodge failed to notify the company of the change of ownership which occurred when he purchased the property at sheriff's sale, and have the permission of the insurance company for the change of ownership indorsed upon the policy. We cannot think that this is such a change of ownership as is contemplated by that clause of the subrogation contract. The change of ownership in this case increased the interest of Dodge, who, under the subrogation contract, is the insured. In no way was the risk increased. The title had not vested in someone other than the insured. It cannot be said that the insurance company might not be willing to insure the property with Dodge as the owner, because Dodge was already the insured."

And under a like policy issued after the mortgage had been foreclosed, but before the time of redemption had expired, the policy was held not to be avoided by the mortgagee's failure to give notice of the nonredemption from the mortgage sale, although the policy provided for notice of any change of ownership; it appearing that the mortgagee had bid in the property at the foreclosure sale. Washburn Mill Co. v. Fire Asso. of Philadelphia, 60 Minn. 68, 51 Am. St. Rep. 500, 61 N. W. 828. To the same effect is Pioneer Sav. & L. Co. v. St. Paul F. & M. Ins. Co. 68 Minn. 170, 70 N. W. 979.

And a clause in a policy issued to the mortgagor, making the loss payable to the mortgagee, and providing that the latter should notify the insurer of any change of ownership, has been held not to be violated by the execution of a quitclaim deed to the mortgagee. Ft. Scott Bldg. & L. Asso. v. Palatine Ins. Co. 74 Kan. 272, 86 Pac. 142.

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So, a policy issued to the mortgagor, having a loss-payable clause, and containing a provision for avoidance in case of alienation, was held not to be defeated by a foreclosure through which the mortgagee became the owner. Bragg v. New England Mut. F. Ins. Co. 25 N. H. 289. The court said: "The title, which became perfected in Prescott [the mortgagee] by means of the foreclosure, was brought about by the operation of law. There was no act of conveyance or transfer by Bragg to Prescott; nothing done by Bragg after the execution of the mortgage and the effecting of the insurance, which gave to Prescott any more rights than those possessed by him when the policy was issued. Bragg did nothing to alienate the property; and the perfection of the title was the mere operation of law, resulting from the situation of the property as it existed at the time of the insurance, and which the defendants might well have foreseen. We cannot, therefore, regard the foreclosure to be an alienation. The title and possession of the property remain in the same persons as when it was insured; and the rights of Prescott through Bragg still exist."

And a transfer of possession and control of the insured property to the mortgagee has been held not a breach of a policy issued to the mortgagor, and assigned, with the insurer's consent, to the mortgagee, which contained a provision that it should become void if the property "shall be sold and conveyed." Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 93 Am. Dec. 628. The court said: "The delivery of the possession of the stock to the mortgagee upon a mortgage made before the insurance was effected would not literally come within the stipulation contained in the policy, that, if the property 'shall be sold and conveyed,' the policy shall be void. It is to be presumed that the company knew that the property had then been conditionally sold, when the policy containing a provision against future alienation was made."

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Where the policy originally issues to the mortgagee, the cases seem agreed that the fact that he subsequently acquires the title, and thereby increases his interest, does not constitute a breach of conditions against sale or transfer of title.

Thus, a release to a mortgagee of the equity of redemption has been held not a breach of a condition in a policy issued to him, which provided that, if the property should "be sold or conveyed, the policy should become void." Heaton v. Manhattan F. Ins. Co. 7 R. I. 502. To the same effect is Bailey v. American Cent. Ins. Co. 4 McCrary, 221, 13 Fed. 250. The court, in the latter case, said: "At all events, it seems clear, both upon reason and authority, that a change of title which increases the interest of the assured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance. This is especially true of a case like the present, where the insurance is upon the interest of a mortgagee. In such a case the parties must have contemplated the possibility, at least, that the mortgage would be foreclosed, and the full title and right of possession pass to the mortgagee. The defendant was bound to expect that complainant would foreclose his mortgage if his debt was not paid at maturity. It must be remembered that the foreclosure, sale, and change of title and possession complained of, are the necessary result of the proceedings to enforce the very mortgage which complainant held upon the property when he applied for the insurance, and that it was for the purpose of insuring his interest under it that he applied for and obtained the policy now in question."

And a policy taken by a mortgagee upon his interest, and containing a clause against change of title, has been held not avoided by foreclosure by which the mortgagee became the sole owner. Esch Bros. v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229. To the same effect are Wich v. Equitable F. & M. Ins. Co. 2 Colo. App. 484, 31 Pac. 389, and Michigan F. & M. Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687.

So, the taking possession by a mortgagee upon default has been held not to constitute a change of possession, within the meaning of a policy issued originally to him. Getman v. Guardian F. Ins. Co. 46 Ill. App. 489.

A case somewhat analogous to the question under consideration arose in Hartford F. Ins. Co. v. Liddell Co. 130 Ga. 8, 14 L.R.A.(N.S.) 168, 124 Am. St. Rep. 157, 60 S. E. 104. There the execution of a chattel mortgage by the insured to one protected by the policy as a purchase-money creditor, retaining title to secure payment, was held a violation of a provision against encumbering the property by a chattel mortgage.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NATHANIEL M. NELSON
v.
J. H. WINCHELL & COMPANY et al., Appts.

(— Mass. —, 89 N. E. 180.)

Trademark — jobber — goods made to order.

1. That a seller of shoes is not the manufacturer of them does not prevent his obtaining a valid trademark in connection with them, if he has them manufactured to

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his order, controlling the design, materials, and workmanship.

Same — license — assumed name.

2. One who, doing business under an assumed name, acquires a trademark in such name, may license or assign the use of such mark in connection with such name, and does not thereby lose the right to assume its use again upon termination of the license.

Same — fraud.

3. The mere fact that a jobber of shoes who has them manufactured under his direction, for his trade, uses a letter head in which he describes himself as a manufacturer of shoes, is not such fraud as will destroy his right to equitable relief against one who infringes his trademark.

Appeal — unassailed error.

4. Refusal of the trial judge to modify his findings at the time of entering an interlocutory decree, so as to make them accord with the facts subsequently found by the master, will not be reversed, where counsel announced before the master that he did not seek to overthrow the findings of the judge.

Evidence — use for intended purposes.

5. One seeking an accounting of profits for infringement of his trademark is not barred from claiming that he had not been guilty of fraud which would prevent his recovery by isolated facts brought out on the hearing before the master, avowedly for another purpose, and with no view to raising that issue.

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6. One who, by the consent and aid of the owner of a trademark, acquires the reputation of being the manufacturer of the goods sold under it, cannot continue to make use of it on his goods after the consent of the owner is withdrawn.

Same — accounting.

7. That the owner of a trademark aided his licensee in acquiring the reputation of being the manufacturer of the product sold under it does not make it inequitable to require the licensee to account for the profits which he made by continued use of the trademark after the license had been withdrawn.

Same — tradename — termination of right.

8. The expiration of a license to use a trademark which has been acquired for use in connection with a business name will terminate the right to use the name in connection with which it was used.

Same — profits — no showing of loss.

9. The absence of evidence that the owner of a trademark has sustained damage because of another's use of it does not make it inequitable to hold the latter liable to him for profits made by its use.

Damages — wrongful use of trademark — license fee.

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11. A delay of two years in seeking to recover profits due to the infringement of a trademark, which is caused in part by negotiations for a settlement, will not bar a right to maintain the suit, at least, where defendants act under express notice that they would be held accountable for infringement of plaintiff's rights.

Same — advice of counsel — profits.

12. One who makes use of another's trademark after notice and warning not to do so cannot be said to be free from wrongful intent, so as to avoid liability for profits, al-

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This subject is covered in a note appended to Johnson & Johnson v. Seabury & Johnson, 12 L.R.A.(N.S.) 1201. The general doctrine therein stated, that the maxim that he who comes into equity must come with clean hands does not apply to the owner of a trademark or tradename who seeks to protect the same from infringement by a competitor, where, in the tradename or trademark, or the label used in connection therewith, no representations are made, but such representations are extrinsic or collateral thereto, is in harmony with that stated and applied in NELSON v. J. H. WINCHELL & Co.

But one case in point other than that under annotation has been found subsequent to that note. The case of A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co. (Ind. App.) 86 N. E. 1025, while not considering the question as affected by the fact that the misrepresentations were collateral to the trademark or tradename, enunciates an exception to the general rule applicable to that state of facts, which would doubtless be recognized by the courts wherein the general rule has been stated and applied. In this case, although the misrepresentations were extrinsic to the trademark or tradename, they were held to be sufficient to preclude the complainant from relief for an infringement, because the misrepresentations, which related to the curative properties of a patent medicine, were considered by the court to be an attempt grossly to impose upon the public, as well as being a menace to human life. On this subject the court said: "If the business of such complainant is, or is sought to be, affected and injured by the misrepresentation or deceit of another, he cannot be heard in a plea that, by the fraudulent rivalry of another, his own fraudulent profits are destroyed or diminished. The exclusive privilege of deceiving or perpetrating a fraud upon the public is hardly a fit subject to be entertained in a court of equity, and certainly not one that such a court can be required to aid or sanction."

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6. One who, by the consent and aid of the owner of a trademark, acquires the reputation of being the manufacturer of the goods sold under it, cannot continue to make use of it on his goods after the consent of the owner is withdrawn.

Same — accounting.

7. That the owner of a trademark aided his licensee in acquiring the reputation of being the manufacturer of the product sold under it does not make it inequitable to require the licensee to account for the profits which he made by continued use of the trademark after the license had been withdrawn.

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8. The expiration of a license to use a trademark which has been acquired for use in connection with a business name will terminate the right to use the name in connection with which it was used.

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9. The absence of evidence that the owner of a trademark has sustained damage because of another's use of it does not make it inequitable to hold the latter liable to him for profits made by its use.

Damages — wrongful use of trademark — license fee.

10. The sum fixed by the parties to be paid annually for the use of a trademark and business name is evidence of the damages to be allowed for their wrongful use after the expiration of the contract right.

Trademark — laches — effect.

11. A delay of two years in seeking to recover profits due to the infringement of a trademark, which is caused in part by negotiations for a settlement, will not bar a right to maintain the suit, at least, where defendants act under express notice that they would be held accountable for infringement of plaintiff's rights.

Same — advice of counsel — profits.

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though he acted under advice of counsel, if he did not acquaint the counsel with all the facts material to the question.

Evidence — cost sheet.

13. In ascertaining the profits of a business for which the infringer of a trademark is liable to account, the master may treat a cost sheet prepared by one of the original firm of the infringers, who was fully acquainted with the business, as evidence of the cost, in the absence of explicit evidence to the contrary.

Same — absence of accounts.

14. Failure of infringers of a trademark to keep accurate accounts of the amounts of their expenses and profits after notice to stop the infringement may be taken as evidence against them, in determining the profits for which they are accountable to the owner of the trademark.

Damages — profits.

15. In determining the amount of profits for which an infringer of a trademark is liable to account to its owner, sales for which the price cannot be collected should not be considered.

Same — expenses.

16. One infringing a trademark in the production and sale of a portion of his product cannot, in accounting with the owner of the trademark, charge against the profits thereon any portion of the general expenses of the business not shown to have been incurred by dealing in the protected product.

Same — jobber's profits.

17. A jobber who has acquired a trademark on the goods dealt in by him cannot, in case his manufacturer infringes his trademark, claim from him the manufacturer's profit, but only that which would have came to him as jobber, and which was protected by his trademark.

Courts — jurisdiction — trademark.

18. A state court has jurisdiction of a suit to recover profits made through the infringement of a trademark.

(June 24, 1909.)

APPEAL by defendants from a decree of the Supreme Judicial Court for Essex County in plaintiff's favor in a suit to restrain the alleged wrongful use of a certain trademark, and to recover profits alleged to have been realized through such use. Modified.

The facts are stated in the opinion.

Mr. **Boyd B. Jones**, for appellants:

An accounting for profits is frequently denied in cases of a wrongful use of the trademark, even where the plaintiff is entitled to an injunction.

Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; McLean v. Fleming, 96 U. S. 245, 257, 24 L. ed. 828, 833; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 106 Fed. 498; International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 A. & E. Ann. Cas. 407; Beard v. Turner, 13 L. T. N. S. 746.

The plaintiff is not entitled to recover profits, because he used his letter heads and the trademark itself falsely to represent to the trade that the Washington Shoe Company (the name under which the plaintiff sold the shoes) was the manufacturer of the shoes, and by these and other artifices deceived the trade, who would not have knowingly bought the goods of a middleman.

Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Messer v. The Fadettes, 168 Mass. 140, 37 L.R.A. 721, 60 Am. St. Rep. 371, 46 N. E. 407; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Leather Cloth Co. v. American Leather Cloth Co. 4 De G. J. & S. 137, 11 H. L. Cas. 523; Pidding v. How, 8 Sim. 477; Perry v. Truefitt, 6 Beav. 66; Palmer v. Harris, 60 Pa. 156, 100 Am. Dec. 557; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990; Cardoze v. Swift, 113 Mass. 250; Dunham v. Presby, 120 Mass. 285; Kenney v. Consumers' Gas Co. 142 Mass. 417, 8 N. E. 138; Claflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; Cohen v. Nagle, 190 Mass. 13, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553.

It is inequitable to hold the defendants accountable for profits, because the defendants did not, by the use of the trademark or otherwise, represent to the trade that the Washington shoes sold by them after the termination of the plaintiff's employment were the goods of the plaintiff.

Regis v. Jaynes, supra; Weener v. Brayton, 152 Mass. 102, 8 L.R.A. 640, 25 N. E. 46; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Baker v. Baker, 53 C. C. A. 157, 115 Fed. 297; Saxlehner v. Apollinaris Co. 66 L. J. Ch. N. S. 533, [1897] 1 Ch. 893, 76 L. T. N. S. 617; Heller & M. Co. v. Shaver, 102 Fed. 882; Cohen v. Nagle, 190 Mass. 15, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553.

The defendants are not accountable for profits, because, at the termination of the plaintiff's employment, the trademark was not a personal one, but belonged to the business of the Washington Shoe Company, which had been transferred to the defendants by the plaintiff.

Warren v. Warren Thread Co. 134 Mass. 247; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 469; Browne, Trade-Marks, 2d ed. § 363.

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It is inequitable to hold the defendants accountable for profits, if any, made between February 1, 1903, and May 1, 1905, because, in fact, the plaintiff suffered no actual loss or damage.

Regis v. Jaynes, supra; Lawrence v. Hull, 169 Mass. 250, 47 N. E. 1001; Cohen v. Nagle, 190 Mass. 4, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553; George G. Fox Co. v. Glynn, 191 Mass. 344, 9 L.R.A.(N.S.) 1096, 114 Am. St. Rep. 619, 78 N. E. 89.

If the defendants are liable at all for the use of the trademark, that liability should be measured by the license fee of $1,000 a year, which was fixed by the contract between the parties.

Clark v. Wooster, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; Bates v. St. Johnsbury & L. C. R. Co. 32 Fed. 628; Cary v. Lovell Mfg. Co. 37 Fed. 654; Cassidy v. Hunt, 75 Fed. 1015.

It is inequitable to hold the defendants accountable to the plaintiff for profits, because the plaintiff, in delaying the commencement of this suit from February 1, 1903, to January 10, 1905, and in asking Wall to sell the Washington shoes for the defendants, was guilty of laches.

Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; Beard v. Turner, 13 L. T. N. S. 746; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 54 C. C. A. 204, 116 Fed. 332; McLean v. Fleming, 96 U. S. 245, 247, 24 L. ed. 828, 829.

It is inequitable to hold the defendants accountable for profits, because they were advised by counsel that they had a right to use the trademark, and continued to use it in good faith, relying on that advice, without any actual intention to defraud the plaintiff or to deceive the public.

Regis v. Jaynes, supra; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Geo. T. Stagg Co. v. Taylor, 95 Ky. 651, 27 S. W. 247.

Messrs. **Alexander P. Browne** and **George W. Mathews**, for appellee:

The use of a trademark may be licensed by the owner for a limited term to parties carrying on the business, the owner of such trademark remaining in connection therewith, but, at the expiration of such term, or upon failure to pay the agreed royalty, the license terminates, and a further use will be enjoined and an accounting ordered.

Batcheller v. Thomson, 35 C. C. A. 532, 93 Fed. 660; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Greacen v. Bell, 115 Fed. 553; Martha Washington C. B. Flour Co. v. Martien, 44 Fed. 473, 37 Fed. 797; Filkins v. Blackman, 13 Blatchf. 440, Fed. Cas. No. 4,786; Winsor v. Clyde, Cox, Trade Mark Cases, 396.

A plaintiff who succeeds in getting an injunction is entitled to an accounting for profits made by the defendant through the wrongful use of the trademark.

Paul, Trademarks, § 326; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774.

In continuing the use of the mark after notice that plaintiff would hold them liable for their infringement, whether acting on their own judgment or the advice of counsel, defendants were taking the chance of being wrong.

Regis v. Jaynes, 191 Mass. 249, 77 N. E. 774.

One whose trademark is wrongfully appropriated is not without remedy, notwithstanding the appropriation is without deceit.

Singer Mach. Mfrs. v. Wilson, L. R. 3 App. Cas. 376.

The burden of proving profits is on the plaintiff; but when the plaintiff shows that the defendants, with due notice of plaintiff's claim, have so mingled his profits with theirs that accurate determination of his profits is difficult, the burden then falls upon the defendants to distinguish their own lawful profits at their peril.

Brennan & Co. v. Dowagiac Mfg. Co. 89 C. C. A. 392, 162 Fed. 472; Docker v. Somes, 2 Myl. & K. 674; Hart v. Ten Eyck, 2 Johns. Ch. 108; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566.

Bad debts should not be deducted from plaintiff's profits; they should be treated as nonexistent.

Edelsten v. Edelsten, 10 L. T. N. S. 780.

Sheldon, J., delivered the opinion of the court:

The plaintiff seeks by this bill to restrain the defendants from using a trademark, and to recover from them the profits which it is claimed they have realized through its wrongful use. The action is brought against the surviving partner of the firm of J. H. Winchell & Company and a corporation of the same name, which has succeeded to the former firm's business. But the defendants agree that, for the purposes of the case, they are to be treated as joint parties, and hereafter they will be spoken of as the defendants without any discrimination.

The case was heard on the merits by a single justice, who filed a statement of the facts found by him. The evidence taken before him also had been reported. It appeared that before October 1, 1900, the plaintiff was doing business on his own account, under the name of the Washington Shoe Company. He did not himself manu-

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though he acted under advice of counsel, if he did not acquaint the counsel with all the facts material to the question.

Evidence — cost sheet.

13. In ascertaining the profits of a business for which the infringer of a trademark is liable to account, the master may treat a cost sheet prepared by one of the original firm of the infringers, who was fully acquainted with the business, as evidence of the cost, in the absence of explicit evidence to the contrary.

Same — absence of accounts.

14. Failure of infringers of a trademark to keep accurate accounts of the amounts of their expenses and profits after notice to stop the infringement may be taken as evidence against them, in determining the profits for which they are accountable to the owner of the trademark.

Damages — profits.

15. In determining the amount of profits for which an infringer of a trademark is liable to account to its owner, sales for which the price cannot be collected should not be considered.

Same — expenses.

16. One infringing a trademark in the production and sale of a portion of his product cannot, in accounting with the owner of the trademark, charge against the profits thereon any portion of the general expenses of the business not shown to have been incurred by dealing in the protected product.

Same — jobber's profits.

17. A jobber who has acquired a trademark on the goods dealt in by him cannot, in case his manufacturer infringes his trademark, claim from him the manufacturer's profit, but only that which would have came to him as jobber, and which was protected by his trademark.

Courts — jurisdiction — trademark.

18. A state court has jurisdiction of a suit to recover profits made through the infringement of a trademark.

(June 24, 1909.)

APPEAL by defendants from a decree of the Supreme Judicial Court for Essex County in plaintiff's favor in a suit to restrain the alleged wrongful use of a certain trademark, and to recover profits alleged to have been realized through such use. Modified.

The facts are stated in the opinion.

Mr. **Boyd B. Jones**, for appellants:

An accounting for profits is frequently denied in cases of a wrongful use of the trademark, even where the plaintiff is entitled to an injunction.

Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; McLean v. Fleming, 96 U. S. 245, 257, 24 L. ed. 828, 833; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 106 Fed. 498; International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 A. & E. Ann. Cas. 407; Beard v. Turner, 13 L. T. N. S. 746.

The plaintiff is not entitled to recover profits, because he used his letter heads and the trademark itself falsely to represent to the trade that the Washington Shoe Company (the name under which the plaintiff sold the shoes) was the manufacturer of the shoes, and by these and other artifices deceived the trade, who would not have knowingly bought the goods of a middleman.

Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Messer v. The Fadettes, 168 Mass. 140, 37 L.R.A. 721, 60 Am. St. Rep. 371, 46 N. E. 407; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Leather Cloth Co. v. American Leather Cloth Co. 4 De G. J. & S. 137, 11 H. L. Cas. 523; Pidding v. How, 8 Sim. 477; Perry v. Truefitt, 6 Beav. 66; Palmer v. Harris, 60 Pa. 156, 100 Am. Dec. 557; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990; Cardoze v. Swift, 113 Mass. 250; Dunham v. Presby, 120 Mass. 285; Kenney v. Consumers' Gas Co. 142 Mass. 417, 8 N. E. 138; Claflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; Cohen v. Nagle, 190 Mass. 13, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553.

It is inequitable to hold the defendants accountable for profits, because the defendants did not, by the use of the trademark or otherwise, represent to the trade that the Washington shoes sold by them after the termination of the plaintiff's employment were the goods of the plaintiff.

Regis v. Jaynes, supra; Weener v. Brayton, 152 Mass. 102, 8 L.R.A. 640, 25 N. E. 46; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Baker v. Baker, 53 C. C. A. 157, 115 Fed. 297; Saxlehner v. Apollinaris Co. 66 L. J. Ch. N. S. 533, [1897] 1 Ch. 893, 76 L. T. N. S. 617; Heller & M. Co. v. Shaver, 102 Fed. 882; Cohen v. Nagle, 190 Mass. 15, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553.

The defendants are not accountable for profits, because, at the termination of the plaintiff's employment, the trademark was not a personal one, but belonged to the business of the Washington Shoe Company, which had been transferred to the defendants by the plaintiff.

Warren v. Warren Thread Co. 134 Mass. 247; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 469; Browne, Trade-Marks, 2d ed. § 363.

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It is inequitable to hold the defendants accountable for profits, if any, made between February 1, 1903, and May 1, 1905, because, in fact, the plaintiff suffered no actual loss or damage.

Regis v. Jaynes, supra; Lawrence v. Hull, 169 Mass. 250, 47 N. E. 1001; Cohen v. Nagle, 190 Mass. 4, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553; George G. Fox Co. v. Glynn, 191 Mass. 344, 9 L.R.A.(N.S.) 1096, 114 Am. St. Rep. 619, 78 N. E. 89.

If the defendants are liable at all for the use of the trademark, that liability should be measured by the license fee of $1,000 a year, which was fixed by the contract between the parties.

Clark v. Wooster, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; Bates v. St. Johnsbury & L. C. R. Co. 32 Fed. 628; Cary v. Lovell Mfg. Co. 37 Fed. 654; Cassidy v. Hunt, 75 Fed. 1015.

It is inequitable to hold the defendants accountable to the plaintiff for profits, because the plaintiff, in delaying the commencement of this suit from February 1, 1903, to January 10, 1905, and in asking Wall to sell the Washington shoes for the defendants, was guilty of laches.

Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; Beard v. Turner, 13 L. T. N. S. 746; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 54 C. C. A. 204, 116 Fed. 332; McLean v. Fleming, 96 U. S. 245, 247, 24 L. ed. 828, 829.

It is inequitable to hold the defendants accountable for profits, because they were advised by counsel that they had a right to use the trademark, and continued to use it in good faith, relying on that advice, without any actual intention to defraud the plaintiff or to deceive the public.

Regis v. Jaynes, supra; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Geo. T. Stagg Co. v. Taylor, 95 Ky. 651, 27 S. W. 247.

Messrs. **Alexander P. Browne** and **George W. Mathews**, for appellee:

The use of a trademark may be licensed by the owner for a limited term to parties carrying on the business, the owner of such trademark remaining in connection therewith, but, at the expiration of such term, or upon failure to pay the agreed royalty, the license terminates, and a further use will be enjoined and an accounting ordered.

Batcheller v. Thomson, 35 C. C. A. 532, 93 Fed. 660; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Greacen v. Bell, 115 Fed. 553; Martha Washington C. B. Flour Co. v. Martien, 44 Fed. 473, 37 Fed. 797; Filkins v. Blackman, 13 Blatchf. 440, Fed. Cas. No. 4,786; Winsor v. Clyde, Cox, Trade Mark Cases, 396.

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The case was heard on the merits by a single justice, who filed a statement of the facts found by him. The evidence taken before him also had been reported. It appeared that before October 1, 1900, the plaintiff was doing business on his own account, under the name of the Washington Shoe Company. He did not himself manu-

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facture any shoes, but bought his goods from manufacturers, largely from the defendants. He had put upon the market shoes stamped with the name "Washington," and a portrait of George Washington, which shoes were manufactured for him and under his direction, by the defendants. Through his efforts, these shoes had become well and favorably known to the trade and the public under the name of the "Washington shoe," and that had become a valuable trademark. In April, 1899, he caused the word "Washington" and said portrait to be registered in the office of the secretary of the commonwealth, as a trademark used by himself under the style of the Washington Shoe Company. Stat. 1895 chap. 462, § 1, p. 519; Stat. 1899, chap. 359, § 1, p. 319; Rev. Laws, chap. 72, § 7. In October, 1900, he entered into the defendants' employ under a verbal agreement, and they took over the business which he had carried on, and have since manufactured and sold shoes stamped with his trademark and known as the "Washington shoes," he having charge of this part of their business as long as he remained in their employ. Subsequently, they caused the trademark to be registered in the Patent Office at Washington in their name. But this was done without any authority from the plaintiff, and he did not know of it until shortly before he brought this suit. He did not assign the trademark to them; he did not abandon his right to it; there was no understanding that it was to become the property of the defendants; and their only right was to use it as his licensees so long as he remained in their employ upon mutually satisfactory terms; and it was so understood by the parties. He left their employ in February, 1903, on account of a disagreement as to his compensation; and their subsequent use of his trademark or label was illegal and without right.

On these facts, the single justice ruled that the plaintiff was entitled to have the defendants restrained from continuing this unlawful use; and by an interlocutory decree they were so enjoined, and the case was sent to a master to take an account, and to determine the damages and the profits, if any, to which the plaintiff was entitled, but reserving consideration of the plaintiff's right to claim profits as such until the coming in of the master's report. The case was heard at length before the master, and he reported that the net profits obtained by the defendants from the sale of shoes bearing the label were $12,563.66, but that the plaintiff's damages were only the nominal sum of $1. Numerous exceptions to this report were overruled; a motion made by the defendants for a revision of the findings of the justice at the hearing on the merits was denied; and a final decree was entered, perpetually enjoining the defendants from using the plaintiff's trademark or label, with certain exceptions, not now material, and ordering them to pay to him the total amount of profits and damages found by the master. The case now comes before us upon the defendants' appeal from the interlocutory and final orders and decrees.

1. In the opinion of a majority of the court, the plaintiff, although not himself the manufacturer of the shoes which he sold, could, under the circumstances, create a valid trademark upon them. He was a jobber, and not strictly a manufacturer. But the shoes were manufactured by the defendants especially and solely for him and in accordance with his directions. He was to be himself responsible to purchasers as if he had been the manufacturer. He dictated the stock to be used and the way in which he wished the shoes to be made, and went to the defendants' factory to see that his ideas were carried out. He determined the design, the material, and the workmanship of the shoes. In short, as he put it in his testimony, he controlled the manufacture of the shoes upon which his label was to be put. We see no reason to doubt the validity of his trademark. Burt v. Tucker, 178 Mass. 493, 52 L.R.A. 112, 86 Am. St. Rep. 499, 59 N. E. 1111; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401. The use of a trademark does not necessarily and as matter of law import that the articles upon which it is used are manufactured by its user. It may be enough that they are manufactured for him, that he controls their production, or even that they pass through his hands in the couse of trade, and that he gives to them the benefit of his reputation, or of his name and business style. Weener v. Brayton, 152 Mass. 101, 102, 8 L.R.A. 640, 25 N. E. 46; McLean v. Fleming, 96 U. S. 245, 253, 24 L. ed. 828, 831; Menendez v. Holt, 128 U. S. 514, 520, 32 L. ed. 526, 527, 9 Sup. Ct. Rep. 143; Godillot v. Harris, 81 N. Y. 263, 266; Re Australian Wine Importers, L. R. 41 Ch. Div. 278, 280, 281; Major Bros. v. Franklin [1908] 1 K. B. 712. It was so assumed in Ullmann v. Leuba [1908] A. C. 443. And this was not a personal trademark, but one connected with the business carried on by him under the name of the Washington Shoe Company. It could be assigned and made to pass with a transfer of that business and that name. Burt v. Tucker, supra; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Warren v. Warren Thread Co. 134 Mass. 247; MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 469, 474, 475. As the absolute property in it could have been so assigned, a limited in-

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terest by way of license, to continue either for a fixed period or while license fees were paid, or while the plaintiff should continue in the employment of the defendants, could also be created. Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Batcheller v. Thomson, 35 C. C. A. 532, 93 Fed. 660; Greacen v. Bell (C. C.) 115 Fed. 553; Martha Washington, C. B. Flour Co. v. Martien (C. C.) 44 Fed. 473, and 37 Fed. 797; Filkins v. Blackman, 13 Blatchf. 440, Fed. Cas. No. 4,786. Of course, the plaintiff's temporary disuse of the trademark during the period of such license would not necessarily operate an abandonment of his rights. Burt v. Tucker, 178 Mass. 493, 501, 52 L.R.A. 112, 86 Am. St. Rep. 499, 59 N. E. 1111.

2. But is is claimed that the plaintiff, even before he entered the employ of the defendants, represented to the dealers to whom he made sales in the name and style of the Washington Shoe Company, that that company, which then consisted solely of himself, was the manufacturer of the shoes which he sold with this label. He was known to the trade as a manufacturer, and not as a jobber. His letter heads read: "Washington Shoe Co., Manufacturers of Specialties. Men's, Boys,' and Youths' Shoes." The defendants contend that this conduct of the plaintiff was the practice of a fraud upon his customers, and that for this reason, although the trademark was itself valid, he should have no relief in equity. And it is true that equity will not lend its aid against the infringers of a trademark which contains a material false representation, adapted to deceive purchasers of the article sold with it, or which is made the basis of material false representations in carrying on that business in which it is used. Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Messer v. The Fadettes, 168 Mass. 140, 37 L.R.A. 721, 60 Am. St. Rep. 371, 46 N. E. 407; Hoxie v. Chaney, 143 Mass. 592, 593, 58 Am. Rep. 149, 10 N. E. 713; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Pidding v. How, 8 Sim. 477; Perry v. Truefitt, 6 Beav. 66; Flavel v. Harrison, 10 Hare, 467; Cheavin v. Walker, L. R. 5 Ch. Div. 850; Leather Cloth Co. v. American Leather Cloth Co. 4 De G. J. & S. 139, and 11 H. L. Cas. 523. This is but an application of the common maxim that he who seeks equity must come into court with clean hands. If his case discloses fraud, deception, or misrepresentation on his own part, relief will be denied to him. California Fig Syrup Co. v. Putnam, 16 C. C. A. 376, 33 U. S. App. 283, 69 Fed. 740, and (C. C.) 66 Fed. 750; Krauss v. Jos. R. Peebles' Sons Co. (C. C.) 58 Fed. 585; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990; Hobbs v. Francais, 19 How. Pr. 567; Palmer v. Harris, 60 Pa. 156, 100 Am. Dec. 557; Kenny v. Gillet, 70 Md. 574, 17 Atl. 499; Solis Cigar Co. v. Pozo, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. 556.

But this defense was not set up in the answer of the defendants, and does not appear to have been taken at the hearing before the single justice. Their position was that they, and not the plaintiff, had originated and owned the trademark, or that they had become its owners under the agreement by which he entered into their employ. The justice found against them on this issue, and the evidence clearly justified his finding. The claim now contended for was not put in issue, certainly was not tried out before the single justice. On the other evidence taken before him, the fact that the plaintiff's letter heads contained the words which have been quoted did not establish the further fact that he was deceiving his customers by false representations that he was the manufacturer of those shoes. Further evidence taken in connection with the use of this letter head doubtless might have established the fact. But the label itself contained no false representation. Moreover, the justice might have found on the weight of the evidence, and it now must be taken that he did find, that these shoes were manufactured under the general direction of the plaintiff, as already has been pointed out. And by his first arrangement with the defendants he was entitled to sell, and apparently did sell, the shoes in the same manner, upon the same terms, and for the same prices, as if he had been himself the manufacturer. Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; Dale v. Smithson, 12 Abb. Pr. 237. But merely collateral representations, though false, will not bar the owner of a trademark from relief, either at law or in equity. Ford v. Foster, L. R. 7 Ch. 611, cited and followed in Siegert v. Findlater, L. R. 7 Ch. Div. 801, 811, Liebig's Extract of Meat Co. v. Anderson, 55 L. T. N. S. 208, 209, and Newman v. Pinto, 57 L. T. N. S. 30, 38. See also William Rogers Mfg. Co. v. Simpson, H. M. & Co. 54 Conn. 527, 9 Atl. 395. The case of Pratt's Appeal, 117 Pa. 401, 2 Am. St. Rep. 676, 11 Atl. 878, though it has been criticized, may yet, in our opinion, be sustained on the ground that the trademark there considered came under the same rule as in Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713, and that no material false representations had been made by the plaintiff.

On the whole, so far as this question is concerned, the majority of the court are satisfied that the single justice was warrant-

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ed in finding that the plaintiff had a valid trademark, and was entitled to relief against the defendants for its infringement. Whether, upon the evidence taken before the master and the facts found in the master's report, the plaintiff should be debarred by reason of his alleged fraud from holding the defendants to account for profits, and whether the single justice ought to have granted the defendants' motion that the findings which he had made and the interlocutory decree based thereon should be amended, will be considered hereafter.

3. We are of opinion, also, that relief cannot be refused to the plaintiff by reason of laches on his part; or because the defendants did not, by the use of the trademark or otherwise, represent that the Washington shoes sold by them after the plaintiff had left their employ were his goods; or on the ground that the trademark was not personal to the plaintiff, but belonged to the business of the Washington Shoe Company, and that the business had been transferred by the plaintiff to the defendants. It is unnecessary to consider these questions here in detail; for the defendants' reliance upon these points is mainly to sustain their contention that they should not be held liable for the profits realized by them from their use of the trademark, and they agree that their defense upon this question is stronger than upon the question of enjoining them from further violation of the plaintiff's rights by using the trademark itself. See Regis v. Jaynes, 191 Mass. 245, 247 et seq., 77 N. E. 774, and cases there cited; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. (C. C.) 106 Fed. 498; Beard v. Turner, 13 L. T. N. S. 746.

4. For the reasons already stated, the plaintiff cannot be prevented from holding the defendants for their profits on the ground that he deceived the trade by falsely representing that the Washington Shoe Company was the manufacturer of his shoes. It is true that the interlocutory decree entered by the single justice left the question of the defendants' liability for profits entirely open; and it is also true that some portions of the testimony before the master, as to whether the plaintiff had been guilty of any material deception, were more favorable to the defendants' present contention than that which was heard by the single justice. But the plaintiff's right to general relief had been settled at the hearing upon the merits: it had been adjudicated by the interlocutory decree; and it was not open to investigation before the master. Rosenberg v. Heffernan, 197 Mass. 151, 156, 83 N. E. 316; Stewart v. Joyce, 201 Mass. 301, 87 N. E. 613. This was the view taken by the parties themselves. This sufficiently appears from what took place when the defendants' counsel offered in evidence to the master the plaintiff's letter head, already mentioned.

The plaintiff's counsel thereupon said to the master: "If it is intended by this line of inquiry to attack any of the findings, either of fact or law, of his Honor, Judge Morton, it is incompetent. All facts in regard to the trademark are concluded by the findings of the court." To this the defendants' counsel answered: "I am not raising any such question as that." If a different position had been taken, it may be that the plaintiff would have gone further into this matter, and that very much other evidence would be now before us. We cannot regard the facts found by the single justice, and made the basis of his interlocutory decree, as changed or modified by the evidence before the master, or by any findings made by him. And the single justice, upon his own previous findings and the master's report, had the right to make his final finding that the plaintiff had not been guilty of any such false or fraudulent representation in regard to the shoes sold by him under this trademark as to render it inequitable to give him the full relief prayed for.

5. It is convenient to consider here the defendants' motion for the modification of the findings made and of the interlocutory decree entered by the single justice, so as to make them accord with the facts found by the master. This motion was, of course, addressed to his judicial discretion (Hirsh v. Beard, 200 Mass. 569, 86 N. E. 954); and although the exercise of that discretion may be reviewed upon appeal, yet it ought not to be disturbed unless it was plainly wrong. In view of the avowal of the defendants' counsel which we have already mentioned, and which both the master and the plaintiff's counsel were warranted in treating as a declaration that it was not sought to overthrow the findings which had been made by the justice, we cannot say that the justice's discretion was wrongly exercised; and his order denying this motion of the defendants must be affirmed. It is manifest that this issue was not tried out or attempted by the defendants to be tried out before the master any more than it had been before the single justice. They were simply seeking to go in to certain specific and isolated facts which they contended, rightly or wrongly, bore upon the plaintiff's right to an accounting for profits. Too much weight ought not to be given to isolated expressions of a witness. Rugg, J., in Picquett v. Wellington-Wild Coal Co. 200 Mass. 470, 473, 86 N. E. 899. This is especially true where both question and answer are directed to a different issue from that to which they are afterwards sought

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to be applied. It would be unjust to the plaintiff to treat him now as barred by the isolated facts thus brought out, and to say that he was prevented by them from contesting an issue which, if it had been seasonably raised and decided against him, would have been fatal to his whole contention. McNeal v. Leonard, 3 Allen, 268. Nor did justice require that the whole question of the defendant's liability should be reopened by reason of these isolated facts, avowedly brought out for a different purpose, upon a different ground, and without any intention of raising the issue upon which it since has been claimed that they were conclusive.

6. The plaintiff, while he was employed by the defendants, and while, under his license, they were rightly using this label and the name of the Washington Shoe Company, did, as the master has found, notify dealers in the trade that the defendants were the manufacturers of these shoes, and were doing business under his former style. By his assistance and largely through his efforts it became generally known that the Washington shoes, so called, were made and marketed by the defendants. Accordingly, after the plaintiff had left their employ, and had forbidden them to use further his label, it still remained true that the shoes sold by them with this label were not sold as the plaintiff's shoes, but as goods of their own manufacture. But it was no less a wrong to the plaintiff to use his trademark against his prohibition than if they had not hitherto used it with his consent. That one result of their rightful user under his license had been to make their customers believe that the trademark belonged to the defendants, and that their continued sales were not made under a false representation that the goods they were selling were the plaintiff's shoes, did not, under the circumstances of this case, at all lessen either the injury done to the plaintiff or the wrongful advantage gained by the defendants. Their contention that it is inequitable, by reason of this circumstance, to hold them accountable for their profits, cannot be sustained. The language of the courts in Weener v. Brayton, 152 Mass. 102, 103, 8 L.R.A. 640, 25 N. E. 46; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 322, 20 L. ed. 581, 583; and Baker v. Baker, 53 C. C. A. 157, 115 Fed. 297, relied on by the defendants, is perfectly correct as the statement of a general rule, but is not applicable to this case, which, as pointed out by the single justice in his memorandum of decision, is not a case of illegal competition, but of wrongful appropriation of a trademark. The cases of Saxlehner v. Apollinaris Co. [1897] 1 Ch. 893, Heller & M. Co. v. Shaver (C. C.) 102 Fed. 882, and George G. Fox Co. v. Glynn, 191 Mass. 344, 352, 9 L.R.A.(N.S.) 1096, 114 Am. St. Rep. 619, 78 N. E. 89, although not exactly in point, have more resemblance to the case at bar.

7. Nor can it be said that the defendants are not liable for profits on the ground that this trademark was not a personal one, but belonged to the business of the Washington Shoe Company, and that this business had been transferred by the plaintiff to the defendants. By the findings of the justice it does not appear that they had a right to use that name except during the time covered by the plaintiff's license; that is, while he remained in their employ. There was no express grant of this right made to them by him; and the limitation of their right to use the label must be applicable alike to their right to use the business name. This results from the very fact that the trademark was not strictly personal, but to be used in connection with the business name.

8. The fact that there was no evidence before the master that the plaintiff had sustained damage through the loss of his trademark or because of its use by the defendants does not necessarily make it inequitable to hold them for their profits. It is expressly provided by our statute (Rev. Laws, chap. 72, § 9) that such profits shall be allowed. The right to refuse to allow them in cases not coming under the statute, like Lawrence v. Hull, 169 Mass. 250, 47 N. E. 1001, is not material here. Nor is the general doctrine stated in Regis v. Jaynes, 191 Mass. 245, 247, 253, 77 N. E. 774, in which it was not found necessary to consider the statute, now of consequence. The master's finding as to damages rests upon the plaintiff's failure to offer evidence as to this subject, rather than upon an actual finding upon evidence introduced, and would seem to indicate an election on the plaintiff's part to claim profits, and not damages. Moreover, the very fact that the parties, by their agreement, made when the plaintiff entered into the defendant's employ, had fixed upon $1,000 as the sum to be paid annually for the use of the plaintiff's trademark and business name, was evidence—according to some of the decisions strong or even controlling evidence — of the damages caused to the plaintiff by its subsequent wrongful use. Coupe v. Royer, 155 U. S. 565, 39 L. ed. 263, 15 Sup. Ct. Rep. 199; Clark v. Wooster, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764; Philp v. Nock, 17 Wall. 460, 21 L. ed. 679; Seymour v. McCormick, 16 How. 480, 14 L. ed. 1024; Bates v. St. Johnsbury & L. C. R. Co. (C. C.) 32 Fed. 628; Cary v. Lovell Mfg. Co. (C. C.) 37 Fed. 654, 656; Cassidy v. Hunt

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(C. C.) 75 Fed. 1015. But for the fact that the plaintiff apparently had elected not to claim damages as such, it might become a serious question whether the master's finding that there was no evidence of damages was not manifestly wrong. But it appears, both upon principle and from the cases already cited, that the defendants' actual profits cannot be decisively measured by the amount of this license fee.

9. The plaintiff has not been guilty of such laches as to deprive him of the right to require an account of profits. He delayed bringing this suit for nearly two years; and there is authority for the contention that, if nothing further had appeared, this unexplained delay might have produced the result claimed by the defendants. Beard v. Turner, 13 L. T. N. S. 746; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; McLean v. Fleming, 96 U. S. 245, 247, 24 L. ed. 828, 829; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 54 C. C. A. 204, 116 Fed. 332; Low v. Fels (C. C.) 35 Fed. 361; Regis v. Jaynes, 191 Mass. 245, 247, 77 N. E. 774. But there were further facts. It was found by the single justice that the delay was in part caused by negotiations between counsel for the parties. There was evidence before the master that it was due in part to the plaintiff's desire to collect other money due to him from the defendants. Beside these circumstances, which it might have been found accounted for less than six months of the delay, there is the conceded fact that, immediately upon leaving the defendant's employ, the plaintiff, through his counsel, expressly notified them of his claim, and warned them that he would hold them legally responsible for any further use of his trademark or of his former business name. This made it manifest that he did not acquiesce in such further use by them. In this respect the case differs from most of those cited above. There was here a real objection instead of merely an apprehended one, as in Daly v. Foss, 199 Mass. 104, 85 N. E. 94. Nor is the defense of laches set up in the answer.

10. After the plaintiff's notice and warning, the defendants' further use of this label cannot be said to have been innocent or free from wrongful intent. Ewing v. Johnston, L. R. 13 Ch. Div. 434; Brennan & Co. v. Dowagiac Mfg. Co. 89 C. C. A. 392, 162 Fed. 472; Regis v. Jaynes, 191 Mass. 245, 248, 77 N. E. 774. So far as it was necessary to show wrongful or fraudulent conduct on their part (see Singer Mach. Mfrs. Co. v. Wilson, L. R. 3 App. Cas. 376), this was enough. They cannot shield themselves under the plea that they acted upon the advice of counsel, even if we assume, without deciding, that this would in any event have protected them; for it does not appear that they communicated to their counsel all the facts upon which that advice should have been based. The finding of the single justice that they had received simply a temporary license from the plaintiff, and that they had no further right, did not create this fact; it simply declared the existence of a fact which they must be taken to have known, and which undoubtedly they did know. But there is no pretense that they communicated this highly material fact to their counsel; and his letter of February 9, 1903, to the plaintiff's counsel, makes it very plain that he was wholly ignorant of its existence.

11. We cannot say, in spite of the very able and elaborate argument of the defendants' counsel, that the master's finding of the amount of the defendants' profits was wrong. He had a right to treat the cost sheet prepared by Clark, one of the defendants' original firm, and adopted and acted on by the defendants in the conduct of their business, as evidence of the cost of their shoes, and to accept its figures as correct, in the absence of explicit evidence to the contrary. In other words, he had the right to find, as he did find, that the cost sheet at least furnished the best basis for ascertaining such cost, especially in view of the fact that Clark was fully acquainted with the business and with the market price and cost of merchandise and all other elements of labor and expense, and that throughout the preparation of these estimates it was intended to leave a leeway or margin of profit in favor of the manufacturers. He had a right to treat the failure of the defendants, after they had received notice of the plaintiff's claim, to keep accounts which would show accurately the amount of their expenses and of their profits upon Washington shoes as a circumstance bearing against them. He did not go further than the rules laid down in Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566; Brennan & Co. v. Dowagiac Mfg. Co. supra; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108, and Docker v. Somes, 2 Myl. & K. 674. As to losses from bad debts, he adopted the doctrine of Edelsten v. Edelsten, 10 L. T. N. S. 780, neither increasing the amount of profits by reason of such sales nor diminishing that amount on account of the loss caused thereby; but practically treating those sales as if they had not been made at all. In our opinion, this was right. As to the allowance of general expenses of the business, he followed the rule laid down in Regis v. Jaynes, 191 Mass. 245, 251, 252, 77 N. E. 774. Here, as there, to allow the defendants to charge against their profits

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upon these goods any portion of such expenses not shown to have been increased by their dealing in these goods would be to permit them, by diminishing the expenses of conducting the rest of their business, to derive a direct advantage from their own wrongdoing. But since, as we shall hereafter see, the defendants are to be allowed their manufacturing profits, this question becomes less important. We see no advantage in going through the calculations made in argument and the figures laid before us in detail. We do not find that the master adopted any erroneous rule of law in dealing with them, or that any of his findings upon them were manifestly wrong.

12. The master has charged the defendants with the total profits realized on the shoes sold by them with the plaintiff's trademark. This is the general rule. Reading Stove Works v. S. M. Howes Co. 201 Mass. 437, 21 L.R.A.(N.S.) 979, 87 N. E. 751; Regis v. Jaynes, 191 Mass. 245, 249, 250, 77 N. E. 774, and cases there cited. But, as has been said, the circumstances of this case are peculiar. This trademark was not a manufacturer's, but a jobber's trademark. The plaintiff never could have realized, he never expected to realize, from it the profits of a manufacturer, but only those of a jobber. Its validity has been sustained simply as the trademark of a jobber. It was to become operative only upon shoes which had already yielded a manufacturer's profit. It was capable of yielding only the profits of a jobber. We are not called upon to determine what would be the measure of liability of a manufacturer who should, as a mere wrongdoer, appropriate a jobber's trademark. These parties had from the beginning dealt with each other as manufacturer and jobber of the Washington shoe. The plaintiff did not himself manufacture his shoes while he alone held the trademark, but bought them from the defendants. They sold the shoes to him, apparently for a somewhat less price than they obtained from their other customers for shoes of a like quality not bearing his label, but still for a price which doubtless yielded them a manufacturer's profit. He then sold the shoes under his trademark for a somewhat higher price, made higher by the addition of a sum which constituted the profit attributable to his trademark. That is, these parties had in the beginning, by the course of dealing which they adopted, divided the total profits to be obtained from these shoes into two portions,—a manufacturer's profit for the defendants and a trademark profit for the plaintiff. In this respect the case differs from any of those which have been cited at the bar, nor have we found any other case of the same character. Under these circumstances, the plaintiff entered into the defendants' employ, and, for certain payments made by them, allowed them by his license to take to themselves both the manufacturing and the trademark profits. When he left them, they had a right still to manufacture the shoes, but not to put his label upon them; and when they continued wrongfully to do the latter in spite of his prohibition, their gain and his loss were the same, *i. e.*, the amount of the trademark profits. They ought then to have paid over to him at once the amount of the trademark profits, undiminished; but they had a right to retain for themselves the manufacturing profits. In the opinion of a majority of the court, they now should account to him for the trademark profits which were originally and lawfully his; they ought not to be required to account for the manufacturing profits, to which he never had any claim. To state the case in symbols, the total amount received by the defendants from their wrongful sales may be represented by the expression $a+b+c$, in which a represents the total cost of the shoes, including all items which properly can be included therein, b is the manufacturing profit, and c is the trademark profit. The master has found the total amount of b and c to be $12,565.66, and the finding must stand. But, of this total, the part represented by b, the manufacturing profit, should be left to the defendants, and the part represented by c, the trademark profit, should be given to the plaintiff. Cartier v. Carlile, 31 Beav. 292, 298, 299; Atlantic Mill. Co. v. Rowland (C. C.) 27 Fed. 24. This is the fundamental principal of Ludington Novelty Co. v. Leonard, 62 C. C. A. 269, 127 Fed. 155. And under the special circumstances of this case, the amount to be received by the plaintiff should be determined according to what was done by the parties between December, 1898, when the plaintiff began to use his trademark, and October, 1900, when he entered into the employ of the defendants. That is, the plaintiff is to be allowed the same proportional part of the sum found by the master that he obtained of the total profits above the cost of manufacture while he used this trademark for himself. He should have also interest from the date of the filing of the master's original report. If the parties cannot agree upon this amount, the case must be recommitted to the master to determine it. This question has not been raised upon any of the exceptions to the master's report; but, upon the defendants' appeal, we must determine what decree is to be entered, and this necessarily requires us to fix the amount of profits for which, upon the facts found and reported, the de-

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fendants are to be held accountable. French v. Peters, 177 Mass. 568, 59 N. E. 449; Huntress v. Hanley, 195 Mass. 236, 239, 80 N. E. 946.

13. It is not necessary to consider in detail the other exceptions taken by the defendants. They cannot be sustained.

14. The defendants also contend that original jurisdiction of the subject-matter of this suit is vested in the courts of the United States, and that this court has not jurisdiction to entertain the case. In our opinion that contention is without merit. Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Re Keasbey & M. Co. 160 U. S. 221, 230, 40 L. ed. 402, 405, 16 Sup. Ct. Rep. 273; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270, affirming s. c. 35 C. C. A. 237, 94 Fed. 667; Traiser v. J. W. Doty Cigar Co. 198 Mass. 327, 84 N. E. 462; Regis v. Jaynes, 191 Mass. 245, 253, 77 N. E. 774; Smail v. Sanders, 118 Ind. 105, 20 N. E. 296.

The final decree must be modified in accordance with the twelfth division of this opinion. In all other respects the orders and decrees appealed from must be affirmed.

So ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANCIS C. WELCH, Trustee, etc.,
v.
GEORGE R. SWASEY et al., Board of Appeal.

(193 Mass. 364, 79 N. E. 745.)

Building — limitation of height — police power.

1. The state may, in the exercise of the police power, limit the height of buildings to be erected in cities when, in its judgment, the public health or public safety so require.

Same — restrictions — discrimination.

2. The legislature, in regulating the height of buildings in a city, may permit them to be higher in the sections where there is a call for office space than in the residential portions, although the streets in the former may be narrower than in the latter.

Legislature — delegation of power — building commission.

3. The legislature may delegate to a commission the power to determine the boundaries of the sections of a city in which the buildings of different heights as determined by the legislature shall be erected.

Same — self-government.

4. Where matters of local self-government may be intrusted to the inhabitants of towns, the legislature may delegate to a commission to be appointed by it the determination of the heights of buildings to be erected in different places within the city, where the statute provides for a general limitation upon the height to which buildings can be erected.

Building — restriction of height — reasonableness.

5. The prohibition of the erection of a building of greater height than 80 feet in the residential portion of a city unless the width on the street shall be at least one half its height is not so unreasonable as to make the regulation invalid.

Mandamus — constitutionality of statute.

6. The question of the constitutionality of a statute limiting the height of buildings may be considered under an application for a writ of mandamus to compel the issuance of a building permit which is refused because of the statute.

(January 1, 1907.)

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There appears to be no doubt of the proposition that the state may regulate the height of buildings in cities. And the conclusion reached in WELCH v. SWASEY, that such regulation was a valid exercise of the police power of the state, finds support in Cochran v. Preston, post, 1163; People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862.

So, the Massachusetts statute regulating the height of buildings adjacent to a certain square in the city of Boston, but giving compensation to persons injured in their property by the limitations which it created, was also upheld as a valid exercise of the police power in Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77. And upon appeal to the Supreme Court of the United States, that tribunal, in 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440, held that such statute was not in conflict with the Federal Constitution.

And in Atty. Gen. v. Williams, 178 Mass. 330, 59 N. E. 812, the same statute was held not to be unconstitutional as impairing the obligation of contracts.

But, in Parker v. Com. 178 Mass. 199, 59 N. E. 634, in which the court, in considering a similar statute, found it unnecessary to express an opinion whether a clear expression by the legislature of its intent to restrain the height of buildings in the exercise of its police power, without compensation to the owners, would infringe the Constitution, Chief Justice Holmes said: "Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so."

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ion of the full bench of an application for a writ of mandamus to compel the issuance of a building permit. Dismissed.

The facts are stated in the opinion.

Messrs. C. H. Tyler, O. D. Young, and B. E. Eames for petitioner.

Mr. Thomas M. Babson, for defendants:

Regulations in regard to the height and mode of construction of buildings in cities may be made by legislative enactments, in the exercise of the police power, for the safety, comfort, and convenience of the people, and for the benefit of property owners generally.

Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 478, 47 L.R.A. 314, 55 N. E. 77; Re Goddard, 16 Pick. 504, 28 Am. Dec. 259; People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; 1 Abbott, Mun. Corp. p. 237; 2 Tiedeman, State & Federal Control of Persons & Property, p. 754.

This power of the legislature may be deputized to municipal boards, commissioners, and other public officers.

Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; Com. v. Patch, 97 Mass. 221; Salem v. Maynes, 123 Mass. 372; Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; Sears v. Boston, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138; Stark v. Boston, 180 Mass. 293, 62 N. E. 375; Stanfill v. County Revenue Ct. 80 Ala. 287; Dunn v. County Revenues Ct. 85 Ala. 144, 4 So. 661; Feek v. Bloomingdale, 82 Mich. 393, 10 L.R.A. 69, 47 N. W. 37; Haigh v. Bell, 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666.

Knowlton, Ch. J., delivered the opinion of the court:

The principal question presented by this case is whether Stat. 1904, chap. 333, p. 283, and Stat. 1905, chap. 383, p. 309, and the orders of the commissioners appointed under them, relative to the height of buildings in Boston, are constitutional. A jurisdictional question, if the petitioner is entitled to relief, is whether a remedy can be given him by a writ of mandamus.

The principal question may be subdivided as follows: First, can the legislature, in the exercise of the police power, limit the height of buildings in cities so that none can be erected above a prescribed number of feet; second, can it classify parts of a city so that in some parts one height is prescribed and in others a different height; third, if so, can it delegate to a commission the determination of the boundaries of these different parts, so as to conform to the general provisions of the statute; fourth, can it delegate to a commission the making of rules and regulations such as to permit different heights in different places, according to the different conditions in different parts of one of the general classes of territory made in the original statute; fifth, if it can, are the rules and regulations made by the commissioners within the statute, and within the constitutional authority of the legislature and its agents?

In the exercise of the police power, the legislature may regulate and limit personal rights and rights of property in the interest of the public health, public morals, and public safety. Com. v. Pear, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 A. & E. Ann. Cas. 842; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306–318, 50 L. ed. 204–209, 26 Sup. Ct. Rep. 100. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power. Com. v. Strauss, ubi supra.

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light, and air, and thus to affect the public health. It may also increase the danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good. In Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77, this court said: "Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort, and convenience of the people, and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Salem v. Maynes, 123 Mass. 372; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27." In People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862, a statute limiting the height of dwelling houses to be erected in the city of New York was treated as unquestionably constitutional. See 1 Abbott, Mun. Corp. 237; 2 Tiedeman, State & Federal Control of Persons & Property, 754. There is nothing in Parker v. City. 178 Mass. 199, 59 N. E. 634, against the validity of the statutes now before us. That case was decided upon the construction given by the court to the legislative act under which it arose. The court held that the legislature had not assumed to determine that any limitation of the height of buildings on the designated streets was required in the interest

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fendants are to be held accountable. French v. Peters, 177 Mass. 568, 59 N. E. 449; Huntress v. Hanley, 195 Mass. 236, 239, 80 N. E. 946.

13. It is not necessary to consider in detail the other exceptions taken by the defendants. They cannot be sustained.

14. The defendants also contend that original jurisdiction of the subject-matter of this suit is vested in the courts of the United States, and that this court has not jurisdiction to entertain the case. In our opinion that contention is without merit. Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Re Keasbey & M. Co. 160 U. S. 221, 230, 40 L. ed. 402, 405, 16 Sup. Ct. Rep. 273; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270, affirming s. c. 35 C. C. A. 237, 94 Fed. 667; Traiser v. J. W. Doty Cigar Co. 198 Mass. 327, 84 N. E. 462; Regis v. Jaynes, 191 Mass. 245, 253, 77 N. E. 774; Smail v. Sanders, 118 Ind. 105, 20 N. E. 296.

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Knowlton, Ch. J., delivered the opinion of the court:

The principal question presented by this case is whether Stat. 1904, chap. 333, p. 283, and Stat. 1905, chap. 383, p. 309, and the orders of the commissioners appointed under them, relative to the height of buildings in Boston, are constitutional. A jurisdictional question, if the petitioner is entitled to relief, is whether a remedy can be given him by a writ of mandamus.

The principal question may be subdivided as follows: First, can the legislature, in the exercise of the police power, limit the height of buildings in cities so that none can be erected above a prescribed number of feet; second, can it classify parts of a city so that in some parts one height is prescribed and in others a different height; third, if so, can it delegate to a commission the determination of the boundaries of these different parts, so as to conform to the general provisions of the statute; fourth, can it delegate to a commission the making of rules and regulations such as to permit different heights in different places, according to the different conditions in different parts of one of the general classes of territory made in the original statute; fifth, if it can, are the rules and regulations made by the commissioners within the statute, and within the constitutional authority of the legislature and its agents?

In the exercise of the police power, the legislature may regulate and limit personal rights and rights of property in the interest of the public health, public morals, and public safety. Com. v. Pear, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 A. & E. Ann. Cas. 842; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306–318, 50 L. ed. 204–209, 26 Sup. Ct. Rep. 100. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power. Com. v. Strauss, ubi supra.

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light, and air, and thus to affect the public health. It may also increase the danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good. In Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77, this court said: "Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort, and convenience of the people, and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Salem v. Maynes, 123 Mass. 372; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27." In People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862, a statute limiting the height of dwelling houses to be erected in the city of New York was treated as unquestionably constitutional. See 1 Abbott, Mun. Corp. 237; 2 Tiedeman, State & Federal Control of Persons & Property, 754. There is nothing in Parker v. Cowen, 178 Mass. 199, 59 N. E. 634, against the validity of the statutes now before us. That case was decided upon the construction given by the court to the legislative act under which it arose. The court held that the legislature had not assumed to determine that any limitation of the height of buildings on the designated streets was required in the interest

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of the public health and public safety, or of the public welfare, and it left open the question whether the legislature might have made the restriction without providing compensation, if it had declared in the statute that no damages should be paid. It is for the legislature to determine whether the public health or public safety require such a limitation of the rights of landowners in a given case. Upon a determination in the affirmative, they may legislate accordingly.

The next question is whether the general court may establish different heights for different neighborhoods, according to their conditions and the uses to which the property in them is put. The statute should be adapted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable, not only in reference to the interests of the public, but also in reference to the rights of landowners. If these rights and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each should be made to yield reasonably to those upon the other side. The value of land and the demand for space in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was therefore reasonable to provide in the statute, that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.

The general subject is one that calls for a careful consideration of conditions existing in different places. In many cities there would be no danger of the erection of high buildings in such locations and of such a number as to affect materially the public health or safety, and no statutory restrictions are necessary. Such restrictions in this country are of very recent origin, and they are still uncommon. Unless they place the limited height at an extreme point, beyond which hardly anyone would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed, and the manner in which the land is laid out, and the nature of the approaches to it.

It was decided in Com. v. Boston Advertising Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601, that a statute of this kind cannot constitutionally be passed for a mere esthetic object. It was said in Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476-480, 47 L.R.A. 314, 55 N. E. 77, that the statute then before the court, enacted under the right of eminent domain, with compensation for landowners, would have been unconstitutional if it had been passed "to preserve the architectural symmetry of Copley square," or "merely for the benefit of individual property owners." The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely esthetic objects; but, if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary. We are of opinion that the provision of Stat. 1904, chap. 333, p. 283, for dividing parts of the city into two classes, on each of which there is a prescribed limit for the height of buildings, was within the power of the legislature, and in accordance with the constitutional principle applicable to the enactment.

The delegation to a commission of the determination of the boundaries of these parts for the two classes was within the constitutional power of the general court. The work of the commissioners, under the first act, was not legislation, but the ascertainment of facts, and the application of the statute to them for purposes of administration. Such subsidiary work by a commission is justified in many cases. Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607; Com. v. Sisson, 189 Mass. 247, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630, 75 N. E. 619; Stark v. Boston, 180 Mass. 293, 62 N. E. 375; Re Kingman, 153 Mass. 566, 12 L.R.A. 417, 27 N. E. 778; Taunton v. Taylor, 116 Mass. 254; Nelson v. State Bd. of Health, 186 Mass. 330, 71 N. E. 693; Com. v. Bennett, 108 Mass. 27; Marshall, Field & Co. v. Clark, 143 U. S. 649-692, 36 L. ed. 294-309, 12 Sup. Ct. Rep. 495; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444.

The delegation to a commission of the power to fix different heights in different places in the parts included in class B, under Stat. 1905, chap. 383, p. 309, goes further, and allows the commissioners to make rules and regulations which are in the nature of subsidiary legislation. This is within the principle referred to in Brodbine v. Revere, ubi supra, and in some of the other cases above cited. It is that, under our system in Massachusetts, matters of local self-government might always be intrusted to the inhabitants of towns. On the establishment of cities, this power is exercised by the city council, or by some board or commission representing the inhabitants. Even in towns such powers have long been exercised by local boards, for example, by the board of health. Originally such representatives of the local authority

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were elected by the people; but for many years local boards, appointed by the governor or other executive authority, have sometimes been intrusted with the exercise of this legislative authority. It is true that they are further from the people than the members of a city council, for whom the people vote, but in a true sense they represent the inhabitants in matters of this kind. Our decisions cover this point also. Com. v. Plaisted and Brodbine v. Revere, ubi supra. It does not follow that all rules and regulations made under such a delegation of authority would be constitutional merely because the original statute is unobjectionable. Such rules may be tested by the courts to see whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests, and whether they have a real, substantial relation to the public objects which the government can accomplish. A statute, ordinance, or regulation will not be held void merely because the judges differ from the legislators as to the expediency of its provisions. But, if it is arbitrary and unreasonable, so as unnecessarily to be subversive of rights of property, it will be set aside by the courts. Re Jacobs, 98 N. Y. 98–110, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389–403, 4 Am. St. Rep. 465, 17 N. E. 343; Health Dept. v. Trinity Church, 145 N. Y. 32–40, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561–593, 50 L. ed. 596–609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306–318, 50 L. ed. 204–209, 26 Sup. Ct. Rep. 100; Lawton v. Steele, 152 U. S. 133–137, 38 L. ed. 385–388, 14 Sup. Ct. Rep. 499; Dobbins v. Los Angeles, 195 U. S. 223–238, 49 L. ed. 169–176, 25 Sup. Ct. Rep. 18; Jacobson v. Massachusetts, 197 U. S. 11–31, 49 L. ed. 643–651, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765.

We do not see that the action of the commissioners, under Stat. 1905, was beyond their power under the Constitution. It was seemingly in accordance with the general purpose of the legislature, and was directed to considerations which they deemed proper in adjusting the rights and interests of property owners and the public. The question is not whether the court deems all the provisions wise; but whether they appear to be outside of the constitutional power of the commission. In prescribing heights in the district, the commissioners might make the width of the streets on which a building was to be erected one factor to be considered. Their action in this particular relates wholly to buildings in class B, which includes only the residential parts of the city.

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We cannot say that the prohibition of the erection of a building of a greater height than 80 feet in class B, unless its width "on each and every public street upon which it stands will be at least one half its height," was entirely for esthetic reasons. We conceive that the safety of adjoining buildings, in view of the risk of the falling of walls after a fire, may have entered into the purpose of the commissioners. We are of opinion that the statutes and the orders of the commissioners are constitutional.

We think that the court has jurisdiction to dispose of the case on the merits, under this petition for a writ of mandamus. The wrong alleged is that the building commissioner, and afterwards the board of appeal, refused to give the petitioner a permit to erect a building. It is conceded that the petitioner was not entitled to a permit if the statutes and orders referred to are constitutional. He alleges that the board of appeal refused to do their duty, and that his only effectual remedy is by a writ of mandamus, ordering them to grant a permit. The case comes within the general rule giving jurisdiction to issue such writs. Farmington River Water Power Co. v. Berkshire County, 112 Mass. 206–212; Carpenter v. Bristol County, 21 Pick. 258, 259; Atty. Gen. v. Boston, 123 Mass. 460. See Locke v. Lexington, 122 Mass. 290; Atty. Gen. v. Northampton, 143 Mass. 589, 10 N. E. 450.

The building commissioner and the board of appeal are not judicial officers. Stat. 1892, chap. 419, p. 471; Stat. 1894, chap. 443, p. 494. The fact that a refusal to act is founded on a mistake of law does not preclude a remedy by a writ of mandamus. In cases where the duty to perform an act depends solely on the question whether a statute or ordinance is constitutional and valid, the question may sometimes be determined on a petition for a writ of mandamus. Atty. Gen. v. Boston, 123 Mass. 460; Warren v. Charlestown, 2 Gray, 84; Larcom v. Olin, 160 Mass. 102–110, 35 N. E. 113.

Petition dismissed.

Affirmed by Supreme Court of United States, May 17, 1909, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567.

MARYLAND COURT OF APPEALS.

WILLIAM F. COCHRAN, JR., Appt.,
v.
EDWARD D. PRESTON, Building Inspector, et al.

(108 Md. 220, 70 Atl. 113.)

Buildings — limiting height — authority.

1. The legislature may limit the height of buildings in a section of a city which is

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devoted to fine residences, public buildings, and works of art, for the purpose of protecting such buildings and works from the ravages of fire.

Same — unjust discrimination.

2. The owners of buildings on the higher ground are not deprived of the equal protection of the laws by a statute limiting the height of buildings to a certain distance above a point located on the high ground of a city, although the buildings on lower ground might exceed theirs in the actual height from the ground.

Same — exception of churches.

3. The exception of churches in a statute limiting the height of buildings in a city does not deprive the owners of private property of the equal protection of the laws.

(June 24, 1908.)

APPEAL by relator from an order of the Court of Common Pleas which dismissed an application for a writ of mandamus to compel the issuance of a permit for the alteration of a building. Affirmed.

The facts are stated in the opinion.

Messrs. Yellott & Symington, for appellant:

Buildings cannot be controlled by law, with a view to securing beauty or symmetry.

Freund, Pol. Power, 1904, §§ 180, 181, 511, 514; 2 Tiedeman, State & Federal Control of Persons & Propery, p. 755; Tiedeman, Pol. Power, p. 4; Com. v. Boston Advertising Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; Belmont v. New England Brick Co. 190 Mass. 442, 77 N. E. 504; Parker v. Com. 178 Mass. 199, 59 N. E. 634; Welch v. Swasey, 193 Mass. 365, ante, 1160, 118 Am. St. Rep. 523, 79 N. E. 745; Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77; People v. Green, 85 App. Div. 400, 83 N. Y. Supp. 460; St. Louis v. Dorr, 145 Mo. 466, 42 L.R.A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976; People v. Hufland, 86 App. Div. 612, 83 N. Y. Supp. 1113; Dill. Mun. Corp. 4th ed. § 600; Farist Steel Co. v. Bridgeport, 60 Conn. 278, 13 L.R.A. 590, 22 Atl. 561.

The act is not a valid exercise of the police power.

22 Am. & Eng. Enc. Law, 2d ed. pp. 935, 938; Tiedeman, Pol. Power, pp. 10, 12; Lewis, Em. Dom. § 156; Dill. Mun. Corp. 4th ed. § 141; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; California Reduction Co. v. Sanitary Reduction Works, 61 C. C. A. 91, 126 Fed. 29; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Jackson & M. Pl. Road Co. 9 Mich. 285; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Austin v. Murray, 16 Pick. 121; Grand Rapids v. Powers, 89 Mich. 94, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; Re Cheesebrough, 78 N. Y. 237; Young v. Com. 101 Va. 853, 45 S. E. 327; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Tilford v. Belknap, 126 Ky. 244, 11 L.R.A. (N.S.) 708, 103 S. W. 289; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; St. Louis v. Hill, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; First Nat. Bank v. Sarlls, 129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434; Crawford v. Topeka, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476.

The act denies the equal protection of the laws.

Cooley, Const. Lim. p. 561; 8 Cyc. Law & Proc. p. 1059; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Janesville v. Carpenter, 77 Wis. 289, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Anderton v. Milwaukee, 82 Wis. 279, 15 L.R.A. 830, 52 N. W. 95; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; Union County Nat. Bank v. Ozan Lumber Co. 127 Fed. 206; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Messrs. W. Cabell Bruce, Edgar Allan Poe, and Sylvan Hayes Lauchheimer, for appellees:

An act need not apply to all portions of a city, or to all individuals.

Garrett v. Janes, 65 Md. 267, 3 Atl. 597; State v. Broadbelt, 89 Md. 580, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; Watertown v. Mayo, 109 Mass. 319, 12 Am. Rep. 694; Welch v. Swasey, 193 Mass. 364, ante, 1160, 118 Am. St. Rep. 523, 79 N. E. 745.

The state in the exercise of the police power can limit the height of buildings.

Lewis, Em. Dom. § 156, p. 387; Tiedeman, State & Federal Control of Persons & Property, p. 754; Welch v. Swasey, supra; Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 478, 47 L.R.A. 314, 55 N. E. 77; Watertown v. Mayo, supra; People ex rel. Kemp v. D'Oench, 111 N. Y. 361, 18 N. E. 862.

Worthington, J., delivered the opinion of the court:

The only question involved in this appeal is whether or not the act of 1904, chap. 42, p. 63, is a valid exercise of legislative power. By this act it is provided

Note. — See note to Welch v. Swasey, ante, 1160, as to constitutionality of statute or ordinance limiting height of building.

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"that from and after the date of the passage of this act, no building, except churches, shall be erected or altered in the city of Baltimore on the territory bounded by the south side of Madison street, the west side of St. Paul street, the north side of Centre street, and the east side of Cathedral street, to exceed in height a point 70 feet above the surface of the street at the base line of Washington Monument." The act was approved March 15, 1904. The ordinances of Baltimore require all persons who desire to build, alter, or repair any structure within the limits of the city, or who desire to put an additional story upon any building therein, to obtain a permit from the inspector of buildings, and also from the appeal tax court of that city. The appellant is the owner of a large apartment house, located on the northwest corner of Mt. Vernon place and Washington place, within the territory to which the prohibition of the statute applies; and, desiring to put an additional story thereon to be used as quarters for employees, he applied to the appellees for a permit to make the desired alteration. In his application for such a permit the applicant stated that the house is at present 70 feet high, and that the proposed addition would be but 8 feet in height, and set back on the roof at a uniform distance of 20 feet from Mt. Vernon place, and a like uniform distance from Washington place, and that it would not be possible to see any part of the addition from either of these places. That the total cost of the building and ground, in the first place, was about $450,000, and that, as the building now stands, it is impossible to derive from the same a sufficient revenue to yield a fair profit on the investment therein, but that the proposed addition would enable the owner to derive a fair return for the whole outlay. The appellees refused the permit, on the ground that the additional story proposed would raise the building to a height greater than 70 feet above the base line of Washington Monument, contrary to the provisions of the act of assembly above mentioned. A mandamus was then applied for, and denied by the court for the same reason assigned by the appellees in the first instance.

It is elementary that the word "land," in its legal signification, has an indefinite extent upwards as well as downwards, and therefore, if it were possible for man to live in a state of nature, unconnected with other individuals, the proprietor of land would own, not only the face of the earth within the boundaries of his proprietorship, but also everything under it and over it. An imaginary person, living in such a state of nature, would be at liberty to use his land as he pleased, to build on it to any height, and to dig into it to any depth, without restraint. But as man was formed for society, and is incapable of living alone, organized society is essential to his well-being and happiness, and every person who enters society must give up a part of his so-called natural rights and liberties for the benefit of the community. 1 Bl. Com. p. 125. "The very existence of government presupposes the right of the sovereign power to prescribe regulations, demanded by the general welfare, for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all." Parker & W. Public Health & Safety, § 14. The power to prescribe regulations, demanded by the general welfare, for the common protection of all, is known as the police power of the state, and is inherent in every sovereignty. Prentice, Pol. Powers, p. 6; Com. v. Alger, 7 Cush. 53; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. Among the police powers of the state the right to regulate the height of buildings in a city is one that cannot be questioned. Lewis, Em. Dom. § 156; Tiedeman, State & Federal Control of Persons & Property, p. 754; Welch v. Swasey, 193 Mass. 364, ante, 1160, 118 Am. St. Rep. 523, 79 N. E. 745. Yet such regulations must be reasonable in their character, and adapted to accomplish the purpose for which they are designed. People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; Watertown v. Mayo, 109 Mass. 319, 12 Am. Rep. 694; Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 477, 47 L.R.A. 314, 55 N. E. 77.

As the purpose of the statute under consideration does not appear on its face, such purpose is open to inquiry, and the appellant contends that its purpose was and is to preserve the beauty and architectural symmetry of the environment of Washington Monument, and that in the exercise of the police power property rights cannot be impaired for purely esthetical purposes. To sustain the legal proposition, he quotes from Freund, Police Power, 1904, § 181, as follows: "If the purposes were purely esthetic, the impairment of property rights, even upon payment of compensation, would not pass unchallenged;" and also from 2 Tiedeman, State & Federal Control of Persons & Property, p. 755, as follows: "Regulations which are designed only to enforce upon the people the legislative conceptions of artistic

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beauty and symmetry will not be sustained, however much such regulations may be needed for the artistic education of the people." Such is undoubtedly the weight of authority, though it may be that, in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power, even for such purposes. In Welch v. Swasey, supra, it is said that, "if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in as auxiliary." And our predecessors have said, in speaking of an ordinance of Baltimore city, passed in pursuance of the act of 1833, chap. 180, and regulating the distance that any portico, steps, or other ornamental structure on Mt. Vernon place might extend from the building line into the street, that the object was, "in furtherance of the purpose to render . . . [these places or squares] attractive, to give more freedom to the exercise of private taste for adornment in their vicinity. In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable." Garrett v. Janes, 65 Md. 260, 3 Atl. 597. We do not assent, however, to the proposition that the statute under consideration was passed for purely ornamental purposes.

We find a more substantial reason for its enactment in the suggestion of the counsel for the appellees that its purpose was to protect the handsome buildings and their contents, located in that vicinity, and also the works of art clustered there, from the ravages of fire. It must be remembered that in the center of the prescribed territory to which the statute applies stands the lofty and beautiful monument to the illustrious Washington; on one corner of Mt. Vernon place and Washington place is the handsome Mt. Vernon Methodist Episcopal Church, on another is the Peabody Institute, a stately marble building, in which are kept for public use many rare and valuable books and works of art, to replace which would be wellnigh impossible; in the same neighborhood are numerous handsome residences of private citizens, containing valuable works of art and of literature. In Mt. Vernon and Washington places are found statutes to several eminent Marylanders,—Severn Teackle Wallis, Roger B. Taney, and General John Eager Howard, and also a number of beautiful figures, known as the "Barye bronzes," so that the environment of the locality in question is, in several respects, unique, and well worthy of preservation in its entirey. During the session of the legislature at which the statute under consideration was passed, a great fire visited Baltimore, and destroyed a large part of the business section of the city. Extracts from an account of the fire will demonstrate some of the dangers to be apprehended from this devouring element. The account says: "The fire spread to the north and east, rapidly devouring block after block of buildings. Landmark after landmark went down. Nothing but burnt clay—bricks and cement—could stand against a conflagration which developed 2,500 degrees of heat, and was carrying itself along by its own volume, against which no water supply, no human effort, could be effective. The lofty skyscrapers on Charles, St. Paul, Calvert, and Baltimore streets burned like great torches up to the sky. Granite and marble cracked and spalled off. The marble work of the new customhouse, then in course of construction, was badly damaged wherever exposed to the heat, as was also the St. Paul street front of the new courthouse. Shortly after midnight the American newspaper office was enveloped in flames, which quickly spread across to the Sun Iron Building, involving all in common ruin. Devastation was carried down Calvert street, down South street, and Holliday street and Gay street, wiping out hotels, newspaper offices, bank buildings, warehouses, and nearly everything in the way, clear to the water front of the inner harbor. Among the buildings destroyed were many so-called fireproof structures. After the fire these lofty buildings stood amidst the ruins of lesser buildings, like gaunt skeletons, burned out interiorally but still 'structurally fireproof,' with from 40 to 60 per cent salvage credited to their construction." Great impetus is given to such a fire by very tall buildings. They serve as so many large funnels furnishing draft for the flames, thereby intensifying the heat, and outreaching the efforts of the firemen. Already some very tall buildings have been erected in this locality; the "Hotel Stafford" being 132 feet high, and the apartment house known as "The Severn" being 115 feet above the pavement at the base line of Washington Monument. It was to prevent the multiplication of such buildings in this neighborhood, and the increased danger from fire attendant thereon, that this statute was no doubt passed. We consider such an object entirely legitimate, and the statute valid as far as its purpose is concerned.

The appellant contends, however, that as the prescribed territory is hilly, and the base line of Washington Monument practically the highest point within its limits, persons owning property on lower ground

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have an advantage over those whose property is located on the higher ground, because the former may build houses to a greater height than the latter, and that therefore the statute denies the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States. While we recognize the force of this contention, we think, when it is remembered that the primary object of the law is protection from fire, it is met by the consideration that very tall buildings on the highest part of the ground would be more difficult to deal with in case of fire than such buildings lower down. By operating from the higher portions of ground, water might be thrown on tall buildings further down the hill, and reach the top, while the tops of buildings of the same height on the higher ground would be wholly out of the reach of the fire apparatus. "In virtue of its right and duty to provide for the public welfare, the legislative branch of government possesses a vast and indefinable power and a large discretion as to the manner in which it shall be exercised." Parker & W. Public Health & Safety, § 4. If the object of the statute is to promote the public welfare, and there is a substantial relation between the object aimed at and the means devised for attaining that object, every intendment will be in favor of the entire validity of such statute. Ibid.; Adler v. Whitbeck, 44 Ohio St. 539, 562, 9 N. E. 672; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. The presumption in favor of the validity of the statute should prevail, unless the lack of constitutional authority is clearly demonstrated. United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

It was for the legislature to determine the manner in which the purpose aimed at was to be accomplished, and we are not prepared to say that the method adopted does not bear a substantial relation to the object aimed at, or that it denies the equal protection of the laws, as that term is understood and construed. Easton v. Covey, 74 Md. 262, 22 Atl. 266; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; Hine v. New Haven, 40 Conn. 478; People ex rel. Kemp v. D'Oench, 111 N. Y. 361, 18 N. E. 862. In the last-mentioned case the court held that a statute regulating the height of all houses used as dwellings did not include stores, factories, warehouses, buildings used for offices, or hotels, and that it was a valid exercise of the police powers, although, because private residences were seldom above the prescribed height, it, in effect, applied only to tenement and apartment houses. The last-mentioned case is also authority for upholding the present statute, although churches are, in terms, exempted from its operation. There is not the same reason for regulating the height of churches as of some other buildings. The former frequently have spires for ornamental purposes, reaching a much greater height than 70 feet, but they do not present the same danger from fire to the surrounding buildings as many other structures do, chiefly because they are not likely to become very numerous in any one locality.

After a careful consideration of the case in all its different aspects, we think the order of the lower court dismissing the application for a writ of mandamus was right, and the same will therefore be affirmed. Order affirmed, with costs.

Appeal dismissed by Supreme Court of United States.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

THIRD NATIONAL BANK OF ST. LOUIS, Plff. in Err.,
v.
W. H. RICE.

(88 C. C. A. 640, 161 Fed. 822.)

Money had and received — wrongdoer — reimbursement.

One who wrongfully takes possession of cattle which are subject to chattel mortgage, and after their sale disclaims all title to them, and consents that the proceeds be turned over to one claiming them under another mortgage, cannot, when a judgment is recovered against him for their value by the mortgagee, which he satisfies, maintain a suit against the one to whom the proceeds were turned over, for money had and received to his use, for the purpose of reimbursing himself for his outlay.

(May 2, 1908.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in plaintiff's fav-

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Note. — The above case and that of Bacon v. Kimmel, discussed by the court in THIRD NAT. BANK v. RICE, appear, from an extended search, to be the only decisions which have passed on the question of the effect as to third persons of the doctrine that satisfaction of a judgment in trover vests title in the defendant by relation.

An analogous case, throwing light upon the court's position as to relation in general, where the rights of third persons become involved, is found in Case v. De Goes, 3 Caines, 261. It was held in this case that one who cut saw logs under a license from

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or in an action brought to recover the proceeds of certain cattle which had been sold, which proceeds had been applied in satisfaction of a mortgage. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Adams, Circuit Judges, and Philips, District Judge.

Mr. Thomas F. Galt for plaintiff in error.

Messrs. **Beardsley, Gregory, & Kirshner**, with Messrs. **R. F. Walker** and **Alfred Gregory**, for defendant in error:

The payment of a judgment in trover for a wrongful conversion of personal property vests the title to the property converted in the defendant, the title in such cases being transferred by operation of law.

2 Kent, Com. 387, 388; 26 Am. & Eng. Enc. Law, p. 815; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Kelly v. Forty-second Street, M. & St. N. Ave. R. Co. 37 App. Div. 500, 55 N. Y. Supp. 1096; Mitchell v. Shaw, 53 Mo. App. 652; Smith v. Smith, 51 N. H. 571; Marsden v. Cornell, 62 N. Y. 220; Thayer v. Manley, 73 N. Y. 307.

When a person comes into possession of chattels or money which of right belong to another, and he converts them to his own use, then the law implies a promise to repay the money or the value of the chattels to the persons rightfully entitled, and in such case it is no longer necessary to aver a promise, but it is enough to set out the facts from which the promise will be inferred.

Pom. Code Pl. §§ 538–540; Farron v. Sherwood, 17 N. Y. 227; Brand v. Williams, 29 Minn. 238, 13 N. W. 42; Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; Deal v. Mississippi County Bank, 79 Mo. App. 269; Bank of Metropolis v. First Nat. Bank, 22 Blatchf. 58, 19 Fed. 301; Clark v. First Nat. Bank, 57 Mo. App. 285; Chase v. Willman Mercantile Co. 63 Mo. App. 482; Siems v. Pierre Sav. Bank, 7 S. D. 338, 64 N. W. 167; Greer v. Lafayette County Bank (Tex. Civ. App.) 47 S. W. 737; Kelly v. Forty-second Street, M. & St. N. Ave. R. Co. supra; Singer Mfg. Co. v. Skillman, 52 N. J. L. 263, 19 Atl. 260; John A. Tolman Co. v. Waite, 119 Mich. 341, 75 Am. St. Rep. 400, 78 N. W. 124.

The title obtained by the payment of the judgment relates back so as to cut out the defendant, who obtained possession of the money pending the action, the doctrine of relation being used for the equitable purpose of protecting intermediate bona fide purchasers for value only.

24 Am. & Eng. Enc. Law, 2d ed. pp. 275, 277, 278; Stahl v. Lynn, 86 Wis. 75, 56 N. W. 188; Case v. De Goes, 3 Caines, 263; Griel v. Pollak, 105 Ala. 249, 16 So. 704.

The petition states a promise of the defendant to pay the plaintiff.

Richardson v. Moffitt-West Drug Co. 92 Mo. App. 515; Fox v. Pullman Palace Car Co. 16 Mo. App. 122; Tamm v. Kellogg, 49 Mo. 118; Moses v. Macferlan, 2 Burr. 1005; Field v. Brown, 146 Ind. 293, 45 N. E. 464; Bliss, Code Pl. 3d ed. § 152; Wills v. Wills, 34 Ind. 106; Gwaltney v. Cannon, 31 Ind. 229; Farron v. Sherwood, supra; Jordan & S. Pl. Road Co. v. Morley, 23 N. Y. 552; Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; Wells v. Pacific R. Co. 35 Mo. 164; Wetmore v. Crouch, 150 Mo. 681, 51 S. W. 738.

It is not necessary to allege a promise to pay, nor is privity of contract between plaintiff and defendant essential.

Clifford Bkg. Co. v. Donovan Commission Co. 195 Mo. 289, 94 S. W. 527.

Johnson-Brinkman Commission Co. v. Central Bank, supra; Calais v. Whidden, 64 Me. 249; Mason v. Waite, 17 Mass. 563; Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Colgrove v. Fillmore, 1 Aik. (Vt.) 347; Tamm v. Kellogg, supra; Hall v. Marston, 17 Mass. 575; Richardson v. Moffitt-West Drug Co. supra.

The mortgage was good, as between the parties, and even as against any subsequent mortgagee.

6 Cyc. Law & Proc. pp. 1022, 1023, 1029; First Nat. Bank v. Marshall & I. Bank, 108 Mich. 114, 65 N. W. 604; McDermed v. Hutchinson Wholesale Grocer Co. 63 Kan. 884, Appx., 65 Pac. 668; Scrafford v. Gibbons, 44 Kan. 533, 24 Pac. 968; Griffiths v. Wheeler, 31 Kan. 17, 2 Pac. 842; Tootle v. Lyster, 26 Kan. 589; Yant v. Harvey, 55 Iowa, 421, 7 N. W. 675.

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another who was in possession of land by writ of restitution was not liable for trespass by relation, although the proceedings under which the licensor was in possession were quashed and restitution ordered. The court said: "But it is a general rule with respect to the doctrine of relation, that it shall not do wrong to strangers. . . . This rule is fully recognized in Menvil's Case, 13 Coke, 21, where it is said that by relation a thing may be considered as annulled *ab initio* betwixt the same parties, to advance a right; but the law will never make such a construction to advance a wrong, or to defeat collateral acts which are lawful, and principally if they concern strangers. Thus, also, in Liford's Case, 11 Coke, 51, it is ruled that, where a person is disseised, the disseisee, after re-entry, can maintain trespass against the disseisor; for the law, as to the disseisor and his servants, will suppose the freehold to have continued in the disseisee; but not so with respect to strangers who come in by right or title under the disseisor; they cannot be made trespassers by relation."

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The thing which passes from the judgment creditor to the judgment debtor when he pays the judgment for full value is the right to the property itself or its value.

Smith v. Gibson, Cas. t. Hardw. 319; Adams v. Broughton, Andrews, 18; Benjamin, Sales, 7th ed. p. 59; Acheson v. Miller, 2 Ohio St. 206, 59 Am. Dec. 663; Griel Bros. v. Pollak, 105 Ala. 249, 16 So. 704.

Phillips, District Judge, delivered the opinion of the court:

The defendant in error (plaintiff below) recovered judgment in the sum of $2,086.77 against the plaintiff in error (defendant below) in an action of assumpsit for money had and received. To reverse this judgment, this writ of error is prosecuted. The controversy arose out of the following state of facts, briefly stated:

One Gillette, a large dealer in cattle in Kansas, who seems to have had a mania, as well as genius, for giving multiplied and conflicting chattel mortgages on the same herd or lot of cattle, by either mixing up the brands or giving the cattle an ostensible different situs, in 1898 acquired about 1,866 head of Texas cattle with the brand "J. A. L." There were various mortgages on these cattle. Notes issued by him, apparently secured by such mortgages, were negotiated by cattle commission merchants at Kansas City, Missouri, to various purchasers, who seem to have taken them avidiously on account of the high rate of interest they bore and the assumed security on tangible cattle. In November, 1898, after he had exhausted his resourcefulness in obtaining money and credit by such factitious methods, and his creditors began to press him, threatening him with prosecutions for obtaining money under false pretenses, Gillette fled the country, taking refuge in the Republic of Mexico. Among those claiming mortgage liens upon some of the Gillette cattle was the firm of Rice Bros. & Nixon, doing business at Kansas City, Missouri, as commission cattle merchants. After Gillette left, Rice Bros. & Nixon sent one George Rice to the pastures out in Kansas to look after the cattle in which they claimed an interest. He found some of the cattle with the brand on which they claimed a mortgage lien in what is known as the "Plum Feed Lots" and some in what is known as the "Brogan Pasture." He discovered on inspection that these cattle were mixed with those of another brand. Brogan, in charge of the cattle in his lots, refused to let George Rice remove them. Thereupon Nixon, of said firm, went out and met Rice. After consultation, they invaded the Brogan pasture between midnight and 1 o'clock A. M., broke down the fence, and drove away all of the cattle in the lot several miles to Neosho, a station on the railroad leading to Kansas City. Nixon then went to the Plum lot, and, leaving enough cattle there to secure Plum as an agistor of Gillette, drove the residue to Neosho, and shipped the whole of the two lots to Rice Bros. & Nixon at the stock yards in Kansas City. Included in these lots of cattle were 128 head bearing a different brand from that to which the plaintiff laid any claim. Nixon knew, when thus tortiously removing the cattle, that there were among them those to which his firm asserted no claim. His only excuse for this lawless act was the trouble and difficulty of separating in the nighttime the different brands. When the cattle reached the yards at Kansas City, Nixon separated those on which the plaintiff claimed a lien and reshipped them to a pasture in the state of Iowa. Instead of making restitution, as far as they might, by returning the 128 head of cattle to the close where Nixon found them, Nixon, acting for his firm, left them in charge of one Munger, their bookkeeper, with instructions to turn them over to the person he (Munger) might think best entitled to them.

Other creditors of Gillette were on the *qui vive*, looking out for any Gillette cattle which might come to said stock yards, as there was considerable clamor among them as to their respective rights to the Gillette cattle. Among them was the National Bank of Commerce of Kansas City, which had a branch bank at said stock yards under the immediate management of one Voorhees. Learning about the situation of said 128 head of cattle, the president of said bank, with an inspector, looked over them and informed Munger that the bank held large amounts of Gillette paper and was anxious to get hold of as many of the Gillette cattle as possible. Rice Bros. & Nixon were evidently anxious to get out of the ugly and embarrassing situation into which Nixon's tortious conduct had brought them, by unloading the burden on anyone willing to take it. Accordingly, Munger turned the 128 head of cattle over to the National Bank of Commerce, with the understanding between them that the bank would hold them harmless from the consequences of their acts in the transaction.

As this arrangement was between Munger, representing the plaintiff, and the bank, it is important to follow the testimony of Munger, a witness on behalf of the plaintiff. After stating that Nixon separated the 128 head of cattle in question from the others shipped in by him, and took those claimed by the firm to a pasture in Iowa, he was asked: "In whose charge did Nixon leave the 128 head of cattle?" He answered: "In my charge." Then, stating that Nixon said to him "to

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turn them over to the parties to whom I thought had the best claim on them," he was pressed, on cross-examination, to state the exact language or terms employed between him and the representative of the bank in turning the cattle over to the latter. His answer was that Voorhees said "that the National Bank of Commerce owned a large amount of Gillette paper, and they were making an effort to secure all of the cattle in which Gillette was interested in any way, and asked me to turn these cattle over to the bank." After stating that Voorhees said the bank would have the cattle sold and the money held as a special deposit until the rightful ownership was decided, he was asked: If the National Bank of Commerce did not say that they would hold the firm of Rice Bros. & Nixon harmless against any loss that they might suffer on account of your turning these cattle over to them?

A. Yes, sir. . . . He (Voorhees) asked me to turn the cattle over to the National Bank of Commerce. I asked him if the National Bank of Commerce would stand good to us for the cattle in case anybody else proved a better title or a better right to them.

. . .

A. I did. . . . And he said that they would. If we would turn these cattle over to him or to the National Bank of Commerce, they would stand good to us and protect us from all liability. But I did not immediately turn them over to him. I called Mr. Winants (the vice president of the bank) over the telephone, and told him what Mr. Voorhees had said and the proposition Mr. Voorhees had made to me, and I asked him to confirm it, and he did. He said the National Bank of Commerce would do that.

Q. Why did you wish to turn these cattle over to anybody?

A. Because they did not—because we had no claim on them.

Q. Is it not a fact that you were anxious to get rid of the cattle, so as to avoid being held for them, and anxious to get somebody else to take them off your hands?

A. We were anxious to get rid of the cattle.

Q. Were you not anxious to turn these cattle over to somebody else, in order to get rid of the liability for them? Is that not a fact?

A. To a certain extent.

Q. Is it not a fact?

A. Yes.

He then stated that he turned the cattle over to the National Bank of Commerce for Rice Bros. & Nixon.

Q. I will ask you if you turned these cattle over to the National Bank of Commerce to hold for the account of Rice Bros. & Nixon?

A. I did not.

Q. I will then ask you again if you did not turn these cattle over to the National Bank of Commerce for them to hold as their own interest?

A. I did not."

Then, being inquired of as to why he turned the cattle over to the National Bank of Commerce, he answered: "Because I thought that in all probability they had a better claim to them than anybody else, on account of their owning a large amount of paper taken from the various commission firms at the Kansas City Stock Yards. . . . We had absolutely no claim on the cattle."

The Bank of Commerce, discovering that it had no lien on these cattle, in turn became anxious to get rid of them. The representative of the bank advised Munger of that fact, and inquired what should be done with the cattle. Thereupon it was agreed to turn them over to the Siegel-Sanders Commission Company to sell. At that time the cattle were in a lot subject to the order of Munger, and he gave to Voorhees a "title order in blank for them."

Q. Was there anything in this order that the National Bank of Commerce was to hold these cattle for the person who held rightful title to them?

A. The title orders are blanks furnished by the stock yards, and they do not permit anything to be written on the order except the number of animals and to whom the stock belongs and to whom it is to be delivered. That order, then, had to be surrendered to the stock yards company.

On further cross-examination of Munger, the following occurred:

Q. I will ask you to relate your conversation with Mr. Voorhees when you turned these cattle over to him?

A. Mr. Voorhees told me that the National Bank of Commerce owned a large amount of Gillette paper; that they were trying to secure as many of the cattle as possible in which Gillette had any interest; and he told me, if we would turn the cattle over to them, they would be responsible to us,—hold us harmless for the value of the cattle—if there were anyone appeared who had a better right to them.

Q. Is it not a fact that you turned these cattle over to the National Bank of Commerce because you thought that they were the most responsible parties, that they would be able to protect you against loss?

A. That is partly, but not wholly, the reason.

Q. What was the other reason?

A. I thought the chances were that they

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would have a better right to the cattle than the other claimants, inasmuch as they had taken a large amount of this Gillette paper from the various commission merchants at the yards.

The Third National Bank of St. Louis (defendant below) at that time held a mortgage on Gillette cattle, which it claimed covered the 128 head in question. Its claim was placed in the hands of Mr. Ball, an attorney of Kansas City, who applied to Rice Bros. & Nixon, and informed them that his client held a mortgage on the cattle, and demanded that they be turned over to him, when he was informed "that they had nothing more to do with it; that those cattle were in charge of Siegel-Sanders Commission Company for the Bank of Commerce, and they had nothing to do with it." Thereupon Mr. Ball demanded the cattle of said commission company. He was informed by them that the Bank of Commerce claimed them, and that they had the cattle for sale, and they would proceed to sell them and turn the money over to the Bank of Commerce. Mr. Ball further testified that it was suggested in the interview that, as the cattle were in the yards on expense, Siegel-Sanders Company could sell them and deposit the money in the Bank of Commerce until it could be ascertained whether the Third National Bank of St. Louis or the Bank of Commerce was entitled to it. When he applied to the Bank of Commerce, he learned from Mr. Winants (vice president) that the Siegel-Sanders Company had sold the cattle and kept the money, and the Bank of Commerce made no claim to it. He then applied to Siegel-Sanders Company for the proceeds, and received from them a check therefor, which he indorsed and forwarded to his client. He further stated that he did not remember the brand of the cattle, but: "I remember that I claimed under what was known as the Dunlap mortgages, and that they bore the brands purporting to be covered by those mortgages."

Soon after the foregoing occurrences, a suit was instituted of rather a peculiar comprehensive character, in the district court of Chase county, Kansas, by one of Gillette's mortgagees, asserting priority of right to certain of the Gillette cattle, including the 128 head in question. Rice Bros. & Nixon, among others, were made parties defendant, and appeared thereto. Although named as a defendant, the Third National Bank of St. Louis was not served with process and did not appear to that suit. After taking evidence, a decree was entered therein, by consent, determining the manner in which the funds in the hands of the receiver of that court, arising from the sales of cattle to which there were conflicting claims, should be apportioned among them; also rendering judgment against Rice Bros. & Nixon for the value of the cattle wrongfully taken by them as aforesaid. Having satisfied that judgment, Rice Bros. & Nixon at once instituted an action at law in the circuit court of Jackson County, Missouri, against the National Bank of Commerce, based on said contract of indemnity between them, made on their behalf by Munger. They were defeated in that action, on the ground taken by the court that the contract was contrary to public policy. See 98 Mo. App. 696, 73 S. W. 930, where the case is reported. Nixon having retired from the copartnership, and one of the Rice brothers having died, W. H. Rice, as surviving partner, instituted the present action against the defendant, the Third National Bank of St. Louis, to recover the money so received by it as aforesaid, and obtained judgment therefor.

The contention on the part of the plaintiff is that, although Rice Bros. & Nixon were trespassers *ab initio* in seizing the cattle, when they satisfied the judgment against them for the tort they became substituted to the owner's right to the cattle from the date of the conversion. The correctness of this, as a general proposition of law, may be conceded. Lovejoy v. Murray, 3 Wall. 11, loc. cit. 18 L. ed. 132; Adams v. Broughton, 2 Strange, 1078; 2 Kent, Com. 388; Thayer v. Manley, 73 N. Y. 307; Smith v. Smith, 51 N. H. 571,—which hold that the title so acquired by the tort feasor takes effect from the time of the conversion. This, resting upon the maxim, *Solutio pretii emptionis loco habetur*, presumes that the wrongdoer is in possession of the property and has not voluntarily parted therewith to a third party. Judge Cooley, in his work on Torts, 3d ed. pp. 881, 882, says: "It was decided in Adams v. Broughton, supra, that judgment in trover or trespass for the value of the property vested the title in the defendant; and this decision has been followed in this county to some extent. . . . The title by relation vests as of the time when the conversion took place, but this relation is not effectual for all purposes; it could not render a third party a trespasser upon the rights of the defendant for anything done by him intermediate the conversion and the judgment; and if, after conversion, the plaintiff sold his interest in the property, the purchaser will not be affected by the suit, . . . since by the sale he has disabled himself from passing title to the defendant."

In support of the text he cites the case of Bacon v. Kimmel, 14 Mich. 201, where the plaintiff brought trespass, and for the purpose of proving title introduced a judgment against him in favor of the mortgagee in a

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chattel mortgage, from whom the property had been wrongfully taken, and which judgment was subsequent to the trespass complained of in the case. Judge Christiancy said that admitting the recovery of that judgment and its satisfaction by the plaintiff "had the effect as between them to vest the right of property and the possession in the plaintiff; and that as between them it related back, so as to perfect the plaintiff's title from the time of the trespass for which that judgment was obtained; still it could not affect the defendants in this suit, so as to make them trespassers as against the plaintiff. . . . There is no evidence in the case tending to show that, at any time during the period covered by the declaration, . . . the plaintiff had any right whatever to the property or its possession, nor tending to show that in obtaining the possession of the property the defendants were guilty of a trespass against anyone, much less against the plaintiff. And, whatever effect the recovery and satisfaction of Wheeler's judgment against the plaintiff should have had as between them by relation back, it cannot by such relation make the defendants trespassers for acts which did not constitute a trespass as against the plaintiff at the time they were committed."

To sustain the action at bar, the learned counsel for the plaintiff assume, as indeed they must, first, that the National Bank of Commerce received the cattle from Rice Bros. & Nixon as mere bailees, or under an express or implied trust to hold them for the benefit of the rightful owner whenever he might appear; and, second, that Siegel-Sanders Commission Company took them impressed with a like trust, which followed and attached to the proceeds in the hands of the defendant in favor of the plaintiff as the *cestui que trust*. That Rice Bros. & Nixon turned the cattle over constructively to the National Bank of Commerce on the controlling assurance that the bank would hold them harmless is confirmed by the undisputed fact that, immediately after Rice Bros. & Nixon satisfied the judgment against them, they made demand on the Bank of Commerce, not for the proceeds of the sale of the cattle, which they knew had been turned over to the Third National Bank of St. Louis, but for the amount paid by them in satisfaction of said judgment, based on the promise of indemnity. In their petition, as disclosed in the reported case (98 Mo. App. 696, 73 S. W. 930), they alleged: "That it was thereupon agreed between them and defendant that, in consideration of their turning the cattle over to defendant, the latter would indemnify and protect them against damages by reason of their act."

As stated by the court from the evidence: "It was then agreed between plaintiffs and defendant that plaintiffs would turn the 128 head over to defendant; the latter agreeing to indemnify them in case they were forced to respond in damages to the true owner, or, indeed, to anyone of superior right. Plaintiffs, as stated by their principal witness, were anxious to get the cattle into other hands, so as to rid themselves of liability. They did not have an opinion as to which of the several claimants of liens had the best right or title; but they decided to turn the cattle over to defendant, for the reason that they thought it to be more certainly responsible than the others."

Moreover, as already shown by the testimony of Mr. Ball, witness for the plaintiff, when the Bank of Commerce advised Mr. Munger that it made no claim to the cattle, to get out of the tangle Munger gave the blank "title order" for the transfer of the cattle from their lot to that of Siegel-Sanders Commission Company to be sold. And when Mr. Ball applied to Rice Bros. & Nixon for the cattle, stating that the Third National Bank of St. Louis claimed them under mortgage, they distinctly disclaimed any interest in the cattle, and said they had turned them over to the bank. They were apprised, therefore, of the defendant's assertion of right to the cattle, and they knew that the Siegel-Sanders Commission Company turned over the proceeds to the defendant. It does not now lie in the mouth of the plaintiff, as asserted in argument by his counsel, to say they do not know that the defendant ever held such mortgage. They were distinctly advised by Mr. Ball that his client asserted such mortgage, and they consented to what was done without asking to see the mortgage; and the trial in this case proceeded upon the theory that the plaintiff in the action in the Kansas district court claimed under mortgage superior in right to that of the defendant.

How, then, can it be legally possible for the plaintiff to maintain against the defendant the action for money had and received to his use? When demand was made upon them by Mr. Ball, they disclaimed any interest whatever in the cattle. There was, therefore, no fiduciary relation or promise, either expressed or implied, between them and the defendant. It is an ancient and deep-rooted axiom of the common law, which "use has made familiar and time has rendered sacred," that "the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration, because such declaration is repugnant to any implication of a promise." Whiting v. Sullivan, 7 Mass. 107; Earle v. Coburn, 130 Mass. 596. While

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there are instances where the law will imply a promise to pay by a party who protests, as where the law creates a duty to perform that for which it implies a promise to pay, as in the illustration of the refusal of a man to furnish food and clothing to his wife and children, yet the rule is that such promise shall never be implied against protest, except in cases where the law itself imposes the duty, which must be a legal, and not a mere moral or sentimental, duty. This idea is expressed by Woodruff, J., in Butterworth v. Gould, 41 N. Y. 463, as follows: "Where a defendant has received moneys due to the plaintiff, but claiming it as his own under circumstances in which he has no authority from the plaintiff, and does not act under any pretense of such authority, and the payment to him is made in proposed recognition of his title thereto as his own, and does not operate to discharge the payer from his liability to the plaintiff, then and in such case, there is no trust and no implied promise to pay the money to the plaintiff."

Had Rice Bros. & Nixon, after the conversion of the cattle, maintained the *status quo*, retaining the cattle or the proceeds until they satisfied the judgment in trespass against them, their title would have attached as of the date of the conversion; and had the defendants in that situation, between the date of the conversion and the satisfaction of the judgment, tortiously taken the cattle or their proceeds from Rice Bros. & Nixon, they could have sued in trover, or have waived the trespass and brought action in assumpsit. But when, after the first conversion, the wrongdoers, as in this case, to extricate themselves, as they intended to do and supposed they were accomplishing, from ultimate liability and loss, voluntarily turned the property over to a third claimant, not in trust for themselves, but as an independent claimant, there was not an expressed or implied promise by the third person to answer to the assenting wrongdoer for the property. *Multo fortiori*, they cannot maintain trespass or trover, as they assented to the taking. We are unable to find any precedent to support the action adopted by the plaintiff; and, in our judgment, established principles of law and procedure interdict it. The request of the defendant below for a directed verdict should have been given.

The judgment of the Circuit Court is therefore reversed, and the cause remanded, with direction to grant a new trial, and for further proceedings in conformity with this opinion.

Petition for rehearing denied.

23 L.R.A.(N.S.)

NEBRASKA SUPREME COURT.

EX PARTE BYRON G. BUTTON.

EX PARTE ELMER C. HAMMOND.

(83 Neb. 636, 120 N. W. 203.)

Deposition — witness — justice of peace.

1. Sections 966 and 967 of the Code of Civil Procedure do not apply to the taking of depositions before justices of the peace, but §§ 356 et seq. control in such matters.

Habeas corpus — commitment for contempt — irregularities — review.

2. Irregularities in proceedings before justices of the peace committing a recusant witness cannot be reviewed upon habeas corpus. It is only when the proceedings are void that this writ can be of any value.

Constitution — construction.

3. The language of the Constitution is to be interpreted with reference to the established laws, usages, and the customs of the country at the time of its adoption, in the course of ordinary and long-settled proceedings according to law.

Deposition — witness — justice of peace — statutory powers.

4. Statutes authorizing justices of the peace to take depositions and to punish persons who disobey subpœnas or refuse to answer proper questions are within the provisions of § 18, art. 6, of the Constitution, providing that justices of the peace shall "have and exercise such jurisdiction as may be provided by law."

Same — improper questions — refusal to answer — contempt.

5. A refusal to answer such improper questions as would constitute abuses of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

(March 5, 1909.)

APPLICATIONS for writs of habeas corpus to secure the release of petitioners from custody to which they had been committed for alleged contempt of court. Writs refused.

The facts are stated in the opinion.

Messrs. **Flansburg & Williams** for petitioners.

Mr. **Charles A. Robbins** for respondents.

Letton, J., delivered the opinion of the court:

This is an application for a writ of habeas corpus. The petitioner was detained

Headnotes by LETTON, J.

Note. — As to power of magistrate to punish witness for contempt, see note to Farnham v. Colman, 1 L.R.A.(N.S.) 1135.

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by virtue of an order of commitment issued by Minor S. Bacon, a justice of the peace in and for Lancaster county, which commanded the keeper of the jail of that county to receive him "and him there safely keep until he shall submit to be sworn and testify, and to give his deposition in the case entitled George W. Herr, Plaintiff, v. Button Land Company et al., Defendants, now pending in the district court for Lancaster county, Nebraska."

It appears that a subpœna was served upon the petitioner requiring him to appear and give his deposition in that case on January 19, 1909, before Justice Bacon, that he demanded and was paid his fees for one day's attendance, and that he failed to appear in response to the subpœna, whereupon an attachment was issued by the justice and delivered to a constable who arrested and brought him before the justice forthwith. He was then requested by the justice to be sworn and testify, but he refused, saying that, acting upon the advice of counsel, he would refuse to be sworn and would refuse to testify in the case. Certain questions were then asked by the attorney for Herr which the witness refused to answer. By agreement the hearing was adjourned until the next day. Like proceedings were had as to Byron G. Button. On that day an answer was filed alleging that the taking of the depositions was in bad faith and for the purpose of annoying the defendants in the case, and was a mere fishing for testimony; that their testimony was not material or necessary to the plaintiff's cause of action; that the defendants are residents of Lancaster county, wherein the action is pending; that they have no intention of removing therefrom; that other witnesses were named in the notice to take depositions, but that none of them were examined or sworn; that after the witnesses were arrested, and brought before the examining officer, the plaintiff, Herr, and his attorney abandoned the complaint charging disobedience to the subpœna, and undertook while they were under arrest to compel the defendants to be sworn and examined under the notice to take depositions; and that the complaint to which this answer is filed is a different complaint and is for a different offense from that for which these defendants were arrested. It is further alleged that the proceeding is void and in violation of that provision of the Federal Constitution which provides that no person in a criminal case shall be compelled to be a witness against himself. The record then shows that the witness "having refused to be sworn, and having refused to testify by deposition upon being requested so to do by the court, and the defendant having filed his showing why he should not be punished for contempt, the court finds the defendant, Elmer C. Hammond, guilty of contempt of court," and judgment was rendered committing him to the county jail, "there to remain until he shall submit to be sworn and testify, and to give his deposition in the case." A warrant of commitment was thereupon issued and the petitioner committed to jail.

A number of questions are discussed in the brief of the petitioner. His first contention is that under §§ 966 and 967 of the Code of Civil Procedure a justice of the peace has no power to do more than impose a fine of $5 for refusal to be sworn or to answer questions. We are of the opinion that these sections do not apply to the taking of depositions, but that §§ 356 et seq. control.

It is next contended that, when a witness is brought before the court by attachment for refusal to obey a subpœna, he can only be tried and punished for that contempt, and that a court has no power to propound questions to him and punish for a refusal to answer the questions. This, however, is the ordinary practice when a trial is in progress, leaving the contempt in refusing to obey the subpœna to be dealt with later, and we see no objections to the practice. The order of procedure is within the court's discretion.

He next contends that the justice of the peace in taking a deposition does not act judicially; that he is a mere ministerial officer, and has no power to adjudge a person guilty of contempt and commit him to jail; and that a law conferring such power violates § 1, art. 6, of the Constitution of the state. Lastly he urges that a refusal to answer improper and irrelevant questions is not a contempt of court, and that it is an abuse of process to take depositions for the purpose of discovery. Several of the points raised by the petitioner have already been considered by this court and disposed of adversely to his contentions, in other cases. In Dogge v. State, 21 Neb. 272, 31 N. W. 929, certain witnesses who had been subpœned to appear before a notary public for the purpose of having their depositions taken failed to appear, an attachment was issued, and the witnesses arrested, taken before the notary, and one of them required to be sworn and give testimony, which she refused to do. She was then found guilty of contempt, and ordered to be committed to prison until she should consent to testify. It was urged in that case, as in this, that the witness was a resident of Lancaster county capable of being present at the trial, that she had no intention of being absent from the county,

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that she was an adverse party in the case, and there was no provision of law whereby she could be compelled to testify before the time of the trial. She further contended that the notary public had no power to commit her, for the reason that he had no judicial powers. As to the first point it was decided that "it was the intention of the legislature, in the enactment of the chapter on evidence, to remove every barrier to the discovery of truth, where the parties to the action have equal opportunity to testify, and, where necessary, either party may call the other to testify as to facts exclusively within his knowledge, provided the questions are not privileged." On the second point, it is held that the provisions of § 1, art. 6, of the Constitution, providing "the judicial power of this state shall be vested in the supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns," do not limit the exercise of all judicial functions to the courts named; that it was not the intention of the framers of the Constitution to prevent the exercise of all judicial functions except by these courts; and that since these statutory powers were in existence before the adoption of the Constitution they were continued in force by § 4 of article 16 thereof.

In Courtnay v. Knox, 31 Neb. 652, 48 N. W. 763, it was held that a notary had no power to punish a person not a witness for contempt in using flagrant and profane language in the presence of the notary and witnesses then present to give testimony, since no such power was conferred by the statute. The conclusion is reached that the notary's powers are limited to the provisions of the statute, and "that he borrows no judicial power, in the taking of depositions, from the dignity of his employment or the necessities of his case." Olmsted v. Edson, 71 Neb. 17, 98 N. W. 415, was an action against a county judge to recover damages for false imprisonment. The petition alleged that the plaintiffs were husband and wife and residents of Webster county, that an action was brought against them in the district court for that county, that a notice to take their depositions in that case at the office of the defendant county judge was served on them, and that a subpœna was issued and served requiring them to appear and give testimony. The plaintiffs appeared before the county judge and made known to him that they were residents of Webster county, that they have no intention of absenting themselves therefrom, either temporarily or permanently; that neither of them are either sick, aged, or infirm, so as to interfere with them being present and giving testimony at the trial of the case; that the attempt to take their deposition was not in good faith, but for the purpose of harassing and vexing them; that they were husband and wife; and that they each objected on that ground to either of them being sworn or to testify as witnesses; that they thereupon refused to give their depositions; that the county judge entered an order finding them guilty of contempt in refusing to give their depositions, and committed them to jail, from which they were afterwards discharged by habeas corpus. In the opinion it was said: "The proper and orderly thing for them to have done was to have taken the oath as witnesses, and if, by the questions propounded, it appeared that the answers would constitute evidence by the one against the other, to have then made the proper objections, which, undoubtedly, would have been sustained. . . . Plaintiffs' contention that such jurisdiction was ousted by a showing that none of the grounds enumerated in § 372 of the Code for using the depositions on the trial of the case existed at the time it was sought to take them is untenable. That section is not a limitation on the right to take depositions, but on the right to use them on the trial of the case." Wehrs v. State, 132 Ind. 157, 31 N. E. 779; Re Abeles, 12 Kan. 451.

The facts in Re Butler, 76 Neb. 267, 107 N. W. 572, were that the petitioner had been imprisoned by a notary for failing and refusing to obey a subpœna requiring him to appear before the notary to take his deposition. Under § 358 of the Code the officer can impose no greater punishment than a fine of $50 for refusing to obey a subpœna, and the court held that since this is the full power given by the statute in such a case the notary had exceeded his power, that his act was void, and the petitioner was illegally held, and he was set at liberty. It was also said that notaries in such matters are not a court and do not exercise judicial functions, but derive their powers solely from the statute. In De Camp v. Archibald, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056, the same contention was made as in this case with reference to the powers of a notary public in committing a witness to jail for refusing to answer questions. The sections of the Revised Statute of Ohio which are mentioned in the opinion contain identical provisions with those of the Nebraska Code. The supreme court of Ohio was of the opinion that "the term 'judicial power' . . . does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action be-

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tween parties. Power to hear and determine matters more or less directly affecting public and private rights is conferred upon and exercised by administrative and executive officers; but this has not been held to affect the validity of statutes by which such powers are conferred"—citing Dogge v. State and Re Abeles, supra; Ex parte McKee, 18 Mo. 599; and distinguishing the case of Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377, one of the cases relied upon by petitioner.

The supreme court of Kansas at first held in Re Abeles, supra, that a notary had power to commit for refusal to testify, but in Re Huron, 58 Kan. 152, 36 L.R.A. 822, 62 Am. St. Rep. 614, 48 Pac. 574, by a divided court it overruled that case and held that the statute purporting to confer such power is invalid. The opinion announcing this conclusion is written by Johnston, J., in opposition to his own views, which are also stated, and which are in line with Dogge v. State. In a note to Farnham v. Colman, 1 L.R.A.(N.S.) 1135, a number of cases are collated, and it is shown that at common law only courts of record had power to punish for contempt, and that the power of a justice of the peace to punish a witness for contempt for refusing to be sworn and refusing to testify had its origin in a statute of Philip and Mary. The practice has long been followed in this country under authority of statutes. The power has its source in the statute and exists no farther than thus granted. This is the point really decided in Re Kerrigan, 33 N. J. L. 344, cited by petitioner, where a recorder was held to have no general power to punish for contempt, not being a court of record, and that magistrates and others empowered to act in a summary way must act within the powers specially conferred. While admitting the persuasiveness of an opinion by a court of the standing of the courts of New York, we believe that under the laws and Constitution of this state we must decline to follow People ex rel. MacDonald v. Leubischer, 34 App. Div. 577, 54 N. Y. Supp. 869, if inconsistent with the views expressed here, though as to this we are somewhat doubtful when the whole opinion is examined. The gist of that case seems to be that a commissioner of the court of another state is not an officer empowered to imprison for contempt, and is not an officer connected with the administration of justice in New York state.

If the language of the Constitution were to be construed as strictly as petitioner contends, no judicial powers or functions could be exercised by a judge at chambers or by a county judge, except when in session as a court, for "district courts" and "county courts" alone are mentioned in the section which he quotes; but the words of the Constitution are to be interpreted with reference to the established laws, usages, and customs of the country at the time of its adoption, and the course of ordinary and long-settled proceedings according to law. Whether the special power given by statute to fine or imprison recusant witnesses is the exercise of a judicial function or of judicial power we think really is merely a matter of academic definition. The point to determine is: Does it violate any provision of the fundamental law? It is one of the long-established means or instrumentalities adopted to aid in securing justice, and must have been in the minds of the makers of the Constitution as much as the fact that much of the action of a county judge or of a district judge in chambers is of a judicial nature. De Camp v. Archibald, supra. But, in any event, § 18, art. 6, of the Nebraska Constitution provides that justices of the peace "shall have and exercise such jurisdiction as may be provided by law." The power to take depositions and commit for refusal to testify is expressly conferred by statute. We think that, construing the two sections together, there is no constitutional restriction upon the legislative right to enact the statute or upon the officer to exercise the power. The language of this section is as broad as of that giving judges of courts of record such jurisdiction as may be provided by law. Const. § 23, art. 6.

The petitioner complains that the taking of the deposition is not in good faith, and that the questions asked him would require the disclosure of his private business. The record does not disclose that this has been attempted, but, even if it were, it might be proper under the issues, of the nature of which we are not informed. If it should be sought to perpetrate a wrong or to abuse the process of the court or officer clearly for an unjustifiable purpose, we think that the witness might lawfully refuse to answer; but this question is not presented here, since the petitioner refused to be sworn or to testify at all. While objections to testimony cannot be ruled upon by the officer, yet it cannot be permitted that a witness may be compelled to answer questions seeking to elicit matters which the determination of the issues of the case did not require, or which pertain to his private business or affairs, and are not proper subjects of inquiry in the case. A commitment of a witness for properly protecting himself from an illegal inquisition would not be upheld; but a refusal to be sworn may properly be punished, as may also a refusal

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to answer proper interrogatories. Ex parte Jennings, 60 Ohio St. 319, 71 Am. St. Rep. 720, 54 N. E. 262; Ex parte Schoepf, 74 Ohio St. 1, 6 L.R.A.(N.S.) 325, 77 N. E. 276; Ex parte Mallinkrodt, 20 Mo. 493; Ex parte Krieger, 7 Mo. App. 367; Ex parte Abbott, 7 Okla. 78, 54 Pac. 319. In the cases Re Davis, 38 Kan. 408, 16 Pac. 790, and Re Cubberly, 39 Kan. 291, 18 Pac. 173, decided while the rule of the Abeles Case was the law of that state, it is held that an officer has no power to commit a witness for refusal to give a deposition, when it appears that it is not taken in good faith, but merely to harass and annoy the adverse party or to fish out evidence in advance of the trial. In this state a speedy remedy for the abuse of the power granted is conferred by § 359 of the Code, which provides that a witness imprisoned by an officer before whom his deposition is being taken may apply to a judge of the supreme court, district court, or probate court, who shall have power to discharge him if it appear that his imprisonment is illegal. This affords a summary method of review by a judicial officer, and by another section of the statute such power may be exercised at chambers. A refusal to answer such questions as would constitute abuse of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

Under the facts shown in the record the justice had the right to issue the subpœna to compel the petitioner to appear. On his refusal he had a right to issue an attachment and have him brought into his presence at the time and place specified in the notice to take depositions. He then had a right to request him to be sworn, and upon his contumacious refusal so to do the statute expressly gave him the power to imprison him until he would comply with the order of the court.

The petitioner seems to be held under a lawful commitment, and the writ is therefore denied.

NORTH CAROLINA SUPREME COURT.

W. H. WHITE, Appt.,
v.
J. J. KINCAID et al.

(149 N. C. 415, 63 S. E. 109.)

Corporation — dissolution — resistance of minority.

1. The courts will not, save in rare and exceptional instances, interfere at the suit of minority stockholders of a corporation with proceedings of a majority to dissolve it as authorized by statute.

Same — hostility.

2. The courts will not, at the instance of a minority stockholder of a corporation, restrain the majority from proceeding to dissolve the corporation, although it is solvent, if because of business conditions it has ceased to operate its plant, and there is no capital ready and available to resume operations should such course be determined upon; while the attitude of the parties towards each other does not give promise of mutual co-operation and eventual success.

Same — winding up — jurisdiction.

3. An action to enjoin majority stockholders of a corporation from proceeding to wind it up will not be dismissed, even though such relief cannot be granted, if because of disputes as to indebtedness and other matters arising in the action, which are in part incident to the proper winding up and adjustment of the corporate affairs, it is proper for the court under its statutory authority to take charge of the winding-up proceedings.

(December 16, 1908.)

Case Note. — Right of minority stockholder to restrain voluntary dissolution of corporation by the directors or majority stockholders.

This note is confined to cases involving the right of minority stockholders to enjoin the dissolution of a corporation by the directors or by the majority stockholders, and does not include cases in which the minority stockholder seeks to set aside a dissolution, or which discuss merely the power of the majority stockholders to dissolve the corporation, or the rights of the minority on dissolution. As to power of majority stockholders to dissolve corporation, see case note to Chilhowee Woolen Mills v. State, 2 L.R.A.(N.S.) 493.

The cases involving this question, which are not numerous, support the rule that a court of equity will not, in the absence of fraud, enjoin the dissolution of a corporation, where the proceedings to dissolve are being conducted in accordance with the statutory provisions.

Thus, an injunction to restrain the dissolution of a corporation was refused in Elbogen v. Gerbereux-Flynn Co. 50 App. Div. 623, 64 N. Y. Supp. 1, where everything that would constitute fraud, and every allegation of the complaint, and every statement in the affidavits of the plaintiff suggesting or indicating fraud, was positively denied by the individual defendants, and there were no circumstances proven which should induce the court to give greater weight to the plaintiff's assertion than to the defendants' denials, and the latter had a clear right under the statute to take the course pursued.

So, in Colby v. Equitable Trust Co. 124 App. Div. 262, 108 N. Y. Supp. 978, affirmed in 192 N. Y. 535, 84 N. E. 1111, it was held

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APPEAL by plaintiff from an order of the Superior Court for Rowan County dissolving a preliminary injunction against the winding up of a corporation. Affirmed.

Statement by **Hoke, J.:**

The plaintiff, using his complaint filed in the cause as an affidavit, alleged, among other things, that he owned $2,000 of stock in defendant company, a corporation having $19,000 of paid-up stock, owning a valuable plant, and owing not more than $2,800. Plaintiff also alleged certain wrongs committed in the control and management of the plant on the part of one of the defendants, J. J. Kincaid, the manager and owner of one hundred and forty shares of stock, and avers, further, that he and the individual codefendants had made a combination, and entered on a scheme to dissolve the corporation, for the purpose of ousting plaintiff from his office as secretary and treasurer and impairing the value of his holdings by selling out the property at a time and in a manner that would result in a sacrifice of the same, and cause great damage to the corporation and the holders of stock therein, etc. Plaintiff alleged, further, that the corporation is solvent, and was prosperous until the last several months, when, owing to the panic, the furniture mills of the county had closed down, or were working on shorter time, and this condition of affairs had made it advisable for defendant company to suspend operation temporarily, but there was every reason to believe that, with the revival of business now probable and imminent, defendant company could resume, and under proper management become, a money-making enterprise. The individual defendants answered, and admitted that the plant was now closed down, and alleged that its indebtedness is much greater than plaintiff states, filing an itemized statement of accounts and claims against it; that while the corporation is now solvent, there are no present means available for further operations. Defendants further admit that under § 1195, Rev. 1905, the defendants' directors, acting in their best judgment, and believing it advisable and most for the benefit of the corporation that the same be dissolved, had passed resolutions to that effect; and having issued proper notices for the stockholders to meet and consider and pass upon this resolution, as required by the statute, the said stockholders were proceeding to act under the notice, when they were stayed by restraining process of the court issued in this cause. Defendants deny that there has been any scheme or purpose to wrong the plaintiff or deprive him of his property, or to wrong or injure the corporation, or the holders of the stock therein, either by reason of the dissolution or the disposition of the property, but aver that the property is to be sold by methods calculated to make it bring its value, and where plaintiff and all others shall have an opportunity to bid and buy; that defendant J. J. Kincaid is the only member of the company who has any experience in this work, and he desires to withdraw and go into the business in the eastern part of the state, and, taking all the conditions and circumstances into consideration, the directors, deeming it to the best interest of the corporation and its stockholders that it should be dissolved, have passed the resolution to that effect, as heretofore stated. Plaintiff replied, denying the amount of the indebtedness claimed, averring mismanagement, etc., on the part of defendant J. J. Kincaid, as stated. On the hearing the preliminary restraining order was dissolved, and the plaintiff excepted and appealed.

Messrs. **T. C. Linn and Thomas J. Jerome**, for appellant:

The majority cannot dissolve the corporation in opposition to the wishes of the

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that if a large majority of the stockholders of a corporation deem it for their interests to liquidate the company, and proceedings in good faith are about to be taken in accordance with the statute for that purpose, it could not be pretended that a court of equity ought to interfere to prevent such liquidation.

And in Windmuller v. Standard Distilling & Distributing Co. 114 Fed. 491, it was held that an injunction would not be granted, restraining corporations holding stock in another corporation from voting such stock on a resolution to dissolve the corporation, which dissolution was being attempted in strict conformity with the statute. The following statement from Thompson on Corporations, vol. 4, § 433, was quoted with approval: "It is believed that no case can be found in which a court of equity has granted an injunction at the suit of a minority stockholder against the majority to prevent them from discontinuing the business of the corporation, and winding up its affairs." The same views were reasserted when the case came before the court again on a motion for a preliminary injunction, in 115 Fed. 748.

While it is intimated in the foregoing cases that an injunction would issue at the suit of a minority stockholder to restrain the dissolution if it was being carried on fraudulently, yet the power of the court to interfere in such a case undoubtedly arises out of its inherent power to prevent fraud, rather than any power to supervise corporations.

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minority, when it is not insolvent or doing a failing business.

State v. Chilhowee Woolen Mills Co. 115 Tenn. 266, 2 L.R.A.(N.S.) 496, 112 Am. St. Rep. 825, 89 S. W. 741; Cook, Corp. §§ 629, 670; Abbot v. American Hard Rubber Co. 33 Barb. 578; People v. Ballard, 134 N. Y. 269, 17 L.R.A. 746, 32 N. E. 54.

Messrs. **L. H. Clement, Hayden Clement,** and **Overman & Gregory,** for appellees:

A court of equity has no power to review the decision of the board of directors of a corporation as to the advisability of a dissolution, or to enjoin such dissolution at the suit of a minority shareholder.

10 Cyc. Law & Proc. p. 1301; Dill. Corp. 4th ed. p. 63; Windmuller v. Standard Distilling & Distributing Co. 114 Fed. 491; Windmuller v. Standard Distilling & Distributing Co. 115 Fed. 748; Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186.

Hoke, J., delivered the opinion of the court:

Our statute on the subject (Revisal 1905, § 1195) provides for the voluntary dissolution of corporations, in effect, as follows: That whenever, in the judgment of the board of directors, it shall be deemd advisable and most for the benefit of a corporation that it should be dissolved, they may pass a resolution to that effect by a majority of the board, proper notice being first given as required, and when this resolution has been submitted in writing to the stockholders, and, in a meeting called for the purpose, two thirds in interest of the stockholders consent to such dissolution, and the action is filed with the secretary of state, who shall issue a certificate to that effect, and after due publication of notice in the county, and this having been made to appear to the secretary, the corporation shall be dissolved and its business affairs settled up and adjusted as required by law. As far as North Carolina is concerned, this statute settles the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution, as established by the better considered decisions on the subject. Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130-404; Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490. This regulation enters into every charter, subject to the provisions of the statute; and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution by resolution of the directors, concurred in by two thirds in interest of the stockholders. This being the law governing the interest of these parties, when the board of directors of a corporation have determined, in the exercise of their best judgment, that the corporation be dissolved, and are pursuing the methods specified by the statute, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts. It is a principle well established that, when a person, corporation, or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another; for though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque injuria.* Dewey v. Atlantic Coast Line R. Co. 142 N. C. 392-408, 55 S. E. 292; Thomason v. Seaboard Air Line R. Co. (plaintiff's appeal) 142 N. C. 318, 55 S. E. 205; Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186. In such cases the motive prompting the act, however reprehensible or malicious, is not as a rule relevant to the inquiry; nor will courts undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem. Windmuller v. Standard Distilling & Distributing Co. (C. C.) 114 Fed. 491.

It is true that, both before and since the enactment of this statute, there is a salutary principle, very generally recognized and upheld by well-considered decisions, that the directors of these corporate bodies are to be considered and dealt with as trustees in respect to their corporate management, and that this same principle has been applied to a majority, or other controlling number, of stockholders in reference to the rights of the minority, or any one of them, when they are as a body in the exercise of this control, in the management and direction of the corporate affairs (Farmers' Loan & T. Co. v. New York & N. H. R. Co. 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043); and certainly this is true when the majority or controlling number of stockholders are exercising their authority in dictating the action of the directors, thereby "causing a breach of fiduciary duty" (Robotham v. Prudential Ins. Co. 64 N. J. Eq. 673-689, 53 Atl. 842). And, while these decisions have been more frequently made in reference to some assignment or disposition of the corporate property or assets, whereby the corporation is disabled from performing its work, and is necessarily retired from active business, this same principle applies, in a restricted degree, when the action complained of is a voluntary dissolution, according to the meth-

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ods provided by law. In these cases, also, if it clearly appears that the action of the management is in bad faith; that the resolution for dissolution, for instance, has been superinduced by fraud or undue influence, or if it could be clearly established that this resolution was not taken for the benefit of the corporation, or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders, or any of them, and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust,—such action could well become the subject of judicial scrutiny and control. Treadwell v. United Verde Copper Co. 47 App. Div. 613, 62 N. Y. Supp. 708; Elbogen v. Gerbereux-Flynn Co. 30 Misc. 264, 62 N. Y. Supp. 287; Re London & M. Discount Co. (1865-66) L. R. 1 Eq. 276; Re Beaujolais Wine Co. (1867-68) L. R. 3 Ch. 15.

Such cases almost invariably arise when the management of a solvent concern, going and prosperous, ceases operations and determines to dissolve and sell out, with a view of continuing the same or similar business under different control, and when there is indication given that the sole purpose was to oppress some of the stockholders and confiscate their holdings, or when it is done in furtherance of some scheme to promote the pecuniary interest of the actors, and to the detriment of the corporation, giving indication of a breach of trust on the part of the authorities in charge and control of the corporate affairs. But no such facts are presented here. There is no testimony offered of any scheme or conspiracy, on the part of defendants, to oppress the plaintiff, except an inference made by him from the fact that a dissolution was resolved upon. While the company is now solvent, it has not been running for several months, because the returns were not satisfactory, and the prospect of a change in this respect only rests in surmise. There is some dispute as to the amount of indebtedness, nor does there seem to be any capital ready and available with which to resume operations in case such a course should be determined upon; and, from the allegations made by the parties, their attitude towards each other does not give promise of mutual co-operation or eventual success. On the evidence, therefore, and in a case of this kind we are permitted to act on the evidence, the court is of opinion that the restraining order was properly dissolved, and that, on the facts as they now appear, the contemplated dissolution should be allowed to proceed.

While we are of opinion that the order restraining the dissolution of the defendant corporation was properly dissolved, we do not think, even if our present disposition of the question should prevail at the final hearing, that the action should be dismissed. In such case, or before that time, if the directors and stockholders see proper, or deem it prudent, to act in advance of a trial, the dissolution should proceed under the methods provided by the statute. But there are, as stated, substantial issues arising in the pleadings, more particularly as to the indebtedness, both between plaintiff and defendants and between the individual defendants and the corporation, which will require decision by the court. And while, by § 1201 of the statute, the directors, unless otherwise determined by order of some court having jurisdiction, are made trustees, with power to settle or wind up the corporate business, under § 1203 this entire matter of winding up the business after dissolution may be taken charge of by the court, and must be at the instance of either the creditors or stockholders or any one of them. And matter clearly arising in this action being in part incident to the proper winding up and adjustment of the corporate affairs, and necessary to be determined, there seems to be no reason why, if dissolution is to be had, the proceedings referred to and contemplated in §1203 should not be carried on and completed in this action, and this will include such orders as to the disposition and sale of the plant as may be for the best advantage of the assets and the best interest of the parties.

There is no error, and the judgment below is affirmed.

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(— Okla. —, 103 Pac. 1016.)

Trial — directing verdict — procedure.

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Estoppel — pleading facts — necessity.

2. An estoppel must be pleaded in order to enable a party to avail himself of it on the trial, and must be pleaded with particularity in order to constitute either a cause of action or defense. No intendments are indulged in favor of such plea, but it is incumbent upon the party pleading to aver all the facts essential to its existence.

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But apparently opposed to this position is Holton v. Alley, 15 Ky. L. Rep. 529, 24 S. W. 113, holding that the negligence of the mortgagee, the record of whose mortgage was destroyed, in failing to restore the record in the easy way provided by the statute, was such as to prevent a court from disturbing an innocent purchaser who acquired title about five years after the destruction of the record, without actual notice. The terms of the statute do not appear, but the decision is referred to the general principle that, where loss must fall on one of two innocent parties, it will be put upon him whose negligence has made the loss possible.

Under the Texas statute providing *inter alia* that, when the original papers have been saved or preserved from loss, the record of the originals having been lost or destroyed, the same may be recorded again, and the last registration shall have force and effect from the filing for original registration, provided that such originals are recorded within four years next after such loss or destruction, it is held that a destroyed record cannot operate as constructive notice, unless it has been restored as required by that provision. O'Neal v. Pettus, 79 Tex. 254, 14 S. W. 1065; Salmon v. Huff, 80 Tex. 133, 15 S. W. 257, 1047; Barcus v. Brigham, 84 Tex. 538, 19 S. W. 703; Magee v. Merriman, 85 Tex. 105, 19 S. W. 1002; Weber v. Moss, 3 Tex. Civ. App. 13, 21 S. W. 609; Greer v. Willis (Tex. Civ. App.) 81 S. W. 1185.

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ods provided by law. In these cases, also, if it clearly appears that the action of the management is in bad faith; that the resolution for dissolution, for instance, has been superinduced by fraud or undue influence, or if it could be clearly established that this resolution was not taken for the benefit of the corporation, or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders, or any of them, and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust,—such action could well become the subject of judicial scrutiny and control. Treadwell v. United Verde Copper Co. 47 App. Div. 613, 62 N. Y. Supp. 708; Elbogen v. Gerbereux-Flynn Co. 30 Misc. 264, 62 N. Y. Supp. 287; Re London & M. Discount Co. (1865-66) L. R. 1 Eq. 276; Re Beaujolais Wine Co. (1867-68) L. R. 3 Ch. 15.

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Same — bona fide purchaser — notice.

5. One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the "actual notice" he would have received.

(May 15, 1909.)

ERROR to the District Court for Payne County to review a judgment in defendants' favor in an action brought to partition certain real property. Reversed.

Statement by **Dunn, J.**:

The plaintiff in error, who was plaintiff below, began her action in the district court of Payne county against Gerd Flesner and others to have adjudged and decreed to her an undivided one-half interest in and to the E. ½ of the S. E. ¼, section 8, and the W. ½ of the S. W. ¼ of section 9, in township 19 N., range 2 E., of the Indian meridian, Payne county, Oklahoma, and have her declared to be entitled to the common possession of the premises with the said defendant during the years from 1901 to 1907, inclusive, and praying an accounting for the value of the use and occupancy of the premises during said time; also asking for partition of the same. To this petition the defendant filed an answer denying all of the averments of the petition, except that he was in the actual and sole possession of the land. A trial of the cause was had to a jury, and, at the conclusion of the evidence of both parties, the court instructed the jury to return a verdict for the defendant, which was accordingly done, and, on judgment being rendered thereon, plaintiff took the case to the supreme court of the territory of Oklahoma by proceedings in error, and the same now comes to us for review by virtue of our succession to that court.

The controversy grows out of the following facts: George W. Gardenhire on the 1st day of December, 1890, commuted on the tract of land in controversy, and on the 2d day of March, 1891, made a warranty deed to the same to his son, Clide, who on

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one who has not paid the purchase price cannot be regarded as a bona fide purchaser so as to entitle him to take advantage of the former purchaser's negligence in failing to have the record restored.

In Kempner v. Beaumont Lumber Co. 20 Tex. Civ. App. 307, 49 S. W. 412, it was expressly held that the statute requiring re-registration as a condition of continued notice was applicable, notwithstanding that the destruction of the record occurred prior to the statute; the time for re-registration in that case running from the time the act took effect.

In Magee v. Merriman, supra, the court, without deciding the question whether the law requires the registration of the original only, and does not relate to the registration of a certified copy in case the original has been lost or destroyed, said that, in the absence of evidence to the contrary, the existence of the original deed would be presumed.

In Tarrant County Agri. M. & B. Stock Asso. v. Yellowstone Kit, 10 Tex. Civ. App. 685, 31 S. W. 1080, it was held that the failure to supply the destroyed record was not excused by the fact that the original deed was destroyed. In answer to the contention that, as the original deed in this case was not "saved or preserved from loss" as provided in § 4 (the provision above set out) no duty devolved upon the holder to provide for a second registration, the court said that the provisions of §§ 1 and 2 provided for the supplying of lost or destroyed records without reference to the existence or nonexistence of the original, and that the duty rested upon the owner without reference to the provision of § 4 or to the preservation or loss of the original. After remarking that there was no period of limitations prescribed in §§ 1 and 2 within which the lost record must be supplied, the only limitation provided for being contained in § 4, the court said that the privilege of supplying the record should be exercised at least before the purchase by a third party. In this case, however, some of the instruments in the subsequent purchaser's chain of title were executed more than four years after the destruction of the record.

While the Texas statute requires re-registration within four years after destruction, re-registering or re-recording after the expiration of that period would seem to be sufficient as against purchasers or encumbrancers subsequent to the re-registration or re-recording. Though the question was not expressly passed on, it was said in Frugia v. Trueheart (Tex. Civ. App.) 106 S. W. 736, that re-registration in 1894 after destruction in 1874 was good for all purposes of notice after the later date.

It was held in Curry v. Lehman, 55 Fla. 847, 47 So. 18, that the lien on real property acquired in one county by the recording of a transcript of a judgment or decree rendered in another, whether such transcript was recorded before or after the destruction of the original record, was not lost by the failure to commence proceedings to establish the lost record as provided by a statute providing that, when the records of any court in any county showing the entry and rendition of any judgment or decree shall have been heretofore destroyed by fire, such judgment or decree shall not be good and effectual as a lien on real estate as against creditors or subsequent purchasers for a valuable consideration and without notice, unless legal proceedings to re-establish the same shall be begun in the proper court within nine months from the passage of this act.

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March 24, 1891, executed a warranty deed to the same tract of land to William G. Scott, who, plaintiff alleges, prior to the 9th day of December, 1895, executed and delivered a warranty deed to Jacob Gardenhire, her husband, to whom she was married on the 20th day of September, 1894, and who died on or about January 5, 1895. It is plaintiff's claim that this warranty deed was duly recorded, but that the record of the same was destroyed at the time of the destruction of the courthouse of Payne county by fire on December 27, 1894, and that the original deed she was unable to find or produce. On January 7, 1895, William G. Scott, executed and delivered to George W. Gardenhire a quitclaim deed, which was duly filed for record with the register of deeds of Payne county, March 15, 1898. On November 20, 1899, George W. Gardenhire made, executed, and delivered to the defendant Flesner his bond for a deed to this tract of land for a consideration of $3,500, $700 of which was duly paid in cash at the time of the execution and delivery of the said bond, and Flesner in March following took actual possession of the tract of land, and on May 16, 1901, received from George W. Gardenhire a warranty deed for the tract, having paid in full the consideration agreed upon. The next payment made after the $700 payment was on the 15th day of January, 1901. At the time of Jacob Gardenhire's death, he was without issue and left surviving him his wife and father, so that, under our law of descent and distribution, they would each inherit a one-half interest in this land, provided the conveyance contended for could be established, and evidence thereof being in such a condition as to charge Flesner with knowledge or notice. At the time Flesner purchased, he was not a resident of Payne county, and was virtually a stranger therein. He made, however, several trips to the vicinity of Stillwater before finally coming to an agreement with his grantor and moving on the land.

The testimony adduced by plaintiff is to the effect that, on one of his visits to that vicinity, in January or February, 1900, he stopped at the home of Louis M. Cooper, the father of plaintiff's present husband, who lived about three quarters of a mile from the land in controversy.

Mr. Cooper testified in answer to interrogatories as follows, in reference to what he told him about plaintiff's claim of right and interest in and to the land involved:

Q. Now, this day that Mr. Flesner and Mr. Shaffer was at your house, you say Mr. Flesner said something about buying this east half of the southeast of 8, and the west half of the southwest of 9, the old Gardenhire land, or the Jake Gardenhire land. You may state to the jury what he said about it.

A. Well, he came there and called for dinner, as I stated, rather late. We had our dinner, and I told him we never turned anyone off, and, if he would wait until my wife could fix dinner, he could have his dinner. While he was sitting there eating dinner, he told his business; said he was around looking up a location, and wanted to buy a farm and wanted to know if I knew of any. Well, I knew of several farms for sale, but I don't know that I named the Gardenhire place. He said, though, he was stuck on the Gardenhire place.

Q. He told you that?

A. Yes, sir, and I asked him, "For why?" He said it was close to the college, close to school, and he believed he would like to own it. "Well, now," I says, "you are a stranger in the neighborhood, and my advice would be to let that farm alone;" that George Gardenhire didn't own it, that if he bought it he would buy trouble; that Jake's widow had married into my family, married one of my sons, and some day they would commence suit for her rights. Well, they asked the question then if there was any heirs, and I told him "No." Well, he said, then he wasn't afraid to buy it, and I told him, the way I understood the statute, she was entitled to one half of that land, and he said, "No," she wasn't entitled to nothing. "Well," I says, "that is your opinion, and my opinion is the other way, but my advice would be to let it alone, and not buy it, for you will buy a lawsuit if you do."

Q. What, if anything, did you say to Flesner about Jake having a deed to that land at any time?

A. Well, I told him how the thing happened—

Q. Just go on and tell fully to the jury that conversation with him.

A. I don't know as I can tell it all.

Q. Tell the jury all you remember you said to him.

A. I told him Mr. George Gardenhire had told me he had deeded the farm away, and Mr. Scott told me also he had deeded it to Jake Gardenhire, and Jake Gardenhire told me also he had a deed for it, it was his, and asked me what I thought about the trade, in exchanging his farm directly north for that. "Well," I says, "I don't know how you traded, but I think you made a good trade, a good exchange." "Well," he says, "I did that, and got a deed for it."

Q. You told Mr. Flesner that, did you?

A. Yes, sir; I did tell him that, to keep him out of trouble, because I didn't want any trouble in my family, and didn't want him to buy it, or any other stranger.

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This testimony is corroborated to a considerable degree by the witness's son and his wife, who testified that they were present and heard it. The defendant Flesner testified that he did not so remember this conversation.

In answer to questions on cross-examination, he testified as follows:

Q. You don't remember of anything further being said until Mrs. Cooper stepped into the room? What did she say then?

A. Why, she said, as she was walking in, I think it was with a dish of fruit, she said, addressing rather Mr. Cooper, as I took it and his answer to her question, says: "Is this the old George's place that they are talking about?"

Q. Then, what did you say or what did Cooper say?

A. He says, "Oh, no; this man wouldn't buy that, for that is in litigation." I am sure he used the word "litigation."

Q. Cooper said, "Oh no, this man wouldn't buy that, because that is in litigation?"

A. Yes, sir.

Q. And that is all that was said about the place?

A. That is all I recollect being said.

And to interrogatories propounded to him by the court in reference to this matter, as follows:

Q. Do you say now—I don't remember whether you did or not—that, at the time you were there at the Cooper's, that neither Mr. Cooper or Mrs. Cooper made any statement to you of a claim that the Jake Gardenhire widow was making to the land?

A. No, sir; they did not.

Q. Never mentioned it to you at all?

A. No, sir.

Q. Didn't make any statement to you that you would get into trouble by buying the land, or have a lawsuit over it?

A. No, sir.

Q. Nothing of that kind mentioned?

A. No, sir.

Of course, the foregoing evidence would be of no materiality except it was predicated upon a showing that Jacob Gardenhire had received a prior deed to the tract of land in controversy. On this question the deposition of William G. Scott was taken. He was a resident of Kansas, and testified that Clide Gardenhire had executed to him a deed to a tract of land, in reference to which he said, a year or two afterward, "I deeded it to Jacob Gardenhire, I think so," and that he never made but one deed to the land. That after Jake's death, being informed by George Gardenhire that the records were burned or destroyed, he signed with him as a witness, but he did not know what it was he signed. (It later developed that this was a quitclaim deed.) That the place on which Jake died was the one he supposed he deeded to him. That he thinks it was the next day after Jake was buried that he signed the paper that he signed after Jake's death. That he received no consideration for the same. That the deed which he made to Jake was made before Mrs. Caldwell, a notary public at Wilmot, Kansas. On cross-examination he testified he never signed but one deed, and that was to Jake. The same witness's deposition was also taken by the defendant. He was interrogated, and asked if he was acquainted with the land in controversy, and he stated that he had seen it, and that it had been deeded to him by Clide Gardenhire, and the deed was handed to him by George Gardenhire; that he did not pay anything for the deed; that he afterwards deeded the land to George Gardenhire, receiving no consideration therefor; that he did not know that the deed he made to Jake Gardenhire was for the same land that was in controversy in this suit.

A witness by the name of Zoe Lahar was also called, who testified that she was living adjoining Jake Gardenhire's place on the east in 1894, and that she saw in his possession a paper purporting to be a deed, which she examined. That the grantor was W. E. or W. G. Scott, and that it conveyed title to Jacob Gardenhire. That it was a warranty deed acknowledged before an officer, whose character she was unable to definitely assert, except that there was a seal attached to the deed; also, that it was not made in Stillwater, but was made in Kansas, and that the consideration named in the deed was $900. In reference to the recording of it she answers to interrogatories as follows:

Q. Did you examine that deed to see whether there was any certificate of record on it or not?

A. Yes, sir.

Q. You may state what you found on the deed.

A. The deed was recorded.

Q. Was there anything calling your attention particularly at that time to the fact that the deed was recorded?

A. Yes, sir.

Q. You may state what it was.

A. Well, shall I tell what brought up the conversation?

Q. Yes.

A. Mr. Gardenhire was taking the deed down to put it in the bank, and I told him he ought to have it recorded before he put it in the bank. If anything happened, then he could get a copy of it, that that is the way we did ours, and he says—(objected to

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as hearsay, which objection was by the court sustained.)

Q. And did you at that time notice to see it was recorded?

A. Yes, sir.

That the description given in the deed involved land in sections 8 and 9, adjacent to the property where she lived, and that she lived on land right east of Jake Gardenhire's land. That, when she examined the deed, she noticed that it conveyed the farm that Jake was living on. It is in evidence that he occupied the land for several years before he died.

It is further admitted by the parties in the record that the tract of land in controversy here was the only land Scott ever had title to in that township. The courthouse and records of Payne county were destroyed by fire December 27, 1894. This action was begun July 25, 1905.

Messrs. **Lowry & Lowry**, for plaintiff in error:

After the due recording of an instrument of record, the destruction of the record by fire does not in any way affect the title of the grantee, as in law such destroyed record is presumed to be extant for the purpose of giving notice to all persons.

Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117; Steele v. Boone, 75 Ill. 459.

The advice to Flesner that, if he bought the property, he would be buying a lawsuit, as some day informant's daughter-in-law would commence an action to recover her interest in the land, constituted "actual notice" within the meaning of the statute.

Lloyd v. Banks, L. R. 3 Ch. 490; Johns v. Scott, 5 Md. 81; Brown v. Wells, 44 Ga. 573; Jones v. Lapham, 15 Kan. 540; Virgin v. Wingfield, 54 Ga. 451; Blatchley v. Osborn, 33 Conn. 226; Lawton v. Gordon, 37 Cal. 202; McKinney v. Bright, 16 Pa. 399, 55 Am. Dec. 512; Musgrove v. Bonser, 5 Or. 313, 20 Am. Rep. 737; Hastings v. Cutler, 24 N. H. 481.

Mr. **George P. Uhl** for defendants in error.

Dunn, J., delivered the opinion of the court:

On the situation presented, of which the foregoing recitals constitute a substantial statement, the learned trial judge directed the jury to return a verdict for the defendant. Having the printed record before us, with opportunity for comparison, study, and reflection, supplemented by investigation, we are led to the conclusion that the facts and testimony set forth therein are sufficient to require a submission of the case to a jury. The question presented to a trial court on a motion to direct a verdict, or which presents itself, in the consideration of such action, on its own motion, is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith. Where the evidence is conflicting and the court is asked, or on its own motion considers, the direction of a verdict, all facts and inferences against or in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled. Baker v. Nichols & S. Co. 10 Okla. 685, 65 Pac. 100; Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270; 6 Enc. Pl. & Pr. p. 693. The same rules obtain in the direction of a verdict as obtain on a demurrer to the evidence. 6 Enc. Pl. & Pr. p. 692. And in the case of Conklin v. Yates, 16 Okla. 266, 83 Pac. 910, the supreme court of the territory of Oklahoma held that, upon a demurrer to the evidence, the court must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer. See also Edmisson v. Drumm-Flato Commission Co. 13 Okla. 440, 73 Pac. 958, in which case Chief Justice Burford, on stating the rule which we have just noted, made a general collation of authorities to sustain it. There is probably no difference as to the rule. The conflict in the case at bar arises out of our inability to concur in the conclusion to which the trial court arrived in considering the evidence. In coming to this conclusion, of course, we do not mean to express any opinion upon the truth or falsity of the evidence produced, nor to make any intimation upon which an argument could be predicated that a jury should accept the same as true. We merely mean to assert, as we have endeavored to state, that on directing a verdict the party against whom it is leveled is entitled to have his evidence considered for the purpose as true and uncontradicted. This conclusion on our part necessarily carries with it a finding that on some one or all of the positions asserted by plaintiff, if true, she is entitled to recover, and we will briefly examine them.

First, assuming, as the testimony tends to show, a deed was executed by Scott to plaintiff's deceased husband, and the same was recorded, then the fact that the records were destroyed in no wise affects the notice which defndant was compelled to take had the records not been destroyed.

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The party, taking his deed to the register of deeds' office and having it recorded, did all that was required of him. Mr. Wade in his work on the Law of Notice (2d ed. § 157) says: "It has also been decided that, where the deed has been once recorded, a subsequent burning or other destruction of the records will not render the same ineffectual as notice to subsequent purchasers." See also Geer v. Missouri Lumber & Min. Co. 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099; Ashburn v. Spivey, 112 Ga. 474, 37 S. E. 703; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117. The force of this rule was broken in the mind of the trial court by reason of the fact that the plaintiff had permitted her claim of interest in and to the land to lie unasserted and without record from the date of the destruction of the courthouse to the date of the bringing of this action, thereby, it was assumed, estopping herself from asserting her claim to the land in the face of a purchaser in good faith for value, whose title was predicated upon an apparently clear record. We question much whether the defendant in this cause was entitled, as the record is presented, to have interposed in his behalf, against the assertions of plaintiff, the doctrine of an equitable estoppel. Estoppel is an affirmative defense to be specially and specifically pleaded. Such is the holding in the cases of Holt v. Holt (Okla.) 102 Pac. 187; Deming Invest. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A.(N.S.) 607, 83 Pac. 918; Tonkawa Mill. Co. v. Tonkawa, 15 Okla. 672, 83 Pac. 915; Troyer v. Dyar, 102 Ind. 396, 1 N. E. 728; Sharon v. Minnock, 6 Nev. 377. So far as the record discloses, the defendant Flesner would not have been in any particular deterred from taking identically the same course which he did had he had full and complete knowledge of the claims of plaintiff, and knew that she intended asserting them. If not, then it was incumbent upon him to assert it, and to aver that the failure of plaintiff to do some act or perform some duty had caused him to act differently than he otherwise would. We do not consider or pass upon the question of plaintiff's failure constituting an estoppel, nor any of its effects should it ultimately be found. We do not regard it as being in the case. On another trial of this cause defendant, if he elects and can do so, should be permitted to amend his answer, and set up the plea of estoppel upon which to predicate proof of the same. If the deed was not recorded, or the same thing, if plaintiff is unable to show it was to the satisfaction of a jury, then the question of notice will be involved.

Section 12, chap. 16, ¶ 888, under the title "Conveyances of Real Estate," Wilson's Rev. & Anno. Stat. 1903, provides: "Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons, unless acknowledged and recorded as herein provided; except, actual notice to such third persons shall be equivalent to due acknowledgment and recording." Our statutes defining notice are found in chapter 28, entitled, "Definitions and Provisions," Wilson's Rev. & Anno. Stat. 1903, §§ 9–13 inclusive, which are as follows:

"Sec. 9. Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

"Sec. 10. Notice is either actual or constructive.

"Sec. 11. Actual notice consists in express information of a fact.

"Sec. 12. Constructive notice is notice imputed by the law to a person not having actual notice.

"Sec. 13. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

The question which then presents itself is: Was the information which plaintiff contends was given defendant at the time of his visit to the Cooper home in January or February, 1900, given, and, if so, was it either actual or constructive notice? It will be observed that § 13, supra, charges every person with constructive notice of the fact itself when, having actual notice of circumstances sufficient to put a prudent man upon inquiry, he omits to make such inquiry with reasonable diligence. In the case of Williamson v. Brown, 15 N. Y. 354, the court of appeals of New York, dealing with this question, speaking through Justice Selden, said: "Notice is of two kinds—actual and constructive. Actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion.

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Constructive notice, on the other hand, is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute. 'Constructive notice,' says Judge Story, 'is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.' Story, Eq. Jur. § 399. A recorded deed is an instance of constructive notice. It is of no consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, notice to an agent is constructive notice to the principal; and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. In such cases the law imputes notice to the party whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof." This question is also elaborately treated by the supreme court of Wisconsin in the case of Brinkman v. Jones, 44 Wis. 498, wherein the court held in the syllabus: "One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the 'actual notice' he would have received." See also Hooser v. Hunt, 65 Wis. 71, 26 N. W. 442, and Pope v. Nichols, 61 Kan. 230, 59 Pac. 257.

The statutes of California on this question are very similar to our own. They will be found embraced in §§ 18 to 19 of the Civil Code. The case of Prouty v. Devin, 118 Cal. 258, 50 Pac. 380, was one somewhat similar to the one at bar, in which the court said: "Section 1217 of the Civil Code provides that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Notice is actual and constructive. Actual notice is that which consists in express information of a fact, and constructive notice is that which is imputed by law. Civil Code, § 18. 'Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact, (Civil Code, § 19), . . . for the general doctrine, as well as the express provision of § 19 of our Civil Code, is that whatever puts a party on inquiry amounts in judgment or law to constructive notice, provided the inquiry becomes a duty, and, if followed, would lead to the knowledge of the requisite facts by ordinary diligence and understanding." After reciting the evidence in the case, the court concluded the opinion by saying: "The question for determination is whether there was actual notice upon the part of Bates of circumstances sufficient to put him as a prudent man upon inquiry. If so, then in law he is chargeable with constructive notice and knowledge of the fact of this pre-existing mortgage." Mr. Wade in his work on the Law of Notice, dealing with this question (§§ 3, 4, and 5), says: "Actual notice has been defined by declaring that it exists 'when knowledge is actually brought home to the party to be affected by it.' This excludes all notice which does not amount in fact, as well as theory, to actual knowledge. There can be no doubt that this definition is too narrow. . . . The courts have accordingly refused to confine actual notice within the narrow limits of the definition quoted above. Their departure from the rule that renders actual notice and actual knowledge synonymous terms is perhaps most conspicuous in cases arising under the registry laws, where, in order to give precedence to a prior unrecorded intrument over a subsequent one affecting the same land, which has been duly recorded, it is necessary to prove that the subsequent purchaser had actual notice of the prior unregistered instrument. . . . There are two classes of actual notice which for convenience may be designated as (1) express, which includes all knowledge or information coming to the party to be charged, of a degree above that which depends upon collateral inference, or which imposes upon him the further duty of inquiry; and (2) implied, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest." The author, in § 8, further discusses the notice which he terms "implied," by stating that it does not include either positive knowledge or information so direct as to necessarily carry conviction to the mind of the person notified, and neither does it belong to that class which depends upon legal presumption, but that it is substantial evidence, from which the jury after estimating its value may infer notice. He then says that it differs from constructive notice, with which it is frequently confounded and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly legal inference, while implied notice arises from inference of fact. The language

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of our statute, it will be observed in this connection, is that the party having actual notice of circumstance, etc., is deemed to have constructive notice of the fact itself; so that it seems to us the constructive notice of our statute and the implied notice referred to by Mr. Wade are almost, if not exactly, the same in legal effect.

The issues presented are all controverted questions of fact, and as such should have been submitted to the jury for its determination. The plaintiff bears the burden of establishing the conveyance and title under which she claims, and that the defendant had either actual or constructive notice thereof. There may be a question of plaintiff's laches involved, and, if insisted on, it also, along with the other questions, should be left to a jury.

The judgment of the lower court is accordingly reversed, and the cause remanded for a new trial.

Kane, Ch. J., and Turner, Williams, and Hayes, JJ., concur.

Petition for rehearing denied.

SOUTH CAROLINA SUPREME COURT.

MARY V. KIRK, Respt.,
v.
H. H. WYMAN et al., Members of Aiken Board of Health, Appts.

(— S. C. —, 65 S. E. 387.)

Health — pesthouse — injunction.

1. A board of health may be enjoined from sending to the pesthouse, which is unfit for her habitation because of want of water supply and heating arrangements and the proximity of the city dumping ground, and because to it are sent persons afflicted with smallpox and other loathsome diseases, an elderly lady of refinement who has a form of leprosy which is very slightly, if at all, contagious, and who has mingled for years with the people without communicating the disease to anyone, while quarantine in her own home would afford complete protection to the public until a comfortable place could be arranged for her elsewhere.

Injunction — pesthouse — protection of patient.

2. A remedy by action against members of the board of health for damages for wrongfully sending one to the pesthouse, if it existed, is not adequate to such an extent as to prevent the issuance of an injunction against such act.

(Hydrick, J., dissents.)

(August 19, 1909.)

23 L.R.A.(N.S.)

APPEAL by defendants from a decree of the Common Pleas Circuit Court for Aiken County temporarily restraining them from removing complainant to the contagious division of the city hospital. Affirmed.

The facts are stated in the opinion.

Messrs. Hendersons, for appellants:

The court under the law should not have undertaken to restrain the exercise of the discretion of this board in its ministerial duty in carrying out the conclusion which they had reached, by passing upon the question as to what was a proper place to which to remove respondent, or whether she should be removed at all.

Brown v. Ansel, 82 S. C. 141, 63 S. E. 449; State ex rel. Rawlinson v. Ansel, 76 S. C. 403, 57 S. E. 185, 11 A. & E. Ann. Cas. 613; State ex rel. Mauldin v. Matthews, 81 S. C. 414, 22 L.R.A.(N.S.) 735, 62 S. E. 695; 21 Cyc. Law & Proc. p. 404; Tiedeman,

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Case Note. — Right to injunction against being sent to pesthouse.

The general rule is that the courts will not interfere with the exercise of legislative or discretionary powers conferred by the state upon municipalities, and will not restrain or coerce the action of a municipal corporation acting through its duly appointed officers or boards, merely because such action is unwise, extravagant, or a mistake of judgment. 20 Am. & Eng. Enc. Law, p. 1230. But where the action is fraudulent, clearly oppressive, or grossly abusive, the courts will intervene and exercise their inherent power of equity to prevent such fraud, injustice, or abuse of power. The above rule applies, of course, to municipalities acting through health officers or boards, as well as to the other branches of the municipal government.

There appears to be no direct authority upon the question whether an injunction will issue to restrain health officers from removing a patient suffering from a contagious disease to a pesthouse. But there is no apparent reason why the courts should not act in such a case, providing that the attending circumstances require or justify the intervention of equity,—as, for example, in KIRK v. WYMAN, where it appeared that the removal of the plaintiff to the pesthouse was unnecessary to protect the public from the spread of the disease, and would work unnecessary hardship upon the plaintiff. Before a court will issue an injunction in any case it must appear that the plaintiff has no adequate remedy at law, and this rule is, of course, applicable to cases of the kind under discussion; and it appears in the above case that the plaintiff would not have any adequate remedy at law for the injuries which would have been inflicted by her removal to the pesthouse under the circumstances.

A few cases may be cited to show different applications of the rule as stated

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State & Federal Control of Persons & Property, §§ 17, 44; Throop, Pub. Off. §§ 553, 558, 562, 567, 842, 843.

If the board of health acted outside of their jurisdiction, with negligence or malice or ill-will, complainant would have a cause of action against them, and that is an adequate remedy at law, and should oust the court of equity of any right to proceed by the extraordinary remedy of injunction.

16 Cyc. Law & Proc. pp. 45, 48; Throop, Pub. Off. §§ 724–726; Americus v. Mitchell, 79 Ga. 807, 5 S. E. 202; Aaron v. Broiles, 64 Tex. 316, 53 Am. Rep. 764; Cooley, Const. Lim. 4th ed. p. 729; 2 Dill. Mun. Corp. art. 2, § 95; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 25 Am. St. Rep. 850, 26 N. E. 100; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854.

Messrs. **Croft & Croft** and **Sawyer & Owens**, for respondent:

A party who is not heard, and who has no opportunity of being heard, before the board of health, is not concluded by the findings or adjudications of the board, and may contest all the facts upon which his liability is sought to be established.

Salem v. Eastern R. Co. 98 Mass. 431; Smith, Corp. ¶ 1675; Golden v. Health Dept. 21 App. Div. 420, 47 N. Y. Supp. 623; Rogers v. Barker, 31 Barb. 447; Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 210; Weil v. Ricord, 24 N. J. Eq. 169; Van Wormer v. Albany, 15 Wend. 262; Sawyer v. State Bd. of Health, 125 Mass. 182; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; Baugh v. Sheriff, 7 Phila. 82; Board of Health v. Potts, 2 Clark (Pa.) 52; Belcher v. Farrar, 8 Allen, 325; Taunton v. Taylor, 116 Mass. 254; Gaines v. Waters, 64 Ark. 609, 44 S. W. 353; Hartman v. Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74; Savannah v. Mulligan, 95 Ga. 323, 29 L.R.A. 303, 51 Am. St. Rep. 86, 22 S. E. 621; Americus v. Mitchell, 79 Ga. 807, 5 S. E. 201; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Metropolitan Bd. of Health v. Heister, 37 N. Y. 661; Harrington v. Providence, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; 21 Cyc. Law & Proc. p. 399.

Where public officers are acting illegally, or without authority and in breach of trust, and causing irreparable injury, they will be enjoined.

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above to cases in which an injunction has been sought restraining health officers.

Thus, in Manhattan v. Hessin (Kan.) 105 Pac. 44, the court refused to restrain the health officers of a city from using one of its buildings as a pesthouse for the isolation of patients suffering from smallpox, where their acts in attempting to stop the spread of the disease were apparently performed in good faith, for the best interests of all persons concerned, and with commendable promptness and good judgment.

And an injunction restraining the city from using property as a hospital for the care of a person afflicted with leprosy was sustained in Baltimore v. Fairfield Improv. Co. 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081, where it was shown that the establishment of such a hospital would cause serious injury to the value of the property in the locality.

And in Wong Wai v. Williamson, 103 Fed. 1, the court restrained the board of health from requiring the Chinese residents of the city of San Francisco to be inoculated with a bubonic plague serum, and from confining such residents within the limits of the city until so inoculated. The court said that while it was possible that the Asiatic or Mongolian race, as a class, might be more liable to the plague than any other, such an explanation would be dismissed as unsatisfactory where no evidence had been offered to support the claim, and it was not known to be a fact.

So, in Jew Ho v. Williamson, 103 Fed. 10, the court held that it had the power to inquire whether a quarantine which had been established to prevent the threatened spread of the bubonic plague was reasonable and necessary under all of the circumstances.

And a board of health was enjoined in Eddy v. Board of Health, 10 Phila. 94, from removing tenants and closing up houses, where it was not justified by the actual existence of a contagious disease. In this case the decision of the court is based upon the ground that there did not appear to be any necessity of such an excessive exercise of power, merely because of the possible approach of cholera during the summer season.

In Summit Twp. v. Jackson, 154 Mich. 37, 18 L.R.A.(N.S.) 260, 117 N. W. 545, an injunction was sustained which forbade a city removing a person afflicted with a communicable disease in an adjoining town without the consent of the latter's health officer, where the general health laws provided that no person so affected should be brought into any township without a permit from its health officer.

Upon the general question of quarantine regulations by health authorities, see note to Hurst v. Warner, 26 L.R.A. 484.

As to the right of municipality to establish contagious disease hospital beyond city limits, see case note to Summit Twp. v. Jackson, 18 L.R.A.(N.S.) 260.

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22 Cyc. Law & Proc. pp. 879, 882; Rogers v. Barker, supra.

The mere fact that damages are recoverable at law is no objection to the granting of an injunction, in case such damages would not be adequate compensation for the injuries.

22 Cyc. Law & Proc. p. 771; First Evangelical Church v. Walsh, 57 Ill. 363, 11 Am. Rep. 21; Dennis v. Eckhardt, 3 Grant, Cas. 390; Butler v. Thomasville, 74 Ga. 570.

Mr. J. P. K. Bryan, also for respondent:

Acts of health bodies and other bodies exercising police power of the state can be reviewed by the court.

Riley v. Greenwood, 72 S. C. 90, 110 Am. St. Rep. 592, 51 S. E. 532; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161; Dobbins v. Los Angeles, 195 U. S. 223, 236, 238, 239, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18; Rohn v. Osmun, 143 Mich. 68, 5 L.R.A.(N.S.) 635, 106 N. W. 697; 2 Dill. Mun. Corp. 409, 410; 2 High, Inj. 3d ed. 969, 974, 993; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; 4 Am. & Eng. Enc. Law, pp. 602, 603.

It is not enough that the plaintiff has a remedy at law; it must be as efficient and as prompt in its administration as the remedy in equity.

Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 12, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77; Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 621, 20 L. ed. 501, 503; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Tyler v. Savage, 143 U. S. 79, 95, 36 L. ed. 82, 88, 12 Sup. Ct. Rep. 340; 2 Story, Eq. § 928; Dobbins v. Los Angeles, 195 U. S. 231, 49 L. ed. 171, 25 Sup. Ct. Rep. 18.

Woods, J., delivered the opinion of the court:

The board of health of the city of Aiken, after investigation, reached the conclusion that Miss Mary V. Kirk, a resident of the city, was afflicted with leprosy contagious in its nature, and passed resolutions requiring her to be removed to the city hospital for infectious diseases. Thereupon Miss Kirk brought this action for injunction, alleging in her complaint that, although she is a victim of leprosy, it is of the kind shown as anesthetic, and not dangerous to the community; that she is a woman of culture and refinement; and that the place to which the board of health require her to be removed is the city pesthouse, coarse and comfortless, used only for the purpose of incarcerating negroes having smallpox and other dangerous and infectious diseases; that the house adjoins the city dumping grounds, where the offal of the city is deposited, from which arise foul and unhealthy odors. Judge Aldrich on the complaint issued a temporary restraining order, and required the board of health to show cause why a temporary injunction should not be granted pending the hearing of the cause. As a return the board of health submitted their answer, alleging: (1) That the leprosy afflicting the plaintiff is contagious and dangerous to the community; (2) that they had resolved on compulsory isolation outside of the city only as a last resort, after Miss Kirk had refused to leave the city; (3) that the city council at their instance have put the city hospital in good condition and repair for Miss Kirk's temporary abode, and have promised to build for her a comfortable cottage, supplied with all modern conveniences, as soon as the work can be done; (4) that, while the city dumping grounds are about 100 yards from the hospital, the foul offal is not deposited there, and foul and unhealthy odors do not arise from it; (5) that they have discharged what they consider to be their duty under the law with humanity and courtesy. After hearing many affidavits from both sides, bearing on the issues thus made, Judge Aldrich granted a temporary injunction, restraining the board of health from removing the plaintiff to the city hospital or pesthouse. The order contained, however, this condition: "This order is not to be understood as interfering with the board of health in maintaining such quarantine regulations as they may deem necessary for the public safety." The board of health appealed.

The order of injunction rests on the finding by the circuit judge that the city hospital or pesthouse is unfit for the habitation of such a patient, by reason of a want of water supply and heating arrangements, and the proximity to the city dumping grounds. The appeal being from a mere temporary injunction, with the hotly contested issues of fact depending on affidavits only, we shall consider no matters of law or fact, except such as are absolutely necessary to decide whether the temporary injunction should be maintained.

The state Constitution thus provides for the creation of boards of health: "It shall be the duty of the general assembly to create boards of health wherever they may be necessary, giving to them power and authority to make such regulations as shall protect the health of the community, and abate nuisances." Art. 8, § 10. All the statute law relating to boards of health was re-enacted and incorporated in chapter 28, art. 1, Civ. Code 1902, and therefore should be referred to the duty to legislate on the

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subject, imposed by the Constitution of 1895 on the general assembly. Municipal boards of health, therefore, are to be considered as deriving their authority to isolate infected persons from the section of the Constitution above referred to, and from § 1099 of the Civil Code, which provides: "The said board of health shall have power and it shall be their duty to make and enforce all needful rules and regulations to prevent the introduction and spread of infectious or contagious diseases by the regulations of intercourse with infected places, by the arrest, separation, and treatment of infected persons, and persons who shall have been exposed to any contagious or infectious diseases, and by abating and removing all nuisance which they shall deem prejudicial to the public health, to enforce vaccination, to mark infected houses or places, to prescribe rules for the construction and maintenance of house drains, waste pipes, soil pipes, and cesspools, and make all such other regulations as they shall deem necessary for the preservation of the public health. They shall also have power, with the consent of the town or city council, in case of the prevalence of any contagious or infectious diseases within the town or city, to establish one or more hospitals and to make provisions and regulations for the management of the same."

Complaint was made about December 8, 1908, that Miss Kirk was afflicted with leprosy. The board came to the conclusion that the complaint was well founded, that the leprosy was contagious, and that it was necessary to the public health that Miss Kirk should leave the city, or be isolated in the city hospital or pesthouse until a more suitable abode could be provided for her. The first resolution was passed on December 13, 1908, in these terms: "Resolved, that we notify Miss Kirk, her friends, and practising physician that we will move her out to the city hospital if she is not moved out of the city in ten days from the date of service." Notice of this resolution was given to Miss Kirk; but at the request of Dr. Croft, Miss Kirk's physician, the board reconsidered the matter, and entered upon a diligent inquiry as to the nature of the disease and the necessity of isolation, calling to their aid Dr. Croft and all the physicians of the city. The investigation did not change the board's conclusion. On December 28th, and again on the 29th, Miss Kirk wrote to the board, submitting to its action and acquiescing therein on condition that she should have a white caretaker.

The following extracts from the minutes of the board of health indicate their formulated rule, after having had the matter under consideration from December 5, 1908, to January 13, 1909: "The matter of Miss Kirk was taken up and discussed. The secretary reported that the resolution adopted, asking council to erect a cottage for Miss Kirk, had been placed before the mayor and council, and that body had agreed to erect such cottage as soon as practicable, and the mayor had so informed Miss Kirk. The following was then introduced and adopted as a part of the rules and regulations of the board of health: 'Resolved by the board of health for the city of Aiken, that pursuant to the law giving us the power thereto, that we do hereby adopt the following rule and regulation: In order to prevent the introduction and spread of infectious or contagious diseases in the city of Aiken, that wherever any person is known to have any contagious or infectious disease, and if they enter the town having such, they be commanded immediately to leave the city, and if they do not, that they be quarantined until they can be removed, and in case any such person or persons is found within the city of Aiken affected with any such infectious or contagious disease, that they be notified to leave, and if they do not leave within a reasonable time, or their relatives and friends do not take them away, then and in such case that an order may be issued by the board of health to the health officers, or any of the policemen of the city, to take such party in charge and remove them to the city hospital for infectious diseases, or such other place as may be designated by the board of health.'"

On January 18, 1909, the board resolved "that Miss Kirk be removed out to the city hospital to-day, provided her health permits." Subsequently, on the same day, Dr. Croft gave to the board a certificate: "I have this day visited Miss Kirk, and find that she is very nervous and has been quite sick all night, and think that it is advisable that she be not removed at present." Three days thereafter, on January 21, 1909, the complaint for injunction and the order to show cause were served on the board of health.

The principles of constitutional law governing health regulations by statute and municipal ordinance may be thus stated:

First. Statutes and ordinances requiring the removal or destruction of property or the isolation of infected persons, when necessary for the protection of the public health, do not violate the constitutional guaranty of the right of the enjoyment of liberty and property, because neither the right to liberty nor the right of property extends to the use of liberty or property to the injury of others. The maxim, *Sic utere tuo ut alienum non lædas*, applies to the person as well as to the property of the citizen.

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The individual has no more right to the freedom of spreading disease by carrying contagion on his person, than he has to produce disease by maintaining his property in a noisome condition.

Second. The state must of necessity lodge the power somewhere to ascertain, in the first instance, and act with promptness, when the public health is endangered by the unhealthful condition of the person or the property of the individual; and the creation by legislative authority of boards of health, with the discretion lodged in them of summary inquiry and action, is a reasonable exercise of the police power. From this it follows that the rules and resolutions within the scope of the authority of such boards have the force of legislative enactment. The conferring of such power on boards of health is not, however, a delegation of the state legislative power lodged by the Constitution exclusively in the general assembly. It is merely the providing of the agency for carrying out the legislative enactment. In this state the exercise of such powers by boards of health has the still higher sanction of a constitutional requirement that "the general assembly shall create boards of health, and give them power and authority to make such regulations as shall protect the health of the community and abate the nuisance."

Third. Arbitrary power over persons and property could not be conferred on a board of health, and no attempt is made in the Constitution or statutes to confer such power. On the contrary, it is implied in all such legislation that the board shall exercise the police power conferred in view of the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws. It is always implied that the power conferred to interfere with these personal rights is limited by public necessity. From this it follows that boards of health may not deprive any person of his property or his liberty, unless the deprivation is made to appear, by due inquiry, to be reasonably necessary to the public health; and such inquiry must include notice to the person whose property or liberty is involved, and the opportunity to him to be heard, unless the emergency appears to be so great that such notice and hearing could be had only at the peril of the public safety.

Fourth. To the end that personal liberty and property may be protected against invasion not essential to the public health,—not required by public necessity,—the regulations and proceedings of boards of health are subject to judicial review, by an action for damages or for injunction or other appropriate proceeding, according to the circumstances. In passing upon such regulations and proceedings, the courts consider, first, whether interference with personal liberty or property was reasonably necessary to the public health; and, second, if the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose to be attained.

Fifth. In exercising the jurisdiction to review the regulations and actions of such boards by injunction or other proceeding, the courts cannot invade the province of the legislative branch of the government. Inasmuch as it is the province of the legislative branch to determine what laws and regulations are necessary to the public health, statutes and regulations made, and measures taken under such statutes, and intended and adopted to that end, are not subject to judicial review; but the courts must determine whether there is any real relation between the preservation of the public health and the legislative enactment, or the regulations and proceedings of boards of health under authority of the statute. If the statute, or the regulations made, or the proceedings taken under it, are not reasonably appropriate to the end in view, the necessity for curtailment of individual liberty, which is essential to the validity of such statutes and regulations and proceedings, is wanting, and the courts must declare them invalid, as violative of constitutional right.

Sixth. In all judicial inquiry with respect to health laws and regulations, every intendment is to be allowed in favor of the validity of the statute and the lawfulness of the measures taken under it.

Citation is unnecessary of all the cases in which is discussed the police power as related to the powers exercised by the various kinds of administrative boards created by constitutional and statutory authority. With respect to the extent to which the action of such boards is subject to judicial review, and the manner in which judicial review may be obtained, the courts are not in entire agreement. The principles we have stated seem to us to be in accord with the adjudications of our own court, and of the Supreme Court of the United States, and with well-considered decisions in other states. The following authorities have special application to the points involved in this case: State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 526, 3 L.R.A. 841, 9 S. E. 686; State v. Moorehead, 42 S. C. 217, 26 L.R.A. 585, 46 Am. St. Rep. 719, 20 S. E. 544; Darlington v. Ward, 48 S. C. 582, 38 L.R.A. 326, 26 S. E. 906; State ex rel. Southern R. Co. v. Earle, 66 S. C. 194,

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In applying these principles, it is to be borne in mind that the case under consideration is unusual, imposing upon the Aiken board of health a delicate and unpleasant duty. Miss Kirk is not only a lady of refinement, highly esteemed in the community, but she is quite advanced in years. The proceedings of the board show clearly their solicitude to treat Miss Kirk with courtesy and consideration. There is no foundation for the charge that they did not give her notice and an opportunity to be heard, for, in response to the notice of the board, she sent communications to them, and her physician, Dr. Croft, appeared and presented her view of the matter. It was not to be expected that the board should assume the peril from the contagion to themselves and others which a personal hearing would have entailed.

That Miss Kirk is afflicted with anesthetic leprosy, contracted while engaged in missionary work in Brazil, is admitted. While there is a strong showing that the anesthetic form of the disease is only slightly contagious, when the distressing nature of the malady is regarded, it is manifest that the board were well within their duty in requiring the victim of it to be isolated. The case then turns on whether, under the principles above stated, plaintiff has made a prima facie showing that the manner of the isolation was so clearly beyond what was necessary to the public protection, that the court ought to enjoin it as arbitrary. The evidence furnished of the opinions of both specialists and general practitioners of medicine was quite full, and leads to the conclusion that there is hardly any danger of contagion from Miss Kirk, except by touch, or at least close personal association. What is more important than these opinions is the uncontroverted fact that Miss Kirk has for many years lived in the city of Aiken, attended church services, taught in the Sunday school, mingled freely with the people in social life, resting on the opinion of Dr. Hutchinson, a distinguished London specialist, that her disease was not contagious, and in all that time there has been nothing to indicate that she has imparted the disease to any other person. Was there any necessity to send such a patient to the pesthouse? The board of health had established a strict quarantine of her dwelling, and there was no evidence that Miss Kirk had made any effort to violate it. The maintenance of this quarantine, we cannot doubt, afforded complete protection to the public. It is true the board could not be expected to maintain a permanent quarantine of a house in the heart of the city of Aiken; but the city council had agreed to build for the purpose of isolation a comfortable cottage outside of the city limits, which could have been completed in a short time.

There is some conflict in the affidavits as to the condition of the pesthouse; but it is not denied that it is a structure of four small rooms in a row, with no piazzas, used heretofore for the isolation of negroes with smallpox, situated within a hundred yards of the place where the trash of the city, except its offensive offal, is collected and burned. The smoke from this pile is blown through the house. The board of health, it is true, have made it less uncomfortable by painting and some other work; but with this improvement, we are forced to the conclusion that even temporary isolation in such a place would be a serious affliction and peril to an elderly lady, enfeebled by disease, and accustomed to the comforts of life. Nothing but necessity would justify the board of health in requiring it, and we think there is a strong prima facie showing that there was no good reason to conclude that such neccessity existed.

We agree with the circuit judge, also, on the point that an action for damages against the members of the board of health as individuals would not afford the plaintiff an adequate remedy. In some jurisdictions it has been held that the members of a board of health incur personal liability for a mistake in destroying property on the ground that it is dangerous, when in fact it is not. Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; People ex rel. Copcutt v. Board of Health, supra. The contrary is held in Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Whidden v. Cheever, 69 N. H. 142, 76 Am. St. Rep. 154, 44 Atl. 908; Compagnie Francaise de Nav. v. State Bd. of Health, 51 La. Ann.

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We agree with the circuit judge, also, on the point that an action for damages against the members of the board of health as individuals would not afford the plaintiff an adequate remedy. In some jurisdictions it has been held that the members of a board of health incur personal liability for a mistake in destroying property on the ground that it is dangerous, when in fact it is not. Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; People ex rel. Copcutt v. Board of Health, supra. The contrary is held in Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Whidden v. Cheever, 69 N. H. 142, 76 Am. St. Rep. 154, 44 Atl. 908; Compagnie Francaise de Nav. v. State Bd. of Health, 51 La. Ann.

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C15, 56 L.R.A. 795, 72 Am. St. Rep. 458, 25 So. 591; Forbes v. Board of Health, 28 Fla. 26, 13 L.R.A. 549, 9 So. 862. In this state it must be held, on the authority of White v. Charleston, 2 Hill, L. 576, that the members of a board of health are not personally liable for errors in their official conduct, when they exercise their honest judgment. Personal liability depends on proof of bad faith. True, bad faith may be shown by evidence that the official action was so arbitrary and unreasonable that it could not have been taken in good faith; but there is no such showing in this case. Even if there were such showing, the remedy by action for damages would not be adequate where the health or life of the citizen is by force unnecessarily imperiled. Protection from the loss of health or life is the only adequate relief in such case.

We cannot too strongly emphasize the caution which courts should exercise in entertaining applications for injunction against boards of health, yet careful consideration of the record leads us to the conclusion that this is an exceptional case, and that the order for the temporary injunction, carefully guarded as it was in its terms, was not improvidently made.

The judgment of this court is that the judgment of the Circuit Court should be affirmed.

Hydrick, J., dissenting:

I feel constrained to dissent from the decision of the court in this case.

In the main, I concur in the statement of the principles of law applicable in the consideration by the courts of municipal ordinances and regulations of boards of health, as laid down by Mr. Justice Woods. There are, however, some expressions contained therein which are susceptible of a construction which would make his statement of the principles applicable in such cases conflict with the previous decisions of this court, and which, if such construction is proper, may prove subversive of the power and authority conferred upon these bodies by the Constitution and statutes. In the fourth subdivision of his statement of the law, he says: "In passing upon such regulations and proceedings, the courts consider, first, whether interference with personal liberty or property was reasonably necessary to the public health; and, second, if the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose to be attained." In the fifth subdivision he says: "If the statute, or the regulations made, or the proceedings taken under it, are not reasonably appropriate to the end in view, the necessity for curtailment of individual liberty, which is essential to the validity of such statutes and regulations and proceedings, is wanting, and the courts must declare them invalid, as violative of constitutional right."

This court has held, in a number of cases, that, within the scope of the power conferred upon them by the Constitution and statutes, these bodies are the exclusive judges of the necessity of police regulations adopted by them, and of the means necessary and proper to enforce them. Within the scope of their powers, their action is legislative, as well as administrative, and the courts have no power to inquire whether it is necessary, reasonable, or appropriate to the end in view, unless, and only in so far as, such inquiry may be necessary to enable the courts to determine whether rights guaranteed by the Constitution, state or Federal, have thereby been invaded. The courts will not be misled by a mere subterfuge. Hence, in order that rights guaranteed by the Constitution may not be violated under the form and pretense of police regulations, the courts will inquire whether there is any real and substantial relation between such regulations and the manner of their administration and the avowed purpose sought to be accomplished. If the language above quoted means no more than that the courts may inquire into the reasonableness or necessity of such regulations and into the manner of their administration, and consider these, in so far as such inquiry and consideration may serve to enable the courts to decide whether there is any real and substantial relation between such regulations and the manner of administering them and the avowed purpose sought to be attained, and hence whether they are bona fide exertions of the police power or mere pretenses, under cover of which constitutional rights are invaded, then I think the statement correct; but if it is meant that the courts can go further, and, after having discovered the existence of some real and substantial relation between such regulations and the method of enforcing them and the end sought to be attained, set their judgment up against that of the municipal corporation or board of health as to the appropriateness, reasonableness, or necessity of such regulations, when they do not invade any constitutional right, then I do not think it a correct statement of the law. If there is such an intimate relation between the law and the avowed purpose of it that reasonable men might differ as to the necessity, reasonableness, or wisdom of the law, the courts are bound by the judgment of the lawmakers, unless law conflicts with the Constitution; but of course, if no such relation appears to exist between the law and its administration and the end to be attained, or if such

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relation is so slight that, considering its effect and operation and the manner of its administration, reasonable men could not differ in the opinion that the real purpose and intent of the law is to evade some provision or guaranty of the Constitution, under a mere pretensive exercise of the police power, or if it does, in fact, in its necessary operation and effect, conflict with the Constitution, then the courts may hold it void, as being in excess of the power granted, or in violation of the Constitution. Upon this view many apparent conflicts in the decisions may be reconciled, for the courts are generally agreed that large powers and discretion must be vested in municipal bodies and boards of health in regulating the police, and that every intendment will be indulged in support of their actions, and they will not be declared void, unless they are clearly in excess of the powers confered, or a palpable invasion of rights guaranteed by the Constitution.

In some states the courts have declared municipal ordinances and regulations of boards of health void because they were unreasonable or unnecessary to the public safety; but upon careful examination of the cases, it will be found that, in the great majority of them, they were said to be unreasonable or unnecessary because they were in excess of the powers granted, or in conflict with constitutional provisions. 1 Dill. Mun. Corp. 4th ed. §§ 94, 319, 328. "The judgment of the court cannot be substituted for the judgment of the board of health." Naccari v. Rappelet, 119 La. 272, 13 L.R.A.(N.S.) 640, 44 So. 13; Ruhstrat v. People 76 Am. St. Rep. 30, and note (185 Ill. 133, 49 L.R.A. 181, 57 N. E. 41); Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798. "If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the state; but, if it could, we presume it did. Of the propriety of legislative interference, within the scope of legislative power, the legislature is the exclusive judge." Munn v. Illinois, 94 U. S. 132, 24 L. ed. 86; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. It may be observed, also, that with regard to the extent to which the court will inquire into the reasonableness or necessity of such law, the courts place laws regulating lawful business enterprises in a class separate and distinct from those enacted to protect the public health. Compare Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18, with Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765. I have cited these decisions of the Supreme Court of the United States to show that upon this point the decisions of that court are in accord with the decisions of this court, because, where Federal questions are involved, the state court is bound to follow the decisions of the Federal Supreme Court.

This court has held, time and again, that it has no power to declare a police regulation void because it is unreasonable or unnecessary. Heisembrittle v. Charleston, 2 McMull. L. 233; Charleston v. Goldsmith, 2 Speers, L. 428; Charleston v. Ahrens, 4 Strobh. L. 241; Charleston v. Wentworth Street Baptist Church, 4. Strobh. L. 306; Summerville v. Pressley, 33 S. C. 56, 8 L.R.A. 854, 26 Am. St. Rep. 659, 11 S. E. 545; Darlington v. Ward, 48 S. C. 570, 38 L.R.A. 326, 26 S. E. 906; Brunson v. Youmans, 76 S. C. 128, 56 S. E. 651. In Summerville v. Pressley, the court, on page 61 of 33 S. C. says: "Assuming for the present that the town council had the power to pass the ordinance, no question can be made whether a 'nuisance' had been created, nor whether the restrictions complained of were necessary to accomplish the purpose in view. It was their exclusive right to judge what was 'necessary and requisite' to preserve the health of the town." Again, at page 63 of 33 S. C.: "We suppose that the cultivation inhibited must have been considered as dangerous to health in the locality of Summerville; but, be that as it may, it was a question for the lawmaking body." On page 64 of 33 S. C. the court quoted, with approval, the following from Harrison v. Baltimore, 1 Gill, 264: "Of the degree of necessity for such municipal legislation, the mayor and council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made guardians." Similar expressions, as directly in point, will be found in each of the cases above cited.

The principal ground of my dissent, however, is upon the point upon which the decision is mainly rested, to wit, whether "plaintiff has made a prima facie showing that the manner of the isolation was so clearly beyond what was necessary to the public protection that the court ought to enjoin it as arbitrary." While I do not think the circumstances demanded precipitate action by the board, and while they might, perhaps, with little danger to the

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public, have allowed Miss Kirk to remain in her own home until they could have provided a more suitable place for her than the pesthouse, still of that they were the exclusive judges, unless their action involved an unconstitutional invasion of her liberty. In view of what has been said, perhaps I should say that in my opinion the board treated Miss Kirk with the greatest kindness and consideration, as, indeed, they should have done, for her unfortunate condition certainly appeals most strongly to the kindest sentiments of humanity; but, considering the situation from the point of view of the board, as well as from that of Miss Kirk, what could they have done, under the circumstances, more than they did? The court holds that they were within their rights and duty in ordering her isolation, and that they were not bound to keep up a perpetual quarantine of her house in the heart of the city. Should they have gone forward and built a house for her? That might have been a useless waste of time and money, for they had no way of knowing whether she would occupy it. By the time it was done, she might have decided to leave the city, as she had the right to do under the ordinance, and as the testimony shows she was contemplating doing. Suppose the board had never suggested the idea of building a more comfortable and convenient house for her, or suppose they had not had the means to do so, and the pesthouse had been the only place where they could isolate her. Would the court hold that, because they had no other place, they could not isolate her there? But what of the pesthouse? There is much of opinion in the affidavits pro and con as to its fitness for the isolation of Miss Kirk. Doubtless these opinions are more or less colored by the feelings and prejudices of the witnesses. The undisputed facts, as to its character and condition, are more to the point. These show that it is composed of four small rooms, measuring about 12x12 feet each, in a row, with a hall about 4 feet wide along the front. Each room has a door opening into the hall, and two windows on the opposite side, which are provided with sash and Venetian blinds. It is built of dressed lumber, weather-boarded, and ceiled. The partitions are of dressed ceiling. The ceiling has shrunk, and shows some cracks and knot holes. The rooms are heated by stoves, which are said to be rickety and rusty. The house has no piazzas. There are no trees or shrubbery around it. It has been used for the isolation of negroes with smallpox; but no case had been there within about two years, and after the last case was discharged the house was fumigated by the best system known to modern science. It was again thoroughly cleansed and fumigated while being prepared for Miss Kirk, and was painted inside and outside. The dump pile, where the trash from the city, consisting of brush, leaves, waste paper, tin cans, etc., but not the offensive offal, was piled and burned, is about 100 yards from the house, and when this trash is being burned, the smoke sometimes blows over and through the house. The city council proposed and intended to remove the dump pile, which could have been done in a day or two.

With this detailed description of the house and its surroundings, the court is as capable as the witnesses of drawing correct conclusions as to whether the confinement there of an elderly lady, cultured and refined, and accustomed to live in a house equipped with all the modern comforts and conveniences, would have caused her any serious injury. I do not think it would; but, granting that it might, it does not follow that the board should be enjoined, on a mere possibility, in the exercise of their honest judgment as to what was necessary for the protection of the public health. I dare say there is not a pesthouse or hospital in the state, except perhaps those in the larger cities, that will afford all, or even many, of the comforts and conveniences of a well-equipped modern dwelling house; but that is no reason why one accustomed to live in such a house should have the right to enjoin a board of health from taking him to a less comfortable or convenient place, if he should be afflicted with a contagious disease, and thereby become a menace to the community. Certainly not, unless he can show with reasonable certainty that it would probably—not possibly—seriously endanger his health or life. The maxim, *Salus populi est suprema lex*, is the foundation of all police law, and to it even rights of property and of liberty, which are protected by the Constitution, must give way. When danger threatens the commonwealth, there arises that overruling "necessity" which "knows no law." It is the principle in which authority is found for compulsory vaccination laws, which have been, without exception, so far as I know, sustained by the courts, notwithstanding the victims are always made more or less sick, and may even suffer death as a consequence. 1 Tiedeman, State & Federal Control of Persons & Property, §§ 17, 44, 169; Markham v. Brown, 92 Am. Dec. 76, and note (37 Ga. 277); Morris v. Columbus, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; State v. Hay, 126 N. C. 999, 49 L.R.A. 588, 78 Am. St. Rep. 691, 35 S. E. 459. "There is an implied assent on the part of every member

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of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good." Broom, Legal Maxims, 4th ed. 49.

I do not go to the extent of saying that, if it had been made to appear with reasonable certainty that confinement of Miss Kirk in the Aiken pesthouse would have probably resulted in serious injury to her health, the board could have lawfully insisted on confining her there; or, if they had, that the court would not, under the circumstances of this case, have enjoined them. But that is not the case made by the record, from which it appears that there was at least as much, if not more, danger to the public from Miss Kirk's being in the city than there was to her from confinement in the pesthouse. It must be remembered that it was only intended for her temporary abode, until a new cottage could be built, and that the city council proposed and intended to supply the house with water, electric lights, and, from the very commendable spirit shown by the board of health and the city council, I have no doubt they would have supplied everything else necessary to make her comfortable. In dealing with such matters, of necessity and for obvious reasons, a wide range of discretion must be allowed the local authorities, and they should not be interfered with, unless it is clearly made to appear that they have abused that discretion to the probable injury to health or life. The Constitution and statutes have conferred large powers on boards of health, but to what purpose, if they are not allowed to enforce them?

I do not think the plaintiff has made a prima facie showing entitling her to injunctive relief, and I think the precedent a dangerous one and unnecessary to the protection of any right of the plaintiff, under the law, and therefore the order of the circuit judge should be reversed.

WASHINGTON SUPREME COURT.

GEORGE H. MEAD et al., Appts.,
v.
J. R. WINSLOW
and
S. A. WHITE et al., Respts.

(53 Wash. 638, 102 Pac. 753.)

Principal and surety — necessity of writing.

1. An undertaking to become surety for a building contractor must be in writing, under the statute of frauds.

Same — sufficiency of writing.

2. The mere indorsement of one's name upon a building contract, under the word "surety," is not a sufficient note or memorandum in writing of the obligation of the one so signing to satisfy the statute of frauds and charge him as surety on the contract.

Contract — reformation — absence of necessary writing.

3. A contract of suretyship which is invalid under the statute of frauds because of insufficiency of the written memorandum cannot be reformed in equity so as to insert the missing provisions and make it enforceable.

(June 22, 1909.)

Case Note. — Subscribing one's name under word "surety" in written contract as satisfying statute of frauds.

A search has disclosed but two additional cases in which this question has been decided, and, in accord with the decision in MEAD v. WINSLOW, the writing was held in each to be insufficient to satisfy the statute of frauds.

Thus, the signature of a person, under a column headed "sureties," in shipping articles, unaccompanied by any addition or explanation showing for what he was surety, has been held not a sufficient writing to satisfy the statute of frauds. Dodge v. Lean, 13 Johns. 508.

And a signature after the word "security," appearing at the end of an agreement signed by one undertaking to pay rent to a third person, was held not a sufficient writing to satisfy the statute, since it failed to show the consideration for the undertaking. Gould v. Moring, 28 Barb. 444.

There appears to be a conflict among the cases as to the necessity of the consideration being expressed in agreements of this kind. The particular ground, therefore, upon which the above decision rests, would not in all states present a valid objection to the sufficiency of the writing.

The case of Moore v. Eisaman, 201 Pa. 190, 50 Atl. 982, although not strictly within the scope of this note, is deemed sufficiently analogous to warrant its insertion. It was there held that the meaning of the letters "O. K.," written before his signature by one sought to be held as guarantor, at the end of a contract for the purchase of brick, entered into between the plaintiffs and a third person, could not be shown by parol. The court said: "While, as has been observed, the defendant could not be made liable to the plaintiffs on a parol guaranty, yet this did not prevent the plaintiffs from showing by parol testimony the meaning of the initial letters 'O. K.' Without the aid of extrinsic evidence, the letters could not be interpreted, nor the use of them in the connection in which they were employed be understood. It was therefore competent for the plaintiffs to show that the letters written on the contract by Eisa-

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APPEAL by plaintiffs from a judgment of the Superior Court for Pierce County in favor of defendants White et al. in an action brought to reform, and, as reformed, to recover upon, a building contract. Affirmed.

The facts are stated in the opinion.

Messrs. **E. L. Culver** and **B. A. Crowl**, for appellants:

Parol evidence is admissible to show who the contracting parties are.

Landers v. Foster, 34 Wash. 674, 76 Pac. 274; Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696.

The old rule, that the contract is to be construed strictly in favor of the surety, has been modified in accordance with common sense and the spirit of the age.

Eureka Sandstone Co. v. Long, 11 Wash. 164, 39 Pac. 446; Ihrig v. Scott, 5 Wash. 585, 32 Pac. 466; Cowles v. United States Fidelity & G. Co. 32 Wash. 124, 98 Am. St. Rep. 838, 72 Pac. 1032.

The contract of White and Bailey is an absolute and original obligation; and they are parties to the original contract, and primarily bound by its terms and conditions, and liable for the faithful performance of the same.

1 Brandt, Suretyship, § 2; Perkins v. Goodman, 21 Barb. 218; Eureka Sandstone Co. v. Long, 11 Wash. 172, 39 Pac. 446; Cowles v. United States Fidelity & G. Co. 32 Wash. 127, 98 Am. St. Rep. 838, 72 Pac. 1032; Hanna v. Savage, 7 Wash. 418, 35 Pac. 127, 36 Pac. 269; Hingley v. Bellingham Bay Boom Co. 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

If the court deemed the words "for Winslow" necessary to make the contract complete, the evidence is sufficient to warrant reformation.

State v. Lorenz, 22 Wash. 289, 60 Pac. 644; Richmond v. Ogden Street R. Co. 44 Or. 48, 74 Pac. 333; Reed v. Root, 59 Iowa, 359, 13 N. W. 323; Pitcher v. Hennessey, 48 N. Y. 415; Dennis v. Northern P. R. Co. 20 Wash. 320, 55 Pac. 210.

Messrs. **H. G. Rowland** and **Dix H. Rowland**, for respondents:

If any credit at all is given to the person for whose benefit the promise is made, and is not given wholly to the promiser, the undertaking is collateral, and must be in writing.

20 Cyc. Law & Proc. pp. 164, 166, 191, 258–260; Nugent v. Wolfe, 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15; Emerson v. Slater, 22 How. 41, 16 L. ed. 365; Stearns, Suretyship, p. 42.

The note or memorandum is clearly insufficient to take the case out of the statute.

Lee v. Hills, 66 Ind. 474; Marion County v. Shipley, 77 Ind. 553; Grant v. Naylor,

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man imported and meant a guaranty in trade circles. Had it been shown that such was their signification in commercial usage, the parties would be presumed to have used them in that sense, and they would have constituted a written contract of guaranty. We have, however, examined the evidence with care, and it fails to show that the common acceptation or meaning of the letters written by Eisaman at the end of the contract is that of a guaranty. The most that can be claimed for the testimony is that it shows that such was the interpretation placed upon the letters 'O. K.' by the witness and by the appellants. This is not sufficient, and is not the proof required to support the appellants' offer. It was not competent to introduce testimony to show that the appellants relied on the writing as a guaranty of Long's contract, or, as has been said, that the parties to the alleged guaranty understood the contract to be of such a character. The offer of parol testimony for such purposes is in itself an admission of the insufficiency of the written agreement to establish a guaranty, and discloses the necessity of such testimony to make the alleged guarantor liable to the appellants. Parol testimony to show either the intention of the parties or that they acted on the understanding that the writing was a guaranty is supplying by parol a defective written guaranty, which is prohibited by the statute of frauds."

Another case, not strictly within the scope of this note, but closely analagous, is Great Western Printing Co. v. Belcher, 127 Mo. App. 133, 104 S. W. 894. It was held in this case that the words "Guaranteed, Belcher," indorsed across the face of an itemized account, constituted a sufficient writing to satisfy the statute of frauds, since the agreement showed the parties and items, and was complete without adding terms or stipulations by parol.

And where a party signs his name at the end of an agreement, adding the word "surety," his undertaking has been held original, so that he is to be treated as a principal, and the statute of frauds is therefore not applicable. Perkins v. Goodman, 21 Barb. 218. The court said: "The undertaking of a surety who signs upon the face or at the end of a contract, with the principal, although he adds the word 'surety' to his name, is an original, and not a collateral, undertaking. It is not a promise to answer for the debt, default, or miscarriage of another, but is an undertaking for a direct performance on his own part. He becomes a party to the contract, and may be treated as principal by the creditor, although he is a surety merely as between him and the other party, with whom he jointly or severally undertakes. In such cases no writing, other than the body of the contract, is necessary; and the statute of frauds has no application. The debt is his if the contract is valid."

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4 Cranch, 224, 2 L. ed. 603; Brandt, Suretyship, 2d ed. § 81; 20 Cyc. Law & Proc. p. 261; Marston v. French, 43 N. Y. S. R. 538, 17 N. Y. Supp. 510; Foote v. Robbins, 50 Wash. 277, 97 Pac. 103.

The evidence did not authorize reformation.

Glass v. Hulbert, 102 Mass. 34, 3 Am. Rep. 418; 2 Pom. Eq. Jur. § 859; Deseret Nat. Bank v. Dinwoodey, 17 Utah, 43, 53 Pac. 216; Phillips v. Port Townsend Lodge No. 6, F. & A. M. 8 Wash. 529, 36 Pac. 476; Heffron v. Fogel, 40 Wash. 698, 82 Pac. 1003.

Gose, J., delivered the opinion of the court:

The appellants commenced this action for the purpose of reforming a written contract, and recovering a judgment thereon against the defendant and the respondents, for its breach. The introductory part of the contract is as follows:

Building Contract.

This agreement made and entered into this 25th day of March, 1907, by and between J. R. Winslow, party of the first part, hereinafter designated the contractor, and George H. Mead and Helen M. Mead, party of the second part, hereafter designated the owner, witnesseth: That the contractor, in consideration of the agreements herein made by the owner, agrees with said owner as follows.

The contract, which is quite lengthy, then provides what shall be done by the contractor and the owner, respectively. The attestation clause and the subscription are as follows:

In witness whereof the parties of these presents have hereunto set their hands the day and year first above written.

J. R. Winslow.
George H. Mead.
H. M. Mead.

In presence of sureties
S. A. White.
W. F. Bailey.

The words "In presence of" are printed, and the word "sureties" was written before the contract was signed. The complaint charges that the respondents "subscribed as sureties for the faithful performance of such contract on the part of J. R. Winslow," and prays that the contract be reformed as to the respondents, so as to read, "Subscribed as sureties for the faithful performance of said contract on the part of J. R. Winslow," and for judgment against the defendant and the respondents. The case was tried to the court, resulting in a judgment for the respondents. From such judgment this appeal is prosecuted.

The answer, among other things, pleads that the contract is void under the provisions of Ballinger's Anno. Codes & Statutes, § 4576 (Pierce's Code, § 5343) which provides: "In the following cases specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say:— . . . (2) Every special promise to answer for the debt, default, or misdoings of another person." The contract does not show the relation of the respondents to it, other than such as may be gathered from their signatures. Upon reading the contract the mind at once inquires, For whom and for what purpose did the respondents sign? The contract may be searched in vain for an answer to this inquiry. It contains many requirements upon the part of the contractor and the owner, but is silent as to any duty or obligation as to the respondents The discussion takes broad ground in the briefs, but the view we take of the case narrows the scope of inquiry.

The appellants contend, first, that the contract of the respondents is an original undertaking, rather than a collateral one, and as such that it is not within the statute. We will first notice this contention. When the object of the undertaking is to become surety for another, the promise is collateral, and must be in writing. 20 Cyc. Law & Proc. p. 163. In Nugent v. Wolfe, 111 Pa. 471, 480, 56 Am. Rep. 291, 4 Atl. 15, 17, speaking to the question of the distinction between an original and a collateral promise, the court say: "It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promiser is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute." "Courts must rely on the circumstances of each particular case and its general features, in order to

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ascertain the intent of the parties, and how they viewed it, when it is doubtful whether it was a contract of suretyship or guaranty, or an original undertaking. Generally speaking, an oral undertaking by a person not previously liable, for the purpose of securing the debt or performing the same duty for which the person for whom the undertaking is made remains liable, is within the statute of frauds, and must be in writing." 20 Cyc. Law & Proc. p. 164. Upon both principle and authority we have no difficulty in reaching the conclusion that the undertaking of the respondents was a collateral one. The contract, therefore, must be in writing, notwithstanding the fact that all the parties entered into it at the same time. Stearns, Suretyship, p. 42.

We will next consider whether the contract as it affects the respondents is in writing, within the meaning of the statute. In Foote v. Robbins, 50 Wash. 277, 97 Pac. 103, the court had under consideration a contract whereby the owner employed a broker to sell real estate. The terms and conditions of sale were complete, but the contract was silent as to the broker's compensation for his services. At pages 279, 280 of 50 Wash. the court said: "If by the written agreement the payment of a commission by respondents was contemplated, resort must now be had to oral evidence for the purpose of showing the amount of such commission, and that it was to be paid by the appellant as vendor, and not by the purchaser as vendee. The unmistakable purpose of the statute was to avoid any such method of fixing the extent of the liability, or the liability itself, of either a vendor or a vendee for the payment of a commission." In Allen v. Kitchen (Idaho) 100 Pac. 1052, 1056, a well-considered case, the court, speaking through Ailshie, J., say: "There is no contract until it is reduced to writing as provided by law. It is not a question as to what the contract was intended to be, but, rather, Was it consummated by being reduced to writing as prescribed by the statute of frauds? Admittedly an essential portion of the contract in this case was not reduced to writing and subscribed by the party to be bound. This case therefore presents the question of adding to and supplying an insufficient description, rather than that of reforming an untruthful description. If a court of equity can supply one requirement of a contract that is required by the statute of frauds to be in writing, it may supply another, and the logical conclusion would be that it might in the end supply all the requirements, and thereby contravene a positive statute. This cannot be done." "In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them. Accordingly, if an oral contract falling within the scope of the statute has terms not stated in the memorandum, or if the memorandum contains a reference to such terms, or imports their existence by fair inference, without clearly stating them, or if the memorandum merely refers to the contract without stating its terms, the case falls within the statute." 20 Cyc. Law & Proc. pp. 258-260. See also Marion County v. Shipley, 77 Ind. 553; Lee v. Hills, 66 Ind. 479; Grand v. Naylor, 4 Cranch, 224, 2 L. ed. 603.

The document, aside from the word "sureties" and the signatures of the respondents, states a complete contract between the appellants and the defendants, but contains no provision which even tends to connect the respondents with it. As between the appellants and the respondents, there is an entire absence of contract. In order to hold the respondents to any liability, the court would be required to create a contract, either by construction or by parol evidence. There is no language in the contract to warrant the former, and the latter is within the prohibition of the statute. Surely the mere subscription of the contract by the respondents under the word "sureties," without showing their relation to the contract or to the parties, cannot be said to create any contract relation. A cursory examination of the record in this case affords abundant evidence, if evidence were wanting, of the wisdom of the statute. One of the respondents testified that he only engaged to guarantee the integrity of the defendant, while the other said that he signed merely for the purpose of recommending him.

Finally, it is contended that a court of equity has power to reform the contract, and to enforce it when so reformed. The contract being invalid, under the statute parol evidence will not be admitted for the purpose of reforming it. To do so would result in permitting the parties to accomplish indirectly that which the statute forbids. Speaking to this question in Allen v. Kitchen, supra, at page 1057 of 100 Pac., it is said: "After a very careful examination of the many authorities dealing with this question, we are clearly of the opinion that courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration, or description that has been inserted

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therein through deception, fraud, or mutual mistake, and to make the statements speak the truth, as it was intended to insert them in the instrument. On the other hand, we are equally satisfied that a court of equity has no power or jurisdiction to construct an executory agreement for the parties, or to insert therein new and essential elements, or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding. In other words, reformation does not mean re-creation. The court will not, under the guise of reforming an instrument, construct or reconstruct the instrument, so as to make it comply with the statute." See also Glass v. Hulbert, 102 Mass. 24. 3 Am. Rep. 418. The record does not present the question of reforming a contract so as to speak the truth, but rather of creating a contract in its entirety.

What we have said renders it unnecessary to consider the other assignments.

The judgment will be affirmed, and the respondents will recover their costs.

Rudkin, Ch. J., and Chadwick, Fullerton, and Morris, JJ., concur.

ARKANSAS SUPREME COURT.

HOME INSURANCE COMPANY, Appt.,
v.
NORTH LITTLE ROCK ICE & ELECTRIC COMPANY.

(86 Ark. 538, 111 S. W. 994.)

Evidence — secondary.

1. The general agent of an insurance company cannot, in a suit upon the policy, state whether or not the report of an agent who issued the policy contained anything as to the idleness of the plant on which it was issued, since the report is the best evidence.

Insurance — knowledge of agent.

2. Knowledge of local insurance agents as to the condition of a risk upon which they issue policies, the property belonging to a corporation of which they are directors and large stockholders, which fact was not known to the insurer or its general agent, is not chargeable to the insurer.

Same — manufacturing plant — idleness.

3. Insurance of a building which is not in operation as a manufactory at the time, as "occupied as an ice factory," does not require its operation as such, to make the policy valid, under a provision that the policy shall be void if on a manufacturing establishment which shall cease to be operated for ten consecutive days.

Same — interpretation.

4. Language in the second clause of an insurance policy, the first clause of which insures a building, which covers machinery and all appurtenances and appliances necessary and used in the owner's business, does not imply that the building is a manufacturing establishment.

(June 15, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. **Rose, Hemingway, Cantrell, & Loughborough** for appellant.

Mr. **J. W. Blackwood**, for appellee:

The establishment had not ceased to be operated within the meaning of the policy.

Lebanon Mut. F. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8; Bole v. New Hampshire F. Ins. Co. 159 Pa. 53, 28 Atl. 205; Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. Rep. 533, 78 N. W. 300; American F. Ins. Co. v. Brighton Cotton Mfg. Co. 125 Ill. 131, 17 N. E. 771; Poss v. Western Assur. Co. 7 Lea, 704, 40 Am. Rep. 68; Lebanon Mut. Ins. Co. v. Leathers, 5 Sadler (Pa.) 226, 20 W. N. C. 107, 8 Atl. 424; City Planing & Shingle Mill Co. v. Merchants' M. & C. Mut. F. Ins. Co. 72 Mich. 654, 16 Am. St. Rep. 552, 40 N. W. 777; Allemannia F. Ins. Co. v. White, 8 Sadler (Pa.) 308, 11 Atl. 96; Commercial Ins. Co. v. Spankneble, 52 Ill. 61, 4 Am. Rep. 582; Ladd v. Ætna Ins. Co. 147 N. Y. 478, 42 N. E. 197; May v. Buckeye Ins. Co. 25 Wis. 291, 3 Am. Rep. 82; Louck v. Orient Ins. Co. 176 Pa. 638, 33 L.R.A. 714, 35 Atl. 247; Home Ins. Co. v. Hancock, 106 Tenn. 513, 52 L.R.A. 665, 62 S. W. 146; Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 316, 49 Am. St. Rep. 699, 38 N. E. 1011; Ostrander, F. Ins. p. 419.

Where the building is not in operation at the date of the issuance of the policy, the company will be charged with notice, and a waiver is implied.

Short v. Home Ins. Co. 90 N. Y. 16, 43 Am. Rep. 138; Clay v. Phœnix Ins. Co. 97 Ga. 44, 25 S. E. 417; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Milwaukee Mechanics' Ins. Co. v. Brown,

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Note. — As to effect of knowledge of insurance agent acting in two capacities, see case note to Foreman v. German Alliance Ins. Co. 3 L.R.A.(N.S.) 444. See also, generally, as to power of agent to bind insurer by oral waiver and as to the effect of non-waiver agreements, notes in Industrial Mut. Indemnity Co. v. Thompson, 19 L.R.A. (N.S.) 1064 and Haapa v. Metropolitan L. Ins. Co. 16 L.R.A.(N.S.) 1165.

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3 Kan. App. 225, 44 Pac. 35; Queen Ins. Co. v. Kline, 17 Ky. L. Rep. 619, 32 S. W. 214; Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Rochester Loan & Bkg. Co. v. Liberty Ins. Co. 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877; Devine v. Home Ins. Co. 32 Wis. 471; Alkan v. New Hampshire Ins. Co. 53 Wis. 143, 10 N. W. 91; Clark v. Manufacturers' Ins. Co. 8 How. 248, 12 L. ed. 1061; Columbian Ins. Co. v. Lawrence, 2 Pet. 49, 7 L. ed. 344, 10 Pet. 515, 9 L. ed. 516; 3 Kent, Com. 237; Flinn v. Headlam, 9 Barn. & C. 693; 1 Marshall, Marine Ins. 450, 481, 482; Hazard v. New England M. Ins. Co. 8 Pet. 557, 8 L. ed. 1043; Green v. Merchants' Ins. Co. 10 Pick. 402; Tidmarsh v. Washington F. & M. Ins. Co. 4 Mason, 439, Fed. Cas. No. 14,024; Buck v. Chesapeake Ins. Co. 1 Pet. 160, 7 L. ed. 94; Carter v. Boehm, 3 Burr. 1905; Burritt v. Saratoga County Mut. F. Ins. Co. 5 Hill, 192, 40 Am. Dec. 345; Livingston v. Maryland Ins. Co. 6 Cranch, 281, 3 L. ed. 224; Bufe v. Turner, 6 Taunt. 338; Walden v. Louisiana Ins. Co. 12 La. 134, 32 Am. Dec. 116; Hall v. Niagara F. Ins. Co. 93 Mich. 184, 18 L.R.A. 139, 32 Am. St. Rep. 497, 53 N. W. 727.

The establishment was not a manufacturing plant.

Re Capital Pub. Co. 3 MacArth. 412; Frazee v. Moffitt, 20 Blatchf. 267, 18 Fed. 584; Hittinger v. Westford, 135 Mass. 262; Halpin v. Insurance Co. of N. A. 120 N. Y. 73, 8 L.R.A. 79, 23 N. E. 989; Long v. Duff, 2 Bos. & P. 209.

Cohn, Special Judge, delivered the opinion of the court:

The Home Fire Insurance Company of Fordyce, Arkansas, was sued in the court below by the appellee for the amount of an award made by two appraisers under an agreement of submission signed by the parties in interest, the insurance company, after the award, refusing to pay the same; it having reserved all rights, except the right to contest the amount of sound value and the loss and damage which the appellee had sustained, in the agreement referred to. It placed its ground of refusal solely upon the ground that the appellee had disregarded the terms of the policies under which its claim originated, which provided that "if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than 10 o'clock, or if it cease to be operated for more than ten consecutive days," the entire policy should be void, unless otherwise provided by agreement indorsed thereon or added thereto. It alleged merely that the appellee was a manufacturing establishment, and that it had ceased, during the life of the policies, to be operated for more than ten consecutive days, without indorsement on the policy, or in any paper added thereto, of permission so to do, and without notification. A trial was held resulting in a verdict and judgment for the appellee for the amount of the award, in addition to the amount of the statutory penalty of 12 per cent, and an attorney's fee was fixed by the court, for which judgment was rendered. The policies all contained the same description of the risk covered thereby, which was given in five separate clauses, as follows:

"$5,000. On their one story brick, composition roof building, including foundations and cold storage vaults, occupied as an ice factory, situated No. 'A' '1' Main street, block 31, sheet 63 Sanborn's map of Argenta, Arkansas.

"$13,500. On their fixed and movable machinery of every description, including engines, boilers and their connections, settings and their foundations, metal stacks, tanks, pumps, refrigerating and ice machines, filters and condensers, ice cans, piping and pulleys, tools, hose, and all appurtenances and appliances necessary to and used in their business. All while contained in the above-described building.

"$500. On their wagons and buggies.

"$100. On their wagon and buggy harness.

"$100. On their office furniture and fixtures, all while contained in the above-described building."

At the trial J. P. Faucette testified in behalf of the appellee, and stated that he was its president at the time of the fire, and for four or five years before, and at the time the policies were issued; that he was a member of the firm of Faucette Brothers, who were the local agents of the Home Insurance Company, at Argenta, Arkansas, where the risk was located; that his brother, W. C. Faucette, was the other member of that firm; that each of them owned $8,000 of the capital stock of the Ice & Electric Company, the entire capital stock being $32,000; that the said Faucette Brothers were also directors of the said Ice & Electric Company, and he was its general manager at the time the policies were issued; that they, said Faucette Brothers, issued the policies in suit, as local agents at Argenta, upon forms furnished in blank to them by G. L. Meyers & Company, general agents of the insurance company at Memphis, Tennessee; that these policies were renewals of previous ones issued by the said G. L. Meyers & Company in other companies; that the property of appellee had not been operated as an ice factory since October, 1904; that he knew of this fact at the time the policies were issued; that,

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at that time, the stables and places for the wagons, and the horses and mules, and the office, were all in the building described in the policy; that a bookkeeper was in charge of the books; that orders were taken there for coal, and ice was delivered there, by wagon and by car load, there being a switch connected with the premises; that, at the time of the closing of the manufacturing, the machinery was in good condition, and he had afterwards personally looked after it; that the factory, ever since it had been opened in 1896, had operated only for the six months during the hot season, suspending in October; that there was no change in the use of the building after October 15, 1904, and that they were open for business, as usual, on the day the fire occurred.

G. L. Meyers, for the appellant, testified that his firm were the general agents of the insurance company for Argenta and elsewhere; that they sometimes sent around inspectors to inspect risks, but he could not remember sending any inspector around to examine the risk in question; that his agent had adjusted a loss in the neighborhood; that he had no notice or knowledge at the time the policies in suit were issued or up to the time of the fire that the building and machinery insured were not being used and operated as an ice factory; that the Faucette Brothers never communicated the fact to his office that these were not being operated as a factory; that he was familiar with the views and customs of insurance companies as to material parts of policies, and that a manufacturing establishment not in operation was not generally considered a good risk. The witness Meyers also testified that Faucette Brothers had sent reports of all policies issued to G. L. Meyers & Company, general agents, shortly after issuing the same, and had done so as to the policies in suit, setting forth the location and general description, but, upon objection by the appellee's counsel, he was not permitted to state whether there was anything in the report about the plant not being in operation, upon the ground that the written report was the best evidence. We may say, in passing, that we do not think there was any error in this ruling. Jackson ex dem. Van Slyck v. Son, 2 Caines, 178.

The appellant asked for a peremptory instruction and also asked the court to instruct the jury that the insurance here was of a manufacturing establishment, and, if it ceased to be operated as a manufactory without consent for more than ten consecutive days, the policy became void; also, that the knowledge of Faucette Brothers that the manufacturing establishment had ceased to be operated would not bind the appellant, if, at the time, they were officially connected with the appellee or interested in it. These instructions were refused. And, at appellee's request, the court gave a peremptory instruction to the jury, directing them to find in favor of the appellee.

A question is raised in the brief of counsel for appellee as to whether appellant was not bound by the custom of the appellee while it was operating an ice factory, to shut down during the cold season. But we do not deem it necessary to decide this.

There are two matters we are called upon to determine: (1) Was the property insured a manufacturing establishment? (2) Was the appellant bound by the knowledge of Faucette Brothers?

Taking up the propositions in the reverse order to that stated, we first pass upon the question as to whether the insurance company was bound by the knowledge of Faucette Brothers. As they were largely interested in the Ice & Electric Company, as directors and stockholders, and one of them was its manager at the time the policies were issued and until the date of the fire, and it has not been shown that these facts were known to the insurance company or its general agents at the time the policies were issued, it would be improper to make their knowledge, thus obtained, binding upon the insurance company. Where an agent has a personal interest known to the assured, and not known to the insurer, which might induce him to keep a matter concealed from his principal, and he does keep the matter concealed from the principal, to the prejudice of the latter, the assured cannot rely upon the doctrine that the knowledge of the agent of such matter is the knowledge of the principal. Elliott, Ins. § 164; Mechem, Agency, § 723; Zimmermann v. Dwelling-House Ins. Co. 110 Mich. 399, 33 L.R.A. 698, 68 N. W. 215; Wildberger v. Hartford F. Ins. Co. 72 Miss. 338, 28 L.R.A. 220, 48 Am. St. Rep. 558, 17 So. 282; Rockford Ins. Co. v. Winfield, 57 Kan. 576, 47 Pac. 511; Spare v. Home Mut. Ins. Co. (C. C.) 19 Fed. 14; Cascade F. & M. Ins. Co. v. Journal Pub. Co. 1 Wash. 452, 25 Pac. 331; note to Potter's Appeal, 7 Am. St. Rep. 279–283. And in stating this conclusion, we are not oblivious to the fact that sometimes the same person acts as agent of both parties, either where both parties are put on notice of that fact and acquiesce therein, or some peculiar provision of statute applies. See Phœnix Ins. Co. v. State, 76 Ark. 180, 88 S. W. 917, 6 A. & E. Ann. Cas. 440; 2 Clement, F. Ins. pp. 504, 505; Clay v. Phœnix Ins. Co. 97 Ga. 44, 25 S. E. 417. And, if this is material in the final deter

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mination of this cause, the failure of the court to notice this principle of law would require a reversal of the cause, even though it may be true that the local agents—that is, Faucette Brothers—sent a report of the issuance of the policies to the general agents at Memphis, setting forth the location and general description of the property insured. For the appellant was entitled to the judgment of the jury, under proper instruction, on the point as to whether the report contained enough to inform the general agents of the fact that the Ice & Electric Company had ceased to operate an ice manufacturing establishment before the policies had issued.

The remaining question is whether it was incumbent upon the Ice & Electric Company to operate a manufacturing establishment, and not to cease doing so for any period of more than ten consecutive days. It is urged that the words "if the subject of insurance be a manufacturing establishment . . . (and) if it cease to be operated for more than ten consecutive days" were alone sufficient to work a forfeiture in this case. But we think that if, at the time the policies were issued, there was no factory in operation, because the manufacturing of ice had been abandoned, the clause could not operate as a cause of forfeiture, and we must seek further for *data* on which to base the contention that the appellee was obliged to maintain a manufacturing establishment. The words quoted are contained in the printed part of the policies, and these printed parts are prepared by the insurer to meet the varying contingencies of different cases of insurance, as they arise; for different forms of policies are not prepared to meet the requirements of each case as it occurs. The clause might apply appropriately where the application for insurance, if such there was, or where the description of the risk in apt terms, showed the intention to be to insure a manufacturing establishment in operation, and nothing else.

We are therefore remitted to the written part of the policies. Now the language of the first clause, referring to the building, uses the words "occupied as an ice factory." Did this require the appellee to operate an ice factory? The language was capable of meaning that the building had been used and operated as an ice factory at one time, but was not necessarily then so operated. If it was intended to make the insurance only apply to the building while it was being operated as an ice factory, it would have been easy to say "occupied and operated as an ice factory, and only while so operated." That would have made the language unambiguous. We are not disposed to construe away the terms of policies, neither are we disposed to give the insurer the benefit of the doubt, where the language is capable of different constructions, since insurance contracts are prepared entirely by the insurer or at its instance, and there is not that mutual consultation as to the use of the terms which obtains in ordinary contracts. Neither can we shut our eyes to the fact that policies of fire insurance are in most instances taken by the insured without reading, and that they are usually, as in the present instance, filled with provisions bearing upon all manner of subjects relating to insurance, some of which may not apply to the then existing case; and that the true application of such provisions is not always clear. We think that the use of the language quoted, especially in view of the apparent indifference of the insurer as to the actual condition and use of the premises until the question of paying the loss arose, indicates that the intention was to insure the property as it was at the date of the policy.

Our conclusions are sustained by the decisions of the supreme court of Pennsylvania in the cases of Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8, and Louck v. Orient Ins. Co. 176 Pa. 638, 33 L.R.A. 712, 35 Atl. 247.

We proceed to examine the cases cited by counsel for appellant. In the case of Stone v. Fireman's Ins. Co. 153 Mass. 475, 11 L.R.A. 771, 27 N. E. 6, it was held that, at the time the policy issued, the property was used and operated as a manufacturing establishment, and was insured as such while it continued in operation, and that afterwards operations were stopped without permission of the insurer. In Dover Glass Works Co. v. American F. Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039, the court held that the property insured was a manufactory in operation, and it appeared that, during the life of the policy, the manufactory ceased to be operated within the meaning of the policy. In McKenzie v. Scottish Union & Nat. Ins. Co. 112 Cal. 548, 44 Pac. 922, a sawmill had been shut down, and the policy required certain conditions to be observed under those circumstances by the insured, which it had failed to comply with. In Brehm Lumber Co. v. Svea Ins. Co. 36 Wash. 520, 68 L.R.A. 109, 79 Pac. 34, the policy insured a sawmill in operation, and it provided that the mill should not remain idle or shut down for more than thirty days without permission indorsed thereon, and the insurance company had on one occasion indorsed its permission on the policy, but, for the period in question, its permission had not been asked nor given. Cronin v. Fire Asso. of Philadelphia, 119 Mich. 74, 77 N. W.

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648, reported again in 123 Mich. 277, 82 N. W. 45, was a case in which a creamery while it continued in operation had been insured, and operation had ceased for the prohibited period without the permission of the insurance company. In Day v. Mill-Owners' Mut. F. Ins. Co. 70 Iowa, 710, 29 N. W. 443, the property insured was a flour mill while it was operated, and the mill was shut down for the prohibited period without the permission of the company. In El Paso Reduction Co. v. Hartford F. Ins. Co. (C. C.) 121 Fed. 937, the facts were that, at the date of the policy, the insured property was being operated as a manufactory, and that it was insured while it should be so operated, and permits had been given to cease to operate the same at certain periods, but not for the period in question. In Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union F. Ins. Co. 77 C. C. A. 121, 146 Fed. 695, the written part clearly provided for the continued operation and use of the premises as a manufacturing establishment, the written part setting out particularly what the insured should do in case the plant became idle or was shut down. And these provisions were disregarded. And in Ranspach v. Teutonia F. Ins. Co. 109 Mich. 699, 67 N. W. 967, the condition of the policy was that it should become void if the buildings insured "be or become vacant, and so remain for ten days," and the premises were left vacant for the prohibited period.

We have reviewed all of the cases which have been called to our attention by counsel for appellant. But we are unable to find anything therein which corresponds with the facts in the present case. All of the cases so cited, except the case last mentioned, went off upon the theory that the facts showed that a mill or manufactory, while continuing to be in operation, was insured, and that there had been a cessation of such operation without permission or other compliance with the terms of the policy. The Michigan case related to vacancy of the premises, and expressly covered an existing, as well as a future, vacancy of the premises. But in the case before us we hold that the evidence shows that the property had ceased to be operated or used as a factory long before the policies were issued, and that the language quoted was all the evidence there was to sustain the position that the property insured was to be operated, and only to be insured while being operated, as a factory, and that this was inadequate to establish that contention. The language of the second clause of the policies, which refers to machinery, engines, and boilers, and says, "and all appurtenances necessary to and used in their business," does not imply that the business of the insured company is that of manufacturing. The courts seem to favor the view in cases like the present one, that each clause must be construed separately from the other, and that the language of a clause relating to the building should not be looked to to construe a clause relating to personal property. Halpin v. Insurance Co. of N. A. 120 N. Y. 73, 8 L.R.A. 79, 23 N. E. 989; Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300; Elliott, Ins. § 251. And see Sunderlin v. Ætna Ins. Co. 18 Hun, 522.

It follows that no material error, which calls for a reversal, occurred at the trial in the Circuit Court, and that the judgment of that court should be affirmed. And it is so ordered

ARKANSAS SUPREME COURT.

GULF COMPRESS COMPANY, Appt.,
v.
W. E. HARRINGTON.

(90 Ark. 256, 119 S. W. 249.)

Warehouseman — limitation of liability.

1. A provision in receipts issued by a warehouseman for property stored with him, that he is not responsible for loss by fire, does not include fire due to his own negligence.

Same — negligence.

2. The owner of a warehouse for the storage of cotton, situated adjacent to a railway track, may be found negligent in permitting cracks in the building through which sparks might reach the cotton, and in keeping in the building large quantities of loose cotton, through which fire would spread rapidly, in close proximity to the property of the bailor.

(May 3, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to

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Case Note. — Effect of stipulation exempting warehouseman from loss by fire.

The conclusion reached in the above case, that a provision in a contract of storage exempting a warehouseman from loss by fire does not include fire due to his own negligence, finds support in Dieterle v Bekin, 143 Cal. 683, 77 Pac. 664; United Fruit Co. v. New York & B. Transp. Co. 104 Md. 567, 8 L.R.A.(N.S.) 240, 65 Atl. 415, 10 A. & E. Ann. Cas. 437; and in Lancaster Mills v. Merchants' Cotton Press & Storage Co. 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317.

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recover damages for the destruction of certain cotton by fire, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Rose, Hemingway, Cantrell, & Loughborough**, for appellant:

The contract exempting defendant from liability for loss by fire was valid.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 62 Fed. 904, affirmed in 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201, affirmed in 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Western U. Teleg. Co. v. Cook, 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624; Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811; Clough v. Grand Trunk Western R. Co. 11 L.R.A.(N.S.) 446, 85 C. C. A. 1, 155 Fed. 81; Coup v. Wabash R. Co. 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; Chicago, M. & St. P. R. Co. v. Wallace, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; Wilson v. Atlantic Coast Line R. Co. 129 Fed. 774; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Bates v. Old Colony R. Co. 147 Mass. 255, 17 N. E. 633; Hosmer v. Old Colony R. Co. 156 Mass. 506, 31 N. E. 652; Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L.R.A. 93, 58 Am. St. Rep. 348, 44 N. E. 796; Pittsburgh, C. C. & St. L. R. Co. v. Mahoney, 148 Ind. 196, 40 L.R.A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; Blank v. Illinois C. R. Co. 80 Ill. App. 475; Robertson v. Old Colony R. Co. 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; Little Rock & Ft. S. R. Co. v. Eubanks, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808; St. Louis, I. M. & S. R. Co. v. Pitcock, 82 Ark. 441, 118 Am. St. Rep. 84, 101 S. W. 725, 12 A. & E. Ann. Cas. 582.

Messrs. **Moore, Smith, & Moore**, for appellee:

The business of defendant being affected with a public interest, it is against public policy to contract against liability for loss by fire caused by the company's negligence.

Little Rock, M. R. & T. R. Co. v. Talbot, 47 Ark. 97, 14 S. W. 471; Taylor v. Little Rock, M. R. & T. R. Co. 39 Ark. 148; Little Rock, M. R. & T. R. Co. v. Harper, 44 Ark. 208; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490.

McCulloch, Ch. J., delivered the opinion of the court:

The plaintiff, W. E. Harrington, was the owner of thirty-four bales of cotton, which were destroyed by fire while held for storage by the defendant, Gulf Compress Company, in its warehouse at Little Rock, Arkansas. He sued the defendant for the value of the cotton, and seeks to establish liability on the alleged ground that the latter was guilty of negligence in permitting destruction of the cotton by fire, and he recovered a judgment for damages, from which the defendant prosecutes this appeal.

Learned counsel raise only two questions in the argument here, *viz.*: (1) That defendant is not liable, because it contracted against liability for loss by fire caused even by its own negligence; and (2) that there is not sufficient evidence to warrant a finding that its servants were guilty of any negligence which caused the fire. The briefs on each side contain interesting and very instructive discussions of the question whether or not it is contrary to public policy to permit a concern operating a compress and receiving cotton for storage and compression, which is said to be a business of a public or quasi public nature, or a business "affected with a public interest," to contract against liability to patrons for damages caused by its own negligence.

But the first question to be decided is whether or not the defendant in this case did in fact contract against such liability; for, until we settle that question in the affirmative, it is unnecessary to go further. The written receipts executed by defendant to plaintiff for the cotton when delivered to it, and which constituted the contract between the parties, are in the following form: "Received on account of W. E. Harrington one bale of cotton, marked as stated herein, on storage, to be delivered to bearer only upon the return of this receipt and the payment of all advances and such charges as may have accrued under the current tariff of this company. Not responsible for loss by fire, acts of Providence, natural shrinkage, old damage, or for failure to note concealed damage." It will be observed that nothing is expressly said in the receipt about exemption from liability for negligence. It provides in general terms that there shall be no responsibility "for loss by fire, acts of Providence, natural shrinkage, old damage, or for failure to note concealed damage." Does this exemption include negligence of the obligor?

The receipt issued is in the form prepared by the defendant itself. The exemption set forth therein is couched in language of its own selection, and, according to well-settled rules of interpretation, should be

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construed in the strongest light against it. Judge Thompson, in his work on Negligence (vol. 1, § 1143), says that there is a "tendency of the law to discountenance stipulations in contracts between parties whereby one of the parties undertakes to exempt himself from liability for his own negligence," and that this tendency is discovered in decisions of the courts declining to construe provisions in contracts so as to bring them within such exemption, even in cases where public policy would not forbid it if clearly expressed. In Railton v. Taylor, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980, it was held (quoting from the syllabus) that "the lessor's own negligence in the management and use of that part of the premises remaining in his control, including the heating apparatus, is not within a stipulation that he shall not be liable for any loss to property on the premises, if 'destroyed or damaged by fire, water, or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner.'"

It has been held in many cases that a receipt given by a warehouseman, stipulating that goods are received at "owner's risk," does not exempt from damage caused by negligence. Denver Public Warehouse Co. v. Munger, 20 Colo. App. 56, 77 Pac. 5; Hunter v. Baltimore Packing & Cold Storage Co. 75 Minn. 408, 78 N. W. 11; Collins v. Burns, 63 N. Y. 1; Herzig v. New York Cold Storage Co. 115 App. Div. 40, 100 N. Y. Supp. 603. In the Colorado case above cited the court said: "Contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases such contracts should be construed strictly, with every intendment against the party seeking their protection." The case of Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664, is precisely in point. There the warehouseman's receipt stipulated that there should be "no liability for fire," etc.; but it was held that this did not exempt him from liability for fire caused by negligence, the court saying: "Such a contract cannot be construed so as to excuse a bailee from the exercise of ordinary care to protect the property from fire."

It may be argued that this construction entirely emasculates the stipulation and renders it meaningless, for the reason that even without it there is no liability on the part of the warehouseman for loss by fire unless the same be caused by negligence. That may be true; but even without a stipulation of exemption there is no responsibility on the part of the warehouseman for loss on account of "acts of Providence, natural shrinkage, old damage, or for failure to note concealed damage," and yet the receipts contain a stipulation exempting from liability for those causes. A warehouseman is no insurer against damage to property held for storage, and is liable only for damage caused by negligence. But this argument affords no reason for importing into the contract a stipulation for exemption from liability for negligence which the parties themselves have not seen fit to express in apt words,—a stipulation, too, which the law at least discourages when it does not positively forbid. If a stipulation against liability for negligence had been intended, we must assume that it would have been more aptly expressed in the contract. We hold that the contracts in question do not contain such exemption.

Does the evidence sustain a finding of negligence on the part of the defendant which caused the destruction of the cotton? The warehouse was located contiguous to railroad tracks along which engines were frequently passing. A large lot of loose, unbaled cotton was kept there, through which fire, if once communicated, would spread rapidly and invade the whole premises. There were holes and cracks in the corrugated iron wall of the shed on the side next to the railroad tracks. A door was permitted to get out of repair, and remain so for a considerable time, so that it could not be closed. It is claimed that in this way the property in store was kept in close proximity to the more highly inflammable loose cotton, and that the whole was exposed, on account of the open door and holes in the wall, to danger from sparks escaping from passing locomotives. There was evidence to the effect that about twenty minutes before the fire was discovered an engine passed along by the warehouse, puffing very hard. The fire is not otherwise accounted for, and, considering all the circumstances, we are of the opinion that the jury had the right to infer that the fire was communicated from the passing engine, and to find that the defendant was negligent in exposing the stored cotton, without proper protection, to this danger. St. Louis, I. M. & S. R. Co. v. Coombs, 76 Ark. 132, 88 S. W. 595, 6 A. & E. Ann. Cas. 151.

Affirmed.

COLORADO SUPREME COURT.

RE ESTATE OF ANDREW J. MACKY, Deceased.

REGENTS OF THE UNIVERSITY OF COLORADO et al., Appts.

(— Colo. —, 102 Pac. 1075.)

Inheritance tax — exceptions — operation.

1. A statute enacted for the collection of

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an inheritance tax, which provides that all property which shall pass by will or the intestate laws shall be subject to a tax, operates upon the interests to which parties succeed upon the death of the former owner, and any statutory tax exemptions to which they are entitled are therefore applicable.

Same — public institutions.

2. A hospital building and home for poor widows and orphan children who are sick and not able to care for themselves, maintained by a city or county, and a university maintained by the state, are impliedly exempt from taxation, and this exemption extends to inheritance taxes on property received by will.

(June 7, 1909.)

APPEAL by the Regents of the University of Colorado et al. from a judgment of the District Court for Boulder County reversing an order of the County Court declaring certain legacies under the will of Andrew J. Macky, deceased, not subject to the assessment of an inheritance tax. Reversed.

Statement by **Musser, J.:**

Sections 21 to 41, both inclusive, of the general revenue act of this state, passed in the year 1902 (Laws 1902, chap. 3. pp. 49-57), provide for the imposition and collection of what is denominated in the act an inheritance tax. Section 21 is as follows: "All property, real, personal, and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state or any interest therein or income therefrom, which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of the grantor or bargainor, or intend-

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Case Note. — Applicability of general tax exemptions to inheritance or succession taxes.

United States bonds.

"It is not open to question that a state cannot, in the exercise of the power of taxation, tax obligations of the United States. . . . So, likewise, it is settled law that bonds issued by a state or under its authority by its public municipal bodies are not taxable by the United States." Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829, citing cases. The reason is that they are separate sovereignties within their respective spheres, and have no power to tax each other's instrumentalities and properties. This is true even in the absence of statute. Ibid. And Congress, in authorizing the issuance of United States bonds, by act of July 14, 1870, and on the face of the bonds themselves, expressly declared that "the principal and interest were exempt [from the payment of all taxes or duties of the United States, as well as] from taxation in any form by or under state, municipal, or local authority."

Nevertheless, it is well settled that a state has power to exact an inheritance, succession, or transfer tax in respect of United States' bonds and other securities. Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829, affirming, 161 N. Y. 631, 57 N. E. 1122 and 30 Misc. 19, 62 N. Y. Supp. 1024; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184; Levy's Succession, 115 La. 377, 8 L.R.A. (N.S.) 1180, 39 So. 37, 5 A. & E. Ann. Cas. 871; Re Whiting, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Re Sherman, 153 N. Y. 1, 46 N. E. 1032, affirming 15 App. Div. 628, 44 N. Y. Supp. 1129; Carver's Estate, 4 Misc. 592, 25 N. Y. Supp. 991, affirmed in 75 Hun, 612, 28 N. Y. Supp. 1126; Re Purdy, 24 Misc. 301, 53 N. Y. Supp. 735; Re Howard, 5 Dem. 483; Re Tuigg, 2 Connoly, 633. 15 N. Y. Supp. 548; Strode v. Com. 52 Pa. 181. But see New York cases subsequently cited under heading, "Construction of statutes."

The reason generally given is that an inheritance or succession tax is not a tax on property, and hence not on the securities or bonds, but that it is on the privilege of giving or receiving property by will or by inheritance; that such privilege is one given by the state, which it can withhold or give subject to such restrictions or conditions as it sees fit, including the withholding a portion thereof to its own use. See authorities cited above.

The acceptance by distributees of specific United States, securities instead of their value does not exempt them from the tax. Strode v. Com. supra.

Where personalty bequeathed consists partly of exempt government bonds, they should, nevertheless, bear their ratable proportion of the debts, expenses of administration, and commissions, for purposes of estimating the taxable value of the succession to the rest of the estate. Re Purdy, supra.

Obligations of taxing power.

It is not an impairment of the obligations of a contract for a state to subject to its transfer or succession tax its own bonds and those of its municipalities. Orr v. Gilman. 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

State bonds are subject to an inheritance tax by the state issuing them, though the state, in the act providing for their issuance and in the bonds themselves, declared that they "shall not be subject to any taxation whatever for state, municipal, or local taxation" in such state. Com. v. Herman,

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ed to take effect, in possession or enjoyment, after such death, to any person or persons or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax at the rate hereinafter specified, to be paid to the treasurer of the proper county, for the use of the state, and all heirs, legatees, and devisees, administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter, or any child or children adopted as such, in conformity with the laws of the state of Colorado, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock,—in every such case the rate of tax shall be $2 on every $100 of the clear market value of such property received by each person, and at and after the same rate for every less amount; provided, that the sum of $10,000 of any such estate shall not be subject to any such duty or taxes, and that only the amount in excess of $10,000 shall be subject to the above duty or tax. When the beneficial interests to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew, or any lineal descendant of the same, in every such case the rate of such tax shall be $3 on every $100 of the clear market value of such property received by each person. In all other cases the rate shall be as follows: On each and every $100 of the clear market value of all property and at the same rate

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16 W. N. C. 210. The same is true of provincial bonds. Lovitt v. Atty. Gen. 33 Can. S. C. 350, affirming 35 N. S. 223.

The legislature of Louisiana, in accordance with a mandate of the Constitution, passed an inheritance-tax law exempting from its operation educational, religious, and charitable institutions, and also providing that the tax "shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance." Construing this law, it was held in Kohn's Succession, 115 La. 71, 38 So. 898, that "exemption from taxation is strictly construed, and cannot be read into a statute by inference or implication;" and hence, as state and municipal bonds had not been taxed, they were subject to the inheritance tax, though exempt from general taxation.

A bequest of British Consols to executors, for the purpose of founding and maintaining a school, was held to be subject to a legacy duty. The fact that the bequest was of exempt Consols was not argued or considered. Re Griffiths, 14 Mees. & W. 516.

Bequest to government.

A bequest to the United States is liable to a state succession tax. Cullom's Estate, 5 Misc. 173, 25 N. Y. Supp. 699, affirmed in 76 Hun, 610, 27 N. Y. Supp. 1105, and 145 N. Y. 593, 40 N. E. 163. So is a bequest to a public school. Leavell v. Arnold (Ky.) 115 S. W. 232.

While property of the United States is not taxable by a state, it was held in United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, affirming Re Merriman, 141 N. Y. 479, 36 N. E. 505, that the inheritance-tax law of New York was broad enough to include legacies to the United States, and was not invalid as an attempt to tax the property of the United States, since it was imposed on the legacy before it reached the hands of the goverment; that "the legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature consents to a bequest of it."

A case in some respects the converse of this is Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803, in which it was held that Congress had power to impose a succession tax on a bequest to a city for corporate purposes, since the tax is not on the property or agencies of the state, but upon the right to succeed to property.

See also Re Hamilton; Re Thrall; and Essex v. Brooks,—infra.

Construction of statutes.

Under a statute imposing a collateral inheritance tax, and providing in general terms that all the estate of which a person should die seised, other than that passing to certain named near relatives, should pay a tax, a bequest to charities is subject to the tax, though exempt from general taxation (Finnen's Estate, 196 Pa. 72, 46 Atl. 269); so is a legacy to a church for the ringing of a church bell (Gilpin's Estate, 14 Pa. Co. Ct. 122); a bequest to orphan asylums and other charitable institutions (Miller v. Com. 27 Gratt. 110); a bequest to a public school (Leavell v. Arnold, supra); a bequest to a religious institution of learning (Booth v. Com. [Ky.] 113 S. W. 61); bonds of a province, declared by statute "not to be liable to taxation for provincial, local, or municipal purposes" (Lovitt v. Atty. Gen. supra).

Bequests to colleges and churches are liable to pay a tax when the words of the act contain no exception in their favor. Barringer v. Cowan, 55 N. C. (2 Jones, Eq.) 436.

Bequests to charitable institutions are

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for any less amount; on all estates of $10,000 and less, $3; on all estates of over $10,000, and not exceeding $20,000, $4; on all estates over $20,000, and not exceeding $50,000, $5; and on all estates over $50,000, $6; provided, that an estate in the above case which may be valued at a less sum than $500 shall not be subject to any such duty or tax." By his will, admitted to probate in the county court of Boulder county, Andrew J. Macky, after certain specific bequests, which need not be mentioned here, gave the sum of $50,000 to and for an hospital building and home, to be built in the city of Boulder for the comfort of poor widows and orphan children while sick and not able to care for themselves, provided that the city of Boulder or the county commissioners of the county of Boulder would maintain and support the said hospital and home; otherwise the said $50,000 to be divided among certain legatees, as named in the will. In the same instrument he devised the residuum of his estate, left after paying the specific bequests, legacies, debts, and costs of administration, to the regents of the University of Colorado, located at Boulder, for a building to be known as an auditorium building, and to be erected upon the university grounds. The estate was appraised as provided in the above-mentioned sections, for the purpose of ascertaining the several amounts thereof subject to an inheritance tax, and, after due allowance for all other matters, it was found that the residuary legacy to the regents of the uni-

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not exempt from a collateral inheritance tax. Simon's Estate, 5 Ohio S. & C. P. Dec. 548.

But a charitable corporation which, by its charter, is exempt from taxation, is also exempt from the operation of a transfer-tax law, and when its personal property is exempt up to a certain amount, a bequest thereto which will not cause it to exceed that amount is also exempt; and this is true although a section of the general tax-exemption law, whose language is broad enough to include it, is, by a change in the transfer-tax law, made inapplicable thereto. Re Kimberly, 27 App. Div. 470, 50 N. Y. Supp. 586.

Construing the language of a statute of New York which made an inheritance tax applicable to "property . . . over which this state has any jurisdiction for the purposes of taxation," it was held that, admitting that the state had power to subject United States securities to an inheritance law, yet it had not done so. Re Whiting, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 713; Re Sherman, 153 N. Y. 1, 46 N. E. 1032; Re Coogan, 27 Misc. 563, 59 N. Y. Supp. 111, affirmed in 45 App. Div. 628, 61 N. Y. Supp. 1144 and 162 N. Y. 613, 57 N. E. 1107. *Contra.* —Carver's Estate, 4 Misc. 592, 25 N. Y. Supp. 991, affirmed in 75 Hun, 612, 28 N. Y. Supp. 1126. In Re Whiting, supra, the court said that the words of the statute above quoted "refer to the jurisdiction actually exercised through contemporary statutes, rather than to the entire jurisdiction actually possessed by the state;" and in Re Sherman, supra, that "it is the jurisdiction of the state to subject property to taxation under its general taxing power, and not whether the jurisdiction has been exercised, which is the test of exemption." Hence, Federal securities were not intended to be subject to the inheritance tax, because not subject to the ordinary taxing power of the state.

—where inheritance-tax law adopts general tax exemptions.

The exemption expressly extended by the inheritance-tax law to "the societies, corporations, and institutions now exempted by law from taxation" (which, under the earlier form of the New York inheritance-tax law, was the language of the exemption clause), was held in Re Vassar, 127 N. Y. 1, 27 N. E. 394, not to be confined to those bodies which enjoyed complete immunity from taxation as to all property which they had or might at any time become possessed of, irrespective of any statutory limit. This case expressly overruled Re Keech, 26 N. Y. S. R. 433, 7 N. Y. Supp. 331 (affirmed in 32 N. Y. S. R. 227, 11 N. Y. Supp. 265); Re Lennox, 31 N. Y. S. R. 959, 9 N. Y. Supp. 895; Re Vanderbilt, 2 Connoly, 319, 10 N. Y. Supp. 242; and impliedly Re Herr 22 N. Y. S. R. 905, 5 N. Y. Supp. 48.

This exemption clause, however, was held not to extend to a board of foreign missions of the Presbyterian Church and the board of home missions of the same denomination, both New York corporations, neither being exempt from taxation by the acts under which they were created or by the general tax-exemption statute. Re Board of Foreign Missions, 58 Hun, 116, 33 N. Y. S. R. 793, 11 N. Y. Supp. 310.

Or to religious societies and colleges not exempt from taxation by charter or special laws. Catlin v. Trinity College, 113 N. Y. 133, 3 L.R.A. 206, 20 N. E. 864; Re Kavanagh, 24 N. Y. S. R. 404, 6 N. Y. Supp. 669.

Or to a society for the prevention of cruelty to animals, not exempt by its charter from taxation, there being no general statute exempting it from general taxation. Re Keith, 1 Connoly, 370, 5 N. Y. Supp. 201.

But an institution for the blind, which did not receive pay from patients under any circumstances, was held to be within such exemption clause, since it was an almshouse, and, as such, exempt from general taxation. Re Underhill, 2 Connoly 262, 20 N. Y. Supp. 134.

And the same was held as to a home for incurables. Re Neale, 32 N. Y. S. R. 910, 10 N. Y. Supp. 713.

And a hospital which is exempt from general taxation is also exempt from the op[illegible]ra-

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versity amounted to the sum of $217,270. The county court found that the bequests for the hospital and home and to the regents of the university were not subject to an inheritance tax. From this judgment of the county court an appeal was taken on behalf of the state of Colorado by the attorney general to the district court of Boulder county, and that court found that the legacies for the home and to the regents were subject to an inheritance tax, under the law above mentioned, and the executor was ordered to pay to the state the sum of $16,305.14 as the inheritance tax due to the state on account of the two bequests. From this judgment of the district court, the regents and the executor have appealed to this court.

Mr. Henry O. Andrew, for appellant Thomas V. Wilson:

An inheritance tax is a tax on the right or privilege of succeeding to property.

27 Am. & Eng. Enc. Law, p. 338; Dos Passos, Inheritance Tax Law, p. 38; Brown v. Elder, 32 Colo. 532, 77 Pac. 853; People v. Koenig, 37 Colo. 283, 85 Pac. 1129, 11 A. & E. Ann. Cas. 140; Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; State v. Hamlin, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 221, 41 N. E. 579; Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184; State v. Alston, 94 Tenn.

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tion of the transfer tax. Re Kimberley, 27 App. Div. 470, 50 N. Y. Supp. 586.

A bequest to a charitable corporation or association to be formed was exempt from the transfer tax, when the corporation or association, when formed, would be exempt from general taxation. Re Graves, 171 N. Y. 40, 13 N. E. 787.

It was held that the exemption of church buildings from taxation by the general tax law did not exempt from an inheritance tax a legacy to build a church, since the rule of equitable conversion did not extend that far. Re Van Kleeck, 121 N. Y. 701, 25 N. E. 50.

It was held in Hunter's Estate, 22 Abb. N. C. 24, that this exemption clause—"societies, corporations, institutions now exempted by law from taxation—" implied an immunity from taxation expressly granted by statute, and not a mere omission to tax, and that therefore only those societies, etc., are deemed "exempted by law from taxation," within the meaning of such phrase, whose property is so exempted.

This same clause was held in Re Hamilton, 148 N. Y. 310, 42 N. E. 717, not to refer to the state itself or any of its political divisions; and a bequest to a municipality within the state was therefore held to be subject to the tax. The court said: "The reference obviously was to such associations, corporations, or institutions as would have been included within its general terms, but for the exception or exemption itself. We have seen that the state or any of its political divisions would not have fallen within the terms of the law, and hence no exemption was necessary to relieve them of its provisions. Exemption implies that the person or corporation to which it applies is or would otherwise be taxable. To include public property which is not, and, in the nature of things, cannot be, taxable at all, within the terms of an exemption act, would be to do a vain and useless thing, which cannot be imputed to the legislature in the construction of the act in question." Thus, the gist of the decision is that the words "exempted by law" mean "exempted by statute."

But the exemption in the inheritance-tax law was held in the subsequent case of Re Thrall, 157 N. Y. 46, 51 N. E. 411, to apply to a bequest to a municipality, the general tax law having been, in the meantime, changed so as to declare specifically that "all real property within the state and all personal property situated within the state or owned within this state " is taxable unless exempt from taxation by law. The court said: "This provision was evidently intended to cover state and municipal property, for, in the next section, the statute proceeds to specify the property exempt from taxation: 1. Property of the United States. 2. Property of this state other than its wild or forest lands in the forest preserve. 3. Property of a municipal corporation of the state, held for a public use, except the portion of such property not within the corporation. We now have a statute taxing the property of municipal corporations, except such portion thereof as is held for a public use within the corporate limits, which, by the express provisions of the statute, is exempt from taxation."

Under a Massachusetts statute providing that all property within the commonwealth which shall pass by will or by intestate succession other than to certain designated near relatives or "to or for charitable, educational, or religious societies or institutions, the property of which is by law exempt from taxation, shall be subject to a tax," etc., it was held that a legacy to a town to establish a free library was exempt from the tax, since it might fairly be called an educational or charitable institution, and not subject to the tax. Essex v. Brooks, 164 Mass. 79, 41 N. E. 119.

So also it was held that the statute exempts bequests and devises to a society or institution whose society is generally exempt from taxation, whether the particular gift, when in the hands of the society or institution, will be exempt from taxation or not. First Universalist Soc. v. Bradford, 185 Mass. 310, 70 N. E. 204. And this rule applies to a devise to a religious society of land and a dwelling house, "to be used and occupied only as a parsonage," which would be taxable to the society when thus used and occupied. Ibid.

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674, 28 L.R.A. 178, 30 S. W. 750; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 43, 44 L. ed. 970, 20 Sup. Ct. Rep. 747; Re Thrall, 157 N. Y. 46, 51 N. E. 411.

The state never taxes its own property to raise revenue for itself.

Cooley, Taxn. pp. 130, 2634; 12 Am. & Eng. Enc. Law, pp. 367-370; People v. McCreery, 34 Cal. 456; People ex rel. Doyle v. Austin, 47 Cal. 361; Denver v. Bonesteel, 28 Colo. 484, 65 Pac. 628; Re Hamilton, 148 N. Y. 310, 42 N. E. 717; Franklin County v. Ottawa, 33 Am. St. Rep. 403, note; Aplin v. University of Michigan (Atty. Gen. v. University of Michigan) 83 Mich. 467, 10 L.R.A. 376, 47 N. W. 440; Illinois Industrial University v. Champaign County, 76 Ill. 184; Kansas State Agri. College v. Hamilton, 28 Kan. 376; People ex rel. Jerome v. State University, 24 Colo. 178, 49 Pac. 286; Abbott, Mun. Corp. pp. 716, 717; Schuylkill County v. North Manheim Twp. 42 Pa. 21.

Messrs. **Giffin, Rowland, & Giffin** for appellants Regents.

Messrs. **William H. Dickson,** Attorney General, and **S. H. Thompson, Jr.,** for appellee:

When a person dies leaving property of a certain amount, the legatee, receiving as his portion the remainder after the tax is taken out, does not pay the inheritance tax, but that is paid by the state; and, consequently, the University of Colorado, in receiving the legacy, takes after the part belonging to the state of Colorado has been deducted.

Re Swift, 137 N. Y. 84, 18 L.R.A. 709, 32 N. E. 1096; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Re Merriam, 141 N. Y. 479, 36 N. E. 505; Strode v. Com. 52 Pa. 181; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; State v. Alston, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750.

The municipality and the University of Colorado are not exempted, and any person bequeathing property to them must pay a portion thereof to the state.

Re Hamilton, 148 N. Y. 310, 42 N. E. 717.

Musser, J., delivered the opinion of the court:

It has been quite universally held in our own state and elsewhere that a tax of the nature of that imposed by the aforesaid sections of our revenue law is not a tax upon property, but is a tax or excise upon the power or right of transmitting or receiving property by will or under intestate laws. Brown v. Elder, 32 Colo. 527, 77 Pac. 853; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Strode v. Com. 52 Pa. 181; Eyre v. Jacob, 14 Gratt. 422, 73 Am. Dec. 367; State v. Hamlin, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; State v. Alston, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Re Merriam, 141 N. Y. 479, 36 N. E. 505; Re Wilmerding, 117 Cal. 281, 49 Pac. 181; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321. The parties concede that that is the law. The attorney general, on behalf of the state, contends that the tax imposed by our law is payable out of the estate; that it is a tax upon the power of a testator to dispose of his property by will; and that, at the death of the testator, his estate is divided into two parts by operation of law, one part passing to the legatees and devisees, as provided in the will, the other to the state, in payment of the inheritance tax, and that, no matter who the legatees or devisees may be, the state is entitled to this tax. On the other hand, counsel for appellants contend that the tax is imposed upon the right of the legatees or devisees to receive the property under the will; that it is payable by the legatees and devisees as a tax for the privilege of taking the property, and that inasmuch as the regents of the university and the city and county of Boulder are public corporations, whose property is exempted from taxation, the exemption applies in this case, and the regents and the city or county of Boulder should be permitted to receive the legacies free from any inheritance tax.

What is the subject upon which the tax provided for in this part of our revenue law is imposed? Is it the right to dispose of or transmit property by will or under the intestate laws, or is it the right to receive property by will or under the intestate laws? It is conceded that, if it is the former, then the judgment should be affirmed, for in that case it is the right or power of Andrew J. Macky to dispose of his property by will that is the subject of taxation. If it is the latter, then it is the right of the public corporations to re-

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ceive the legacies that is, the subject of taxation; and the further inquiry must then be made as to whether or not such corporations are exempt from the inheritance tax, or, rather, whether the rights of such corporations to receive the legacies is a subject of taxation. In Knowlton v. Moore, supra, Mr. Justice White reviewed the history of taxes of the nature of those imposed by our law, and applied to them the term "death duties," as they are called in England, to indicate their generic nature, for it is to be remembered that fundamentally it is the power to transmit or the right to receive property by death that is the subject levied upon by all such taxes. As is shown by Mr. Justice White, the oldest form of death duty in England was a probate duty, established in 1694. It was a fixed tax upon the sum of the personal estate, payable upon the grant of letters of probate, and was treated as an expense of administration. In 1780 there was added a tax known as a legacy tax, and collected by means of a stamp fixed to the receipt of the legatee. The burden of this duty fell on the legatee, unless, in case of a will, the testator otherwise directed. 4 Enc. Laws of England, 125. In 1853 the two forms of taxes aforesaid were supplemented by a tax called a succession duty, which was levied upon real estate passing wholly or partly because of death, and on personalty not subject to the legacy tax. This was akin to the legacy tax, and borne by the successor; *i. e.*, the beneficiary under the succession. Id. 129. In 1894 an act called the "finance act" provided an estate duty which took the place of the probate duty, and, like the latter, is payable out of the general residue of the estate. Id. 130–135. Speaking with reference to this estate duty, it is said in Hanson's Death Duties, p. 63: "The new duty imposed by the finance act, and called estate duty, as has been said above, supersedes probate duty; but the key to the construction of the finance act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty which have no real connection with the subject." Here, then, are presented two classes of death duties; the one being the taxation of the interest which ceased with death, and which is upon the transmission of property. Into this class fall the probate duty and the estate duty, the burden of which is borne by the estate; the other class being the taxation of the interest to which a person has succeeded on the death, and which is upon the right to receive. Into this latter class fall the legacy and succession taxes, the burden of which is borne by the person beneficially interested,—the legatee or successor in interest. In 1797 (1 Stat. at L. 527, chap. 11, § 1) our Congress imposed a legacy tax which continued in force until 1802. The tax was collected by means of stamps placed upon the receipts given for the payment of the legacies or distributive shares of personal property, and was charged upon the legacies or distributive shares, and not upon the residuum of the personal estate. In 1862 a legacy tax was again imposed, like in character to that of 1797, and in the same act a probate duty was levied, proportioned to the amount of the estate. In 1864 (13 Stat. at L. 285, 286, chap. 173, §§ 124, 125) an act was passed increasing the rate of the probate duty on the whole estate and the legacy tax on each particular legacy or distributive share, and adding a duty on the passing of real estate. "Thus it came to pass that the system of death duties prevailing in England, and that adopted by Congress,—leaving out of view the differences in rates and the administrative provisions,—were substantially identical and of a threefold nature; that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a succession duty charged against each interest in real property." Knowlton v. Moore, 178 U. S. 51, 44 L. ed. 973, 20 Sup. Ct. Rep. 751. It is now apparent that, if the position of the state in the present case is proper, then the death duties imposed by our statute must be placed in that class which Hanson says is a taxation upon the interest which ceased with death, and in which we have seen fall the probate and estate duties of England and the United States, and, as we shall presently see, transfer taxes in the nature of those imposed by the New York act of 1892 (Laws 1892, chap. 399, p. 814), and the burden is on the estate. On the other hand, if the position of the appellants is the correct one, then the death duties imposed by our law must be placed in that class; that is, a taxation of the interest to which some person succeeds on the death, in which the burden is borne by the one benefited, and which we have seen embraces legacy and succession duties, and must perforce include inheritance and collateral inheritance taxes, for an inheritance is an interest to which a person succeeds upon the death of an an-

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cestor intestate. Hence we are led from a contemplation of the generic, to a discussion of the specific, nature of the death duties levied by the sections of our revenue act under consideration.

While the particular appellation employed by a legislature in designating a subject of legislation is not always indicative of its specific nature, yet, in this instance, the fact that our legislature called the tax an inheritance tax is of much significance, in view of the fact that, from the very language of the sections, no other term could be used that would more aptly indicate the specific nature of the tax. The statute provides that interests, whether in real or personal property, passing by will or under the intestate laws, shall be subject to the tax. A tax upon an interest in personal property passing by will is a legacy tax. The tax upon an interest in real property, whether passing by will or under the law of descent, could be aptly termed a succession tax. The tax imposed upon the interests obtained by lineal descendants might be termed a lineal inheritance tax, and that upon collateral ones a collateral inheritance tax. No term sufficiently comprehensive could be more aptly employed to embrace a tax upon the right to acquire interests in real and personal property passing by will to devisees or to legatees, or under the statute of descents and distributions to heirs, whether lineal or collateral, than the term "inheritance tax." When we further consider the fact that the sections of our revenue act dealing with this tax are almost literal copies of an Illinois act entitled, "An Act to Tax Gifts, Legacies, and Inheritance," etc. (Laws 1895, p. 301), it strongly appears that the legislature, by the term "inheritance tax," intended that term to be expressive of the specific nature of the tax, and that it should operate upon interests to which persons succeeded upon death, as described by Hanson. Take the language of chap. 3, § 21, p. 49, Laws 1902, copied above. What property does it make subject to a tax? All property which shall pass by will or by the intestate laws of the state. Not any portion of the decedent's estate that may be used in the payment of debts or costs of administration, for that does not pass,—not all the property of the decedent, but all the property of the decedent which shall pass. Again, if any interest "shall be transferred by deed, grant, sale, or gift," in contemplation of death, to take effect in possession or enjoyment after such death, it is subject to the tax. Plainly, the interests subjected to a tax are those to which some persons have succeeded. Who are made liable for the tax? The statute answers: "And all heirs, legatees, and devisees, administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." Who are these "heirs, legatees, and devisees, administrators, executors, and trustees" upon whom the burden is cast? They are the persons who have succeeded to the property,—the administrators and executors for the purpose of administration; trustees for the carrying out of any trusts; and the heirs, legatees, and devisees at the final distribution, or, it may be, at the death, so far as real estate is concerned. It might be said right here that administrators and executors succeed to the whole estate, but in the very next sentence, and in the remainder of the section, the statute again limits the portion subject to the tax, and classifies the same for the purpose of fixing the rate and measuring the amount of the tax. What is that classification, and what property and persons are its subjects? The property embraced in each of the classes is the beneficial interest in any property or income therfrom which shall pass to some person included in any group. Here again is property which has passed. Who are the persons that are affected? They are the lineal and collateral heirs and strangers in blood of the decedent. Again, it is those who have succeeded to the property. We could thus proceed through other sections, but enough has been said to clearly show that it is only property that has passed by will or descent that is charged with the tax, and it is upon those who succeed to the beneficial interests that the burden of the tax is cast.

Adverting to some of the decisions, there is found the case of United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, which appears to hold that the tax in question there was a tax upon the right to dispose of property, and the state in this case lays much stress upon that decision. It appears in the Perkins Case that one Merriam bequeathed all his estate to the United States government. The surrogate's court fixed a tax to be paid by the estate. The matter finally reached the court of appeals, where it was determined that the tax should be paid. In Re Merriam, 141 N. Y. 479, 36 N. E. 505. The matter was brought to the Supreme Court of the United States. The tax was assessed under a law of 1892. Section 1 of the act provides: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $500 or over . . . to persons or corporations not exempt by law from taxation on real or personal property in the following cases." (Laws 1892, chap. 399.) The

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first case is when the transfer is by will or by the intestate laws of the state from any person dying seised or possessed of the property while a resident of the state. The second case is when a transfer is by will or intestate law of property within the state, and the decedent was a nonresident. The third case is when a transfer is of property by deed, grant, bargain, sale, or gift made in contemplation of death. The court of appeals of New York determined that this tax limited the power of testamentary disposition, which is equivalent to saying that it was a tax upon that power. The Supreme Court of the United States in the Perkins Case followed the holding of the New York court, that the tax was under the law of 1892, and not under a previous one, and seemed to base its opinion upon the law of 1892. This law is, as it purports to be, a tax upon the right to transfer property; and while it is of the same generic nature as the Colorado law, being a death duty, it is not of the specific nature. If, as the court of appeals said, this tax limits the power of testamentary disposition, it is to be placed in that class spoken of by Hanson, as being a tax upon the interests that ceased by death. Hence, the opinion in the Perkins Case, which seems to accept the view of the court of appeals, is not fairly authority here. It must be borne in mind that the decisions are numerous wherein the nature of death duties is discussed generically only. Such decisions have in view the idea that the tax is not one on property, and, to sustain that view, treat the subject in a more general way, and hold that it is the right to dispose of or receive property by death that is the subject of taxation, without intending to be specific in the case. No decision has been pointed out to us wherein is discussed the specific nature of an inheritance or succession tax, as distinguished from that of a probate, estate, or transfer tax, but that it is held that an inheritance or succession tax is on the right to receive the property. In State v. Hamlin, supra, speaking of a tax under a statute substantially like ours, the supreme court of Maine, at page 504 of 86 Me, said: "The tax under this statute is, once for all, an excise or duty upon the right or privilege of taking property by will or descent under the law of the state." In State v. Alston, supra, speaking with reference to a tax imposed under an act providing for a collateral inheritance and succession tax, the supreme court of Tennessee, at pages 680, 681, of 94 Tenn., said: "It must be borne in mind that the tax is not upon the property, but the right or privilege of acquiring it by succession. It is a condition upon which the person may take the estate of a deceased relative by inheritance or testator by his will. It is a retention by the state of a part of a deceased person's property which the state may take to meet its necessities, and which in certain cases it may take *in toto*, as in cases of escheated property. It is not a tax upon the right of alienation, but on the privilege of receiving, by inheritance or will or otherwise, at the death of a former owner." In State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 325, 30 L.R.A. 218, 41 N. E. 579, 580, the court, speaking of an inheritance tax under a statute very similar to ours, said: "Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed." The court then proceeds to say that the right to dispose of property is not so clearly taxable, and then continues: "But, when the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, and this is so whether the property is disposed of by the owner during his lifetime or at his death." And on page 326 of 53 Ohio St. the court said: "As a majority of the court are of opinion that it is not a tax on property, but upon the right to receive property, the statute must, as to this point, be sustained." In Gelsthorpe v. Furnell, supra, the supreme court of Montana, discussing an inheritance tax law very similar to ours, at pages 303, 304, of 20 Mont., said: "The better view, as laid down by the authorities, is that a collateral inheritance or succession tax is a duty or bonus exacted in certain instances by the state upon the right and privilege of taking legacies, inheritances, gifts, and successions passing by will, by intestate laws, or by any deed or instrument made *inter vivos*, intended to take effect at or after the death of the grantor. The burden of the tax is not imposed upon the property itself, but upon the privilege of acquiring property by inheritance. In nearly all inheritance-tax laws the statutes provide for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheriting can be valued." And on page 305 of 20 Mont.: "The most exact rule is that which regards the tax as upon the right to receive property, rather than the right to dispose of it." In 1895 the legislature of Illinois passed an act already referred to. The sections of our revenue act, relating to an inheritance tax, are almost literal copies of the whole of the Illinois law. The person who framed the Colorado law evidently had before him the Illinois law, which was copied, with here and there a word changed. The only sub-

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stantial difference is in the rate and in the verbiage of the proviso relative to exemptions. In 1897 the supreme court of Illinois in Kochersperger v. Drake, supra, passed upon the constitutionality of the law of that state. As our law was adopted after that decision was rendered, the utterances of the Illinois court come to us with a force like unto that of a legislative enactment. On pages 125 and 126 of 167 Ill., the Illinois court said: "The laws of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the state then provides for by the law of descent or devise. The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto. To deny the right of the state to impose such a burden or condition is to deny the right of the state to regulate the administration of a decedent's estate. When, by the act of June 15, 1895, for the taxation of gifts, legacies, and inheritances in certain cases, the legislature prescribed that a certain part of the estate of the deceased person should be paid to the treasurer of the proper county, for the use of the state, it was in effect an assertion of sovereignty in the estate of deceased persons. Whether to be levied and determined as a tax or penalty, the prinicple is that, where one owning an estate dies, that estate is to be assessed in accordance with the provisions of the act, and the tax to be paid for the right of inheritance. The amount reserved to the state from the estate of a deceased owner is not a tax on the estate, but on the right of succession." Thus the decisions of the courts in other jurisdictions impel the inevitable conclusion that it is sought in this proceeding to tax the right of the regents of the university and the right of the county or city of Boulder to receive the legacies left to them by the will of Andrew J. Macky.

While this result has been reached without special reference to decisions of this court, it is gratifying to note that in former decisions this court has reached the same conclusion. In Brown v. Elder, supra, wherein the inheritance tax in this state was held constitutional, after adverting to the fact that all the objections which were made to its constitutionality had been met by other courts, and that it was not necessary to make any argument in support of its validity, this court, at page 532 of 32 Colo. said: "We shall content ourselves merely with the general statement taken from the opinion of the Supreme Court of the United States in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, in which the decree of the circuit court of the United States for the district of Illinois, upholding the validity of the act of which ours is a substantial copy, was affirmed, that the constitutionality of such taxes is based upon two principles: First, an inheritance tax is not one on property, but one on the succession; second, the right to take property by devise or descent is a creature of the law, and not a natural right, and therefore the authority which confers it may impose conditions upon it." And the court, summing up its argument on page 539 of 32 Colo., said: "We have already held that our law imposes a tax upon the privilege of taking, receiving, and enjoying property that passes by will or under our intestate laws, and that authority for its imposition is found in the sovereign power of the state to lay a tax upon privileges and successions." In People v. Koenig, 37 Colo. 283, 285, 286, 85 Pac. 1129, 1130, 11 A. & E. Ann. Cas. 140, our court again refers to this tax as "a succession or inheritance tax, excise, or duty." And, after summarizing § 21 of the act, this court said: "From the foregoing summary of the section, it is apparent that thereby the tax or duty imposed is upon the receipt of some beneficial interest in the property which passes by will or under the intestate laws of the state. Each heir, devisee, or legatee must pay in proportion to the amount which he actually receives. While all heirs, devisees, and legatees, etc., are liable for such taxes, certainly each beneficiary can be held only for the tax on what he receives, and not on the whole estate, unless he receives the same. . . . As the tax is laid upon the receipt of 'such property by each person,' naturally the exemption should, and we hold does, apply to the separate distributive shares and legacies, and not to the aggregate value of the property of the decedent." Other quotations from this case would unnecessarily lengthen this opinion. A careful perusal of that decision shows that its reasoning is based upon the hypothesis that the tax is on the beneficiary, and leads to the conclusion that if this court were now to hold that our inheritance tax is a burden upon the estate of a deceased person, payable out of his estate, and is not a tax upon the right to receive a legacy or distributive share of the estate, to be borne by the beneficiary, such holding would be foreign to the reasoning of our court in People v. Koenig, and would be in effect a reversal of that case.

The conclusion having been reached that the right of the regents and the right of the county or city of Boulder to receive the legacies in the present case are the subject sought to be taxed, and that the regents

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and the county or city are the beneficiaries from whom it is sought to collect the tax, it becomes necessary to inquire whether these public corporations are exempt from the tax, or, rather, are such rights of such public corporations proper subjects of taxation within the contemplation of our inheritance tax law? Appellants claim an exemption first under § 4 of article 10 of our Constitution, and § 17 of the revenue act; and, second, upon the broad principle that a state never taxes its own property or the property of minor governmental agencies of the state. The sections of our Constitution and revenue act referred to provide that the property of the state, counties, cities, towns, and other municipalities shall be exempt from taxation. As these sections deal with taxation of property, it may be difficult to apply them in this case. It is not necessary, however, to consider whether these sections apply or not. It is enough to say that a county and a city, though differing somewhat in their corporate nature, are public corporations, carrying out the powers delegated by the laws of the state for the purpose of local government. What are the regents of the university? Section 5 of article 8 of our Constitution declares the University of Boulder to be an institution of the state. Section 12 of article 9 provides that the regents of the university shall be elected by the people, and constitutes them a body corporate under the name of "The Regents of the University of Colorado." Section 14 of the same article provides that this corporation shall have the general supervision of the university, and the exclusive control and direction of its funds and appropriations. By constitutional amendment, all these rights and franchises may be changed or taken away. The regents constitute a body corporate, but this body is a part of the state,—a department of the state to which is intrusted the supervision and government of the university of the state. By § 5 of article 8 of the Constitution, this body corporate is under the control of the general assembly, except as limited by the other provisions of the Constitution. It is fostered by the state. Appropriations are made and confided to it, which are raised by taxation upon the property of the people of the state. It is a public corporation in which the regents have no private interest whatever. It is an agency of the state for the government of the university. Its property and rights are the property and rights of the state.

There is a principle of law by which some things are always presumptively or impliedly exempted from the operation of general tax laws, because it is reasonable to suppose that they were not contemplated by the legislature at the adoption of the law. Such is the case with property belonging to the state and its governmental agencies which is held for governmental purposes. It is said that the taxation of such property would render necessary new taxes to meet the demand of the tax imposed, and the public would be taxing itself in order to raise money to pay to itself. Though the state has the power to do this, the process would be a useless one, and by it no one would be benefited except the officers employed, whose compensation would go to increase the tax levy. Such property is therefore regarded as impliedly exempt from the operation of tax laws unless the intention to include it is clearly expressed. Public Schools v. Trenton, 30 N. J. Eq. 667; People ex rel. Doyle v. Austin, 47 Cal. 353; Schuylkill County v. North Manheim Twp. 42 Pa. 21; Cooley, Taxn. 3d ed. 263 et seq.; Abbott, Mun. Corp. 716. The authorities last referred to, it is true, speak only of taxes on the property of the state or its governmental agencies. It is perfectly logical, however, to say that the same thing is true in case of an excise tax when the subject sought to be taxed is some right of the state or its governmental agencies, the exercise of which will aid them in the performance of their governmental duties. Indeed, if the doctrine of implied exemption is true in case of a property tax, then it follows that it must also be true in case of an excise tax. No matter what the subject of taxation may be in our revenue law, the object is always the same,—the raising of money for the support of government in the state. One of the great objects of county government is the erection and maintenance of homes for the poor. By subdivision 47, § 6525, Rev. Stat. 1908, cities and towns are empowered to erect and maintain hospitals, orphanages, etc., for the relief of persons in sickness and distress through poverty. Thus has the state provided for the care and support of the poor and dependent of its people. Hospitals and homes for this class of unfortunates must be built and maintained by taxation, unless some person, as in the present case, donates a fund for that purpose. An auditorium is a convenient and necessary building to be used in connection with the university. Sooner or later it would be built by taxation were it not for this present gift. What substantial difference is there between taxing the poorhouse, hospitals and orphanages of the county and city and the auditorium of the university, and taxing the right of these public corporations to receive a fund with which to erect these buildings, the erection of which is the exercise of a governmental duty? The application of the doctrine of implied exemp-

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tion of governmental subdivisions and agencies from excise duties or taxes has already been made in this state. In 1901 the general assembly passed a general revenue law (Laws of 1901, chap. 94, p. 241), containing the inheritance tax and some other forms of excise duties. It contained a section imposing a tax of $5 upon each party appearing in the supreme court. This was for the purpose of state revenue, and was not recoverable by the successful party. It was, in fact, a tax upon the right to appear in the supreme court, and was levied in general language including all litigants. This tax was not contained in the revenue law of 1902, when, for some reason, the law of 1901 was substantially re-enacted. The then county of Arapahoe, in one case, and the city of Denver, in another, paid this supreme court tax of 1901 under protest, and then moved to have the same refunded. In the opinion rendered on the determination of the motion in City of Denver v. Bonesteel, 28 Colo. 483, 65 Pac. 628, this court said: "It is by virtue of political subdivisions, such as counties, and municipalities like cities, that the laws are executed and the welfare of the people subserved, Taxes are charges levied by the sovereign state upon the persons of its subjects or citizens, and not charges upon itself. Revenue is the object of taxation, and none would result from levying a tax upon the agencies of the state through which it exercises the functions of government, or by virtue of which it protects and enforces its rights or those of its citizens. Taxation of these functions and agencies would, in effect, be merely taking money out of one pocket and putting it into another. In the end no net revenue would be derived. Such a policy would simply require a levy to meet these expenses in the first instance, to be again returned by the imposition of a fee. Hence, however general the statute may be in enumerating the parties liable to a tax of the character under consideration, the rule is that the subdivisions of the state, created for governmental purposes, are not included, or were intended to be excluded, in the absence of a specific declaration to the contrary; and the general rule of law invoked by the attorney general with respect to exemptions does not apply to public matters." It is thus apparent that the doctrine of implied exemption, as applying to this case, is the law of this state, and, if it is not now applied, there would be a departure from that law. It follows, therefore, that the judgment of the district court was wrong. The New York decisions cited by both parties have been discussed, for the reason that these decisions appear to deal with taxes of this nature generically or with laws specifically different, or turn upon the point that the statutes do not expressly exempt public corporations from taxes of this nature, thus not considering the law of implied exemption in such cases, as applied in this state.

The judgment will therefore be reversed, and this cause remanded, with directions to the District Court to vacate its judgment, and enter a judgment that the legacies, when paid to the regents of the university and the city or county of Boulder, shall be so paid free from and without the payment of any inheritance tax.

All the Justices concur.

OKLAHOMA SUPREME COURT.

JOHANN GRABOW, Plff. in Err..
v.
WILLIAM McCRACKEN et al.

(— Okla. —, 102 Pac. 84.)

Statute of frauds — deed of land — parol reservation of crop.

M. and another conveyed by warranty deed to G. a certain tract of land for a consideration recited in the deed of $2,900. at said time there being standing upon said land a matured crop of corn; it being agreed by parol that the grantors should gather and remove from said premises said corn as a part of the consideration of said conveyance. The grantee afterwards claimed said crop of corn by virtue of said deed, there being no reservation of said crop in the face thereof. Held that it might be shown by parol that said corn was reserved by the grantors as a part of the consideration for said conveyance.

(May 12, 1909.)

Headnote by WILLIAMS, J.

Case Note. — Must a contract for the sale of growing crops or a reservation of the same by a grantor in a deed be in writing.

Whether or not growing crops are realty or personalty depends very greatly upon the nature of the transaction in which the question arises. Many courts consider them realty as to some transactions and personalty as to others. It is the purpose of this note to discuss the question whether they are to be considered realty or an interest therein so as to be capable of passing only by a contract in writing; and the further somewhat analogous question whether a grantor of the lands upon which the crops are growing may reserve them by parol. These questions are in a way distinct and are so treated by many authorities, but other authorities seem to treat the right of a grantor to reserve growing crops by parol

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ERROR to the District Court for Kingfisher County to review a judgment in defendants' favor in an action brought to recover possession of certain crops to which plaintiff alleged title under a deed of the land upon which they were grown. Affirmed.

Statement by Williams, J.:

On the 18th day of October, A. D. 1906, the plaintiff in error, as plaintiff, commenced his action in the probate court of Kingfisher county, territory of Oklahoma, against the defendants in error, William McCracken and Lucy McCracken, as defendants, by petition in replevin, alleging in due form that he was the owner and lawfully entitled to the immediate possession of certain personal property, to wit, all the corn that was shucked and standing in a field upon a certain tract of land, all kaffir corn and hay on said land, and all kaffir corn in shocks standing on said land, etc. The evidence tended to show that on the 13th day of October, A. D. 1906, the defendants, by their warranty deed in regular form, conveyed in fee simple to the plaintiff the land upon which said corn and hay were then standing, same being matured and ready to be gathered and harvested; that then and there, as a part of the consideration of said conveyance, it was verbally understood that said corn and hay were reserved and should remain the property of the grantors, and not become the property of the grantee. Said cause was tried in the

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as dependent upon the necessity of a contract for the sale of such crops being in writing. And it will be noted that in some of the cases cited in GRABOW v. MCCRACKEN the two questions are in a way combined. It is consequently thought advisable to treat both questions in one note.

This case does not include cases involving the necessity of a delivery of the crops if deemed personal property, in order to satisfy the statute.

Sale of growing crops.

The great weight of authority is to the effect that annual crops, raised by yearly labor and cultivation, are, although unsevered from the soil, to be regarded as personal chattels and capable of being sold by oral contract, without regard to whether the crops are growing or matured. Marshall v. Ferguson, 23 Cal. 65; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Bull v. Griswold, 19 Ill. 631; Bricker v. Hughes, 4 Ind. 146; Sherry v. Picken, 10 Ind. 375; Craddock v. Riddlesbarger, 2 Dana, 205; Dayton v. Dakin, 103 Mich. 65, 61 N. W. 349; Garth v. Caldwell, 72 Mo. 622; Holt v. Holt, 57 Mo. App. 272; Westbrook v. Eager, 16 N. J. L. 81; Austin v. Sawyer, 9 Cow. 39; Newcomb v. Ramer, 2 Johns. 421, note; Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442; Green v. Armstrong, 1 Denio, 550; Brittain v. McKay, 23 N. C. (1 Ired. L.) 265, 35 Am. Dec. 738; Wisely v. Barclew, 1 Ohio Dec. Reprint, 216; Carson v. Browder, 2 Lea, 701.

Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether before or after severance, is not an interest in land under the statute of frauds. Carson v. Browder, supra.

So, a verbal contract for the sale of growing crops is not rendered void by the statute of frauds, although it may confer upon the purchaser an exclusive right to the land while the crop is ripening and being harvested. Davis v. McFarlane, supra.

Annual crops, such as corn, raised by yearly labor and cultivation, are to be regarded as personal chattels independent of and distinct from the land, capable of being sold by oral contract, and this without regard to whether the crops are growing or, having matured, have ceased to derive any nutriment from the soil. Garth v. Caldwell, supra.

A contract for the sale of nursery stock need not be in writing. Whitmarsh v. Walker, 1 Met. 313.

In Dunne v. Ferguson, Hayes (Exch.) 542, it was held that growing turnips were to be considered chattels, and a valid sale thereof could be made by parol.

A verbal contract for the sale of potatoes to the plaintiff, who was to have them at digging time and was to furnish the diggers, is not within the statute of frauds. Sainsbury v. Matthews, 4 Mees. & W. 343.

So, a contract for the sale of potatoes to be taken "immediately" from the ground is not within the statute. Parker v. Staniland, 11 East, 362. So, also, a contract to sell a crop of potatoes at a fixed price per acre, to be dug and carried away by the purchaser, is not within the statute. Warwick v. Bruce, 2 Maule & S. 205. In both of these cases the crop had ceased to grow, but the same rule was applied where the crop was still growing, in Evans v. Roberts, 5 Barn. & C. 829. And to the same effect were the decisions in Poulter v. Killingbeck, 1 Bos. & P. 397; Jones v. Flint, 10 Ad. & El. 753; Mayfield v. Wadsley, 3 Barn. & C. 357.

Proof of a verbal sale of the corn, although only a few inches high, was held in Northern v. State, 1 Ind. 113, to be a good defense to an action upon a constable's bond for failure to levy upon the corn under an execution against the vendor, issued after the sale.

An assignment of the owner's interest in a farm does not carry with it growing crops which had been verbally reserved by the owner's grantor upon his conveyance of the property to the owner within a year. Austin v. Sawyer, 9 Cow. 39.

A crop of timothy seed, whether sold before or after it is gathered, is not a part of the realty so that a landlord's lien thereon

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probate court of said county, and on November 1, A. D. 1906, was appealed to the district court, and on the 25th day of January, A. D. 1907, same was tried in the district court of said county without intervention of a jury, and judgment rendered in favor of the defendants. Thereafter, in due time, a motion for a new trial was filed and overruled, and exceptions saved. By proceeding in error an appeal was prosecuted to the supreme court of the territory of Oklahoma, and, by virtue of the provisions of the enabling act and the Schedule to the Constitution, same is now before this court for determination.

Messrs. **Noffsinger & Hinch**, for plaintiff in error:

Crops so far partake of the nature of the realty that, in the absence of reservation or exception, they pass by a sale or conveyance of the land as appurtenant thereto, whether unripe or matured, so long as there has not been a severance, actual or constructive, of such crops from the land.

Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695; Garanflo v. Cooley, 33 Kan. 137, 5 Pac. 766; Chapman v. Veach, 32 Kan. 167, 4 Pac. 100; Smith v. Hague, 25 Kan. 246; Smith v. Leighton, 38 Kan. 544, 5 Am. St. Rep. 778, 17 Pac. 52.

Mr. F. P. Whistler for defendants in error.

Williams, J., delivered the opinion of the court:

The sole question for determination is whether or not, as a part of the considera-

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could be released only by a writing. Wimp v. Early, 104 Mo. App. 85, 78 S. W. 343.

A verbal agreement between landlord and tenant or between tenants in common of a growing crop of cotton, that the landlord or a cotenant shall have a lien on the crop for supplies furnished the tenant or a cotenant, is not offensive to any provision of the statute of frauds, and is operative against all persons but bona fide purchasers without notice. Gafford v. Stearns, 51 Ala. 434.

There are but few cases which hold that a verbal contract of sale of an ordinary annual crop is repugnant to the statute of frauds.

A growing crop of wheat was held in Kerr v. Hill, 27 W. Va. 576, to be real estate, and a verbal sale thereof directly within the statute of frauds. And to the same effect was the decision in McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196, which, however, was practically overruled by Garth v. Caldwell, supra. These decisions are clearly opposed to the great weight of American authority.

In Emmerson v. Heelis, 2 Taunt. 38, it was held that a sale of growing turnips conveyed an interest in land and must be in writing. A number of the later English cases cited above expressly repudiate the decision in the Emmerson Case.

—fruit.

Contracts for the sale of fruit growing upon trees need not be in writing. Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Smock v. Smock, 37 Mo. App. 56.

So, in Brown v. Stanclift, 20 Alb. L. J. 55, it was held that a sale of growing fruit, to be picked up by the vendor and delivered in barrels furnished by the vendee, is not a sale of an interest in realty, and need not be in writing.

And in Purner v. Piercy, supra, the court said: "It would be a perversion of the objects of the statute to hold as invalid the sale, in other respects legal, of the growing crop of peaches, with no intent of the parties to sell or purchase the soil, but affording a mere license, express or implied, to the purchaser to go upon the land to gather the fruit and remove the same. Substantially, to use the language of § 271 of 1 Greenleaf's Ev., the transaction takes its character of realty or personalty from the principal subject-matter of the contract and the interest of the parties, and, therefore, a sale of any growing produce of the earth in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land."

But to the contrary was the decision in Rodwell v. Phillips, 9 Mees. & W. 501, where it was held that a contract for the sale of growing fruit must be in writing.

—hops.

Hops are considered as chattels and will pass by a parol contract.

Thus, in Latham v. Atwood, Cro. Car. 515, hops were held to be like emblements because they were such things as grow by the manurance and industry of the owner by the making of hills and the setting of poles; that labor and expense, without which they would not grow at all, was deemed equivalent to the sowing and planting of other vegetables and fruit.

So, hops growing and maturing on the vines, which are produced by annual cultivation and the industry of the owner, are personal chattels within the meaning of the statute of frauds. Frank v. Harrington, 36 Barb. 415.

And a sale of hop roots growing in the ground may be made by a parol contract. Webster v. Zielly, 52 Barb. 482.

A contract made in November for the sale of all the hops to be grown during the following year upon a certain number of acres was held in Waddington v. Bristow, 2 Bos. & P. 452, to be a contract for an interest in lands, and to be valid must be in writing. While this case appears to be contrary to the other hop cases, it has been

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tion of the deed, it was permissible to reserve by parol the standing, ungathered, matured crop of corn and hay on said land.

In the case of Heavilon v. Heavilon, 29 Ind. 513, the court said: "It is well settled that a vendor, in a suit for the purchase money, may prove by parol evidence the amount thereof, the terms of payment, and its nonpayment, notwithstanding the receipt of the purchase money may be acknowledged in the deed. Now, suppose that the defendant, as a part of the consideration to the plaintiff for the land described in the deed, had agreed that the plaintiff should have a crop of wheat growing on another tract of land owned by the defendant, and had subsequently refused permission to cut and carry it away, would anyone contend that the plaintiff could not recover of the defendant the value of the wheat? Or if, as in this case, the plaintiff had harvested the wheat without objection, that the defendant could recover back its value? Does not the same principle apply to this case? Can any logical reason be shown why it should not? Admit that the deed upon its delivery conveyed the growing wheat, still it was not a fixture which constituted permanently a part of the land; it was the subject of sale by parol, and what rule of law is there to prohibit the defendant from making such sale a part of the same contract by which he would become the owner, or that would convert the deed into an estoppel against parol proof of such sale? If, as alleged in the reply, the defendant contracted the wheat to the plaintiff, as a part of the consideration of the land, then the execution

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distinguished upon the ground that the hops were not in being at the time of the sale.

—grasses.

A sale of growing perennial grasses is very generally held to convey an interest in lands, and a contract for such sale must be in writing to satisfy the statute of frauds.

Thus, in Green v. Armstrong, 1 Denio, 550, it was held that there was a distinction between growing trees, fruit, and other natural products of the earth on the one hand, and growing crops of grain and other annual productions raised by cultivation of the earth and industry of man on the other; the former are parcel of the land, and a contract in writing is required to make a valid transfer: the latter are personal chattels, and not within the statute. In the Green Case, there was an attempted sale of standing timber, but the decision was cited with approval and followed in Bank of Lansingburgh v. Crary, 1 Barb. 542, and in Hobbs v. Wetherwax, 38 How. Pr. 385, where there was an attempted sale by parol of growing grasses.

So, in Craddock v. Riddlesbarger, 2 Dana, 205, a distinction was made between spontaneous grasses and those crops which were produced necessarily by annual planting, cultivation, and labor, and it was stated that a contract for the sale of spontaneous grasses must be in writing.

Growing grasses, whether wild or cultivated, are a part of the land and require an agreement in writing for their sale and severance from the land. Powers v. Clarkson, 17 Kan. 218; Smith v. Leighton, 38 Kan. 544, 5 Am. St. Rep. 778, 17 Pac. 52; Ross v. Cook, 17 Kan. 117, 80 Pac. 38.

A contract for the sale of growing grass, to grow until ripe, was held in Crosby v. Wadsworth, 6 East, 602, to pass an interest in lands. As, by the terms of the contract, the buyer was to mow the grass and must have possession of the land for a time, the court declared that he did acquire an interest in the land.

In Carrington v. Roots, 2 Mees. & W. 248, it was held that an oral contract that the plaintiff might, for a fixed price, go upon the defendant's close, cut and carry away growing grass, might be available as a license, but was not as a contract.

A verbal sale of growing perennial grass to be cut by the vendee is invalid as within the statute of frauds; such a case must be distinguished from one in which the grass was to be cut by the vendor himself, as in the latter case it could not be said that the vendee would have an interest in the land itself. Kirkeby v. Erickson, 90 Minn. 299, 101 Am. St. Rep. 411, 96 N. W. 705.

But grass ready to cut may be sold by parol. Cutler v. Pope, 13 Me. 377.

Parol reservation of growing crops.

Cases have been excluded in which the interests of third parties have intervened, and, as in Chapman v. Veach, 32 Kan. 167, 4 Pac. 100, the decision turns upon the rights of a grantee of the land without notice of any reservation of the crops.

Whether growing crops are considered personalty or realty, it is a rule asserted by the great weight of authority, that they are so incidental to the realty that they pass with a grant of the land, unless they are expressly reserved. The question then arises, May they be reserved by parol? This question is considered, by the majority of the cases presenting it, as one of evidence, rather than one involving the statute of frauds.

The weight of authority is apparently to the effect that evidence of a parol reservation of the growing crops by the grantor in a deed is inadmissible under the well-known rule of evidence, that the terms of a written instrument cannot be contradicted or varied by parol. Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Gam v. Cordrey, 4 Penn. (Del.) 143, 53 Atl. 334; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; Damery v. Ferguson, 48 Ill. App. 225; Chapman v. Long, 10 Ind. 465; Turner v. Cool, 23 Ind. 56, 85 Am. Dec. 449; Brown v. Thurston, 56

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of the deed was a performance of the contract on the part of the plaintiff, and entitled him to the wheat, and no question under the statute of frauds, contended for by the appellee, could arise in the case."

See also Harvey v. Million, 67 Ind. 93.

In the case of Austin v. Sawyer, 9 Cow. 39, the court said: "Whatever may be the rule of construction elsewhere, we are not at liberty here to question the validity of a parol contract for the sale of growing crops. Was there any evidence of such a contract? Rejecting all that passed anterior to and at the time of executing the written contract, the proof is that Wilcox, when treating with the defendant as to the sale of the farm, declared the wheat to belong to the plaintiff. This is sufficient, in my judgment, to authorize a jury to presume a formal and valid contract for the sale of the wheat."

In the case of Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592, the court said: "It is a rule of the common law that growing crops are personal property, but pass by conveyance as appurtenant to the land, unless served by reservation or exception; and this rule has not been altered by statute of frauds and perjuries. A party may show by parol that the growing crops were reserved on a sale of the land, although there be no exception in the deed."

See also Harbold v. Kuster, 44 Pa. 392.

In the case of Neill v. Chessen, 15 Ill. App. 266, it is held that parol evidence is admissible to show that the grantor should have the growing wheat and the rent for a certain time, when the same is not reserved in the face of the deed.

In the case of Baker v. Jordan, 3 Ohio St. 438, it is held that growing corn may be reserved by parol from the operation of a deed, in common form, for the land whereon it grows; that growing corn may be a part of the realty for some purposes, but it is generally to be considered as personalty; that, when the evidence of such understand-

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Me. 126, 96 Am. Dec. 438; Vanderkarr v. Thompson, 19 Mich. 82; Adams v. Watkins, 103 Mich. 431, 61 N. W. 774; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196.

A reservation by parol, if permitted to be established in a court of justice, would come directly in conflict with the well-settled rule of law which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. Gibbons v. Dillingham, supra.

A parol reservation of wine plants, which are of the nature of rhubarb, is inadmissible to contradict the terms of a conveyance of the land, absolute on its face. Wintermute v. Light, 46 Barb. 279.

In Fiske v. Soule, 87 Cal. 313, 25 Pac. 430, real-estate brokers had sold some land without reserving the crops, at the price at which the land was to be sold without the crops, and the court held that they were entitled to recover their commissions, as it appeared that all of the parties understood that the crops were not to pass with the land, and the sale was not consummated for reasons entirely outside the terms of the contract of sale. The court said that a written contract for the sale of land, which did not contain any reservation of growing crops, if standing alone, must prevail, notwithstanding the fact that there was a verbal understanding that the crops were not to pass.

A parol reservation of crops may amount to a license to enter and remove the crops. Powell v. Rich, 41 Ill. 466; Carter v. Wingard, 47 Ill. App. 296.

In speaking of a parol reservation of crops of grain which was not mentioned in a deed, the court in Huffman v. Hummer, 17 N. J. Eq. 269, said that a written agreement may be altered by a parol agreement subsequently made, but, if contemporaneous with the written agreement, the instrument itself is a repository of the intention of the parties and the only competent evidence of what their intention was.

But a number of cases hold that a verbal reservation by the grantor of crops growing on the land conveyed is valid, and evidence thereof is admissible. It will be noted that the admissibility of such evidence is put upon several different grounds.

Thus, in Walton v. Jordan, 65 N. C. 170, the court said: "Annual crops, which are regarded in law as *fructus industriales*, do not necessarily pass with the title of the land. For many purposes they are considered as personal property, and they may be sold and transferred by parol, as they are not embraced in the statute of frauds. While they are growing, they pass by presumption of law with the title of the land, but this presumption may be rebutted, even with parol evidence."

So, also, in Baker v. Jordan, 3 Ohio St. 438, the court said: "Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed, either by words or their behavior, signify their understanding that as between them it is personalty, the law will so regard it and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what, in some instances, would go with the lands as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect." And to the same effect was the decision in Bourne v. Bourne, 12 Ky. L. Rep. 467.

And in Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592, it was held that a reservation of a growing crop acts as a sev-

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ing is produced, it is not to contradict the deed, for with that it is perfectly consistent, but it is to show that what in some instances would go with the land as a part of the realty was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect.

See also Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695; Aull Sav. Bank v. Aull, 80 Mo. 199; Champion v. Munday, 85 Ky. 31, 2 S. W. 546; Richardson v. Traver, 112 U. S. 423, 28 L. ed. 804, 5 Sup. Ct. Rep. 201; McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Hersey v. Verrill, 39 Me. 271; Quimby v. Stebbins, 55 N. H. 420; Steed v. Hinson, 76 Ala. 298; Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506; Mobile & M. R. Co. v. Wilkinson, 72 Ala. 286; McMahan v. Stewart, 23 Ind. 590; Frey v. Vanderhoof, 15 Wis. 398; Drury v. Tremont Improv. Co. 13 Allen, 168; McDill v. Gunn, 43 Ind. 315.

The following authorities support the contrary rule: Kammrath v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213; Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Winn v. Murehead, 52 Iowa, 64, 2 N. W. 949; Stewart v. McArthur, 77 Iowa, 162, 41 N. W. 604; Adams v. Watkins, 103 Mich. 431, 61 N. W. 774; Taylor v. Southerland, 7 Ind. Terr. 666, 104 S. W. 874; Chapman v. Veach, 32 Kan. 167, 4 Pac. 100.

The weight of authority and reason supports the rule, at least that a matured crop of corn and wheat standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land, as a part of the contract price or consideration of the deed.

The judgment of the lower court is affirmed.

All the Justices concur.

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erance, and the crop does not pass by the deed with the land; consequently, parol evidence as to a reservation does not vary or contradict the terms of the deed.

And following the Backenstoss Case, it was held in Harbold v. Kuster, 44 Pa. 392, that a verbal agreement that growing crops should remain the property of the grantor would not necessarily be merged in a deed of the realty.

In Hendrickson v. Ivins, 1 N. J. Eq. 562, it was held that a verbal reservation of "green grain" was valid, but the decision was based upon the fact that the parties intended to insert the reservation in the deed and it was omitted by the scrivener who drew the deed.

Although a growing crop of wheat was considered to be real estate and within the statute of frauds, it was held in Kerr v. Hill, 27 W. Va. 576, that where it was verbally agreed between the parties upon the sale of land under the power given in an ordinary deed of trust, that, if the land should be purchased by one of the parties, the owner should reserve the wheat, such a verbal agreement would be enforced where it appeared that the purchaser bid for the land with such a reservation in mind.

In some cases a reservation of a growing crop has been treated as a part of the consideration, and, as such, may be shown by parol. This is the view taken by GRABOW v. McCRACKEN and by Heavilon v. Heavilon, 29 Ind. 509, which is quoted at length therein.

And the Heavilon Case is approved and followed in Harvey v. Million, 67 Ind. 90. These Indiana cases expressly overrule the earlier cases from that state, of Chapman v. Long and Turner v. Cool, supra, which hold to the contrary.

So, where the reservation of a growing crop is made as part of the trade, which includes the conveyance, it was held in Benner v. Bragg, 68 Ind. 338, that it might be proven by parol. And to the same effect was the decision in Hisey v. Troutman, 84 Ind. 115.

And in Kluse v. Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047, it was held that "the true and full consideration of a sale of land may always be shown by parol, and as the reservation of the emblements may enter into the consideration for, or constitute an inducement to, the sale, it is held that parol evidence is admissible to prove a reservation of the growing crops or emblements, notwithstanding the rule that such crops, prima facie, pass with a sale of land."

So, also, in Holt v. Holt, 57 Mo. App. 272, it was held that a parol reservation of crops by the grantor was valid under the statute of frauds, and an admission of evidence thereof was permissible. The court said: "The statement of the amount of the consideration in a deed, and the acknowledgement of its payment, is no more than a receipt,—a statement of a fact which is not necessary to the validity of the deed. It is only prima facie evidence of what it states, but not conclusive, except that there was some consideration. Such a recited consideration is not intended to be contractual, and therefore works no estoppel as to amount or character; or, in other words, the parties in such case are not estopped from showing by parol evidence the amount and character of the consideration to be different from that recited in the deed."

But parol evidence that the grantor was to retain growing crops as a part of the consideration of a deed was held inadmissible in Kammrath v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213. The court said: "The true consideration may generally be shown, but, when evidence offered for such purpose will have the effect

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to restrict the legal operation of the covenants, it is incompetent."

A few cases hold that whether evidence of a parol reservation of crops is admissible or not depends upon whether the statute of frauds requires a contract concerning growing crops to be in writing or not.

Thus, it was held in Flynt v. Conrad, 61 N. C. (Phill. L.) 190, 93 Am. Dec. 588, that parol evidence is admissible to show that it was the intention of the parties at the time the deed was executed that only the land should pass, and that the growing crops should continue to be the property of the grantor, as the statute of frauds does not apply to an agreement concerning a growing crop.

But in Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233, it was held that parol evidence to show a verbal reservation of growing crops was contrary to the statute of frauds.

And in McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196, it was held that, as growing wheat is an interest in land, a contract concerning it is within the statute of frauds and perjuries, and must be in writing; and it would follow, therefore, that parol evidence of the sale of a growing crop of wheat would be inadmissible. The effect of this decision, however, is practically overthrown by Garth v. Caldwell, 72 Mo. 622, supra, in which it was held that annual crops were capable of being sold by parol contract.

In Powell v. Rich, 41 Ill. 466, it was held that, if immatured crops are to be reserved from passing with a conveyance of the land, the reservation must be in writing to satisfy the statute of frauds, as they are to be deemed an interest in the land and pass with it. A statement as to a distinction between matured and immatured crops made in this case was said in Damery v. Ferguson, 48 Ill. App. 225, to be mere *dictum*, and the rule was held to apply to matured crops if unsevered as well as to immatured crops. And to the same effect was the decision in Carter v. Wingard, 47 Ill. App. 296. In none of these cases, does the court express any opinion as to the question whether a verbal sale of growing crops is valid or not.

In regard to these cases, it is not clear in what way the admissibility of evidence of a parol reservation is dependent upon the provisions of the statute of frauds. It would seem that, if the court proceeds upon the theory that evidence of a parol reservation of growing crops would tend to vary the terms of the conveyance, absolute on its face, the rule of evidence forbidding the contradiction or variation of written instruments by parol testimony is conclusive in itself, regardless of whether the rule of that jurisdiction required a contract for the sale of growing crops to be in writing or not; and it will appear from the cases discussed earlier in the note that in some jurisdictions evidence of a parol reservation of a crop has been held inadmissible, although an oral sale of growing crops is held valid, and not within the statute of frauds. And in Austin v. Sawyer, 9 Cow. 39, while it was held that evidence of a parol reservation of the crops was inadmissible, the validity of a parol contract for the sale of the crops was expressly affirmed.

WASHINGTON SUPREME COURT.

ALMA CABLE, Admrx., etc., of Rufus E. Cable, Deceased, Appt.,

v.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Respt.

SADIE CABLE, by Guardian *ad Litem*, Appt.,

v.

SAME, Respt.

(50 Wash. 619, 97 Pac. 744.)

Electric railway — duty — crossing.

1. One about to cross a track of an interurban electric railway, on which trains are customarily operated at high speed, must stop, look, and listen for approaching trains.

Same — contributory negligence.

2. One is negligent in assuming that an electric interurban train which he knows to be approaching a crossing is to stop, and in driving upon the track in front of it when his view is obscured by obstructions, without ascertaining its exact location, so as to prevent holding the railroad company liable for injuries, although the company is negligent in running a through train at high speed, off from schedule time, without sounding proper warning at the crossing.

Imputed negligence — railroad crossing — individual duty.

3. A person of years of discretion who is injured at a railroad crossing while riding with another who has full control of the driving cannot escape the charge of contributory negligence, on the theory that the negligence of the driver is not imputable to him, if there is no evidence that he made any effort to protect himself by attempting to secure observation of the rule requiring such travelers to stop, look, and listen.

(October 16, 1908.)

Case Note. — Duty to look and listen before crossing interurban electric railway on company's own right of way.

The cases discussing the duty of a person traveling upon a street to look and listen before crossing the tracks of an electric railway traversing public streets or highways are collected and discussed in a note to Pilmer v. Boise Traction Co. 15 L.R.A.(N.S.) 254. This note is confined to cases passing upon the duty to look and listen before attempting to pass over an electric road crossing a street or highway in a country

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APPEALS by plaintiffs from judgments of the Superior Court for Spokane County in favor of defendant in actions brought to recover damages for personal injuries which were alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Adler C. Clausen** and **Samuel T. Crane** for appellants.

Messrs. **Graves and Kizer & Graves**, for respondent:

Deceased in driving upon the track, under the circumstances, was guilty of negligence barring recovery.

Woolf v. Washington R. & Nav. Co. 37 Wash. 507, 79 Pac. 997; 2 Thomp. Neg. §§1641, 1656; Phillips v. Detroit, G. H. & M. R. Co. 111 Mich. 274, 66 Am. St. Rep. 392, 69 N. W. 496; Gulder v. Pennsylvania R. Co. 70 N. J. L. 196, 56 Atl. 124; Griffin v. Chicago, R. I. & P. R. Co. 68 Iowa, 638, 27 N. W. 792; Merkle v. New York, L. E. & W. R. Co. 49 N. J. L. 473, 9 Atl. 680; Golinvaux v. Burlington, C. R. & N. R. Co. 125 Iowa, 652, 101 N. W. 465; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 A. & E. Ann. Cas. 700; Keyley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811; Louisville, N. O. & T. R. Co. v. French, 69 Miss. 121, 12 So. 338; Allen v. Maine C. R. Co. 82 Me. 111, 19 Atl. 105; Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892; Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Pennsylvania R. Co. v.

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district, where the tracks are laid on the company's own right of way.

The cases hold generally that there is imposed upon a traveler about to cross an electric track which is laid upon the company's own right of way through the country, a greater duty to look and listen for approaching cars than would exist in a city where so great a rate of speed cannot be maintained, and where there is a greater degree of care required of the motorman to keep his car under control. The duty imposed upon a traveler in the country about to cross the tracks of an electric railway is very similar to the duty to look and listen imposed upon a traveler about to cross the tracks of a steam railway.

Thus, in Robinson v. Rockland, T. & C. Street R. Co. 99 Me. 47, 58 Atl. 57, it was held that where a traveler upon a highway approaching an electric railway crossing is able to view the track for but a short distance from the crossing, until his horse is directly upon the track, it is all the more his duty to listen for an approaching car, and failure so to do constitutes contributory negligence. The court said: "The conditions of a country crossing of an electric railway in some respects more nearly resemble the crossings of steam railways than they do the situation in the city streets, where persons and teams are constantly traveling across and upon the tracks. A greater speed may be reasonable upon the part of the electric car, calling for a corresponding increase of vigilance on the part of the traveler."

And failure actually to look before attempting to cross an electric railway track was held in Phillips v. Washington & R. R. Co. 104 Md. 455, 65 Atl. 422, 10 A. & E. Ann. Cas. 334, to be contributory negligence precluding recovery for injuries caused by being struck by a car while attempting to cross. The court said: "In considering this question of contributory negligence it must be borne in mind that the injury did not occur on the streets of a city, but in the open country, where a higher rate of speed in the movement of electric cars is permissible than is allowable along the more crowded thoroughfares of a town. More caution was therefore demanded of a person in crossing a track of an electric railway in the country than would have been necessary in the city. The use of no greater caution in the open country than would have been requisite to constitute ordinary care and prudence in the city would not have been due care and caution on the part of the individual in approaching and going upon an electric railway crossing in the country. An act which would be prudent in the city might be glaringly negligent in the country; and hence the standard by which contributory negligence is to be measured in the two instances necessarily varies with the changed conditions existing in the two dissimilar localities."

So, where in approaching a suburban railway crossing the plaintiff's intestate did not stop, or even look, after reaching a point where either act would have been of any benefit to her, it was held in Folkmire v. Michigan United R. Co. (Mich.) 121 N. W. 811, that she was guilty of contributory negligence precluding a recovery.

And failure on the part of the plaintiff to look and listen for a car after the regular car has passed is contributory negligence which precludes a recovery of damages for injuries received by being struck by an extra car which followed the regular car at an interval of about fourteen seconds. Hatcher v. McDermott, 103 Md. 78, 63 Atl. 214. The court, after stating the rule laid down in Annapolis & B. Short Line R. Co. v. Pumphrey, 72 Md. 82, 19 Atl. 8, that there is no principle of law which precludes a railroad company from sending extra trains or engines over its road whenever the necessities of its business may require, said: "That being the law in reference to steam railroads, upon which trains are usually made up of a number of cars to which other cars may be added when required, it is even more applicable to electric railways running through the country, as circumstances may often arise which require extra cars to accommodate the public."

So, the failure of a traveler to observe the requirement to avail himself of his full

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Beale, 73 Pa. 509, 13 Am. Rep. 753; Schaefert v. Chicago, M. & St. P. R. Co. 62 Iowa, 624, 17 N. W. 893; Mantel v. Chicago, M. & St. P. R. Co. 33 Minn. 62, 21 N. W. 853; Haas v. Grand Rapids & I. R. Co. 47 Mich. 401, 11 N. W. 216; Chicago, R. I. & P. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Central R. Co. v. Smalley, 61 N. J. L. 277, 39 Atl. 695; Criss v. Seattle Electric Co. 38 Wash. 320, 80 Pac. 525; Coats v. Seattle Electric Co. 39 Wash. 386, 81 Pac. 830; Davis v. Cœur d'Alene & S. R. Co. 47 Wash. 301, 91 Pac. 839; Anson v. Northern P. R. Co. 45 Wash. 92, 87 Pac. 1058; Baker v. Tacoma Eastern R. Co. 44 Wash. 575, 87 Pac. 826; Schofield v. Chicago, M. & St. P. R. Co. 2 McCrary, 268, 8 Fed. 488, affirmed in 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; Hatcher v. McDermott, 103 Md. 78, 63 Atl. 214; Bush v. Union P. R. Co. 62 Kan. 709, 64 Pac. 624; Durbin v. Oregon R. & Nav. Co. 17 Or. 5, 11 Am. St. Rep. 778, 17 Pac. 5; Judson v. Great Northern R. Co. 63 Minn. 248, 65 N. W. 447; Toledo, W. & W. R. Co. v. Jones, 76 Ill. 311; Smith v. Wabash R. Co. 141 Ind. 92, 40 N. E. 270; Ward v. Richmond & D. R. Co. 43 Fed. 422; Horn v. Baltimore & O. R. Co. 4 C. C. A. 346, 6 U. S. App. 381, 54 Fed. 301; Blount v. Grand Trunk R. Co. 9 C. C. A. 526, 22 U. S. App. 129, 61 Fed. 375; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 810; Pyle v. Clark, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744; Louisville & N. R. Co. v. Webb, 90 Ala. 185, 11 L.R.A. 674, 8 So. 518; Little Rock & Ft. S. R. Co. v. Dinsemann, 54 Ark. 431, 16 S. W. 169; Glascock v. Central P. R. Co. 73 Cal. 137, 14 Pac. 518; Mann v. Belt R. & Stock Yard Co. 128 Ind. 138, 26 N. E. 819; Oleson v. Lake Shore & M. S. R. Co. 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736; Hunter v. Montana C. R. Co. 22 Mont. 525, 57 Pac. 140; Blackburn v. Southern P. Co. 34 Or. 215, 55 Pac. 225; Day v. Boston & M. R. Co. 97 Me. 528, 55 Atl. 420; Barnhill v. Texas & P. R. Co. 109 La. 43, 33 So. 63; Vincent v. Morgan's L. & T. R. & S. S. Co. 48 La. Ann. 933, 55 Am. St. Rep. 287, 20 So. 207; Brown v. Texas & P. R. Co. 42 La. Ann. 350, 21 Am. St. Rep. 374, 7 So. 682; Dascomb v. Buffalo & State Line R. Co. 27 Barb. 221; Salter v. Utica & B. River R. Co. 75 N. Y. 273; Brinker v. Michigan C. R. Co. 121 Mich. 283, 80 N. W. 28.

A person driving with another, in such a situation that his means of observation are equal to those of the driver, may not trust his safety absolutely, blindly, to the driver, but must make use of his own faculties to preserve himself from danger, and he is required to look and listen, to warn, to protest, and if these be ineffectual, even to leave the vehicle.

Hoag v. New York C. & H. R. R. Co. 111 N. Y. 199, 18 N. E. 648; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; Aurelius v. Lake Erie & W. R. Co. 19 Ind. App. 584, 49 N. E. 857; Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Fechley v. Springfield Traction Co. 119 Mo. App. 358, 96 S. W. 421; Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; Illinois C. R. Co. v. McLeod, 78 Miss. 334, 52 L.R.A. 954, 84 Am. St. Rep. 630, 29 So. 76; Crescent Twp. v. Anderson, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379; Bush v. Union P. R. Co. and Colorado & S. R. Co. v. Thomas, supra; Miller v. Louisville, N. A. & C. R.

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opportunity to listen for a car which he knew might cross the road from behind an obstruction which prevented him from seeing its approach was held to be contributory negligence in Heitman v. Pacific Electric R. Co. (Cal. App.) 102 Pac. 15. The court applied the rule laid down in Herbert v. Southern P. Co. 121 Cal. 227, 53 Pac. 951, but said that they did not assume to hold that in all cases, and under all conditions, the crossing of an interurban electric railway is to be governed by the same rules as those applied to steam railways.

And in McNab v. United R. & Electric Co. 94 Md. 719, 51 Atl. 421, where the negligence of the plaintiff consisted in driving upon the track after she saw the car approaching, rather than her failure to look or listen, the court held that while there was a clear distinction between the duty of a person crossing an electric road in city streets and crossing the tracks of a steam railroad in the country, that distinction lay not in the difference of motive power, but because of the different conditions surrounding the running of the cars in the different localities. After citing a number of cases which make this distinction the court said: "The cases cited above distinguish between a street railway in a city and a steam railway in the country; but they do not justify the pushing of that distinction to the extent of holding that there is such a difference between an electric railway in the country and a steam railway as to change what would be contributory negligence as respects the latter into noncontributory negligence or due care as respects the former."

As to duty to stop, look, and listen after entering on first track of railway, see case note to Cherry v. Louisiana & A. R. Co. 17 L.R.A.(N.S.) 505.

As to duty of traveler to stop, look, and listen upon approaching overhead or underground railway, see case note to Heinmiller v. Winston, 6 L.R.A.(N.S.) 150.

As to failure to give customary signals as excusing nonperformance of duty to look and listen, see case note to Cooper v. North Carolina R. Co. 3 L.R.A.(N.S.) 391.

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Co. 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; Cincinnati, I. St. L. & C. R. Co. v. Howard, supra; Smith v. Maine C. R. Co. 87 Me. 339, 32 Atl. 967; Meenagh v. Buckmaster, 26 App. Div. 451, 50 N. Y. Supp. 85; Thompson v. Pennsylvania R. Co. 215 Pa. 113, 64 Atl. 323, 7 A. & E. Ann. Cas. 351; Holden v. Missouri R. Co. 177 Mo. 456, 76 S. W. 973; Brannen v. Kokomo, G. & J. Gravel Road Co. 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; Dryden v. Pennsylvania R. Co. 211 Pa. 620, 61 Atl. 249; Chicago, S. F. & C. R. Co. v. Bentz, 38 Ill. App. 485; Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Hajsek v. Chicago, B. & Q. R. Co. 5 Neb. (Unof.) 67, 97 N. W. 327; Louisville & N. R. Co. v. Molloy, 122 Ky. 219, 91 S. W. 685.

Root, J., delivered the opinion of the court:

These two actions arose out of the same occurrence, and may be disposed of in one opinion. One was an action brought by Alma Cable, as administratrix of the estate of Rufus E. Cable, who was killed by a collision with the cars of the respondent at an interurban railway crossing, and the other was by Sadie Cable, a minor, brought by her guardian, for injuries sustained at the time of said accident. Each case was withdrawn from the jury, and judgment of dismissal entered by the court.

The facts were about these: Respondent operates an electric railway between Spokane, Washington, and Cœur d'Alene, Idaho. Upon its line is a station known as "Spokane Bridge," located 18 miles east of Spokane. Rufus Cable lived near this station. On the day of the accident he was to take his daughter, appellant Sadie Cable, aged seventeen years, to this station, where she was to board the train of respondent for Spokane. The train which caused the accident is known as the "Flyer," and does not make stops at this station. On the day in question it was late, and a special had gone by somewhere near the time that the Flyer usually passed Spokane Bridge. Prior to the coming of the train, Cable and two daughters and another person were driving about the neighborhood in an open buggy. When the train was about a half a mile from the station of Spokane Bridge, these people were in their buggy visiting with a neighbor, about ⅛ of a mile from the crossing, which crossing is about 175 feet west of the station. The train was coming from the east. Decedent and his party supposed it was a local train which made stops at this station, and they immediately drove toward the station, in order that the young lady might board the train. They drove at a brisk trot until the horse was nearly to the track, when it slowed into a walk, and at this moment reared, and, as it came down, struck against the side of one of the three cars of the train, which at that moment dashed by. Rufus Cable received injuries from which he died the next day, and the appellant Sadie Cable was seriously injured. Appellants claim that the people in the buggy supposed the train to be the local, and that it would stop at the station. Sadie Cable testifies that she looked when they were some distance from the crossing, and did not see the train coming. There was evidence of the presence of certain freight cars upon the side track, and of certain buildings, cord wood, and small trees which, to a certain extent, obscured the view. The evidence showed, however, that all these parties knew that the train was coming, and that, if the horse had been stopped shortly before reaching the track, they could have both heard and seen the approaching train.

It is contended by appellants that respondent was negligent in running its train at too high a speed, and in not whistling or sounding bells, or otherwise giving suitable warning of its approach. There was considerable conflict in the evidence as to these matters; but, assuming that the railway company was negligent, we will take up the question of contributory negligence, which formed the basis of the trial court's action in dismissing the cases. From the evidence introduced by appellants we can see no escape from the conclusion that the decedent and his daughter, one of the appellants herein, were chargeable with contributory negligence. It is the rule in this as in most states that a person about to cross the track of a steam railway must stop, look, and listen, unless the conditions be such that to do so would avail nothing. The observations and experiences of mankind, with reference to this class of accidents, have led the courts to announce and observe this rule as an appropriate measure of the degree of care and prudence necessary to relieve a person from the charge of negligence when about to go upon so dangerous a place as the crossing of a railway. We think the same rule applies to an interurban electric railway upon which trains are customarily operated at a high speed. These people did not stop before crossing the railway track. Had they done so shortly before reaching the crossing, they could plainly have seen and heard the approaching train. If they looked or listened, it was not at a time or place where looking or listening revealed to them the true condition of affairs. If, as contended by appellants, there were box cars or other obstructions which obscured the view un-

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til decedent and companions were within a short distance of the track, it would seem that this fact should have impressed them with the greater necessity of stopping to look and listen before emerging from behind said obstructions and going upon the track, especially as they had already seen the train coming. It seems to us that this deplorable catastrophe was a result of the people in the buggy taking it for granted that the train was to stop at the station, when as a matter of fact it was a train that did not make stops at said station, and passed through on this occasion, as on all others, without stopping.

There is a suggestion that the appellant Sadie Cable is not chargeable with contributory negligence, even though her father may have been, inasmuch as she was not driving the horse, and had no control thereover. Ordinarily where one rides in a vehicle with the driver thereof, and is injured by the negligence of a third person, to which negligence that of the driver contributes, this contributory negligence is not imputable to the passenger, unless said passenger has, or is in a position to have and exercise, some control over the driver with reference to the matter wherein he was negligent. We are not disposed to impute to appellant Sadie Cable the contributory negligence of her father; but she, being of years of discretion, was subject to the general rule of "stop, look, and listen," heretofore announced; and, in the absence of a showing that she endeavored to stop the horse, or have her father do so, or to anything for her protection equivalent thereto, and in the absence of any evidence tending to show a purpose, intention, or attempt on her part to take any such precaution, or that she was prevented, or without fault on her part induced, from so doing, we see no way by which she may escape the operation of the rule.

The judgment of the Superior Court is affirmed.

Fullerton, Crow, Rudkin, and Dunbar, JJ., concur.

Petition for rehearing denied.

IDAHO SUPREME COURT.

ALBERT D. BRADFIELD, Respt.,
v.
JENNIE FARRER AVERY.

(— Idaho, —, 102 Pac. 687.)

Pleading — election contest — complaint — sufficiency.

1. A complaint to contest an election under subdivision 2, § 5026, Rev. Codes, must allege and show facts which disqualify the incumbent, or person declared elected, at the time of the election.

Officer — "eligibility."

2. Where the word "eligibility" is used in connection with an office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office, rather than the qualication to be elected to the office.

School superintendent — eligibility — time of qualification.

3. The provision of § 585, Rev. Codes, "that no person shall be eligible to the office of county superintendent of public instruction except a first-grade practical teacher of not less than two years' experience in Idaho, one of which must have been while holding a valid first-grade certificate issued by a county superintendent," relates to the time the person so elected is inducted into office, and, although the person so elected does not possess such qual-

Headnotes by STEWART, J.

Case Note. — Officer: eligibility to be determined as of time of election or appointment, or of induction into office.

The cases discussing this question are quite evenly divided, and, while perhaps the majority are in accord with BRADFIELD v. AVERY, there is considerable authority to the contrary. The question has arisen most frequently under statutory or constitutional provisions using the word "eligible" in connection with certain qualifications or disqualifications for public office. That such a provision relates to the time of taking office, instead of the election or appointment, was held in the following cases: State ex rel. Thornburg v. Huegle, 135 Iowa, 100, 112 N. W. 234; People v. Hamilton, 24 Ill. App. 609; Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 A. & E. Ann. Cas. 944; Brown v. Goben, 122 Ind. 113, 23 N. E. 519; Shuck v. State, 136 Ind. 63, 35 N. E. 993; Demaree v. Scates, 50 Kan. 275, 20 L.R.A. 97, 34 Am. St. Rep. 113, 32 Pac. 1123; Kirkpatrick v. Brownfield, 97 Ky. 558, 29 L.R.A. 703, 53 Am. St. Rep. 422, 31 S. W. 137; State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N. W. 299.

In Smith v. Moore, 90 Ind. 294, under a constitutional provision that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state other than a judicial office," it was held that the word "eligible" means legally qualified, and one who is elected to a judicial office which he refuses to accept may subsequently be elected to a nonjudicial office.

And in Vogel v. State, 107 Ind. 374, 8 N. E. 164, under the same constitutional provision, it was held that, where the term of the nonjudicial office began the same day that the judicial office terminated, the party elected would not be eligible.

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fication at the time of election, still, if the disqualification is removed and the person elected becomes qualified at the time he is inducted into office, such person is eligible to the office of county superintendent of public instruction.

Same — disqualification when elected.

4. A person who will become qualified to hold the office of county superintendent of schools under the laws of this state may be elected to such office while under disqualification, provided such disqualification is removed before the term of office to which such person is elected begins.

Same — statutory qualifications.

5. Section 593, Rev. Codes, empowers the state board of education "to authorize the county superintendents to issue teachers' certificates to graduates of state normal schools and to graduates of any chartered college or university having the right to grant degrees: Provided, that applicants for certificates under the provisions of this section shall have been successfully engaged in teaching not less than twenty-seven months, and shall present to the state board of education a certificate of graduation from a state normal school, or a literary degree from a chartered college or university."

School — teachers' certificate — date.

6. When application is made to the state board under said § 593, Rev. Stat., and the necessary credentials and proof are furnished the board, and the board admits that such proof is sufficient, and subsequently issues a certificate thereon and by reason thereof, then the applicant is entitled to have such certificate issue as of the date such application and proof are made, and a certificate issued upon such proof will relate back to the date such applicant showed she was entitled to such certificate.

(June 26, 1909.)

APPEAL by the contestee from a judgment of the District Court for Ada County in contestant's favor in a proceeding to contest an election. Reversed.

The facts are stated in the opinion.

Other provisions for qualification for office which have been held to relate to the time of induction, rather than that of election or appointment, are "shall be qualified to hold office" (Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301); and "the surveyor must be a licensed land surveyor of the state" (Ward v. Crowell, 142 Cal. 587, 76 Pac. 491).

In State ex rel. Perine v. Van Beek, 87 Iowa, 569, 19 L.R.A. 622, 43 Am. St. Rep. 397, 54 N. W. 525, while there was no statutory or constitutional provision involved, the court held that an alien cannot hold office until naturalized, but that naturalization after election and before induction into office is sufficient.

In State ex rel. Schuet v. Murray, 28 Wis. 96, 9 Am. Rep. 489, under a former decision holding that one not a citizen was ineligible to hold office, it was held to be sufficient if this ineligibility was removed before taking office.

And this decision was followed in State v. Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512, holding that, under a provision vacating the office if the person elected fails to qualify and enter upon its duties within ten days after notice of election or appointment, the removal of a disability before the expiration of the ten days is sufficient, though it is after the date named for taking office.

But a number of cases construing provisions using the word "eligible" have held that the qualifications or disqualifications mentioned in connection therewith relate to the time of election, and that compliance with the provision between election and induction into office is not sufficient. It was so held in the following cases: Searcy v. Grow, 15 Cal. 117; State v. Lake, 16 R. I. 511, 17 Atl. 552; Territory ex rel. Parker v. Smith, 3 Minn. 240, Gil. 164, 74 Am. Dec. 749; Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; Roane ex rel. Tunstall v. Matthews, 75 Miss. 94, 21 So. 665.

And these cases are supported by *dicta* in State ex rel. Elliott v. Bemenderfer, 96 Ind. 374; Finklea v. Farish (Ala.) 49 So. 366; Com. v. Pyle, 18 Pa. 519.

In State ex rel. Nourse v. Clarke, 3 Nev. 566, it was held that a constitutional provision that no person holding a lucrative Federal office "shall be eligible to any civil office of profit under this state," relates to the time of election as well as induction into office, but that the resignation of a United States district attorney is effective when mailed on the day preceding the election.

In State ex rel. Childs v. Holman, 58 Minn. 219, 59 N. W. 1006, under a statutory provision for residence of members of the assembly of a city that they "shall be elected at large, and four of same shall reside, etc.," it was held that they must reside in the districts specified at the time of election.

In Re Corliss, 11 R. I. 638, 23 Am. Rep. 538, under a provision that no person "holding an office of trust or profit under the United States shall be appointed an elector," it was held that the qualification must be removed before election by the people.

In R. ex rel. O'Donnell v. Broomfield, 5 Ont. L. Rep. 596, 2 Ont. Week. Rep. 295, under an act providing that no one holding a certain office shall be qualified to be a member of the council, it was held that the disqualification relates to the time of election, instead of the time of taking office.

And in R. ex rel. Zimmerman v. Steele, 5 Ont. L. Rep. 565, 2 Ont. Week. Rep. 242, the same provision was held to disqualify a person holding an incompatible office at the time of his nomination; but this decision seems to be based on other decisions holding that the nomination is the beginning of the election.

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Messrs. **J. G. Watts and Wyman & Wyman**, for appellant:

The statute providing for the institution and conduct of the contest belongs to the law of procedure solely, and cannot be construed as prescribing disqualifications of persons to hold office.

Ward v. Crowell, 142 Cal. 587, 76 Pac. 491.

Any person who can qualify himself to take and hold the office is eligible to it at the time of the election.

Ibid; State ex rel. Perine v. Van Beek, 87 Iowa, 569, 19 L.R.A. 625, 43 Am. St. Rep. 397, 54 N. W. 525.

The requirements of the statute neither add to nor detract from one's qualifications, as it is purely and simply a matter going to one's eligibility, and not to one's qualifications.

State ex rel. Atty. Gen. v. Seay, 64 Mo. 89, 27 Am. Rep. 206; Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301; Hyde v. State, 52 Miss. 665.

The date named in a certificate is not conclusive, and proof may be introduced to show the true date.

Hobson v. Kissam, 8 Ala. 357; Harrington v. Gage, 6 Vt. 532; Gest v. Flock, 2 N. J. Eq. 108.

Mr. **John F. Nugent**, for respondent:

"Eligible" as used in the statute denotes a condition existing at the time of choosing.

People v. Purdy, 21 App. Div. 66, 47 N. Y. Supp. 601; Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; Drew v. Rogers (Cal.) 34 Pac. 1081; Searcy v. Grow, 15 Cal. 118; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350; Roane ex rel. Tunstall v. Matthews, 75 Miss. 94, 21 So. 665; Saunders v. Haynes, 13 Cal. 145; People ex rel. Hoffman v. Hecht, 105 Cal. 621, 27 L.R.A. 203, 45 Am. St. Rep. 96, 38 Pac. 941; People ex rel. Palmer v. Woodbury, 14 Cal. 43; Spear v. Robinson, 29 Me. 541.

Stewart, J., delivered the opinion of the court:

At the general election held in this state on the 3d day of November, 1908, the appellant was elected to the office of county superintendent of public instruction in Owyhee county, and received a certificate of election therefor. The respondent contests such election upon the ground that upon the date of such election the appellant had not had one year's experience as a teacher in the state of Idaho while holding a valid first-grade certificate issued by a county superintendent of public instruction in this state. The appellant demurred to the complaint upon the ground of insufficiency of facts; first, for the reason that the allegation of want of one year's experience while holding a valid first-grade certificate at the date of election is not a ground of ineligibility; and, second, for the reason that Acts 1903, p. 284 (Rev. Codes, § 585) in so far as it prescribes the qualification of one year's experience under a first-grade certificate, is unconstitutional and void. The demurrer was overruled and answer filed, in which the appellant pleaded the facts with reference to her application for, and the issuing to her of, a certificate. It is alleged in the answer and found by the trial court that, on September 27, 1907, the appellant presented to the state board of public instruction of the state of Idaho a certificate of graduation from the Mansfield State Normal School of Mansfield, Pennsylvania, and also presented proof to said board that she had taught twenty-seven months since said certificate was issued to her, together with proof of her good moral character, and in every way complied with the statute of Idaho defining the qualifications necessary to entitle a state normal school graduate to receive a certificate from a county superintendent of public instruction in Idaho; that upon said date she requested said board to authorize the county superintendent of public instruction of said Owyhee county to issue a certificate to her; that said board refused the request of the said appellant, and gave as the reason for said refusal that the said Mansfield State Normal School of Pennsylvania was not included in an accredited list of schools that was then being prepared by said board; that on said day, and frequently thereafter, the appellant by correspondence and interviews requested and insisted that said board authorize the issuing to her of a license to teach, and that on March 31, 1908, said board authorized the county superintendent of Owyhee county to issue said certificate to appellant, and it was so issued on April 2, 1908; that said certificate was issued notwithstanding the fact that the said Mansfield State Normal School was not on an accredited list prepared by said board; that no objection was ever made by the board to the diploma of the appellant from the Mansfield State Normal School or to her qualifications, and that the only reason ever given by said board for not authorizing the issuance of a first-grade certificate to her was that said school was not included in said accredited list; that the only time the appellant ever presented her said diploma or her qualifications, as provided by law, to said board, was on said September 27, 1907, and the first-grade certificate issued to her by said county superintendent on April 2, 1908, by authority of said board was based upon said diploma and qualifica-

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tions, presented to said board on September 27, 1907. Trial was had and judgment rendered in favor of the contestant, respondent here. This appeal is from the judgment.

It is first contended by appellant that the complaint fails to state a cause of action, for the reason that the allegation of a want of one year's experience while holding a first-grade certificate, at the date of election, is not a ground of ineligibility. This contest is brought under § 5026, Rev. Codes, and, in so far as applicable to this case, reads as follows: "The election of any person to any public office . . . may be contested: . . . 2. When the incumbent was not eligible to the office at the time of the election." Section 6, art. 18, Idaho Const. provides: "The salary and qualifications of the county superintendent shall be fixed by law." This provision of the Constitution would seem to clearly authorize the legislature to fix and determine the fitness, capacity, or qualification of a person to be elected to the office of county superintendent or to hold such office after election. In other words, this constitutional provision is broad enough to authorize the legislature to prescribe the capacity, fitness, or qualification of a person, both for the election to, and the holding of, the office of county superintendent. Carroll v. Green, 148 Ind. 362, 47 N. E. 223; People ex rel. Marshall v. Leonard, 73 Cal. 230, 14 Pac. 853; Smith v. Moore, 90 Ind. 294; 10 Am. & Eng. Enc. Law, p. 971. This leads us to an examination of the statute with a view of determining what qualifications have been prescribed by the legislature with reference to the office of county superintendent of schools, and whether the qualifications so fixed apply to the person at the time of election or at the time of the person elected is to be inducted into the office. The only statutory provision in this state which attempts to prescribe the qualifications of a county superintendent is § 585, Rev. Codes, as follows: "Provided, that no person shall be eligible to the office of county superintendent of public instruction except a first-grade practical teacher of not less than two years' experience in Idaho, one of which must have been while holding a valid first-grade certificate issued by a county superintendent, and the holder of a first-grade certificate at the time of his election or appointment, nor unless twenty-five years of age."

The serious question in this case is to determine whether, by the language used in the above section, the legislature intended to prescribe and fix the capability or fitness of a person to be elected to the office of county superintendent, or intended to fix and determine the capability and qualification of such person to hold such office after election. The word "eligibility," as used in connection with an office or the person to be elected to fill an office, has been variously defined by the courts and various constructions given to the use of such word, with reference to whether the same applies to the election to office or the induction into office. The authorities upon both sides of this question are cited in 29 Cyc. Law & Proc. p. 1376, and 10 Am. & Eng. Enc. Law, pp. 970, 971. We are satisfied that the better reason is with the proposition that, where the word "eligibility" is used in connection with an office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office, rather than the qualification to be elected to the office. Ibid.; Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 A. & E. Ann. Cas. 944. It will be observed that the language of the statute above quoted is "no person shall be eligible to the office," and not "eligible to be elected to the office." "Eligible to the office" clearly implies the qualification or capacity to hold the office, and clearly indicates the intent of the legislature to use the word "eligible" in the sense that it applies to the capacity or qualification of the person to hold the office. While it is true that the word "eligible" may mean capable of being chosen, fit to be chosen, subject to selection, and applies to the time seclection or election, yet, where such meaning is not clearly indicated by the manner in which the word is used, or by the qualifications or modifications thereof, we think it naturally applies to one's fitness or qualification to hold the office. 10 Am. & Eng. Enc. Law, pp. 971, 972, and authorities there cited; 29 Cyc. Law & Proc. p. 1376, and authorities cited. That the legislature was dealing with the question of qualification or fitness to hold office, in enacting this section, we think also clearly appears when we take into consideration the provisions of § 6, art. 18, Const. supra. The word "qualification" as used in the Constitution was evidently intended to refer to an educational equipment or attainment, and it no doubt was the intention of the legislature, in enacting the above section, to prescribe such educational equipment, wherein it is provided that to be eligible to the office of county superintendent one must be a "first-grade practical teacher of not less than two years' experience, one of which must have been while holding a valid first-grade certificate." To be thus qualified requires education and experience, and these are purely matters of acquirement, tending to fit one for the place or office. Had the statute read "eligible to be elected to the office," then it would have

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been clear that the qualification had reference to the capability of the person to be elected, but where the language is "shall be eligible to the office," and then follow attainments,—the result of experience and education,—it seems to us the legislature was intending to deal with the fitness of a person to hold the office, rather than the capability of one to be elected to such office.

We think this position is also strengthened when we take into consideration the opening statement of § 585, wherein it is provided: "Before entering upon the duties of his office, the county superintendent of public instruction shall take and subscribe the oath prescribed by law [etc.]: . . . Provided, that no person shall be eligible to the office," indicates that the proviso has reference to qualifications required at the time the person is inducted into office. This position is also strengthened by the provision found in said section, "and the holder of a first-grade certificate at the time of his election or appointment." If it was intended that the qualification, "a practical teacher of not less than two years' experience," had reference to the time of election, rather than the time of induction into office, it would not have been necessary to also provide that such person should be the holder of a first-grade certificate at the time of election, for, if all such qualifications related to the time of election, it would not have been necessary to specifically state that such person must hold a first-grade certificate at the time of election or appointment. The fact that this particular qualification is made to apply to the time of election would indicate that the other qualifications prescribed were not intended to apply to the time of election. We are therefore forced to the conclusion that, in enacting this statute, the legislature were attempting to carry out the power given them by the Constitution, and prescribe qualifications required of a person to hold the office of county superintendent, rather than qualifications rendering such person capable of being elected to such office.

The contest provided for by § 5026, Rev. Codes, is directed toward facts and conditions that existed at the time of the election of the incumbent or that transpired at the election itself. Toncray v. Budge, 14 Idaho, 621, 95 Pac. 26. If, then, the contest is directed toward facts and conditions that existed at the time of the election, then, in order to state a cause of action, the complaint should allege such facts as would show the disqualification of the contestee at the time of the election. The facts alleged in the complaint in this case are not matters which would render the contestee disqualified from being elected to such office, as a person is not required to possess such qualifications at the time of the election. From what has been said it follows that the trial court erred in overruling the demurrer to the complaint.

Counsel for the respective parties have argued the merits of this case, and, as the facts are agreed to by both parties, upon a reversal of this case the question necessarily will arise whether the contestant can amend the complaint so as to state a cause of contest. Inasmuch as this question naturally arises upon the facts, and the facts are agreed to and have been fully discussed by respective counsel, we deem it proper to dispose of the entire case upon its mertis. It is conceded that the contestee was elected to the office of county superintendent at the November election in 1908; that she received a certificate certifying to her election. It appears from the facts, and the court finds, that on September 27, 1907, the appellant presented to the state board of public instruction of the state of Idaho a certificate of graduation from the Mansfield State Normal School of Mansfield, Pennsylvania, and also presented proof to said board that she had taught twenty-seven months since said certificate was issued to her, together with proof of her good moral character, and in every way complied with the statute, and requested said board to authorize the county superintendent of public instruction of said Owyhee county to issue a certificate to her; that the board refused, but afterwards, and on April 2, 1908, did issue said certificate upon the application made by appellant on September 27, 1907, and without any additional proof having been presented to said state board. If the state board had directed that a certificate issue to appellant upon September 27, 1907, after she had presented her application and proof or within a reasonable time thereafter, then the appellant would have been the holder of a first-grade certificate for more than one year of the two years she was engaged in teaching, and the holder of a first-grade certificate at the time of her election. The certificate, however, was not issued until April 2, 1908, which would not make her the holder of a first-grade certificate during one of the two years she was engaged in teaching.

The question then arises: Was the appellant entitled to have her certificate dated as of the date of her application and completion of proof, or, if not then dated, does it relate back to such date as effecting her qualification to hold the office of county superintendent? As stated above, the certificate directed to be issued to the appellant was upon the application made by her on September 27, 1907, and the proof furnished

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on that date. No additional proof or evidence was furnished by the appellant to the state board. By causing the certificate to be thereafter issued on such application and proof, the board conceded and admitted that the appellant was entitled to have such certificate issued to her on the date she made her application and furnished her proof. Under the provisions of § 593, Rev. Codes, the state board of education has power "to authorize the county superintendents to issue teachers' certificates to graduates of state normal schools and to graduates of any chartered college or university having the right to grant degrees: Provided, that applicants for certificates under the provisions of this section shall have been successfully engaged in teaching not less than twenty-seven months, and shall present to the state board of education a certificate of graduation from a state normal school, or a literary degree from a chartered college or university." The only reason assigned why the state board did not authorize the county superintendent to issue a certificate in accordance with the provisions of this statute is that, at the time the application was made, the board had not made up an accredited list of state normal schools which it would recognize. Whether an applicant can compel the state board to direct that a certificate issue upon presenting proof that the applicant is a graduate of a state normal school or a chartered college or university having the right to grant degrees, and has been successfully engaged in teaching for not less than twenty-seven months, may be questioned, especially until the board have determined that one so qualified is entitled to a certificate. But, when the board recognizes that the applicant is fully qualified under the provisions of this statute and has furnished the board with the necessary credentials and proof to entitle the applicant to a certificate, and admits such fact, and concedes that the applicant is entitled to a certificate under the showing made, then there can be no question but what it is the duty of the board to authorize the certificate to issue to such applicant as of the date when the showing is made, required by the statute. If the proof of the applicant was incomplete at the time presented, and additional proof was required by the board, then the date the certificate should issue is to be determined by the time the board determines that the proof presented is sufficient to entitle the applicant to a certificate. If the proof is wholly insufficient and unsatisfactory to the board, then a doubt might arise whether the board could be compelled to issue the certificate; but the duty of the board under such circumstances does not arise in this case, for it is conceded that the applicant was fully qualified; that her proof was sufficient; that she fully complied with the statute, and did every act and furnished proof of every qualification to entitle her to a certificate on September 27, 1907. This being true, it was the duty of the board to cause such certificate to be issued as of that date.

Counsel for respondent, however, argues that, it being entirely discretionary with the board as to whether a certificate should issue, the board in this instance had the right and power to postpone causing such certificate to issue, until the applicant had demonstrated her fitness and qualification to receive such certificate by teaching a sufficient length of time to satisfy the board. The court, however, finds that the certificate was issued, not by reason of the fact that the applicant demonstrated her qualification to receive the same by teaching after she made application for such certificate, but that the certificate was issued by reason of the application and proof made on September 27, 1907. There is nothing in the record in this case which indicates that the state board were in any way influenced or controlled by reason of the fact that the applicant proved her qualification by her work as a teacher after the application was made. The facts and the findings of the trial court clearly show that the state board acted wholly upon the proof submitted on September 27th, and decided and determined that such proof was sufficient to entitle the applicant to a certificate, and ordered such certificate to issue by reason of such application and proof. This being true, the appellant was entitled to have such certificate relate back as of the date she furnished such proof to the state board, and it was the duty of the state board to have caused such certificate to issue as of that date. Under the facts and the findings of the trial court, it was of that date that she was entitled to such certificate. Under the facts of this case, the appellant was clearly qualified to hold the office of county superintendent of schools, and, being qualified to hold the office, she was capable of being elected to such office while under disqualification, provided such disqualification was removed before the term of office to which she was elected began. Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 A. & E. Ann. Cas. 944; Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301; State ex rel. Off v. Smith, 14 Wis. 497; State ex rel. Schuet v. Murray, 28 Wis. 96, 9 Am. Rep. 489.

From what has been said, it follows that the appellant was qualified to hold the office of county superintendent, to which the peo-

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ple of Owyhee county elected her, at the time her term began, under the statute of this state. The judgment in this case is reversed, and the cause remanded, with direction to proceed in accordance with this opinion. Costs awarded to the appellant.

Ailshie, J., concurs. Sullivan, Ch. J., did not sit at the hearing.

IOWA SUPREME COURT.

FIRST STATE BANK OF CORWITH v. ED. WILLIAMS, Appt.

(— Iowa, —, 121 N. W. 702.)

Note — renewal — forgery — estoppel.

1. One who gives a new note in renewal of old ones, one of which he claims to be a forgery, will, after he has retained possession of the old note and received the benefit of the renewal for several months, until the bank has become insolvent, be estopped from setting up the forgery in partial defense of a suit on the renewal note.

Same —consideration.

2. Sufficient consideration for a promise to pay a note given in renewal of several, one of which was claimed to have been forged, exists in the surrender by the payee of the old note and the extension of the time for payment.

(Weaver, J., dissents.)

(June 5, 1909.)

APPEAL by defendant from a judgment of the District Court for Hancock county entered upon a directed verdict in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. John Hamill and Seneff & Bliss for appellant.

Messrs. C. R. Wood and J. E. Wichman, for appellee:

The extension of time of the two notes renewed was a sufficient consideration for the new note.

German Sav. Bank v. Geneser, 116 Iowa, 119, 89 N. W. 201; Keys v. Mann, 63 Iowa, 560, 19 N. W. 666.

The question of whether the $1,000 note was a valid obligation, or not, could not be investigated or tried in the suit on the new note.

French v. French, 84 Iowa, 655, 15 L.R.A. 300, 51 N. W. 145; Greenlee v. Mosnat, 116

Case Note. — Liability upon paper given in renewal of forged paper.

The cases presenting this question are not sufficiently numerous to formulate any general rule governing it, but the few reported cases, for the most part, hold that a maker or indorser of commercial paper which is given in renewal of forged or altered paper will be liable on the renewal paper, especially where it was given with full knowledge of the defects in the original paper.

A note given as a compromise in a suit upon a note for a larger amount, claimed by the maker to be a forgery, was held valid and enforceable in Grant v. Chambers, 30 N. J. L. 323. This decision is referred to the general doctrine of compromise, and it was held that the settlement of the dispute, and not the alleged forged paper, was the consideration of the renewal note.

An acceptor who renewed a bill that was forged as to his acceptance could not, after the lapse of a month, plead the forgery in bar to an action on the second bill, as the law would infer a loss to the holder by the delay. Mather v. Maidstone, 18 C. B. 273.

In Bradford Nat. Bank v. Taylor, 75 Hun, 297, 27 N. Y. Supp. 96, the defendant indorsed certain notes in blank and delivered them to a third person; the year was filled out, but the month and day were left blank; a third person, two years later, changed the figures of the year, filled out the blanks, and had the notes discounted at the plaintiff's bank; with full knowledge of all these facts the defendant indorsed other notes in renewal of the notes so altered. The court held that the defendant was liable on the renewal note, apparently upon the ground that there was no such alteration of the notes as to vitiate them. The question presented in FIRST STATE BANK v. WILLIAMS was therefore not necessarily decided, but the argument is clearly to the effect that even if the defendant would not have been liable upon the altered notes, he would have been liable upon the renewal notes. The court said: "After being informed of every material circumstance relating to the alteration of the notes, the defendant consented to indorse the note in suit, delivered it to the plaintiff, required the return of the two notes canceled, and retained them for three months, and all this after he was informed of the use of the notes by Smith two years and more after the time he made the indorsements."

But a person making or indorsing a bill in renewal of another bill which has been so altered as to release him from liability is not liable upon the renewal bill, where it was given in ignorance of the alteration. Bell v. Gardiner, 4 Mann. & G. 11.

The mere offer to renew an altered note, which offer is not accepted, is not a waiver of the alteration. McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567.

Upon the general question of liability of person whose signature is forged on commercial paper, see note to Traders' Nat. Bank v. Rogers, 36 L.R.A. 539.

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Iowa, 535, 90 N. W. 338; Keefe v. Vogle, 36 Iowa, 87.

As against the receiver the defendant was estopped from claiming "failure of consideration," having permitted the note to remain in the bank as part of its assets, without dispute, until after it was due and after the bank failed; and by permitting the bank to hold it and report it as part of its assets, he was estopped as against the receiver and the bank's creditors from saying that it was not valid.

First Nat. Bank v. Felt, 100 Iowa, 680, 69 N. W. 1057; Pauly v. O'Brien, 69 Fed. 460; German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737, 98 N. W. 606.

Ladd, J., delivered the opinion of the court:

The receiver appointed November 27, 1907, to settle the affairs of the First State Bank of Corwith found among its assets a promissory note of $1,372, executed to the bank by the defendant and his wife, dated March 23, 1907, bearing interest at the rate of 8 per cent per annum and payable November 1st of that year. This action is based thereon. The defendant admitted the execution of the note, but averred that there was a partial failure of consideration, in that it was given in renewal of the note of $271.22, conceded to be valid, and another note of $1,000 dated March 21, 1906, and payable to the bank March 1, 1907, purporting to be signed by the defendant and his wife. It is said in the answer that the last note was forged, and that, by falsely representing that it was genuine, the cashier of the bank induced the defendant to execute the note sued on. The receiver pleaded in reply a general denial, and that defendant was estopped from interposing the defense. The defendant testified that at the time he signed the note, the cashier exhibited to him the $1,000 note; that upon examining it he stated that he did not recollect about it; that the cashier replied that he certainly gave it, or it could not have been in the bank, and that the signatures were genuine, and the books of the bank so showed; that defendant studied a little bit over it, and not being certain, and relying upon the cashier's integrity and statements, executed the note sued on. Both notes were handed to him. He carried them home, and made no further objection to the note alleged to have been forged until after the bank had been closed by the appointment of the receiver over eight months afterwards. He denied having signed the note, as did his wife, but admitted that he knew as much about the transaction when the note sued on was executed as he did at the trial.

Any rulings excluding evidence which may have been erroneous were cured by its subsequent admission, and the only inquiry for us to determine is whether the court erred in directing a verdict for the plaintiff. It is to be noted that the cashier made no claim to personal knowledge, nor does its appear that he was aware of the facts being otherwise than represented. This being so, the allegations of fraud were not supported by the evidence. The evidence did not raise an issue of whether the $1,000 note was genuine, but, as we think, this was foreclosed by the execution of the new note. This was necessarily on the ground of ratification, as to which the authorities seem to be in sharp conflict. An "act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him." Wilson v. Tumman, 6 Mann. & G. 236. But may an act of one not assuming to be for, but personating, another, as in forging a signature, be ratified? Answering in the affirmative, see: Howard v. Duncan, 3 Lans. 175; Greenfield Bank v. Crafts, 4 Allen, 447; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106. See 3 Randolph, Com. Paper, § 1775. *Contra*, and holding that silence, when confronted with the forged instrument or even a promise to pay it or to be bound thereby, unless this be for a consideration or has misled the holder to his prejudice, will not preclude the defense of forgery, see: M'Kenzie v. British Linen Co. 34 Moak, Eng. Rep. 301; Brook v. Hook, L. R. 6 Exch. 89; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Warren v. Fant, 79 Ky. 1; Woodruff v. Munroe, 33 Md. 148. See Smith v. Tramel, 68 Iowa, 488, 27 N. W. 471. The decisions seem to be agreed, however, that if the holder had been misled to his prejudice by the conduct or promises of the person whose name has been forged, the latter will be estopped from pleading that the instrument is not genuine. Buck v. Wood, 85 Me. 204, 27 Atl. 103; Kuriger v. Joest, 22 Ind. App. 633, 52 N. E. 764, 54 N. E. 414. See Dan. Neg. Inst. 5th ed. § 1352b. See Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331; § 3060a (23), Code Supp. 1907.

The circumstances were such as to estop defendant from interposing the defense. Both the notes for which that sued on was executed were past due. One of them is conceded to have been valid, and the extension of time for payment involved in the giving of the last note was a valuable consideration. So, too, in connection therewith was the surrender to the defendant of the note alleged to have been forged and the extension of time for paying the sum named

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therein. But for this the bank might have proceeded against the person who forged it. It was prevented from so doing for more than seven months following, during which defendant retained the discredited paper, without objection. Having accepted the benefits of the adjustment to the manifest disadvantage of the bank, the defendant is estopped from again inquiring into the genuineness of the note. Moreover, the controversy has been settled. In so far as appears, the dispute was bona fide on either side and a proper subject of adjustment. See Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338. Nothing is known now of which defendant was not aware then, so that he was in no way deceived. The bank granted further time and surrendered the old notes. The defendant executed the note in suit. The consideration on either side was ample. To constitute a consideration, it is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him. Harlan v. Harlan, 102 Iowa, 701, 72 N. W. 286; Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58; McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Daily v. Minnick, 117 Iowa, 563, 60 L.R.A. 840, 91 N. W. 913.

Yielding to the inducement offered by the making of the new note, and by reason thereof doing that but for which the bank would not have done, *i. e.*, surrendering the note alleged to have been forged, as well as the other, and extending the time of payment of both,—constituted a valuable consideration. Smith v. Smith, 4 Idaho, 1, 35 Pac. 697; Grant v. Chambers, 30 N. J. L. 323. See Mather v. Maidstone, 18 C. B. 273. "The compromise itself was the consideration as agreed to by both parties to the new note, and it is a matter of entire indifference whether the old note was genuine or a forgery." Grant v. Chambers, supra.

The ruling was correct, and the judgment is affirmed.

Weaver, J., dissenting:

In my judgment the case was clearly one for a jury. There is no showing or claim that the alleged forged note had been purchased or received by the bank from a third person in ignorance of its true character. On the contrary, the circumstances are such as indicate that, if forged, the note was fabricated in the bank by its cashier. So far as appears, the bank never parted with any money or thing of value in consideration for the paper. There is therefore no room for an estoppel against defendant to plead want of consideration for the note in suit, or to claim the benefit of an alleged ratification. It is true that the defendant's statement of the matters of his defense is not such as appeals very strongly to one's confidence. It seems unnatural, though not necessarily incredible, and as jurors we might well refuse to give it credit; and I fear that this feature of the case is now leading the court to announce propositions of law which we shall hesitate to affirm when confronted with them in the future. In all ordinary cases at law the credibility of witnesses and the weight of their testimony is for the jury alone.

I think the district court erred in directing a verdict.

MASSACHUSETTS SUPREME JUDICIAL COURT.

L. D. WILLCUTT & SONS COMPANY
v.
JEREMIAH J. DRISCOLL et al., Members of Bricklayers' Benevolent & Protective Union No. 3 et al.

(200 Mass. 110, 85 N. E. 897.)

Master and servant — strike — propriety.

1. Demands of laborers for increased wages and that wages shall be paid during working hours are properly enforced by a strike.

Labor union — fine — validity.

2. A labor union cannot impose fines upon its members to coerce them to join a strike to the injury of one seeking their services.

(Knowlton, Ch. J., and Sheldon, J., dissent.)

(October 24, 1908.)

Case Note. — Right of labor union to impose fine on members as a means of inducing them to join in strike.

The question under consideration necessarily assumes that a labor or trade union is lawful. If it were an illegal or unlawful combination any action by it would necessarily be likewise unlawful.

Cases so holding would not be in point on the question under consideration, and hence are excluded. To fairly raise this question it should not only be assumed that the labor union is legal, but also that the fine was levied, or a threat made to levy it, in an attempt to bring to a successful issue a lawfully inaugurated strike or boycott, since, if either were unlawful *per se*, that fact would likewise render any means resorted to in aid thereof unlawful. Assuming, then, what was found to be the fact in the case under annotation, that the union and the strike were *per se* lawful, the question is presented whether, as a means to bring the strike to a successful end, the in-

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REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after entering a decree in favor of defendants of a bill to enjoin interference by defendants with plaintiff's business. Decree reversed.

The facts are stated in the opinion.

Messrs. **Elder & Whitman**, for complainant:

The defendants should be enjoined from the imposition of fines and penalties, or threatening the same, upon the plaintiff's employees in order to induce them to quit their jobs.

Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226; Ertz v. Produce Exch. Co. 82 Minn. 173, 51 L.R.A. 825, 83 Am. St. Rep. 419, 84 N. W. 743; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275; Temperton v. Russell [1893] 1 Q. B. 726.

No one can unjustifiably and intentionally interfere with a man's right to dispose of his capital as labor in any manner he pleases, or in any way whatsoever, whether by force or fraud, or by peaceable persuasion or other noncoercive inducements.

Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; May v. Wood, 172 Mass. 11, 51 N. E. 191; Vegelahn v. Guntner, 167 Mass. 92,

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fliction of a fine by a labor union on its members in accordance with its by-laws is such coercion as will entitle the employer whose employees are on strike to relief therefrom.

A labor union being a voluntary association, it would seem, on principle, that the concession that it is a lawful organization, that the strike inaugurated is a lawful one, and the end sought to be gained thereby lawful, must necessarily and logically lead to the conclusion that the enforcement of a lawful by-law by levying a fine on any member violating it by working for the employer against whom the strike is aimed, is also lawful, and not such unlawful coercion of its own members as to entitle such employer to relief therefrom. The opposite conclusion was, however, reached by a divided court in L. D. WILLCUTT & SONS CO. v. DRISCOLL, based on reasons very fully and ably presented in a majority opinion therein, while an equally able minority opinion denied that an employer of labor is entitled to relief under such circumstances.

The majority opinion, while recognizing the validity of the association, the lawfulness of the strike and the by-law in question, denies the right to enforce it, when such enforcement coerces the members to the extent to interfere with what is termed the employer's right to an unrestricted labor market. This doctrine receives little, if any, support from the cases wherein the question has been considered, and the cases cited and apparently relied upon give very doubtful support to the proposition.

One of these cases, Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607, presented a very different state of facts. In that case a dealer was held entitled to damages for injury to his business by an unlawful combination of dealers conspiring to ruin his business, the means used being a fine upon any member of the combination that dealt with him.

Another case cited and relied upon was Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085. This was also an action for damages caused plaintiff by a combination of competitors conspiring together to ruin his business. The case might well have been disposed of on the ground that the combination was an unlawful conspiracy, on the theory that the purpose and the object, as well as the means used, were unlawful. The court, however, based its conclusion that the combination was an unlawful conspiracy, on the ground that the means used were unlawful. The means thus stamped as unlawful was a boycott of plaintiff, enforced by coercing the members of the combination from trading with him, by levying heavy fines upon any members having business dealings with him. In reaching its conclusion the court said that from the very nature of the case it was manifest that the right of competition furnished no justification for an act done by the use of means which in their nature were in violation of the principle upon which it rested, and added: "The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business, through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal." Although this case was apparently regarded by the entire court

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therein. But for this the bank might have proceeded against the person who forged it. It was prevented from so doing for more than seven months following, during which defendant retained the discredited paper, without objection. Having accepted the benefits of the adjustment to the manifest disadvantage of the bank, the defendant is estopped from again inquiring into the genuineness of the note. Moreover, the controversy has been settled. In so far as appears, the dispute was bona fide on either side and a proper subject of adjustment. See Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338. Nothing is known now of which defendant was not aware then, so that he was in no way deceived. The bank granted further time and surrendered the old notes. The defendant executed the note in suit. The consideration on either side was ample. To constitute a consideration, it is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him. Harlan v. Harlan, 102 Iowa, 701, 72 N. W. 286; Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58; McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Daily v. Minnick, 117 Iowa, 563, 60 L.R.A. 840, 91 N. W. 913.

Yielding to the inducement offered by the making of the new note, and by reason thereof doing that but for which the bank would not have done, *i. e.*, surrendering the note alleged to have been forged, as well as the other, and extending the time of payment of both,—constituted a valuable consideration. Smith v. Smith, 4 Idaho, 1, 35 Pac. 697; Grant v. Chambers, 30 N. J. L. 323. See Mather v. Maidstone, 18 C. B. 273. "The compromise itself was the consideration as agreed to by both parties to the new note, and it is a matter of entire indifference whether the old note was genuine or a forgery." Grant v. Chambers, supra.

The ruling was correct, and the judgment is affirmed.

Weaver, J., dissenting:

In my judgment the case was clearly one for a jury. There is no showing or claim that the alleged forged note had been purchased or received by the bank from a third person in ignorance of its true character. On the contrary, the circumstances are such as indicate that, if forged, the note was fabricated in the bank by its cashier. So far as appears, the bank never parted with any money or thing of value in consideration for the paper. There is therefore no room for an estoppel against defendant to plead want of consideration for the note in suit, or to claim the benefit of an alleged ratification. It is true that the defendant's statement of the matters of his defense is not such as appeals very strongly to one's confidence. It seems unnatural, though not necessarily incredible, and as jurors we might well refuse to give it credit; and I fear that this feature of the case is now leading the court to announce propositions of law which we shall hesitate to affirm when confronted with them in the future. In all ordinary cases at law the credibility of witnesses and the weight of their testimony is for the jury alone.

I think the district court erred in directing a verdict.

MASSACHUSETTS SUPREME JUDICIAL COURT.

L. D. WILLCUTT & SONS COMPANY v. JEREMIAH J. DRISCOLL et al., Members of Bricklayers' Benevolent & Protective Union No. 3 et al.

(200 Mass. 110, 85 N. E. 897.)

Master and servant — strike — propriety.

1. Demands of laborers for increased wages and that wages shall be paid during working hours are properly enforced by a strike.

Labor union — fine — validity.

2. A labor union cannot impose fines upon its members to coerce them to join a strike to the injury of one seeking their services.

(Knowlton, Ch. J., and Sheldon, J., dissent.)

(October 24, 1908.)

Case Note. — Right of labor union to impose fine on members as a means of inducing them to join in strike.

The question under consideration necessarily assumes that a labor or trade union is lawful. If it were an illegal or unlawful combination any action by it would necessarily be likewise unlawful.

Cases so holding would not be in point on the question under consideration, and hence are excluded. To fairly raise this question it should not only be assumed that the labor union is legal, but also that the fine was levied, or a threat made to levy it, in an attempt to bring to a successful issue a lawfully inaugurated strike or boycott, since, if either were unlawful *per se*, that fact would likewise render any means resorted to in aid thereof unlawful. Assuming, then, what was found to be the fact in the case under annotation, that the union and the strike were *per se* lawful, the question is presented whether, as a means to bring the strike to a successful end, the in-

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REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after entering a decree in favor of defendants of a bill to enjoin interference by defendants with plaintiff's business. Decree reversed.

The facts are stated in the opinion.

Messrs. **Elder & Whitman**, for complainant:

The defendants should be enjoined from the imposition of fines and penalties, or threatening the same, upon the plaintiff's employees in order to induce them to quit their jobs.

Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226; Ertz v. Produce Exch. Co. 82 Minn. 173, 51 L.R.A. 825, 83 Am. St. Rep. 419, 84 N. W. 743; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275; Temperton v. Russell [1893] 1 Q. B. 726.

No one can unjustifiably and intentionally interfere with a man's right to dispose of his capital as labor in any manner he pleases, or in any way whatsoever, whether by force or fraud, or by peaceable persuasion or other noncoercive inducements.

Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; May v. Wood, 172 Mass. 11, 51 N. E. 191; Vegelahn v. Guntner, 167 Mass. 92,

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fliction of a fine by a labor union on its members in accordance with its by-laws is such coercion as will entitle the employer whose employees are on strike to relief therefrom.

A labor union being a voluntary association, it would seem, on principle, that the concession that it is a lawful organization, that the strike inaugurated is a lawful one, and the end sought to be gained thereby lawful, must necessarily and logically lead to the conclusion that the enforcement of a lawful by-law by levying a fine on any member violating it by working for the employer against whom the strike is aimed, is also lawful, and not such unlawful coercion of its own members as to entitle such employer to relief therefrom. The opposite conclusion was, however, reached by a divided court in L. D. WILLCUTT & SONS CO. v. DRISCOLL, based on reasons very fully and ably presented in a majority opinion therein, while an equally able minority opinion denied that an employer of labor is entitled to relief under such circumstances.

The majority opinion, while recognizing the validity of the association, the lawfulness of the strike and the by-law in question, denies the right to enforce it, when such enforcement coerces the members to the extent to interfere with what is termed the employer's right to an unrestricted labor market. This doctrine receives little, if any, support from the cases wherein the question has been considered, and the cases cited and apparently relied upon give very doubtful support to the proposition.

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35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Tasker v. Stanley, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Employing Printers' Club v. Dr. Blosser Co. 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 A. & E. Am. Cas. 694; Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 747, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Noice v. Brown, 39 N. J. L. 569; Allen v. Flood, [1898] A. C. 133; Alfred W. Booth & Bro. v. Burgess, supra.

Mr. **Frederick W. Mansfield** for respondents.

Hammond, J., delivered the opinion of the court:

This bill, although originally brought agaist two unincorporated associations, or labor unions by name, has now been amended, so that it runs only against certain individuals as officers and members of these associations and against the other members of those associations as represented by these individuals. No question is made that the defendants do not sufficiently represent all the members of both unions; and the bill is not open to objection upon this ground. Pickett v. Walsh, 192 Mass. 572, 589, 590, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638, and cases there cited.

The questions before us are raised upon a report of the facts found by the justice of the superior court who heard the case. They grew out of a trade dispute between the plaintiff and the members of the unions who were in its employ. In April, 1906, these unions adopted a code of working rules, in which, beside some minor demands not now material, they demanded that wages be increased 5 cents an hour, that all foremen should be members of the unions, that the

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as supporting the majority opinion in L. D. WILLCUTT & SONS Co. v. DRISCOLL, it is, however, not entirely clear that it was intended to enunciate the broad doctrine as it was applied in the WILLCUTT CASE. At least the language used is susceptible to a contrary construction. Thus the court expressly pointed out that the conspirators failed to show that the coercion or intimidation of its members, who were plaintiff's customers, by levying a heavy fine upon them, was justified by the law of competition, and said that the ground of justification was not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, was unlawful. The court also apparently attempted to limit the doctrine that even under such circumstances the imposition of a fine upon members of a combination would generally be coercion. Upon this point the court said: "We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal instrument. In many cases it is so slight as not to be coercive in its nature; in many it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation, and in many it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature, but conditional, and is inconsistent with the conditions upon which the right rests, then the coercion becomes unjustifiable and taints with illegality the act."

The dissenting opinion in the WILLCUTT CASE is based, in part at least, upon the theory that the labor organization being legal, and the strike in question lawful, the enforcement of a lawful by-law inflicting a fine upon the members of the union not obeying strike orders would likewise be lawful, both as to the members and their employer or employers. This conclusion receives support in Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590, which holds that an employer of labor is not entitled to an injunction restraining a labor union from peaceably enforcing its rules against its members to the extent of expulsion of such as work for those who employ nonunion labor. The employer in this case contended that the unions exercised unlawful coercion upon their members by fines and threats of expulsion to cause them to refrain from working for him, thereby interfering with his right to a free labor market. In denying the contention that this was unlawful coercion the court said: "This was a risk voluntarily assumed by the members entering the unions, and if no longer willing to pay the price, if the advantages derived are not equal to the burdens assumed, each member has a perfect right to withdraw from the union; to seek to get back his former employment, and to be protected therein."

The right of an employer of labor to complain of the enforcement of such by-laws was also presented to the court in Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547. The court, however, did not pass upon it, and it was said that the charge of intimidation through the enforcement of such by-laws was not sufficient on demurrer, because it did not appear that there was sufficient odium attached to the enforcement thereof to put the members in fear, or that compliance with the orders and resolutions of the union were induced thereby.

In Wabash R. Co. v. Hannahan, 121 Fed. 563, in answering the contention of an employer of labor that the necessary operative

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business agent of the unions should be allowed to visit any building under construction to attend to his official duties, and that wages should be paid during working hours. The plaintiff declined to accept these rules, and a strike followed.

By the constitution and rules of the unions it appeared that a code of fines and penalties was established by the International Union, an association composed of these and other similar unions throughout the country, and that this code was being actively enforced by the local unions. One rule provided that any member violating any section of the working code should be fined upon conviction not less than $5 nor more than $25, one of these sections being that "no member of the union shall work with a nonunion man who refuses to join the union." Various other penalties were provided, varying from $5 to $500 for each offense, to be imposed upon persons designated as "common scabs," "inveterate or notorious scabs," and "union wreckers;" these terms being applied to those who in different ways persist in working after a strike has been called. These fines in their operation are likely to be coercive in their nature.

This code was actively enforced by the unions, and most of the members of the unions who left their work did so through fear of the fines that would be imposed upon them if they continued to work. The defendants Driscoll and Reagan on one occasion found two men at work for the plaintiff, one a journeyman who had been, and the other a foreman who then was, a member of the union. Reagan threatened the journeyman with a fine of $100 if he continued to work, and Driscoll notified the foreman that he was called out. Both refused to leave. Driscoll reported the fact at a meeting of the union, and a vote was passed that charges be preferred against the men for working contrary to the rules. A preliminary injunction

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result of the system and methods of the labor union in requiring its members to strike when so ordered, under pain of incurring a fine, expulsion, or other punishment, was subversive alike of the fundamental rights of the employer to manage his own business and of the employees to bestow their labor as they might elect, the court said: "This kind of argument enters deeply into the domain of political science, and might well be addressed to a body of constructive statesmen, or men originally contemplating a labor organization; it is an argument that would be pertinent against the organization of society into government. The will of the individual must consent to yield to the will of the majority, or no organization, either of society into government, capital into combination, or labor into coalition, can ever be effected. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes and by organic agreement to subject individual members to rules, regulations, and conduct prescribed by the majority is no longer an open question in the jurisprudence of this country."

And see Re Charge to Grand Jury, 4 Inters. Com. Rep. 781, 62 Fed. 828, wherein it is said that no man in his individual right can lawfully demand and insist upon conduct by others which will lead to an injury of a third person's lawful rights; that an employer of labor has a right to the service of each of his employees until each lawfully chooses to quit; and any concerted action on the part of others to demand or insist, under any effective penalty or threat, upon their quitting, to the injury of the employer, is conspiracy, unless such demand or insistence is in pursuance of a lawful authority conferred upon them by the employees themselves, and made in good faith in the execution of such authority.

Considering the same subject in Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275, Brown, J., remarked that it was undoubtedly true that when the injury resulting from a disregard of such by-laws as are under consideration is confined to the members of the union, they alone can complain; and added: "Even if injury incidentally results to outsiders through compliance, by the members of the union, with its rules and orders, there may be no remedy for it. An agreement by those to be benefited by it that they will themselves observe its terms in accepting employment, even if employers be incidentally embarrassed thereby, can occasion no injury to employers which the law will recognize, for workmen, whether bound by a compact among themselves or not, have the absolute right to give their services to whom they please, or to withhold them from whom they please, without responsibility for consequences to employers or to anyone else."

Although not in point as to the facts, this doctrine also finds support in Badger Brass Mfg. Co. v. Daly, 137 Wis. 601, 119 N. W. 328, wherein, after pointing out that the relation between the coerced employees and the plaintiff in the action was merely that of employer and employee, the court said that when one laboring man was prevented from soliciting work, engaging in a contract to work, or continuing in his work, by one or more of his fellow laborers, the more direct wrong is that done to the laboring man so coerced, and he ordinarily should bring the action to redress that wrong, and added: "At the same time a right of action of a different nature sometimes accrues to the employer of such person, as where the workman so coerced is in this manner induced to break his existing contract with such employer, or in cases where the in-

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was issued in this case, and no further steps were taken under the vote.

The defendants established a strike headquarters, and provided a strike fund from which payments were made to the strikers and other men out of work. Some of the defendants made constant visits to a job of the plaintiff, generally at noontime, to persuade men whom the plaintiff had hired to leave its employ. They offered as inducements in some cases to nonunion men membership without the full payments usually required, and in other cases work elsewhere. Men frequently left the plaintiff's employ after these talks, in some cases stating that they would like to work, but could not run the risk of being fined. The defendant Driscoll induced two men to go who otherwise would have continued at work, by paying them with funds of the unions the wages due them from the plaintiff, and providing them with transportation to Utica, New York, where he had secured other work for them.

The plaintiff was constructing other buildings at Fairhaven and at Andover, which were within the districts of other unions: and the union men employed by the plaintiff on those jobs also struck. It was found, however, that these men were not under the control of the defendants, though it did fairly appear that these strikes were a direct result of the strike in Boston, since all these unions were affiliated together in the International Union and all members of the unions were familiar with what should be done in such cases.

It was admitted that the defendants were not persons of financial responsibility, and the judge found "that the acts of the defendants as above set forth were calculated to interfere and did interfere with the performance of the plaintiff's contracts for the

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terference with workmen not yet under contract with the employer, but seeking employment, becomes so greatly attended with abuse and violence and backed by a conspiracy and the aid of numbers as to amount to an actionable interference with the right of the employer to carry on his lawful business."

And see also note to Reynolds v. Davis, 17 L.R.A.(N.S.) 162, wherein this distinction is also made between an employee's right to relief when interfered with in his attempt to labor, by a labor organization, and the right of his employer to relief against such interference.

The dissenting opinion also finds support in Master Stevedores' Asso. v. Walsh, 2 Daly, 1, which holds a by-law prescribing a penalty against any member working with nonunion members, or for less than specified wages, not to violate either the common law or statute. It is also held that the enforcement of such by-law is not in restraint of trade.

This case contains a very interesting discussion of the general question whether or not such labor unions are unlawful at common law, and it reviews the early English and American cases on the subject. Referring to the validity of the by-law, the court said: "There was nothing in the by-law inconsistent with the act of incorporation or with the laws of the state. As individuals the master stevedores might collectively enter into an agreement not to work under certain rates, and when formed into a corporation they could, as a corporate body, make a by-law of that nature, being one in the language of the statute 'to promote the business and interest of the association.' If the by-law is one which it is in the power of the corporation to make, it has the power also to attach to it a penalty for the purpose of enforcing it. All who become members of the corporate body are bound by it, and where the penalty is incurred an action may be brought in the name of the corporation to recover it. . . . The proper mode of enforcing a by-law is by a pecuniary penalty; for the corporation cannot, either directly or indirectly, impose any forfeiture of goods, or of stock or other corporate interests for the breach of it, . . . and the penalty must be certain. . . . The words of the by-law are that the party shall forfeit to the association 25 per cent of the amount of such bill as fixed by the association, which penalty may be collected by due process of law. Though the word 'forfeit' is used, this is not a forfeiture, . . . but a pecuniary penalty, and it is sufficiently certain. This was not a by-law in restraint of trade; for it imposes no restraint upon one party which is not beneficial to the others, and is not, as has been shown, prejudicial to the interests of the public."

See also Burns v. Bricklayers' Benev. & P. Union No. 1, 27 Abb. N. C. 20, 14 N. Y. Supp. 361, wherein it was held that a member of a trade union was not entitled to the aid of the court to be relieved from fines assessed against him by the union because he violated a strike order and worked for an employer who employed nonunion men, both of which were in violation of by-laws of the union. Relief was denied on two grounds: (1) Because it was conceded that the plaintiff had violated the by-laws of the union relating to working with nonunion men; (2) because plaintiff had not appealed from the action of the executive committee in imposing the fines, and he had not exhausted his remedy in the society.

But see in this connection the concurring opinion of Davis, J., in People ex rel. Doyle v. New York Benev. Soc. 6 Thomp. & C. 85, wherein he says that a by-law which in effect forbids the members of a union to work at their trade at such prices as they choose, and compels them to join in a strike, by punishing those who refuse to do so, is void as against public policy.

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construction of buildings, and, had they continued, would have seriously embarrassed the plaintiff in the prosecution of its business, and that such consequences were contemplated by the defendants in their endeavor to force the plaintiff to accept their working rules to govern the management of its business."

As already stated, the strike had four objects. Of these the demand for an increase of wages was properly enforceable by a strike. The demand that wages should be paid during working hours amounts merely to a demand for a shorter day, and also was properly enforceable by a strike. The reasonableness of such demands we have not the means of determining; and it is settled that such matters are best left to be adjudicated in the freedom of private contract between the interested parties. More difficult questions are presented by the demands that all foremen shall be members of the unions, and that the business agent of the unions shall be allowed to visit any building under construction. See as to the first of these points a very interesting article by Professor Smith, 20 Harvard Law Rev. p. 431, note 1. But it is unnecessary under the circumstances to determine these questions, as the plaintiff replied with a bare refusal of all the demands.

We are of opinion, therefore, that this strike must be regarded as simply a strike for higher wages and a shorter day. It was not a mere sympathetic strike, as in Pickett v. Walsh, 192 Mass. 572, 587, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638, or one whose immediate object was only remotely connected with the ultimate object of the strikers, as in Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. It was a direct strike by the defendants against the other party to the dispute, instituted for the protection and furtherance of the interests of the defendants in matters in which both parties were directly interested and as to which each party had the right, within all lawful limits, to determine its own course. Such a strike must be treated as a justifiable strike so far as respects its ultimate object.

But however justifiable or even laudable may be the ultimate objects of a strike, unlawful means must not be employed in carrying it on; and it is contended by the plaintiff that the use of fines and threats of fines, under the circumstances disclosed in the record, are unlawful. The question is stated by the trial judge in the following language: "In case of a justifiable strike, has the contractor the right to invoke the aid of the court to prevent the labor union from imposing a fine [which the court has found to be coercive in its nature] or taking action to impose one upon one or more of its members under its rules to induce them to leave the contractor's employ to his injury?" Under the findings of the judge it would seem that the question is not intended to be quite so broad as otherwise might be inferred from its language. The language is broad enough to include the case where the employee is under a contract to stay with his employer and where to leave would be a violation of that contract. But no such state of things appears upon the record. The plaintiff "hired its masons by the day and paid them on the basis of the number of hours worked, and it might have discharged them and they might have left at the close of any day." The question must therefore be considered as applying only to cases where the employee by leaving violates no contractual right of the employer.

The question how far the imposition of fines by an organization upon its members where the effect is to injure a third party is justifiable is considered by this court in Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, and it was there adjudged that the imposition of such a fine, by which members of the organization were coerced into refusing to trade with the plaintiff, not a member, to his great damage, was inconsistent with the ground upon which the right to competition in trade is based, and as against him was not justifiable. In the course of the opinion the case of Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607, was cited, in which the same conclusion was reached. In Martell v. White, five justices sat, and four of them, being a majority of the whole court, concurred in the ground upon which it was decided. The case was carefully presented by counsel, the questions involved were regarded as important, and there was a difference of opinion among the judges who sat in it. It was therefore considered at great length; and the conclusion was reached after a most exhaustive discussion and the most careful deliberation. It stands as a solemn adjudication by this court after such discussion and deliberation. So far as respects the trend of judicial opinion and authority there has been no change since the decision was announced, unfavorable to it or to the ground upon which it was reached. On the contrary, so far as we are aware, whenever the case has been mentioned by members of the profession, whether they be judges engaged in the practical administration of the law, or professors teaching the students of our schools the true theory of legal principles, it has been received with favorable comment. See Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A.(N.S.)

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254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 A. & E. Ann. Cas. 698; Allis-Chalmers Co. v. Iron Moulders' Union, No. 125 (C. C.) 150 Fed. 155, 178; 20 Harvard Law Rev. pp. 355, 356; 17 Green Bag, 210. There is every reason why the doctrine of *stare decisis* should apply; and, so far at least as respects this commonwealth, the case must be held as settling the correctness of the principle upon which the decision was based.

That principle, if applicable to the facts of this case, is decisive. The majority of the court are of the opinion that it is applicable, and hence that there should be a decree for the plaintiff, enjoining intimidation or coercion by fines.

Under ordinary circumstances this opinion would end here. But inasmuch as a minority of the court still think that the principle laid down in Martell v. White, with reference to intimidation by fines imposed by an organization upon its members, is not correct, and also, perhaps, that, even if correct, it is not applicable to the facts of this case, and are unwilling to accept that principle as law in this commonwealth notwithstanding the authority of that case, it may be well to say something in addition to what was there said. We are also somewhat influenced to take this action by reason of the importance of the question and its relation to a part of the law still in the nebulous but clearing stage.

Before entering more fully upon the discussion it is well to get a clear conception of what the case is. To begin with, it is not a contest between the members of two competing labor unions, as was Plant v. Woods, supra, nor is it a conflict between an organization and one of its members in a matter in which no third party is interested. Neither does the plaintiff corporation contend that it has any right to compel the intimidated workman to enter its employ. Nor is it seeking, in behalf of a member of a union, to enforce or defend the right of such member to be free from a fine or threat of a fine. The plaintiff has no concern with the imposition of fines by a union upon its members, unless, and only so far as, such an imposition is in violation of a right of the plaintiff. Even if the fine be illegal the plaintiff has no standing in court to complain unless some one of its rights is invaded to its damage. In a word, the case is not between the party imposing the fine and the person fined, nor between the person fined as such and a third party who suffers, but on the contrary it is between such third party and the party imposing the fine. If it were only between the person fined and the party imposing the fine, then with some degree of plausibility it might be said that the former had no right to complain, or at least had waived that right; but it is manifest that neither of the immediate parties to the fine can, either by an agreement among themselves or by waiver, justify the invasion of the right of a third party, if any he has, to object to it.

What is the complaint of the plaintiff? It is a corporation engaged in the construction of buildings and employing a number of men. Its men left its employ on a strike. To keep them away the defendants threatened with fines such as were members of the unions, and by that means kept them away from the plaintiff when otherwise they would have stayed; all to the great damage of the plaintiff. Shortly stated, the case is this: The plaintiff's men are being coerced by threats of a fine to leave its employ, greatly to its injury, the fines to be levied in accordance with the by-laws of a voluntary association of which the proposed victims are members. This injury to the plaintiff is intended by the defendants. Has the plaintiff any standing in equity to an injunction against the infliction of such injury?

It is to be premised that the right which the plaintiff seeks to have protected against the acts of the defendants arises from no contract or statute, but out of the nature of things. It is one of the large body of rights which have their foundation in the fitting necessities of civilized society. It is the common-law right to a reasonably free labor market. Vice Chancellor Stevenson, in speaking of it, says it has been called a "probable expectancy," and describes it as "the right which every man has to earn his living or to pursue his trade or business without undue interference." Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230. He further remarks (pages 765, 766 of 63 N. J. Eq.): "It will probably be found . . . that the natural expectancy of employers in relation to the labor market, and the natural expectancy of merchants in respect to the merchandise market, must be recognized to the same extent by courts of law and courts of equity, and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market." And in Atkins v. W. A. Fletcher Co. 65 N. J. Eq. 658, 664, 55 Atl. 1074, 1076, the same judge says: "The elemental right of the employer of labor, which the courts recognize to-day, no doubt, is the right to employ, while the corresponding right of the workman is the right to be employed. In other words, the right to buy labor and the right to sell labor are recognized by the law, and their enjoyment is greatly impaired or destroyed unless free-

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dom in the labor market—freedom on both sides of the labor market—is maintained. Each party to a contract for the sale of labor has an interest in the freedom of the other party with respect to making the contract." In the words of Lord Lindley in Quinn v. Leathem [1901] A. C. 495, 534, "a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so." This right of the employer is conclusively established by the numerous cases which hold that he may maintain an action against those who by intimidation prevent persons from entering into his employ. See remarks of Lord Halsbury in Allen v. Flood [1898] A. C. 1, 71, 72. In our own reports such a case may be found in Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077. This is the right—the right to a free labor market—which the plaintiff asserts has been invaded by the defendants, and for which he seeks protection.

The defendants also have rights. They have the right to work or not to work, to sell their labor upon such terms as they see fit and to combine for the purpose of getting more pay or a shorter day. And for the purpose of strengthening their organization and making it more effective they have the right to make appropriate by-laws for its internal management, and for the regulation of the conduct of its members toward each other in matters affecting the general interests of the body; and they may enforce obedience to such by-laws and regulations by fines or other suitable penalties.

But not much progress is made by this general statement of the rights of the respective parties. We are still only on the skirmish line. In the jurisprudence of any civilized country there are but few, if any, absolute rights,—rights which bend to nothing and to which everything else must bend. The right to one's life would seem to be quite absolute, but it must yield to the private right of self-defense and to the public right to punish for crime. And so in the case before us, neither the right of the plaintiff to a free labor market nor the right of the union to impose a fine upon its members is absolute. Neither is to be considered apart from the other, or without reference to any other conflicting right, whether public or private; but each must be regarded as having in the rules of human conduct its own place, beyond the limits of which it must not go. Moreover, it must be borne in mind (what sometimes seems to be forgotten by the actors upon each side of such controversies) that the controversy is not a warfare in the sense that for the time being the usual rules of conduct are changed, as in the case of an actual war between two countries. There is no martial law in these cases, no change in the ordinary rules of society, but these rules remain the same as before, commanding what was theretofore right and prohibiting what was theretofore wrong.

The right of an employer to free labor is subject to the right of the laborers to hamper him by many expedients short of fraud or intimidation amounting to injury to the person or property of those who desire to enter his employ, or threats of such injury. For instance, persuasion not amounting to such intimidation is lawful, and perhaps the same may be said of social pressure even when carried to the extent of social ostracism, not including, however, any threat in a business point of view. See Vegelahn v. Guntner, supra; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 769, 53 Atl. 230; 20 Harvard Law Rev. p. 267. Social rights and privileges must take care of themselves. The law cannot prescribe with whom one shall shake hands or associate as a friend.

So long also as the by-laws of a union relate to matters in which no one is interested except the association and its members, and violate no right of a third party or no rule of public policy, they are valid. Fines may be imposed, for instance, for tardiness, absence, failure to pay dues, or for misconduct affecting the organization or any of its members; and for numerous other acts. It cannot be successfully contended, however, that as against the right of some party other than the association and its members an act, otherwise a violation of the third party's rights, is any less a violation because done by some member in obedience to a by-law. If a member commits an assault upon a person, and is called into court by the commonwealth upon a criminal complaint or in a civil action by the victim, he can find no valid ground of defense in the fact that he committed the assault in compliance with the requirements of a contract with some other person, or in obedience to a by-law of an association of which he was a member. So a by-law providing that, upon an order to strike, every employee shall quit work, even although such an act should be in violation of a contract then existing between him and his employer for continuous service, and that for failure thus to break his contract the member should be fined, doubtless would be declared invalid. And the principle at the bottom of such a decision is this; namely, an interference with the right of a third party cannot be justified upon the ground that the intruder is acting in accordance with an agreement between him and some other person. In a word, so long as a fine is imposed for the guidance of members in matters in which outside par-

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ties have no interest, or in which there is no violation of a right of an outside party, then no such party can complain. But when the right of such a party is invaded, it is no defense, either to the person fined or to those who have imposed the fine, that the invasive act was done in accordance with the by-laws of an association.

In the case before us, standing opposed to each other are these two rights,—the right of the employer to a free labor market, and the right of the striking employees in their strife with him to impair that freedom; and the crucial question is, How far can the latter go? On which side of the line shall stand the matter of coercion by fines imposed by a union upon its members to impair that freedom? Is the employer's right to a free market subject to this system of mutual intimidation and coercion by fines, or is the right to establish such a system subject to the right of the employer to a free market? If the employer's right is not subject to this method of intimidation, then of course as against him it is unlawful. If it is subject to it, then he cannot complain, no matter how severe the blow.

So far as concerns the law of this commonwealth at least, some things seem to be settled. It is settled that the flow of labor to the employer cannot be obstructed by intimidation or coercion produced by means of injury to person or property, or by threats of such injury. Vegelahn v. Guntner, supra. In that case Allen, J., said: "Such an act [picketing as a means of intimidation] is an unlawful interference with the rights both of employer and employed. An employer has a right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution itself. Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Braceville Coal Co. v. People, 147 Ill. 66, 71, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362." See also Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307. And it is unnecessary to cite cases in support of the proposition that such is the great weight of authority elsewhere, even though the ultimate object of the strike be legal.

There can be no doubt that fining is one method of injuring a man in his estate, and that a threat to fine is a threat of such an injury. Indeed this is recognized by the decree made by the trial court in this very case, so far as it affects Reagan, one of the defendants, who it is found had threatened with a fine a man once but not then a member of a union.

It is urged, however, that although this method of intimidation is generally an invasion of the employer's right to a free market, and therefore illegal, yet when the intimidation is exerted by a union upon its members in acordance with its by-laws, in a strike whose object is legal, it is justifiable and legal. To this the obvious reply is that the rule of freedom to contract is founded upon principles of public policy, that each party to a contract is interested in the freedom of the other party, that it can make no difference to the public or to the employer (who in the present case is the other party) that the person intimidated is or is not a member of the society intimidating. In either case the injury is the same and is from the same cause, namely, intimidation. The workman is no longer free. In Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547, the court, after speaking of the general right of labor unions to make rules, proceeds thus: "It must be understood, however, that these associations, like other voluntary societies, must depend for their membership upon the free and untrammeled choice of each individual member. No resort can be had to compulsory methods of any kind to increase, keep up, or retain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules, and regulations through violence, threats, or intimidation, or to employ any method that would induce intimidation or deprive persons of perfect freedom of action."

The keynote on this matter is struck in Alfred W. Booth & Co. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226, 233, in the following language: "No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employees who are first coerced, made by them when they enter their labor unions, can . . . affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employees are permitted to exercise their liberty. The employees may be able to surrender their own right, but they certainly cannot surrender the rights of other parties;" citing Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607, and Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 A. & E. Ann. Cas. 738. And in Downes v. Bennett, 63 Kan. 653, 662, 55 L.R.A. 560, 88 Am. St. Rep. 256, 66

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An opposite doctrine leads to strange conclusions. For instance, if ten men banded together undertake by coercion to keep two other men from entering an employment, and they do this in order to force the employer, for lack of ability to get the two, to employ them (the ten), the employer's right to a free market is invaded, and if he suffers thereby he may proceed either in equity or law against the ten; but if the ten men first induce the two other men to enroll themselves in the same organization with the ten, then, it is said, the ten men may by fines or threats of fines so intimidate the two men as to frighten them from the employer, and that such intimidation is no violation of the employer's right. A rule of law which leads to such inconsistencies is not to be adopted. It does not distinguish between coercion and noncoercion, but between organized coercion and sporadic coercion. It makes a distinction entirely foreign and immaterial to the ground upon which the right to a free market is based.

If it be said that fines are not in themselves illegal, and that consequently their use cannot be illegal, the answer is that when they are used as a method of coercion and create a kind of coercion inconsistent with the right of a person they are, as against that person's right, illegal. If it be said, as we have heard it said, that fines are innocent and cannot be illegal, because they are used by all governments as a method of punishing criminals, the answer is that if the principle is true that, what a government may do to punish for crime, individuals or societies may do to enforce private rights, then it follows that a by-law providing for imprisonment or even death may be legal.

If it be said that the member fined may take his choice either to leave the organization or abide by its rules, to which he has before assented, and that where there is a choice there can be no coercion, the answer is that in almost every conceivable case of coercion short of an actual overpowering of the physical forces of the victim there is a choice. The highwayman who presents his cocked pistol to the traveler, and demands his purse under pain of instant death in case of refusal, offers his victim a choice. He may either give up his purse and live, or refuse and die. In Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, the victim had a choice either to pay a fine or take the consequences of a refusal. And so the member of a labor union has the choice either to pay the fine or leave the union. Is it difficult to realize what that choice is in these days of organized labor? Is it too much to say that many times it is very difficult, indeed practically impossible, for a workman to get bread for himself and his family by working at his trade, unless he is a member of a union? It is true he has a choice between paying his fine and not paying it, but is it not frequently a hard one? May not the coercion upon him sometimes be most severe and effective? Such is not a free choice. And a market filled with such men is not a reasonably free market. In this connection the language of Boutwell v. Marr, supra, seems significant and appropriate: "The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectable. . . . The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of this unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation simply by working through an association."

If it be said that without fines the same result may be indirectly reached by the organization by exercising two rights, namely, the right to expel a member and the right to charge an initiation fee upon his return, and since the same result may thus be legitimately reached, nobody is harmed if it be reached by fine, the reply is that if the purpose of expulsion and the subsequent initiation fee be each a part of one and the same transaction, namely, the imposition of a fine, and the two acts are in substance the procedure by which the intimidation by fine is exercised, and such is the intention, then there may be a strong reason for holding that such a procedure is one imposing a fine and should be treated as such. Ordinarily, however, each separate act should be treated by itself and its validity judged by itself. The fact that separately and independently executed they incidentally may have the effect of a fine is immaterial on the question of the right to fine. The fact that a result may be incidentally reached

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If it be said that the member fined may take his choice either to leave the organization or abide by its rules, to which he has before assented, and that where there is a choice there can be no coercion, the answer is that in almost every conceivable case of coercion short of an actual overpowering of the physical forces of the victim there is a choice. The highwayman who presents his cocked pistol to the traveler, and demands his purse under pain of instant death in case of refusal, offers his victim a choice. He may either give up his purse and live, or refuse and die. In Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, the victim had a choice either to pay a fine or take the consequences of a refusal. And so the member of a labor union has the choice either to pay the fine or leave the union. Is it difficult to realize what that choice is in these days of organized labor? Is it too much to say that many times it is very difficult, indeed practically impossible, for a workman to get bread for himself and his family by working at his trade, unless he is a member of a union? It is true he has a choice between paying his fine and not paying it, but is it not frequently a hard one? May not the coercion upon him sometimes be most severe and effective? Such is not a free choice. And a market filled with such men is not a reasonably free market. In this connection the language of Boutwell v. Marr, supra, seems significant and appropriate: "The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectable. . . . The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of this unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation simply by working through an association."

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in one way does not show that the same result may be lawfully reached in another way.

In considering this question we cannot lose sight of the great power of organization. It should be taken into account when one is considering where the line should be drawn between the right of the employer to a free market and the right of workmen to interfere with that market by coercion through the rules of a labor union. It is not universally true that what one man may do any number of men by concerted action may do. In Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638, Loring, J., after alluding to the great increase of power by combination, says: "The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals, or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do."

This organization of labor to better the condition of the laborer is natural and proper. There can be no doubt that it is the most effective way, perhaps the only effective way, in which as against the organization of capital the rights of the laborer can be adequately protected. In many ways the labor unions have succeeded in bettering the condition of the laborer; and so far as their ultimate intentions and the means used in accomplishing them are legal they are entitled to protection to the extreme limit of the law.

But their powers must not be so far extended as to encroach upon the rights of others. It is clear that if the power to intimidate by fine be regarded as one of the powers which labor unions may rightfully exercise, then the right to a free market for labor—nay, even the right of the laborer to be free—is seriously interfered with, to the injury both of the public and the employer as well as the laborer.

In Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, it was said: "The right of competition rests upon the doctrine that the interests of the public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of these laws." So of competition in labor; and so of competition between the employer and employee. The contest between them is only competition on a wide basis. As was said by Knowlton, Ch. J., in Berry v. Donovan, 188 Mass. 353, 358, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 605, 3 A. & E. Ann. Cas. 738: "In a broad sense the contending forces may be called competitors." If the contest be carried on under the rules which regulate the law of supply and demand, leaving those engaged on either side to act under the general and natural laws of business, free from artificial coercion or intimidation, as the words are ordinarily understood in this connection, then neither party has the right to complain; but if coercion or intimidation by threats of a direct personal loss, due not to causes arising out of the situation or logical to the situation, but to a cause having no natural relation to the situation, and entirely inconsistent with the basic principle of freedom of action under the natural laws of business, then there is cause for complaint. Such a method of coercion must be declared illegal, as in violation of the right of the public and all concerned to a reasonably free labor market, that is, a market where all may act under this basic principle of freedom.

In view of these considerations and of others more fully set forth in Martell v. White, which are not here repeated, and in Boutwell v. Marr, ubi supra, a majority of the court are of opinion that the overwhelming sense of the thing is that the principle that the right of the employer is not subject to coercion or intimidation by injury or threats of injury to the persons or property of laborers standing in the market to meet him, should apply to the coercion and intimidation exerted by labor unions upon their members by fines or threats of fines. Any other conclusion is inconsistent with the existence of a reasonably free labor market, to which both the employer and the employee are entitled.

Our attention has not been called to any case, nor are we aware of any, in which the precise point here involved has been discussed, which is inconsistent with the conclusion which we have reached. We are not aware of any case in which it has been adjudged that, where a third party has a right to insist that those with whom he deals shall be free from coercion, the rule does not apply to coercive acts by way of fines or threats of fines, imposed or to be imposed by a voluntary association upon its members in accordance with its by-laws. The case of Bowen v. Matheson, 14 Allen, 499, was explained in Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. Neither in that case nor in Pickett v. Walsh, supra, was there any evidence of coercion by fines. And the same may be said of Mogul S. S. Co. v. McGregor, L. R. 15 Q. B. Div. 476, L. R. 21

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Q. B. Div. 544, L. R. 23 Q. B. Div. 598, [1892] A. C. 25. In that case there was simply a withdrawal of trade advantages under certain conditions. The defendants had two prices,—one price for one class of customers, and a different one for another class. There was nothing in the nature of an arbitrary fine. As stated by Fry, L. J., in the case as reported in L. R. 23 Q. B. Div. 598, 622: "Competition was in substance the only weapon which the defendants intended to use against their rivals in trade. No thought of using violence, molestation, intimidation, fraud, or misrepresentation was entertained by the defendants." See also in same case the language of Coleridge, Ch. J., L. R. 21 Q. B. Div. 544, 552, and that of Halsbury, Lord Chancellor [1892] A. C. on p. 36, as follows: "After a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them,"—and that of Lord Watson, on page 43 of the same volume.

In the preparation of this opinion a large number of cases, in addition to those hereinbefore named, have been consulted, among which are the following: Brown v. Stoerkel, 74 Mich. 269, 3 L.R.A. 430, 41 N. W. 921; Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Fuerst v. Musical Mut. Protective Union (City Ct.) 95 N. Y. Supp. 155; Burns v. Bricklayers' Benev. & P. Union No. 1, 27 Abb. N. C. 20, 14 N. Y. Supp. 361; Master Stevedores' Asso. v. Walsh, 2 Daly, 1; Froelich v. Musicians' Mut. Ben. Asso. 93 Mo. App. 383; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Temperton v. Russell [1893] 1 Q. B. 715; Wabash R. Co. v. Hannahan (C. C.) 121 Fed. 563; Mayer v. Journeymen Stonecutters' Asso. 47 N. J. Eq. 519, 20 Atl. 492; Thomas v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881. See also for others, those cited in Martell v. White and in Pickett v. Walsh, supra.

The result is that in the opinion of a majority of the court there should be a decree restraining and enjoining the defendants, their agents, and servants from intimidating by the imposition of a fine, or by a threat of such fine, any person or persons from entering into the employ of the plaintiff or remaining therein, or from in any way being a party or privy to the imposition of any fine or threat of such imposition upon any person desiring to enter into or remain in the employ of the plaintiff; and it is

So ordered.

Sheldon, J., dissenting:

The Chief Justice and I are unable to assent to the conclusion reached by the majority of the court. We cannot convince ourselves that under such circumstances as are here presented the defendants should be enjoined from imposing or threatening to impose fines upon those members of their organization who, by continuing to work for the plaintiff, had, under the rules to which they had themselves assented, become liable to such imposition. The question is one of great practical importance; it has been said that the law upon the subjects involved is not yet fully settled; and we think it proper to state the views which seem to us to be correct.

We assume that any defendants who have instituted or are carrying on an unjustifiable strike, or who for the prosecution and maintenance of a justifiable strike are inducing workmen either to leave or to refrain from entering the employ of a plaintiff, by the use of means which are either unlawful in themselves or would operate as an interference with a superior right of the plaintiff,—who, that is, have combined either to secure an unlawful end or to secure a lawful end by the use of unlawful means,—may be restrained by injunction, at any rate from such specific wrongful acts in furtherance even of a lawful strike as are unjustifiable towards the plaintiff, and are likely to cause such injury to the plaintiff as to warrant equity in interfering. It would not be material in such a case that there was no continuing contract of employment between the plaintiff and the servants who were thus induced to leave him, or that the employer was complaining of the action of the labor union in seeking merely to enforce its rules upon its own members, although no question arose between the union itself and workmen who desired to continue in their employment, but who were coerced by the fear of fines or of other consequences that might follow their infraction of the rules of the union. See, as to this general doctrine, Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Frank v. Herold, 63 N. J. Eq. 443, 52 Atl. 152; Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl.

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226; Spaulding v. Evenson (C. C.) 149 Fed. 913; Temperton v. Russell [1893] 1 Q. B. 715. Nor is it doubted that the promoters of a strike would have no right to persuade a laborer to violate any existing contract of employment with the plaintiff. Beekman v. Marsters, 195 Mass. 205, 210, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 A. & E. Ann. Cas. 332, and cases cited; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457. Nor would they have a right, by the threat of a fine or of any similar disciplinary measure, to prevent anyone who was not a member of their union from working for the plaintiff. Read v. Friendly Soc. [1902] 2 K. B. 88; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Employing Printers' Club v. Dr. Blosser Co. 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 A. & E. Ann. Cas. 694; South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A. C. 239, 2 A. & E. Ann. Cas. 436. This is the fundamental doctrine of Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

But the defendants' associations were lawful ones. The language of Knowlton, Ch. J., in Reynolds v. Davis, 198 Mass. 294, 302, 17 L.R.A.(N.S.) 162, 84 N. E. 457, states as to this point a universally recognized doctrine. No court would assert that the organization of a labor union constituted in itself an unlawful conspiracy. The objects aimed at by these unions were proper ones. Their main object, as stated in the constitution of one of them, the Bricklayers' Benevolent & Protective Union, is "to unite all practical journeymen bricklayers working within the jurisdiction of this union, so that by concerted action their interests will be protected and their condition improved, and to render assistance to injured members, and also provide a proper burial for deceased members." The right of the defendants to form such combinations or unions for the purpose of protecting their interests and improving their condition by securing higher wages and shorter periods of labor, even in competition with other laborers, is undisputed. Pickett v. Walsh, 192 Mass. 572, 580, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638; Snow v. Wheeler, 113 Mass. 179; Carew v. Rutherford, 106 Mass. 1, 10, 8 Am. Rep. 287; Com. v. Hunt, 4 Met. 111, 129, 38 Am. Dec. 346.

Nor is there now any question that the defendants had the right, through concerted action, to attempt to secure the attainment of these lawful objects by means of a strike. If the end aimed at is lawful, the strike is lawful, and is not made unlawful by the fact that it is ordered and carried on by the action and through the instrumentality of a labor union. This is the express point of the decision in Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457, a decision which was made only some months ago, and which as to this point was concurred in by every member of the court, the only dissent being as to the lawfulness of the purpose of the strike which was there considered. This means and must mean that the members of a labor union who have engaged in a strike for a lawful purpose have a right to carry it on and to seek to make it effectual by the use of any means which are neither unlawful in themselves, nor inconsistent with the exercise by others of any equal or superior rights.

It is conceded in this case that the defendants' strike was a lawful one, because it must be treated as instituted and carried on for the lawful purposes of obtaining higher wages and shorter periods of labor. We adopt as to this question what is said in the majority opinion. It follows accordingly that the defendants had a right not only to carry on their strike, but to seek to make it successful by the use of whatever rightful means were available to them. And this seems to us to be the general doctrine of the cases. It has been upheld, either in terms or by necessary inference, in Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; Mills v. United States Printing Co. 99 App. Div. 605, 91 N. Y. Supp. 185; Rogers v. Evarts (Sup.) 17 N. Y. Supp. 264; Downes v. Bennett, 63 Kan. 653, 55 L.R.A. 560, 88 Am. St. Rep. 256, 66 Pac. 623; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172. Indeed this proposition, as we understand, is not disputed by the majority; nor has it been denied by any authoritative judicial decision.

The plaintiff in the case before us has in deed, like every other employer of labor, a right to enjoy a free labor market, to have a free flow of labor come to him; that is, he has a right to employ such men as are willing to work for him upon such terms as may be mutually agreed upon between him and them. The strongest statements of this right may perhaps be found in some of the cases cited in the majority opinion. Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 A. & E. Ann. Cas. 698; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230; Atkins v. W. A. Fletcher Co. 65 N. J. Eq. 658, 664, 55

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Atl. 1074; Quinn v. Leathem [1901] A. C. 495, 534. But even these decisions follow the now universal current of authority in recognizing the right of the defendants to curtail and restrict this right of the plaintiff, by combining in labor unions to engage in a lawful strike for the improvement of their own conditions, and in endeavoring to render their strike successful by using all rightful means both to secure unanimity of action among their own members and to dissuade other laborers from entering the employ of the plaintiff. That is, the relative right of the plaintiff to enjoy a free labor market is modified and limited by the right of its employees to enter into an agreement or combination to secure higher wages or to improve otherwise the conditions of their employment, and for this purpose to engage in a strike and to use all rightful means to insure the success of their strike by checking, and if they can do so without resorting to wrongful means by wholly stopping, the free flow of labor to the plaintiff. But if this be so, manifestly the plaintiff's right to a free labor market is not only not a paramount right, but it is and must be subject to the higher right of the defendants to combine and to carry on a strike by the use of whatever lawful means may be in their power; and we cannot see how this right can be further limited than by restricting it to acts which are not forbidden by law, either as being unlawful in themselves or at variance with a sound public policy. Accordingly, the question now to be decided is whether we can say that the members of a labor union have no right, acting in conformity with rules previously established, to impose a fine upon one of their own members if he goes to work or continues to work for an employer against whom a justifiable strike has been declared in accordance with those rules, where there is no contractual right or duty on either side for the performance of such work.

If we are right in what thus far has been said, the answer to this question must depend upon whether the imposition of such a fine is either forbidden by some rule of law or is found to be inconsistent with some principle of public policy. But in our opinion neither of these affirmations can be made.

The right of all voluntary associations, whether formed for the carrying on of business or for purely social purposes, to establish appropriate by-laws and regulations, not only for their own internal management, but also to regulate the conduct of their members towards each other and in matters affecting the general interests of the body, is conceded. And the right to enforce obedience to such by-laws and regulations by suitable penalties is generally recognized. See, besides many other cases that might be cited, R. v. Westwood, 7 Bing. 1, 90, 2 Dow. & C. 21; Goulding v. Standish, 182 Mass. 401, 65 N. E. 803; McFadden v. Murphy, 149 Mass. 341, 21 N. E. 868; Smith v. Nelson, 18 Vt. 511; Mayer v. Journeymen Stonecutters' Asso. 47 N. J. Eq. 519, 20 Atl. 492; Brown v. Stoerkel, 74 Mich. 269, 3 L.R.A. 430, 41 N. W. 921; Wabash R. Co. v. Hannahan (C. C.) 121 Fed. 563; Martin v. Nashville Bldg. Asso. 2 Coldw. 418. That provisions for fines to be imposed for conduct injurious to the members of such voluntary associations are not necessarily bad, either as between the members themselves or as affecting the conduct of members towards third persons, was assumed in Bowen v. Matheson, 14 Allen, 499. See page 501. And although the manifest effect of the fine provided for in that case was to put at least a certain measure of coercion upon the individual members of the association to persist in conduct which had been found to be ruinous to the plaintiff's business, the decision was restated and approved in Plant v. Woods, 176 Mass. 492, 500, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. The same may be said of other cases cited in that opinion. The suggestions as to the decision in Bowen v. Matheson, supra, made in Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, and in the majority opinion in the case at bar, really go no farther than to say that such a fine is not necessarily unlawful; but that is exactly what is here contended for.

We cannot make the law to be enforced against labor unions in this respect more stringent than that which is applicable to other organizations established for proper purposes. Such unions are voluntary associations. They are formed for proper purposes. Their objects are not only lawful, but commendable. Like some other associations, the very purpose for which they are created makes it highly important that their members should be held together by the strongest possible bonds, so as to work with absolute unanimity, especially in the time of a trade dispute or strike. Pledges and promises binding all the members are desirable. Voluntary agreements to abide in such matters by the will of a majority of the members under a coercive pecuniary influence, or even under pain of expulsion, cannot be objectionable. Indeed, the right of labor unions to enforce, under penalty of fine or expulsion, compliance by all their members with rules and regulations which have been adopted because deemed by a sufficient majority to be for the common good, and which are not in themselves inappropriate

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or unlawful, is necessary to their continued existence. It is to the united action of all their members that such organizations owe their strength and their ability to accomplish the results at which they aim. Doubtless persons who do not agree in the desirability of those results, or in the wisdom or efficiency of the means adopted to secure them, cannot be required to continue as members against their will, any more than they could have been compelled to become members in the first instance.

It is of the very essence of a voluntary organization that membership in it is and must continue to be itself voluntary; and this must be so on both sides as long as property rights do not come in question. Plant v. Woods, 176 Mass. 492, 502, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Longshore Printing Co. v. Howell, supra. So long, however, as such membership continues and the organization still serves the purpose for which it was created, "the will of the individual must," as was said by the court in Wabash R. Co. v. Hannahan, supra, "consent to yield to the will of the majority, or no organization, either of society into government, capital into combination, or labor into coalition, can ever be effected. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes, and by organic agreement to subject the individual members to rules, regulations, and conduct prescribed by the majority, is no longer an open question in the jurisprudence of this country." So Taft, J., in Thomas v. Cincinnati, N. O. & P. R. Co. (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803, 817, after conceding the right of the employees of a receiver to organize themselves into a labor union which shall take joint action as to their terms of employment, and to elect officers to represent them, says: "The officers they appoint, . . if they choose to repose such authority in anyone, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory." In Mayer v. Journeyman Stonecutters' Asso. supra, it appeared that members of the defendant association were practically compelled to acquiesce in the decision of the majority and to join in strikes or abstain from working for particular employers by forfeiture of membership consequent upon being declared "scabs;" and this was not interfered with by the court, no other coercion or actual violence having been used. The same rule was applied in Brown v. Stoerkel, supra, to persons suspended from a labor union for not joining in a strike. The validity of such rules as are here in question, and of penalties to be imposed under them after due notice and hearing in conformity to the rules, was either declared or recognized and assumed in Pickett v. Walsh, 192 Mass. 572, 575, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638; Fuerst v. Musical Mut. Protective Union (City Ct.) 95 N. Y. Supp. 155; Burns v. Bricklayers' Union, No. 1, 27 Abb. N. C. 20, 14 N. Y. Supp. 361; Master Stevedores' Asso. v. Walsh, 2 Daly, 1; Froelich v. Musicians' Mut. Ben. Asso. 93 Mo. App. 383; and Moores v. Bricklayers' Union, 23 Ohio L. J. 48. In Quinn v. Leathem [1901] A. C. 495, the fines imposed were not treated as in themselves objectionable, but the decision was put upon the ground that the defendants had acted not for any purpose of advancing their own interests as workingmen, but for the sole purpose of injuring the plaintiff in his trade. See language of Lord Shand, at page 514. So, in Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 A. & E. Ann. Cas. 698, it was assumed that the imposition of fines, even up to the amount of $500, might be lawful; but the case turned upon the fact that the plaintiff had not had such notice and trial as were guaranteed to him by the rules of the union In Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226, the object of the fines was to enforce a strike which was merely sympathetic or in the nature of a boycott, such as was held to be unjustifiable in Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638. In Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275, a strong decision against the coercion of an employer by sympathetic strikes against his customers, it was assumed throughout the opinion that the officers of the labor union would not have been prevented from enforcing by peaceful means upon their own members the rules of the union forbidding its members to work upon nonunion material; and this would include the right to impose the penalties established by those rules. In Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598, affirmed on appeal in [1892] A. C. 25, it appeared that conformity to the rules of the association was enforced by a penalty of dismissal, a severer and more drastic remedy than a mere pecuniary penalty, which practically could usually be enforced only by expulsion, and this fact was relied upon by

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the plaintiff upon the appeal (page 30); but both Lord Watson and Lord Morris declined to treat this threat of expulsion as involving any wrongful intimidation (pages 43, 49, 50). Indeed, we do not understand it to be denied that those members of the unions who declined to join in the strike which was ordered were liable to expulsion by the unions acting in good faith, and as it appears that the defendants are pecuniarily irresponsible, payment of the fines threatened could have been enforced only by expulsion. And the member of a union upon whom such a fine has been lawfully imposed in accordance with by-laws to which he has himself previously assented is in no respect in the predicament of a highwayman's victim, who has the bare option of parting with his money to save his life or of losing his life without thereby saving his money. The situation of one who finds himself compelled to choose between two alternatives, however distasteful, which he has brought upon himself and neither of which is unlawful, is in no way comparable to that of one who is compelled by wrongful force to elect between submitting to one of two alternative injuries, both of which are unlawful. An argument which rests upon such a comparison is without foundation.

Nor can we say that the imposition of fines not in themselves unlawful, and not injurious to the plaintiff except as they restrict an inferior right by the lawful exercise of a higher right is to be regarded as contrary to a sound public policy. Gloomy vaticinations of injurious results to be apprehended from the excessive power which labor unions may acquire by their combination of many individuals into one body do not greatly impress us. The power of capital hitherto has not been found insufficient to prevent other than proper advantages from being gained by the representatives of labor, nor does it seem to us likely to be insufficient in the future. If it shall appear that there is such a danger, yet we cannot alter the law by denying to labor unions the rights and powers which the law gives to all lawful associations.

The law does not do so vain a thing as to allow the formation of labor unions and to declare their right to initiate and by lawful means to carry on a justifiable strike, and then refuse them the use of the only practical means by which their acknowledged rights can be secured. And see, beside the cases already cited, Cote v. Murphy, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Macaulay Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1. The books are full of cases recognizing the right of labor unions to enforce their rules upon their members in a reasonable way. There are but few cases that discuss by-laws authorizing the imposition of fines for a violation of rules; for their validity is almost universally conceded. It is believed that most of the many thousand labor unions in this country and Great Britain have such a rule or by-law, under which they are acting to-day without complaint from anyone. In such action they are in our judgment simply adopting a principle which is of general application for similar purposes.

It is true of course that no man lawfully can be compelled at the mere dictation of other men to abstain from working for such prices and during such periods of labor as he may be willing to accept; but it is no less true that when one chooses voluntarily to unite with others of the same craft in forming an organization for the purpose of bringing about by the united action of all its members more favorable conditions of employment, he is bound, so long as he desires to remain a member of that organization, to submit within certain limits his own freedom, alike of judgment and of action, to the judgment of his associates, and to conform his conduct to that standard which they shall have agreed to be for the best interest of all and of each. Unity of action would be impossible upon any other terms. Accordingly, all the members of such a body have a right to expect, and by reasonable rules and appropriate penalties to provide for, the observance of such terms. Those who desire to employ the members of such organizations must expect this to be the case, and have no right to complain of the requirements of such rules, and of their reasonable enforcement upon each other by the members of such organizations. To this extent, the employer's relative right to a free labor market must yield to the higher right of the laborers to combine and to act in unison for the purpose of obtaining better terms from their employer. In other words, the general right of an employer to go into the market to hire laborers does not deprive a union, in carrying on a lawful strike, of the right to use upon its individual members, for the purpose of keeping them up to the performance of their duty as such members, all the influences that any other organization properly could use, including the imposition of fines. The right to use such influences is an independent and paramount right. The interests of the employer are subordinate to this right, and must yield to it.

Doubtless this power of discipline by fines or by the ultimate penalty of expulsion can-

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not properly be resorted to for the purpose of requiring conduct intrinsically unlawful, or for the purpose of compelling a minority member to join in action the ultimate object of which is to damage a third person. Ertz v. Produce Exch. Co. 82 Minn. 173, 51 L.R.A. 825, 83 Am. St. Rep. 419, 84 N. W. 743. Just as the rules of an association cannot protect its members who have done actionable injury to a third person, so a plaintiff who has suffered injury by the enforcement of its rules and penalties upon its own members for a wrongful purpose may properly be allowed a remedy. Carew v. Rutherford, 106 Mass. 1, 10, 8 Am. Rep. 287. If a strike should be declared for an unlawful object, it would be illegal because of its object; and all the members trying to maintain it by direct or indirect action against the employer might be liable in damages and subject to injunction. They would be so liable just as much without a by-law authorizing the imposition of fines as with one. Any labor organization acting against an employer to prevent him from carrying on his business is acting unlawfully if its action is without legal justification. The case of Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607, might well have been put upon this ground; and in our opinion our own case of Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, should have been rested upon a similar doctrine. But if the object of a strike is legal and commendable, an effort to keep the members together by the imposition of fines, if need be, under a by-law previously adopted, is also legal and commendable.

The only cases that we have found which in principle are contrary to our conclusions are Boutwell v. Marr, supra, the reasoning of which we regard as ill-considered and erroneous, and Martell v. White, supra, in which a majority of this court followed the Vermont decision. But in Martell v. White, it was assumed (page 262 of 185 Mass.) that the fine was "so large as to amount to moral intimidation or coercion," and was "used as a means to enforce a right not absolute in its nature but conditional," and was "inconsistent with the conditions upon which the right" rested. None of these conditions are applicable here. The findings made in this case went no further than that some coercion was exercised upon the striking members of the unions by their apprehension of fines. We have seen that the fines which were threatened were not in themselves unlawful, were in accordance with the by-laws of the unions of which the strikers were members, and were imposed in conformity with a right which was paramount to any inconsistent right of the plaintiff. We do not consider that the point actually decided in Martell v. White was necessarily inconsistent with the view here taken. So far, however, as the general doctrine of that case is applicable to fines imposed for a violation of rules lawful in themselves, and not sought to be enforced for a purpose either strictly unlawful or opposed to public policy or inconsistent with the general welfare of the community, we are not willing to follow it. We do not think that the court can distinguish between the coercive effect of larger and smaller fines, or say as matter of law that they do, by reason merely of their magnitude, amount to moral intimidation. All fines are necessarily coercive in their operation, if they have any effect whatever. The statement that they may simply call the attention of a member of an organization to the fact of the infringement of some innocent regulation, or serve as an extra incentive to the performance of some absolute duty, we understand to be, and to have been manifestly intended to be, a concession that the degree of coercion which they exert in some instances may be a proper one. Perhaps unreasonable or excessive fines sometimes might be found to amount to intimidation; but we think it better to say that such fines as are here in question, not found to be excessive in amount, are not to be declared to be unreasonable or unlawful where they are imposed under rules or by-laws which are themselves proper and reasonable, are imposed for justifiable purposes, and are well adapted to serve useful ends for a paramount interest of the parties whose conduct they are to guide, and do not interfere with any absolute or prior right of a third person, or work an injury to his relative rights disproportionate to the good aimed at and reasonably expected to come by reason of them to the members of the association. Downes v. Bennett, 63 Kan. 653, 55 L.R.A. 560, 88 Am. St. Rep. 256, 66 Pac. 623.

To repeat what has been already said in substance, what seems to us the fallacy of the majority opinion is its failure to act upon the fact that the strike in this case was upon justifiable grounds, and of course was lawful. It follows that the action of each member of the union in trying to maintain the strike, without force or wrongful coercion or intimidation exercised upon anyone, was justifiable and lawful. It was not an interference with the rights of the plaintiff, because, as we have seen, the right of an employer to conduct his business without interference in the labor market is subordinate to the right of his employees to strike and to maintain the strike in a lawful manner. As against this right of

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the employees the employer has no right to have their labor flow to him uninfluenced or undiverted.

Accordingly, we are of opinion that the decree of the superior court should be affirmed.

Loring, J., specially concurring:

For the reasons stated in the opinion of Mr. Justice Sheldon I should agree with the conclusion there reached, were it not for the recent decision made by this court in Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085.

The agreement in Martell v. White was not an agreement or combination of laborers to better their condition, but an agreement between certain manufacturers, quarriers, and polishers of granite to buy and sell to and to work for each other to the exclusion of other granite manufacturers, quarriers, and polishers. This court held such an agreement to be a valid one. Whether that agreement was a valid one is not now up for decision. For the purposes of this discussion I take Martell v. White to be a decision as to what means may be lawfully used to enforce a legal agreement.

In my opinion the decision in Martell v. White ought not to be overruled in the case at bar although it was wrong, provided laborers and labor unions will not suffer injustice from our standing by it.

The evils which ensue from overruling a wrong decision where no injustice is involved in following it are greater than those which come from standing by it. It would be hard to measure the disastrous consequences to the administration of justice if it were thought that a change in the personnel of the court is to be the occasion for rearguing what has been decided.

The decision in Martell v. White will not (in my opinion) work injustice to employees and labor unions if it is confined to the point there decided, and is not extended to broader propositions.

These broader propositions are as follows: (1) That employees have a right to combine to better their condition, and to do all acts (not unlawful) necessary to make the combination an efficient one; (2) that they have a right to strike to gain that end if their demands therefor are not granted by their employer, and to do all acts (not unlawful) necessary to make the strike successful; and (3) that these rights of the employees are superior to the right of the employer to have a free flow of labor in his business.

There is nothing in the decision in Martell v. White, or in the decision in the case at bar, which calls in question these propositions or any one of them.

All that was decided in Martell v. White and all that is up for decision in the case at bar is that the imposition of a fine is the use of unlawful means.

It was not decided in Martell v. White that in case a member of a labor union (which has instituted a strike to get higher wages, for example) goes to work for the employer in question at the old rate, he cannot be expelled.

Neither was it decided in Martell v. White that since the labor union, in the case put above, can expel such a member, it cannot, if he goes to work for the old rate of pay, threaten to expel him for the purpose of keeping him in the ranks of the labor union, that is to say, in the ranks of the strikers.

Further, it was not decided in Martell v. White that if a member in the case put above is subject to expulsion because he has deserted the union and gone to work for the lower rate of pay, the union is not at liberty to impose upon him the payment of a sum of money for the common benefit as a condition of his reinstatement. In such a case the union is not bound to expel the deserter. It is at liberty to take him back. On the other hand, since it can expel him and at the same time is at liberty to take him back, it can take him back on such terms as it may choose to impose, including the payment of a sum of money to the union for the common benefit.

And finally, since it may do this it may threaten to do this to keep such a fellow member from going back to work at the old lower rate of pay. There is nothing in Martell v. White which denies or pretends to deny this right to a labor union.

A payment imposed upon a deserting member of a labor union under the circumstances stated above is not, using words accurately, a fine. The difference is that a fine is imposed upon a former member for breaking the by-laws while he was a member, and can be collected whether the deserting member returns to the ranks of the union or not, while such a sum as is described above is a condition of the reinstatement of a member who has been expelled or is subject to expulsion, and cannot be collected if the member does not choose to be reinstated.

But although there is a difference between a fine and such a payment as is described above, the difference between the two is of no practical consequence to labor unions. So long as a labor union can impose upon a member who is subject to expulsion the payment of a sum of money as a condition of his reinstatement, the right to impose a fine (giving to that word its accurate meaning) is of no practical consequence. No labor union in the past ever attempted to collect

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a fine from a member who had left the union and did not seek reinstatement. And no labor union will ever find it worth while to enter on such litigation. The game is not worth the candle. It is because the difference between these two things is not of practical consequence that I think that Martell v. White should not be overruled. What we are dealing with in the case at bar are the practical rules which govern strikes properly instituted for a proper purpose. If a wrong decision has been made, it had better stand if it does not work injustice. As I have said, if the decision in Martell v. White is not extended it does not work injustice, and for that reason (in my opinion) it ought not to be overruled in the case at bar.

I am of opinion that the case at bar is covered by the decision in Martell v. White. Further, that the decision in Martell v. White ought not to be overruled in this case, and that the plaintiff is entitled to the decree stated in the opinion of a majority of the court.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

HARRIET T. SAMMONS, Exrx., etc., of Anna Leslie Higbie, Deceased, Respt.,
v.
KATE J. PIKE et al., Appts.

(— Minn. —, 120 N. W. 540.)

Divorce decree — collateral attack in foreign jurisdiction.

1. One Higbie, at all times involved, a resident of Minnesota, initiated in 1886 a divorce proceeding in Dakota against his wife, who lived in New York. She answered. He dismissed the action. In 1887 he brought another suit, in Nebraska. She answered, and set up a cross bill for a divorce on her part. While this action was pending, and in 1887, he began a third divorce proceeding, in Dakota. Fraud in service of summons was claimed and denied. The wife did not appear. Decree for absolute divorce was granted in 1889. Neither party remarried. The wife had actual knowledge of the existence of the decree for some seven years before her death. The husband died in 1905. The wife died in 1906. In an action of ejectment, brought later, in 1906, by persons claiming under her, to recover possession of the homestead and other property from persons claiming under him, it is held that a decree of divorce may be impeached collaterally in the courts of another state by proving that the court granting it had no jurisdiction because of the plaintiff's want of domicil, even where the record purports to show such jurisdiction.

Voidable divorce decree — laches — effect on property rights.

2. Where a decree of divorce by a court within the jurisdiction of which the person seeking a divorce was a resident at the time involved is voidable only, because of fraud in connection with the service of the summons or in the conduct of the case, the victim of the fraud may, by unexplained delay, lasting until after the death of the perpetrator of the fraud, or by other conduct operating by way of waiver or estoppel, be prevented from successfully asserting a right to a distributive share of the estate of the original wrongdoer.

Void divorce decree — validation by subsequent conduct.

3. Whether, under any circumstances of aggravation, a decree of divorce entered by a court of a state of which neither plaintiff nor defendant was a resident at any time, could be validated by any subsequent conduct—*quære.*

Same — subsequent conduct — effect on property rights.

4. The failure of the wife in this case to attack the invalid decree, and her other conduct complained of, did not operate to prevent persons claiming under her from securing her distributive share in his estate as the law determined it to be.

(Start, Ch. J., and Brown, J., dissent.)

(March 26, 1909.)

Case Note. — Impeaching decree of divorce rendered in other state on the ground of nonresidence or domicil of person in whose favor it was granted.

As shown in the note to Benton's Succession, 59 L.R.A. 135, it is held in many cases, and established beyond question, that a decree of divorce rendered in another state may be impeached on the ground of the lack of residence or domicil of the plaintiff at the divorce forum, notwithstanding the recitals of the jurisdictional facts in the decree.

In the subsequent case of German Sav. & L. Asso. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 231, where the decree rendered in one state was successfully attacked in another on the ground that the party in whose favor it was granted was not a resident of the divorce forum, it was said in the opinion that it is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party.

To the same effect are the following cases decided since the note above referred to: Beeman v. Kitzman, 124 Iowa, 86, 99 N. W. 171; State v. Westmoreland, 76 S. C. 145,

Headnotes by JAGGARD, J.
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APPEAL by defendants from a judgment of the District Court for Steele County in plaintiff's favor in an action brought to recover possession of certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. **L. W. Collins** and **William H. Hallam**, for appellants:

A judgment of divorce in a sister state, regular on its face, and known to the defendant several years before her death, cannot be assailed for the first time in a collateral proceeding involving a mere contest over property, and begun after both parties are dead.

Colby v. Colby, 65 Minn. 549, 67 N. W. 663; Re Ellis, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056; Nelson, Div. & Sep. §§ 1054, 1056, 1064; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; McNeil v. McNeil, 78 Fed. 834; Marvin v. Foster, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W.

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8 L.R.A.(N.S.) 842, 56 S. E. 673; Field v. Field, 215 Ill. 496, 74 N. E. 443.

In none of the cases cited in this note was the attack upon the decree made by the party who procured it. In State v. Westmoreland, supra, the attack was by the state in a prosecution for adultery against the party who procured the divorce in the other state. In the other cases the attack was by the party against whom the divorce was granted.

As shown in the earlier note, it was held in Re Swales, 60 App. Div. 599, 70 N. Y. Supp. 220, that a wife who had obtained a divorce in Illinois was estopped to question the jurisdiction of the Illinois court upon the ground that she was not a resident of the state at the time of the divorce, in a proceeding by her in New York for letters of administration upon the estate of the divorced husband. This decision was subsequently affirmed by the court of appeals on the opinion below (172 N. Y. 651, 65 N. E. 1122).

So, it was held in People ex rel. Shrady v. Shrady, 47 Misc. 333, 95 N. Y. Supp. 991, that a man who procured a divorce in another state, and remarried, could not attack the validity of that divorce on the ground of his nonresidence, in a prosecution in New York as a disorderly person for abandoning a woman whom he married subsequently to the divorce.

To the same effect is Bledsoe v. Seaman, 77 Kan. 679, 95 Pac. 576, where a wife who procured a divorce in another state upon a cross petition in a suit commenced by her husband was held barred, in a subsequent action in Kansas for alienation of the affections of her former husband, from attacking the validity of the decree on the ground of her nonresidence at the divorce forum. The court said that the parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated; that people who invoke the action of a court, and, through negligence or falsehood, mislead the court as to the existence of the facts upon which its jurisdiction depends, and obtain a judgment for relief, will not afterwards be heard to deny the validity of such judgment. Though expressly stating that the rule applied in the case did not rest upon the doctrine of estoppel as ordinarily understood, the court intimated that there were some facts presented which indicated that an ordinary estoppel might have been applied, remarking that the defendant in the action for alienation of affections had a right to assume that the plaintiff therein no longer had or claimed any right to the affection or society of her former husband, and that any relations which she (defendant) might assume with him thereafter would not in any way infringe the plaintiff's rights.

It is to be observed in this connection that the right of a party who procured a decree of divorce in another state, to impeach the same upon the jurisdictional ground that he or she was not a resident of that state at the time the divorce was obtained, presents a different question from the right of one who procured a decree in the state in which he or she then resided to impeach the same on the ground that the defendant was a nonresident and was served constructively only. The former question goes to the jurisdiction of the subject-matter; the latter merely to the jurisdiction of the parties. As a matter of precaution, however, it may be pointed out in this connection, that the decision of the appellate division in Starbuck v. Starbuck, 62 App. Div. 437, 71 N. Y. Supp. 104 (referred to at page 172 of the earlier note), to the effect that one who procured a divorce in the state of her residence was not precluded from denying the effect of the decree in New York upon the ground that her husband was a nonresident of the divorce forum and was served constructively only, was subsequently reversed by the court of appeals (173 N. Y. 503, 93 Am. St. Rep. 631, 66 N. E. 193).

As to character of residence essential to give jurisdiction in divorce proceedings, see case note to Bechtel v. Bechtel, 12 L.R.A. (N.S.) 1100. For conflict of laws on the subject of divorce, in general, including the recognition in one state or country of a decree of divorce rendered in another, and the right to impeach such foreign decrees, see note to Benton's Succession, 59 L.R.A. 135, and supplementary notes to Joyner v. Joyner, 18 L.R.A.(N.S.) 647, as to extraterritorial effect of decree of divorce rendered upon constructive service, and to State ex rel. Aldrach v. Morse, 7 L.R.A.(N.S.) 1127, on the jurisdiction of a court of the state of matrimonial domicil to grant a divorce upon constructive service of process against defendant who is out of the jurisdiction. As to effect in third state of decree upholding a foreign divorce, see case note to Bidwell v. Bidwell, 2 L.R.A.(N.S.) 325.

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484; Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342; Earle v. Earle, 91 Ind. 27; Hurley v. Hurley, 117 Iowa, 621, 91 N. W. 895; Re Brigham, 176 Mass. 223, 57 N. E. 328; Arthur v. Israel, 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81; Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223; Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082; Sloan v. Sloan, 102 Ill. 581; Perry v. Perry, 15 Phila. 242; Everett v. Everett, 60 Wis. 200, 18 N. W. 637; Mohler v. Shank, 93 Iowa, 273, 34 L.R.A. 161, 57 Am. St. Rep. 274, 61 N. W. 981; Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216, 44 N. W. 675; Potts v. Potts, 10 W. N. C. 102; Johnston v. Sharpe (Tex. Civ. App.) 34 S. W. 1006; Maher v. Title Guarantee & T. Co. 95 Ill. App. 367; Gilbert v. Reynolds, 51 Ill. 513; Larimer v. Knoyle, 43 Kan. 338, 23 Pac. 487; Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105; Holcomb v. Independent School Dist. 67 Minn. 321, 69 N. W. 1067; Reed v. Reed, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720; Hurley v. Hurley, 117 Iowa, 621, 91 N. W. 895; Moor v. Moor (Tex. Civ. App.) 63 S. W. 347; Starbuck v. Starbuck, 173 N. Y. 508, 93 Am. St. Rep. 631, 66 N. E. 193; 2 Bishop, Marr. & Div. § 753, B; Richardson's Estate, 132 Pa. 292, 19 Atl. 82.

Messrs. Leach & Reigard, for respondent:

A foreign divorce may be collaterally attacked and declared null and void on the ground that the plaintiff in the divorce case was not a resident of the state or country where the divorce action was prosecuted, if the defendant did not appear.

State v. Armington, 25 Minn. 29; Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108; Re Ellis, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056; McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1; 14 Cyc. Law & Proc. pp. 722, 723, 820, 821; 23 Cyc. Law & Proc. p. 697, note 60; State v. Westmoreland, 76 S. C. 145, 8 L.R.A.(N.S.) 842, 56 S. E. 673; Benton's Succession, 59 L.R.A. 183, note; Beeman v. Kitzman, 124 Iowa, 86, 99 N. W. 171; German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; Pollock v. Pollock, 9 S. D. 48, 68 N. W. 176; Smith v. Smith, 7 N. D. 404, 75 N. W. 783.

An absolutely void, as distinguished from a voidable, divorce judgment can have no force or effect whatever, and can acquire no force or effect from lapse of time.

Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585; 17 Am. & Eng. Enc. Law, 2d ed. pp. 1046–1049.

Jaggard, J., delivered the opinion of the court:

Plaintiff, claiming under Mrs. Higbie, deceased, brought ejectment in the latter part of 1906 to recover possession of a homestead and other lands in this state from defendant Pike, claiming under the will of Mr. Higbie, also deceased, and against other defendants in possession as her tenants. Mr. and Mrs. Higbie were married in New York in 1864, and shortly afterwards removed to Owatonna, Minnesota. Mr. Higbie resided there until his death, January 5, 1905. Mrs. Higbie came to Minnesota with her husband, but lived apart from him between October, 1877, and April, 1880, when she returned and lived with him until November 3, 1883, when she finally left him, and lived in New Jersey and New York, where she died in 1906. In 1886 Mr. Higbie initiated divorce proceedings in Dakota against Mrs. Higbie on the ground of desertion. Mrs. Higbie answered. Mr. Higbie dismissed the action. In 1887 Mr. Higbie began another divorce suit in Nebraska on the ground of desertion. Mrs. Higbie answered, and set up a cross bill for divorce on her part. Mr. Higbie sought to dismiss the case on the ground that he had become a resident of Minnesota. His motion the court denied. In 1888 Mr. Higbie's bill for divorce was dismissed, but the action was retained on the cross bill. In September, 1890, it was stricken from the docket on motion of Mr. Higbie. In June, 1887, while the Nebraska action was still pending, and while he was still a resident of this state, he swore to a complaint for divorce from Mrs. Higbie on the ground of desertion, and in July filed it in Hand county, Dakota territory, which is now in South Dakota. Later he made affidavit in which he stated he was a resident of Minnesota. Summons was served on Mrs. Higbie by publication. A copy was mailed to Mrs. Higbie by registered letter. Some one satisfied the postal authorities and received it. Plaintiff insists, and the trial court found, that the letter was sent to a place at which Mrs. Higbie did not reside, and that the service of summons was void for fraud. Defendant challenges the sufficiency of the evidence. The wife did not appear. The Dakota court entered a decree granting an absolute divorce in 1889. According to defendant upon the record it appears that Mrs. Higbie had no cause for desertion or divorce, that plaintiff had full knowledge of the decree of divorce rendered in the Dakota court for seven years, and that she is barred by her "acquiescence, trickery, artifice, cunning, and bad faith." The trial court found that Mr. Higbie was, at the time of the Dakota divorce proceedings and at all times here involved, a resi-

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dent of Minnesota. It granted plaintiff judgment. Some aspects of this case were before this court in Sammons v. Higbee, 103 Minn. 448, 115 N. W. 265. The present appeal involves two questions not there considered.

Of these the first is whether the decree of the Dakota court was subject to collateral attack under the circumstances of this case. The rule is settled beyond peradventure that "a decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the plaintiff's want of domicil, even when the record purports to show such jurisdiction." German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221. How universally this view of the law has been accepted will appear in cases collected in Benton's Succession, 59 L.R.A. 183, note. It is unquestionably the law in this state. Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108. And see Pollock v. Pollock, 9 S. D. 48, 68 N. W. 176; Smith v. Smith, 7 N. D. 404, 75 N. W. 783. No well-considered decision, as distinguished from a *dictum*, to the contrary, has been called to our attention.

The second question is whether the divorce decree should be given legal effect because of Mrs. Higbie's conduct subsequent to it. That decree, plaintiff insists, was clearly void because, first, of fraud in the service of the summons; and, second, of the nonresidence in Dakota of both the plaintiff and defendant. In the view of the case we take, the second of these reasons only need be considered. It is decisive of the issues. Defendant places emphasis upon the fact that neither the cause of morality nor interest of the public is involved, since both parties are dead, and that this is a controversy about property interests only, to which principles peculiar to divorce proceedings should not be applied. They insist that the decree was voidable only, and that, under the circumstances presented by this record, it must stand.

None of the many authorities to which they have directed our attention justify this conclusion, in letter or in spirit. In none of them were both the parties nonresidents of the state the court of which granted the divorce. In all but one of them, after a summons had been duly served, and after proper proof had been adduced, and after all the required subsequent proceedings had been lawfully observed, a valid decree could have been entered. The proposition in which they fairly result, is: Where a decree of divorce by a court within the jurisdiction of which the person seeking a divorce was a resident at the times involved is voidable only, because of fraud in connection with the service of the summons or the conduct of the case, the victim of the fraud, by unexplained delay lasting until after the death of the perpetrator of the fraud, or by other conduct operating as a waiver or estoppel, may be prevented from successfully asserting a right to a distributive share of the estate of the original wrongdoer. Thus, in the leading case on the subject, Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831, nine years' unexcused delay, during which the plaintiff in the divorce proceeding had died, was held sufficient to validate the divorce, although the publication of the summons was secured by fraud and constituted an imposition on the court. In that case, however, the defendant lived in Ohio; but no question was raised that plaintiff lived in Michigan. If the defendant had appeared in the proceeding, a valid decree might have been entered. Defendant might have waived an improper service of summons by appearance. It was consonant with equity that her conduct subsequent to the decree constituted a waiver. In none of the cases to which defendant has referred us,—and we have examined them all,—did it appear that the plaintiff was not a resident of the state in which the court granted the divorce. Some of them were cases of fraud in connection with the service of summons. Zoellner v. Zoellner, supra; Earle v. Earle, 91 Ind. 27; Everett v. Everett, 60 Wis. 201, 18 N. W. 637; Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105; Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082; Marvin v. Foster, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484. Indeed, in Maher v. Title Guarantee & T. Co. 95 Ill. App. 365, there was "colorable jurisdiction." At page 373 the court said: "The decree was not void for want of jurisdiction of appellant, or because of want of power" on part of the court to entertain an application for divorce and to proceed to a decree. The proceedings of the court were at the most erroneous. In Gilbert v. Reynolds, 51 Ill. 513, no notice had been served and no appearance entered. In Re Brigham, 176 Mass. 223, 57 N. E. 328, the charge was that evidence in the divorce proceeding had been suppressed by fraud and collusion. "The jurisdiction was undoubted and complete." In Nicholson v. Nicholson, 113 Ind. 132, 15 N. E. 223, both parties were residents of the proper state. The fraud consisted of inducing the noninterposition of a defense. Promise to dismiss was broken. And see Larimer v. Knoyle, 43 Kan. 338, 23 Pac. 487; Johnston v. Sharpe (Tex. Civ. App.) 34 S. W. 1006 (where the answer was filed by an attorney without the authority of defendant, then a nonresident); Arthur v. Israel, 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81 (where the

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wife, after learning of the decree, married another man); Mohler v. Shank, 93 Iowa 273, 34 L.R.A. 161, 57 Am. St. Rep. 274, 61 N. W. 981 (where the same feature appeared); Hurley v. Hurley, 117 Iowa, 621, 91 N. W. 895; Sloan v. Sloan, 102 Ill. 581 (an unauthorized action). In Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342, the husband resided in that state, and brought suit in the courts of that state, but not in the right county. This case is the only one cited by defendant which tends to support his contention.

Plaintiff insists that the divorce was "an absolute nullity, a mere *brutum fulmen*," of no force whatever, and incapable of having any legal effect given to it. Both principle and authority are strongly persuasive of the soundness of that proposition. But if a defendant in such irregular divorce had married, had had offspring, and had died after the death of the plaintiff, would a court bastardize the innocent children? Or if after the decree the defendant had attempted, successfully or unsuccessfully, to kill the plaintiff, and then died after his decease, would she transmit a right to his estate? The question whether, under any possible circumstances of extreme aggravation, the subsequent conduct of the defendant in the divorce proceedings could validate the improper decree, or operate as an estoppel against one claiming a distributive share of the estate of plaintiff therein, it is not necessary to here decide. For, assuming that there might be such circumstances, the record now before us certainly does not disclose them.

In this case, Higbie himself was guilty of deliberate fraud upon his wife and upon the court. The trial court found, and was justified in finding, that neither husband nor wife had at any time been a resident of or domiciled in the territory of Dakota or in the state of South Dakota, and that Mr. Higbie never had any bona fide intention of removing thereto, but went there temporarily for the sole purpose of instituting the divorce action. This was not "a mere irregularity." A deliberate perjury as to a prerequisite to jurisdiction was involved. Mr. Higbie could not have come into equity with clean hands. Those claiming under him are in no better position. Nor was the alleged misconduct of Mrs. Higbie by any justifiable reasoning sufficient to have confirmed the decree, or to have estopped her, or persons through her, from claiming a distributive share of the husband's estate. She had never married again. She had stopped the first divorce in Dakota. She had appeared in the second proceeding, in Nebraska. Knowing that her husband lived and continued to live in Minnesota, she was not bound to follow him into any other jurisdiction, remote or near, in which he might attempt to perpetrate an outrage on the courts and fraud on her. Her mere inaction until the time of actual knowledge of the existence of the decree is immaterial and insignificant. What she did afterwards did not validate the divorce. The unvarnished substance of her alleged misconduct is that she defaulted in the performance of her conjugal duties, that she contributed none of the aid of a wife to build up this estate, that she slept on her rights, and that, according to the verbal testimony of a real-estate agent, whose remembrance was indefinite, she once wrote a letter, which was not produced, wherein she claimed to have been divorced from her husband and to own certain property as a *feme sole*. Defendant's conclusion is that the time-honored trio, "conscience, good faith, and reasonable diligence, were wanting in her conduct." If there were no other considerations presented in this case, it is clear that the divorce was not validated by her conduct. It appears, however, that Mr. Higbie's words and actions to his wife were brutal, and justified her in living apart from him, and that she notified persons engaged in buying land from Mr. Higbie that she was still his wife. She was not shown to have signed any deed as a single woman. The trial court, indeed, found that she never, at any time after such pretended divorce, acquiesced therein, or held herself out as a single woman, but, until the death of her husband, at all times claimed to be his wife. She always insisted that the Dakota divorce was a fraud. It necessarily follows that the judgment of the trial court must be and is hereby sustained.

In this view of the case it would be a work of supererogation to consider the merits of defendant's further contention that judgment previously rendered in the probate court operated as an estoppel.

Affirmed.

A petition for rehearing having been filed, **Jaggard**, J., on July 2, 1909, handed down the following additional opinion.

Defendants' motion for reargument proceeds on the express assumption that the original opinion herein was based on two points not represented nor argued. In point of fact, that decision rests on two simple and unmistakable propositions, elaborately argued orally and on briefs, on which the decision of the trial court rests, *viz.*: First, that the invalid Dakota divorce decree was subject to collateral attack; second, that the wife's conduct subsequent to the decree did not operate to validate it. The opinion did set forth that a group of authorities in

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defendants' brief sustained not the proposition for which they were cited, but another which was there formulated, namely, that the conduct of a spouse, including laches, subsequent to the granting of a divorce decree invalidated by fraud in the service of summons or in the course of the trial, may estop representatives of such person from claiming a distributive share in his estate. Defendants insist, however, that the cases to which reference will be immediately made sustain the position that delay for a sufficient period to attack a decree of divorce void because neither of the parties was a resident of the jurisdiction rendering the decree may by estoppel prevent any question as to its validity.

We did not refer in the original opinion to Re Ellis, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056, because it does not purport at all to be of the class of cases to which the instant controversy belongs. There the divorce was obtained by collusion to confer jurisdiction. The divorced husband died. The parties to the controversy concerning his estate were his divorced wife, who alleged the invalidity of the decree, a woman whom he had married after the divorce, who asserted its validity, and a sister and a brother, claiming under the will. The trial court found for the second wife. This was affirmed. In the case at bar neither of the parties had married again. The intervening rights of third parties were not involved. Defendants themselves called our attention to the principle that the courts, in motions to vacate judgments, proceed with great caution and anxious care of the intervening rights of strangers. Black, Judgm. 321. Moreover, at page 410 of 55 Minn. Gilfillan, J., says: "When, as between whom, and to what extent is such determination [of residence of the parties] binding in the state in which the parties are in fact residents? . . . First, in proceedings between the state of the parties' actual residence and one of the parties; second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, in proceedings between the parties, when both voluntarily appeared in the action in which the divorce was granted and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. In the second class of cases it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it. The decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment." The decision tends to sustain our original conclusion.

In Hurley v. Hurley, 117 Iowa, 621, 91 N. W. 895, it did not appear and was not found that the husband was a nonresident when he obtained a divorce. Moreover, the rights of third persons had intervened. In McNeil v. McNeil (C. C.) 78 Fed. 834, the opinion was oral and rested on the proposition that, "McNeil not having been a resident of the state for a year when he brought his suit for divorce, the court had no jurisdiction. This, however, is not apparent on the record, and hence a judgment cannot be said to be void on its face and therefore subject to attack at any time." This rule, as has appeared in the original opinion, is distinctly not the law, either in the Federal courts or in this court.

For the first time our attention is now called to Reed v. Reed, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720. It fails, for a number of reasons, to support defendants' contention. It suffices for the present to point out that the law in Michigan accords with the opinion previously expressed in the original opinion. In O'Dell v. Goff, 153 Mich. 643, 117 N. W. 59, the testator had obtained a divorce in Indiana from contestant's mother. The undisputed evidence in the case proved that at this time the testator resided in Michigan. The judgment was held to be void *ab initio*, and that defendant in the proceedings to obtain it had a right to disregard proceedings therein of which she had notice. Carpenter, J., said: "The controversy was being tried by a court which possessed no jurisdiction, and she was pursuing a course which she had a lawful right to pursue by paying no attention to the steps that were taken therein."

Former opinion adhered to.

Brown, J., dissenting:

I dissent. A careful consideration of the merits of this case, after reargument, leads me to the conclusion that a reversal should be ordered. The opinion of the court states all the facts, and the reasons for my conclusions are, in brief, as follows:

The judgment of divorce, though void in fact, was valid on its face, and a certified copy thereof was personally served on Mrs. Higbie many years before her death, yet she took no proceedings to have it set aside, and to this extent at least she acquiesced therein. If both parties had voluntarily appeared before the Dakota court in which the action for divorce was brought, and submitted to its jurisdiction, they would have been bound by the judgment, although the court, by reason of the fact that both were nonresidents, had no jurisdiction of the subject-matter of the action,—the marital rela-

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tions between them. Re Ellis, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056. If in such a case the parties conclude themselves by their personal appearance, it is a little difficult to see why a long-continued acquiescence by one of them, with full knowledge of a judgment obtained by a court of a state having no jurisdiction of the subject-matter, but valid on its face, would not be equally effective against him. Reed v. Reed, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720; McNeil v. McNeil (C. C.) 78 Fed. 834; Earle v. Earle, 91 Ind. 27.

In this particular case, the parties had resided apart for a long number of years,—Higbie in Minnesota, and Mrs. Higbie in New Jersey. The divorce judgment was entered by the Dakota court in 1889, and the wife, though immediately served with notice thereof, permitted it to remain unchallenged, and never in any proceeding did she question its validity before her death, in 1906, a period of sixteen years. Higbie died in 1905. Under such circumstances it would seem at least equitable and just that the rights of the heirs, the only persons now before the court, should be tested in the light of and guided by the status of the relations of the Higbies as fixed and settled by the judgment for divorce, valid on its face, which they voluntarily chose to abide by and acquiesce in for sixteen years prior and up to the time of their death, namely, not husband and wife. And this the Ellis Case sustains.

I am authorized to say that Chief Justice Start concurs in this view of the case.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Appt.,
v.
DULUTH BOARD OF TRADE et al., Respts.

(107 Minn. 506, 121 N. W. 395.)

Monopoly — combinations prohibited — intent — effect.

1. A combination, contract, or understanding, the direct and necessary effect of which is to stifle or restrict competition in trade or business, violates the anti-trust statute (chapter 359, p. 487, Gen. Laws 1899; Rev. Laws 1905, § 5168), whatever may have been the intention of the parties.

Same — indirect restriction.

2. A combination, the main purposes and effects of which are to foster the trade and increase the business of those who make and operate it, and which only indirectly and remotely restricts competition in trade or business, is not a "combination and conspiracy in restraint of trade," within the meaning of the statute.

Same — charges for personal services.

3. An agreement or combination for the purpose of fixing and determining the value of wages or other charges for personal services is not within the prohibitions of the statute.

Same — combinations to promote fair dealing.

4. A combination formed by dealers in articles of a similar nature in a particular locality for the purposes of fairly regulating the methods of conducting business and providing rules for fair dealing among members, but which exercises no improper control over nonmembers, and does not control prices or production, is not in contravention of the statute.

Same — uniform commissions.

5. Rule 26 of the Duluth Board of Trade, which provides that all members of the board shall charge a uniform and determined rate of commission for selling grain for nonmembers, and provides penalties for the violation of such rule, is not in violation of the Minnesota anti-trust statute.

Same — conspiracy.

6. The Duluth Board of Trade, as constituted under its charter and rules, is not a conspiracy or combination in restraint of trade, or which restrains, limits or interferes with free competition in the production of grain, or in the purchase and sale of grain at Duluth.

Same — uniform commissions.

7. Rule 26 of the Duluth Board of Trade does not violate the Minnesota anti-trust

Headnotes by ELLIOTT, J.

23 L.R.A. (N.S.)

Case Note. — Is combination to control the price of labor or other personal service per se a violation of statute against trusts and monopolies.

This note is confined to cases considering the question whether a combination to control the price of labor or other personal service is *per se* a violation of statutes against trusts and monopolies, without reference to the means resorted to to accomplish the end sought. Cases recognizing the legality of a combination to control the price of labor, but holding that the particular means resorted to to accomplish the end in view were within the inhibition of particular statutes, are therefore excluded. People v. McFarlin, 43 Misc. 591, 18 N. Y. Crim. Rep. 412, 89 N. Y. Supp. 527, is typical of the line of cases excluded. There, although the Penal Code expressly declared to be lawful the orderly and peaceable assembling or co-operation of employees to obtain an advance in wages, yet it was held to be unlawful for employees, in an attempt to secure this end, to violate another section of the Penal Code, by conspiring together to prevent another from exercising a lawful trade or calling, or committing acts injurious to trade or commerce by

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statute, as its direct and necessary tendency is neither to restrain trade by preventing competition in the business of buying and selling grain, nor to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture or use bought and sold within the state, nor to prevent or limit competition in the purchase and sale thereof.

Same — competition — suppression.

8. The rules of the Duluth Board of Trade do not create, or tend to create, a monopoly. Trade and commerce are monopolized when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations, acting together, that they have power to practically control the prices of a commodity, and to thus practically suppress competition.

Appeal — monopoly — prosecution — rights of state.

9. In a proceeding by the state against a corporation and its officers, charging them with the violation of the anti-trust statute, the state may appeal from a judgment in favor of the defendants.

(May 7, 1909.)

APPEAL by the State of Minnesota from a judgment of the District Court for St. Louis County in defendants' favor in a proceeding to forfeit the franchise of the defendant corporation. Affirmed.

Statement by Elliott, J.:

In this proceeding the state seeks to forfeit the corporate franchise of the Duluth Board of Trade, and to restrain it and its officers from further transacting business under the present rules, on the ground that they violate the anti-trust statute of the state. The appeal is by the state from a judgment in favor of the defendants, and the record presents the question whether the conclusions of law are justified by the findings of fact. The facts stand conceded. It appears that the Duluth Board of Trade was incorporated January 31, 1881, under chapter 20, p. 35, Gen. Laws 1868, and now has and exercises the powers conferred by Gen. Stat. 1894, §§ 2982–2984, inclusive. The Minnesota Farmers' Exchange is a corporation organized under the laws of the state of Minnesota, having its office and principal place of business at Minneapolis,

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means of threats, intimidations, strikes, or boycotts.

Very little direct authority is to be found upon the question here under consideration. The few cases, however, wherein the question has been considered, are in harmony with the conclusion reached in the case under review. As a general proposition, a combination among laborers for any beneficial purpose, including the securing of higher wages, is not unlawful at common law, at least, as applied in this country and by the later English cases. On the other hand, combinations to create a monopoly and enhance the price of such merchandise, commodities, etc., as come under the term, "necessities," are unlawful at common law. Hence, statutes making combinations unlawful which tend to enhance or control the price of merchandise, commodities, etc., are generally only declaratory of the common law on the subject, and do not extend the scope of the common-law inhibition against combinations and monopolies, unless the language used expressly shows an intent so to do. Therefore, such statutory provisions will not be construed to include combinations to control the price of labor or other personal service, unless the language of the statute clearly embraces such combinations. Such words as "merchandise," "commodities," etc., in describing combinations within the inhibition of the statute, do not cover combinations to control the price of labor or personal services. Rohlf v. Kasemeier, post, 1284; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 A. & E. Ann. Cas. 280; Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40; Lohse Patent Door Co. v. Fuelle, 215 Mo. 23 L.R.A.(N.S.) 421, 22 L.R.A.(N.S.) 607, 114 S. W. 997; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A.(N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092.

With the exception of Rohlf v. Kasemeier, the foregoing cases, while sustaining the doctrine as stated, did not consider the question where raised in a prosecution under such statutes on the claim that combining to control the price of labor or other personal service is a crime within the purview thereof.

In Hunt v. Riverside Co-op. Club, supra, an injunction was issued, to restrain a combination of plumbers and manufacturers of plumbers' goods to control the price of plumbing material and labor, and the combination, so far as the control of the price of material was concerned, was held to be within the terms of such a statute, and unlawful. The court, however, said that an agreement fixing and regulating the price of labor alone was not within the provisions of such a statute.

So, in Jacobs v. Cohen, supra, in holding that a contract by a manufacturer to employ only members of a particular labor union as laborers was not within the terms of such a statute, the court said that the right of workingmen to unite and organize for the protection of their interests and welfare was not denied, and added: "Their right to combine and to co-operate for the promotion of such ends as the increase of wages, the curtailment of hours of labor, the regulation of their relations with their employer, or for the redress of a grievance,

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with power to own and operate mills for the manufacture of flour and other mill products, and to deal in grain, farm, and dairy products, live stock, meats, agricultural implements and machinery, coal, lumber, and other articles.

The city of Duluth is one of the important terminal grain markets in the Northwest, and in the immediate vicinity thereof are found elevators, flour mills, and proper equipment for handling and marketing grain and other farm products. The board of trade does not buy, sell, or in any way deal in grain. Not more than 20 per cent of those holding membership in the board are engaged in the grain or milling business at Duluth. Some are engaged in banking, marine insurance, and vessel agency business of Duluth, while others are engaged in the grain and other business outside of Duluth. The board merely furnishes facilities and conveniences for the transaction of the grain business, and to that end procures for its members information as to crop conditions and the grain markets of the world. It owns a building, of the value of $500,000, in which there is an exchange room, where actual trades are made and posted, and where grain is bought and sold. Persons engaged in the grain commission business, and others connected with vessel agencies and marine insurance, have their offices in this building. Two classes of commission men—those who sell for the owner grain coming into Duluth and those who buy for the consumer at Duluth or Superior, or for transportation to lower lake ports or for foreign exchange—transact business on the floor of the board of trade. Practically all the grain bought and sold at Duluth is bought and sold on the board of trade, although some little grain, used for local consumption, is handled elsewhere.

The memberships in the board of trade, which originally cost $1,000 each, have all been disposed of, and are now held by various individuals. They are subject to sale, and the owners may become members of the board of trade upon certain terms and conditions prescribed by the board. The Minnesota Farmers' Exchange never applied for membership in the Duluth Board of Trade, and neither the board nor its officers or members in any manner conspired or combined to prevent the Minnesota Farmers' Exchange from having its grain handled or dealt in on the board, by threatening to boycott any member who might venture to handle its grain, or otherwise. Rule 27 of the board of trade provides that regular sessions shall be held from 9:30 A. M. to 1:15 P. M. daily, except Saturday, when trading shall cease at 12 o'clock noon, and that no firm, member, or corporation shall buy or offer to buy, sell or offer to sell, any grain or seed on track, by sample or to arrive, except during such

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is justifiable. Their combination is lawful when it does not extend so far as to inflict injury upon others, or to oppress and crush them by excluding them from all employment unless gained through joining a labor organization or trades union. This we have decided, and this the law of the state sanctions." The majority opinion of the court does not clearly pass upon the legality of a combination of labor within such a statute, but the dissenting opinion of Justice Vann makes it clear that that question was before the court and passed upon.

In Cleland v. Anderson, supra, the question whether an exception of combinations of laborers from the operation of such a statute would render the statute unconstitutional was decided in the negative. The court said of such a statute: "In its letter and spirit, it refers only to combinations and conspiracies of persons engaged in the manufacture, sale, and transportation of goods, wares, and merchandise, to prevent or hinder competition, and regulate and control prices. No express exception of organizations of laborers intended to maintain or advance wages was necessary to exempt them from its operation. The section in question is inserted rather out of abundance of caution, to prevent judicial extension of the terms of the act beyond its scope and purpose, than to grant a privilege or immunity to persons who would otherwise fall within its terms. The distinction between goods and merchandise produced by skill and labor and the skill and labor which produce them is manifest and reasonable. The statute does not say that laborers who have goods, wares or merchandise, the product of labor, for sale, may combine to advance or control the price, but only that the law designed to prevent combinations in restraint of trade in such articles when produced shall not be construed to affect organizations formed to regulate the wages or compensation of the labor and skill which produce them."

But compare Niagara F. Ins. Co. v. Cornell, 110 Fed. 816, which held that the same statute was unconstitutional, because, by excepting labor organizations from its provisions, it denied the equal protection of the laws to all persons not members of such organization.

A conclusion to the contrary was also reached in People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 236, 66 N. E. 349, which hold unconstitutional and void, an amendment to an anti-trust law making an exception in favor of combinations the principal object or effect of which was to maintain or increase wages. In reaching this conclusion, the court followed Connolly v. Union Sewer Piper Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, which held such a statute unconstitutional, because it improperly discriminated in favor

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trading hours and on the floor of the exchange.

The state charges that the board and its officers have violated the anti-trust statute by adopting and enforcing what is known as "Rule 26," which is as follows:

"The following rates of commission are deemed to be just and reasonable.

"Grain, etc.

"Section 1. Receiving and selling on arrival, to arrive, or for some future month's delivery: Wheat, barley, rye, and flax, 1 cent per bushel; Durhum wheat, 1 cent per bushel; corn and oats ½ cent per bushel; mill stuffs, 50 cents per ton; ground feed, 50 cents per ton; hay, 50 cents per ton, except that the minimum charge on hay shall be $5 per car. On sales to arrive, where delivery is not made, one half of the above commission shall be charged.

"Sec. 2. Buying and shipping in cars in lots of less than 5,000 bushels: Wheat, barley, rye, and flax, 1 cent per bushel; corn and oats, ½ cent per bushel. In lots of 5,000 bushels or more, not less than ½ cent per bushel.

"Warehouse Receipts.

"Sec. 3. Buying lots of not less than 5,000 bushels ¼ cent per bushel; no charge for selling same receipts. Selling warehouse receipts, lots not less than 5,000 bushels, ¼ cent per bushel; lots less than 5,000 bushels, ½ cent per bushel.

"For Future Delivery.

"Sec. 4. Buying and selling ⅛ cent per bushel on lots of 5,000 bushels or more, ¼ cent per bushel on lots of less than 5,000 bushels. Where delivery of warehouse receipts is made on such contracts, ¼ cent per bushel.

"Sec. 5. Between members of the Duluth Board of Trade, the rates of commission may be arranged without restriction.

"Sec. 6. In addition to the above, there shall be charged such legitimate expenses as are necessarily incurred in caring for the property and guarding the interests of both consignor and consignee, including interest on advances. Interest shall be charged on all advances made to country shippers or members of other exchanges.

"The minimum rate to be fixed each year during August, for one year, by a committee of three, appointed by the president. Nothing in this rule shall be so construed as to prevent any special arrangement between consignor and consignee, by which a higher rate of commission or interest may be charged in special cases.

"Sec. 7. Every member of the association, and every person, firm, and corporation ad-

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of agricultural products or live stock in the hands of the producer or raiser. The Illinois court made no distinction between such an exception and an exception as to combinations to control and regulate the price of labor. It is also to be noted in this connection that, according to the common-law rule as applied in Illinois, a combination to control or regulate the price of labor is as unlawful a monopoly as is a combination to regulate and control the price of any merchandise or commodity. More v. Bennett, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888.

State ex rel. Star Pub. Co. v. Associated Press, supra, held a combination for the purpose of gathering news and disposing of it was not within such a statute, because it related to personal services. On this point the court said: "There is nothing here on which a monopoly can attach. The business is one of mere personal service,—an occupation. Unless there is 'property' to be 'affected with a public interest,' there is no basis laid for the fact or the charge of a monopoly." And see Lohse Patent Door Co. v. Fuelle, supra, wherein the foregoing case is cited and quoted from with approval on this point.

But see Froelich v. Musicians Mut Ben. Asso. 93 Mo. App. 383, wherein a combination among professional musicians to regulate and control prices to be charged for their professional services was said to 23 L.R.A.(N.S.)

be an unlawful monopoly, because in restraint of trade.

Also State v. Wilson, 73 Kan. 343, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737, wherein an agreement among persons engaged in buying and selling cattle at a given point, tending to restrict competition in such work, and to fix and regulate the compensation therefor, was held to be within the terms of a somewhat similar statute, and therefore illegal. This decision, however, was based upon a provision in the statute, invalidating contracts tending to create a restriction in trade or commerce, and in the full and free pursuit of a business authorized and permitted by the laws of the state. This agreement was treated as relating to a business rather than to personal services, and the court did not consider the question here under consideration. The case comes very close to a line of cases not included herein, relating to the validity of combinations of laborers who conspire actively to interfere with trade or interstate commerce, including such cases as Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815, which held that combinations of laborers to boycott goods which were subjects of interstate trade and commerce came within the Federal anti-trust act against combinations affecting interstate trade or commerce.

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mitted to trade, or to do business therein, who shall charge less than the regular rates of commission and interest established by the rules of the association, or shall assume, or rebate any portion of the same, or shall, with intent to evade in any way, directly or indirectly, the regular rate of commission established by the rules of the association, or shall with intent to cut, or to evade in any way, directly or indirectly, the regular rates of commission established by the rules of the association, purchase, or offer to purchase, any grain or seed on track, at any railway station outside of and for delivery at the city of Duluth or Superior, or who shall purchase, directly or indirectly, for his own account or otherwise, from any person not a member of the association, any grain, seed, or other commodity dealt in upon the board, without charging and deducting from the purchase price the regular rates of commission and interest, if any, established by the rules of the association, or shall make or report any false or fictitious sales or purchases, or shall resort to any method of accounting, directly or indirectly, in violation of or contrary in purpose, and effect to a strict adherence to the regular established rates of commission of the association, or shall, with intent to evade the regular rates of commission established by the rules of the association, directly or indirectly pay or give, or offer so to do, any money or other consideration of whatsoever nature, to any person, to procure or influence shipments or consignments of grain or seed in any form, or shall, with intent to cut or evade in any way, directly or indirectly, the regular rates of commission established by the rules of the association, make use of any shift or device whatsoever, shall be deemed guilty of violation of the rules of the association establishing rates of commission, and, on conviction thereof, shall be fined by the association not less than $1,000 nor more than $2,000, as the board of directors may determine, such sum to be paid into the general fund of the association.

"Sec. 8. Any member of the Duluth Board of Trade, who shall become the agent of, or who shall handle grain on commission; or otherwise, for any person, firm, or corporation, when such person, firm, or corporation is known to be buying or handling, or has attempted to buy or handle, grain for less rates of commission than provided in this rule, such member shall be considered as having violated this rule, and be held subject to the penalties prescribed.

"Sec. 9. Any charge of the violation of the foregoing provisions, or any part thereof, shall be by complaint in writing, filed with the secretary of the association. The party charged shall be summoned by written notice from the secretary, and shall appear before the board of directors of the association, who shall investigate and try the charge.

"Sec. 10. The board of directors shall offer a reward, not exceeding $1,000, to any person who shall furnish evidence that does convict any member of the Duluth Board of Trade, or any firm, corporation, or party admitted to trade or to do business in the Duluth Board of Trade, of a violation of the established rates of commission; the object of this rule being to prevent the demoralization resulting from the giving, either directly or indirectly, of compensation to station agents, elevator agents, bankers, brokers, merchants, or any other parties, at any locality whatsoever to influence shipments or consignments of grain. But this rule shall not prevent the regular employment, by members of this association, of traveling men, but shall prohibit a division of commissions with such traveling men who are not resident members of this association.

"Sec. 11. Any member of the Duluth Board of Trade may at any time submit in writing to the board of directors any question for interpretation under this rule, and the question and its interpretation shall be posted on the board for at least ten (10) days, and henceforth be, to all intents and purposes, a part of this rule."

Rules substantially like those of the Duluth Board of Trade, relating to the qualifications of members and the manner of their admission, fixing a minimum rate of commission that may be charged upon transactions for nonmembers, allowing rates and commissions between members to be arranged without restriction, providing for and charging interest upon advances, regulating the trading upon the floor of the exchange, and providing penalties by expulsion or suspension for violation of the rules, have been in force for many years in similar exchanges in New York, Philadelphia, Boston, Chicago, Minneapolis, Milwaukee and elsewhere.

Messrs. **E. T. Young**, Attorney General, and **George W. Peterson**, for appellant:

The fact that the immediate result of the combination has been temporarily to reduce prices, or that it may reduce them, is immaterial in determining the legality of the combination, the court not being governed by the temporary effect upon the prices, but by the power of the combination to control them.

20 Am. & Eng. Enc. Law, p. 850; 27 Cyc. Law & Proc. p. 898.

All arrangements, in whatever form,

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which are designed to suppress competition, are in restraint of trade.

27 Cyc. Law & Proc. p. 899; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Slaughter v. Thacker Coal & Coke Co. 55 W. Va. 642, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 47 S. E. 247, 2 A. & E. Ann. Cas. 335; Herriman v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660; State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; People v. Milk Exchange, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785.

The test of illegality is not the intent with which a combination is ent ed into, nor its actual present effect, but the power it has or may have to produce the same or another or different effect in the future, such effect being restraint upon trade and commerce.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; United States v. Swift & Co. 122 Fed. 529, affirmed in 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

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mitted to trade, or to do business therein, who shall charge less than the regular rates of commission and interest established by the rules of the association, or shall assume, or rebate any portion of the same, or shall, with intent to evade in any way, directly or indirectly, the regular rate of commission established by the rules of the association, or shall with intent to cut, or to evade in any way, directly or indirectly, the regular rates of commission established by the rules of the association, purchase, or offer to purchase, any grain or seed on track, at any railway station outside of and for delivery at the city of Duluth or Superior, or who shall purchase, directly or indirectly, for his own account or otherwise, from any person not a member of the association, any grain, seed, or other commodity dealt in upon the board, without charging and deducting from the purchase price the regular rates of commission and interest, if any, established by the rules of the association, or shall make or report any false or fictitious sales or purchases, or shall resort to any method of accounting, directly or indirectly, in violation of or contrary in purpose, and effect to a strict adherence to the regular established rates of commission of the association, or shall, with intent to evade the regular rates of commission established by the rules of the association, directly or indirectly pay or give, or offer so to do, any money or other consideration of whatsoever nature, to any person, to procure or influence shipments or consignments of grain or seed in any form, or shall, with intent to cut or evade in any way, directly or indirectly, the regular rates of commission established by the rules of the association, make use of any shift or device whatsoever, shall be deemed guilty of violation of the rules of the association establishing rates of commission, and, on conviction thereof, shall be fined by the association not less than $1,000 nor more than $2,000, as the board of directors may determine, such sum to be paid into the general fund of the association.

"Sec. 8. Any member of the Duluth Board of Trade, who shall become the agent of, or who shall handle grain on commission; or otherwise, for any person, firm, or corporation, when such person, firm, or corporation is known to be buying or handling, or has attempted to buy or handle, grain for less rates of commission than provided in this rule, such member shall be considered as having violated this rule, and be held subject to the penalties prescribed.

"Sec. 9. Any charge of the violation of the foregoing provisions, or any part thereof, shall be by complaint in writing, filed with the secretary of the association. The party charged shall be summoned by written notice from the secretary, and shall appear before the board of directors of the association, who shall investigate and try the charge.

"Sec. 10. The board of directors shall offer a reward, not exceeding $1,000, to any person who shall furnish evidence that does convict any member of the Duluth Board of Trade, or any firm, corporation, or party admitted to trade or to do business in the Duluth Board of Trade, of a violation of the established rates of commission; the object of this rule being to prevent the demoralization resulting from the giving, either directly or indirectly, of compensation to station agents, elevator agents, bankers, brokers, merchants, or any other parties, at any locality whatsoever to influence shipments or consignments of grain. But this rule shall not prevent the regular employment, by members of this association, of traveling men, but shall prohibit a division of commissions with such traveling men who are not resident members of this association.

"Sec. 11. Any member of the Duluth Board of Trade may at any time submit in writing to the board of directors any question for interpretation under this rule, and the question and its interpretation shall be posted on the board for at least ten (10) days, and henceforth be, to all intents and purposes, a part of this rule."

Rules substantially like those of the Duluth Board of Trade, relating to the qualifications of members and the manner of their admission, fixing a minimum rate of commission that may be charged upon transactions for nonmembers, allowing rates and commissions between members to be arranged without restriction, providing for and charging interest upon advances, regulating the trading upon the floor of the exchange, and providing penalties by expulsion or suspension for violation of the rules, have been in force for many years in similar exchanges in New York, Philadelphia, Boston, Chicago, Minneapolis, Milwaukee and elsewhere.

Messrs. **E. T. Young**, Attorney General, and **George W. Peterson**, for appellant:

The fact that the immediate result of the combination has been temporarily to reduce prices, or that it may reduce them, is immaterial in determining the legality of the combination, the court not being governed by the temporary effect upon the prices, but by the power of the combination to control them.

20 Am. & Eng. Enc. Law, p. 850; 27 Cyc. Law & Proc. p. 898.

All arrangements, in whatever form,

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which are designed to suppress competition, are in restraint of trade.

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33 Atl. 1; Gladish v. Kansas City Live Stock Exchange, 113 Mo. App. 726, 89 S. W. 77; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; Warren v. Louisville Leaf Tobacco Exchange (Ky.) 55 S. W. 912; Mogul S. S. Co. v. McGregor, L. R. 21 Q. B. Div. 544; Gibbins v. Metcalfe, 15 Manitoba L. Rep. 560; Dos Passos, Stock Exchange, p. 25.

Elliott, J., delivered the opinion of the court:

The trial court found that the Duluth Board of Trade, as organized and conducted, is not an arrangement, conspiracy, or combination in restraint of commerce within the state; that it does not restrain, limit, interfere with, or destroy open and free competition in the purchase and sale of grain at Duluth; that competition between seller and buyer is active and free; that the board does not fix prices of grain, nor prevent nor limit competition in the purchase or sale of grain; but that the facilities which it furnishes are in aid of the traffic in grain from the point of production to the point of consumption.

1. The right of the state to appeal in a proceeding of this nature has been discussed by counsel at great length. The action is in form a civil proceeding, wherein the state seeks to obtain a judgment forfeiting the corporate privileges, powers, and franchises, dissolving the corporation, and disposing of its property, and enjoining the defendants and each of them from in any way continuing the alleged conspiracy, and from in any way interfering with, restraining, or limiting open and free competition in the sale and purchase of produce in the Duluth market or elsewhere. It is authorized by the statute, and is a civil proceeding, notwithstanding the fact that the statute makes the prohibited acts criminal. Without entering upon an extended discussion of the question, we sustain the right of the state to prosecute the appeal.

2. The finding that there has been no conspiracy or boycott against the Minnesota Farmers' Exchange, and that it never applied for membership in the Duluth Board of Trade, leaves but one question to be determined, and that is whether, by the promulgation of rule 26, and the transaction of business thereunder, the defendant has entered into a combination, contract, arrangement, or conspiracy in violation of chapter 359, p. 487, Gen. Laws 1899.

The public policy of this state with reference to combinations and agreements which tend to restrain trade and limit, restrict, or regulate the production, price, and distribution of articles of trade, manufacture, or use, has been declared by constitutional provisions and statutory enactments.

In 1888 there was embodied in the organic law of the state a declaration that "any combination of persons, either as individuals or as members or officers of any corporation to monopolize the markets for food products in this state, or to interfere with or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy, and shall be punished in such manner as the legislature may provide." Const. art. 4, § 35. In 1891 the legislature enacted a statute denouncing as illegal all combinations to fix prices or to control the production of any commodity. Gen. Laws 1891, chap. 10, p. 82. In 1899 the provisions of this statute were elaborated and re-enacted as chapter 359 of the General Laws of that year, which was in force when the present action was commenced. It provided that "any contract, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into, which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, or which limits or tends to limit or control the supply of any article, commodity, or utility, or the articles which enter into the manufacture of any article or [of] utility, or which regulates, limits, or controls or raises, or tends to regulate, limit, control, or raise the market price of any article, commodity, or utility, or tends to limit or regulate the production of any such article, commodity, or utility, or in any manner destroys, limits, or interferes with open and free competition in either the production, purchase, or sale of any commodity, article, or utility, is hereby prohibited and declared to be unlawful. . . .

"Any corporation heretofore or hereafter created, organized, or existing under the laws of this state, which shall hereafter either directly or indirectly make any contract, agreement, or arrangement, or enter into any combination, conspiracy, or trust, as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, forfeit its charter, rights, and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust, or monopoly, except as to the final disposition of its property under the laws of this state."

With the exception of a provision prohibiting boycotting (Gen. Laws 1901, chap. 194, p. 269), no further changes were made in the law until the adoption of the Revised Laws of 1905, in which the act of 1899 ap-

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pears in substance as §§ 5168 and 5169. Section 5168 provides that "no person or association of persons shall enter into any pool, trust agreement, combination, or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade within this state, or between the people of this or of any other state or country, or which tends in any way or degree to limit, fix, control, maintain, or regulate, the price of any article of trade, manufacture, or use, bought and sold within the state, or which limits or which tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do. Every person violating any provision of this section, or assisting in such violation, shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment in the state prison for not less than three nor more than five years."

A subsequent statute (Gen. Laws 1907, chap. 252, p. 342), makes it unlawful for persons or corporations handling grain at public warehouses in the state to enter into any combination, contract, agreement, or understanding with any other person or corporation owning or operating any other public warehouse at any railway station, whereby the amount of grain to be received or handled shall be equalized or pooled between such warehouses, or whereby the profits or earnings derived from such warehouses shall be divided or pooled or apportioned in any manner, or whereby the price to be paid for any kind of grain at such station shall be fixed or in any manner affected.

3. The Minnesota anti-trust law is framed along the lines of the Federal statute, although it is more diffuse. It may fairly be assumed, however, that the general purpose of all statutes of this kind is the same, and we may therefore properly look to the decisions made under Federal and state statutes of a similar character for the principle by which to construe our own statute. Minnesota v. Northern Securities Co. (C. C.) 123 Fed. 692. The first clause or part of the statute prohibits agreements and combinations in restraint of trade, thus following the language of § 1 of the Federal statute (act July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200). This general language is then followed by provisions which specifically forbid combinations or agreements which tend in any way to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use, bought and sold within the state, or which prevent or limit competition in the sale or purchase of the same. The statute thus specifically refers to such agreements as affect the price or production of articles of the kind named, or competition in the purchase and sale thereof.

We have reached the conclusion that, in view of the statutory powers of the Duluth Board of Trade, the nature of its business, and the services for which the uniform charges are required to be made, the agreement embodied in rule 26 does not constitute a combination, contract, or understanding in restraint of trade or commerce within this state, nor does it tend to limit, fix, maintain, control, or regulate the price or production of any article of trade, manufacture, or use, or to prevent or limit competition in the purchase or sale of the same, within the purview of the anti-trust statute. All cases of this character must be determined and controlled by their own facts; and before examining the anti-trust statutes and decisions, for the purpose of trying to find some controlling principle, it may be well to ascertain the statutory powers of the Duluth Board of Trade, the nature of its business, and the conditions under which it is carried on.

In 1868 (Laws 1868, chap. 20, p. 35) the legislature enacted a law which authorized any number of persons, not less than three, in any town or city having a population of more than 3,000, to proceed according to the provisions of title 111, chap. 34, Gen. Stat. 1866, for the organization of corporations for purposes other than pecuniary, to "associate themselves and become incorporated as a chamber of commerce or a board of trade for the purpose of advancing the commercial, mercantile, and manufacturing interests of such city or town, for inculcating just and equitable principles of trade, for establishing and maintaining uniformity in the commercial usages of said city or town, for acquiring, possessing, and disseminating useful business information, and for adjusting the controversies and misunderstandings which may arise between individuals engaged in trade, and for promoting the general prosperity of such city or town." The ordinary powers were conferred upon such corporations, and in addition thereto they were authorized to constitute committees of reference and arbitration and committees of appeals, to be governed by such rules and regulations as may be prescribed in the rules, regulations, and by-laws, for the settlement of matters of difference between members of the association and other persons not members. They were authorized to "examine, measure, weigh, guage, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said

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corporation, and the certificate of such person or inspector as to the quality or quantity of any such articles, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller of the quantity, grade, or quality of the same, and shall be binding upon the members of said corporation or others interested and requiring or assenting to the employment of such weights, measures, guages, or inspectors."

Chapter 20, p. 35, Gen. Laws 1868, was carried forward into Gen. Stat. 1878, where it became §§ 197–199, inclusive, of chapter 34. Chapter 37, p. 54, Gen. Laws 1881, amended § 2, chap. 20, p. 36, Gen. Laws 1868, and provided that corporations organized thereunder "shall have full power and authority to purchase, improve, hold, use, rent, mortgage, sell, and convey, such real and personal property as it may deem advisable, and may by resolution or by-law prescribe the terms and conditions of membership and the mode of admitting members, and in like manner may prescribe what officers it will have, their mode of election or appointment, and their functions and duties, and generally as to the management and transaction of all its business and affairs." In 1883 (Gen. Laws 1883, chap 138, p. 193) the legislature enacted a new statute, providing for the organization of chambers of commerce and boards of trade. This statute expressly legalized all such corporations which had been incorporated under chapter 20, Gen. Laws 1868, and chapter 37, Gen. Laws 1881, and conferred upon them all the power, authority, and jurisdiction conferred on such as should be organized under the new act. By this act the powers of such corporations were specifically stated and somewhat enlarged. The 1868 statute had provided that such corporations could be organized "for establishing and maintaining uniformity in the commercial usages of such city or town." The act of 1883 authorized their creation in counties, as well as in cities and towns,—the restriction as to population being retained,—and added, after "maintaining" the words "and enforcing." Fines for a breach of the rules, regulations, and by-laws might be imposed on the members and collected in the courts as in an action for debt. In 1887 (Gen. Laws 1887, chap. 87, p. 138) § 1 of the act of 1883 was amended so as to provide for the organization of chambers of commerce or boards of trade, or both, in any organized village, city, town, or county, without reference to the population thereof. The existing statute became §§ 2982–2984, inclusive, subtitle 7, title 3, chap. 34, Gen. Stat. 1894, and §§ 3112 et seq., Rev. Laws 1905.

The Duluth Board of Trade was organized January 31, 1881, under the 1868 statute, and two months before the enactement of chapter 37, Gen. Laws 1881. The articles of incorporation stated that (1) "the general nature of its business is to establish and maintain uniformity in commercial usages, to inculcate just and equitable principles of trade, to adjust controversies and business disputes, to acquire and disseminate valuable business information, and particularly to maintain a commercial exchange, and to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits. The principal place of the transaction of said business is in Duluth, St. Louis county, state of Minnesota." (2) "The qualifications and terms of membership in this corporation shall be subject to such by-laws and to such fees and assessments as may be fixed by the board of directors from time to time." By virtue of the provisions of the subsequent statutes its powers were made the same as similar corporations organized under the later law. It has continued to exist until the present time, and Rev. Laws 1905, § 2838, provides that "all private corporations existing and doing business at the time of the taking effect of the Revised Laws shall continue to exercise and enjoy all powers and privileges possessed by them under their respective articles of incorporation and the laws applicable thereto then in force. . . ."

It is through such organizations as the Duluth Board of Trade that the grain trade of the Northwest has been and now is largely transacted. The purposes for which such corporations may be created are stated in the statute and in the articles of incorporation of this defendant. The primary object is to furnish facilities for the proper conduct of business. The board of trade itself neither buys nor sells grain. It maintains an exchange room where the representatives of buyers and sellers meet and compete, and their competition results in trades in grain. It maintains telegraphic communication with other grain markets, and furnishes and posts information as to such markets and as to crop conditions generally. It has a building, in which its members engaged in the grain trade have offices, as do others who are connected more or less directly therewith. It is not claimed that the board fixes prices at which grain is purchased and sold. It collects and publishes statistics. It makes a market, in the sense that it keeps a record of actual transactions in the buying and selling of grain, thus making a Duluth market, in the sense that there is a Chicago and Minneapolis market. These things necessarily promote, instead of restrict, the grain trade. As said by the trial court, instead of limiting competition in

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the purchase and sale of grain, "the facilities which it furnishes are in aid of the traffic in grain, from the point of production to the point of consumption."

The nature of the grain business seems to require peculiar and unusual facilities for its transaction. The grain is brought by the producer to local stations, where it is placed in elevators or sold to local buyers. It must then be shipped to terminal points, like Duluth or Minneapolis, to be there disposed of on the market. These great central markets are essential, not only for the preservation and storing of the grain in large quantities, but also in order that the business may be financed. At about the same time in each year great sums of money are required for this purpose, and it is stated that the banks of Minneapolis and Duluth furnish each year to the grain men from $40,000,000 to $50,000,000. This money, which is absolutely necessary for the moving of the crops, cannot be obtained unless the business is so organized and conducted as to minimize the risks resulting from fluctuating prices. Through these organizations the demoralization of prices of the products which constitute the basis of credits is prevented. These markets also enable parties operating elevator lines and purchasing large quantities of grain to sell for future delivery on each day substantially the amount of grain which they purchase at interior points, thus reducing the hazards of the business, and enabling them to procure from financial institutions the funds necessary to move the crops.

The business of handling grain is of such a nature as to subject it to regulations which would be entirely unjustifiable if applied to a purely private business. It is because the business is of a quasi public nature that even the owner of a country elevator, who buys for himself alone, and is his own grader and weighmaster, may be required to secure a license from the state. State ex rel. Railroad & W. Commission v. W. W. Cargill Co. 77 Minn. 223, 79 N. W. 962, Id. 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. For the same reason, the legislature may make a weighmaster's certificate prima facie evidence of what is stated therein. Vega S. S. Co. v. Consolidated Elevator Co. 75 Minn. 308, 43 L.R.A. 843, 74 Am. St. Rep. 484, 77 N. W. 973. It may also require all persons who sell grain on commission to take out a license and execute a bond for the protection of persons who deal with them. State ex rel. Beck v. Wagener, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; State v. Edwards, 94 Minn. 225, 69 L.R.A. 667, 102 N. W. 697. See generally State ex rel. Stoeser v. Brass, 2 N. D. 482, 52 N. W. 408, Id. 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; New York & C. Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855. The fact that a business is affected with a public use does not, of course, exempt it from the operation of the anti-trust statute. But the general policy of the law, which requires uniformity of charges by persons engaged in such business, may well have a bearing upon the construction of the statute. These conditions, which are matters of general knowledge, must be taken into consideration in determining whether the legislature, when it enacted the anti-trust statute, intended to interfere with the well-understood workings of boards of trade and chambers of commerce, which had been organized under statutes designed to afford proper facilities for the marketing of grain and other produce.

The legislatures and courts recognize that such organizations serve a useful and proper purpose in modern business communities, and no disposition has been shown to unduly restrict the exercise of their corporate powers and functions. Evans v. Chamber of Commerce, 86 Minn. 448, 91 N. W. 8; McCarthy Bros. Co. v. Chamber of Commerce, 105 Minn. 497, 21 L.R.A.(N.S.) 589, 117 N. W. 923. The Duluth Board of Trade was organized long before the enactment of the anti-trust law, under a statute which expressly authorized such corporations. Both statutes were subsequently embodied in the Revised Laws. The anti-trust statute applies to all persons, associations, and corporations, and the members thereof; but it should not be construed so as to destroy or cripple a legitimate, legally authorized business, unless such clearly appears to have been the legislative intention. But if the Duluth Board of Trade is transacting its business in a manner which is against the public policy of the state, it must change its methods or cease doing business. In order to determine what is forbidden by the statute, it is necessary to examine the common law and the statutes by which it has been declared and supplemented, as well as the construction which has been placed thereon by the courts. The evils sought to be remedied are general, and the statutes, national and state, are similar in purpose, though somewhat diverse in form.

4. To say that a combination restrains trade and prevents competition is a repetition of the same idea,—the giving of two names to the same thing. Whatever restrains trade prevents competition, and whatever prevents competition in trade nec-

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essarily restrains trade. The word "monopoly," which plays so great a part in the law, conveys the same idea, because where there is monopoly there can be no competition. Production, and hence prices, are under the control of the monopolist, to the possible and probable injury of the public. Freedom of trade requires competition. Without one the other cannot exist, and whatever restrains the one restricts the other. It is true that unrestrained and unregulated competition may destroy what it is designed to preserve; but the theory of law and legislation still is that the welfare of the public requires that competition in trade and commerce shall exist, in order that freedom of trade may be maintained. To understand the language of the statute, it is necessary to know something of its history. The contract in restraint of trade, which originally fell under the condemnation of the common law, was one whereby a party bound himself not to follow some particular occupation, trade, calling, or profession, or to engage in some particular business for a period within a particular territory. From the earliest time the policy of the English law has been to discourage these voluntary restraints which tradesmen were induced to impose upon themselves, because they intended to deprive the community of the services of one of its members, and frequently tended to create a monopoly, and thus destroy the freedom of trade.

An early, and possibly the first, case in which a contract of this character was held void was decided during the reign of Henry V. Year Book, 2 Hen. V. (1415). It appeared that a dyer had bound himself not to exercise his trade for six months in the same town with the plaintiff. After holding the contract void, the court indignantly exclaimed: "Per Dieu! If the plaintiff were here, he should go to prison until he had paid a fine to the King!" In 1602, in Colgate v. Bacheler, Cro. Eliz. pt. 2, p. 872, it was said that it was against the law "to prohibit or restrain any to use a lawful trade at any time or at any place; for as well as he may restrain him for one time, or one place, he may restrain him for longer times and more places, which is against the benefit of the commonwealth." The reasons assigned for the invalidity of such contracts were that they disabled a man from acquiring a livelihood, thus depriving the community of the benefit of his labor, and possibly requiring it to support him and his family, and had a tendency to give the covenantee a monopoly of the trade from which he had thus excluded one competitor, and by the same means might exclude others. In the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, decided in 1711, Chief Justice Parker declared that the courts should not approve such contracts, because of the mischief which might arise from them to the party by the loss of his livelihood and the subsistence of his family, and to the public by reason of depriving it of a useful member, and also because they enabled parties to obtain exclusive advantages in trade by reducing it into as few hands as possible. These reasons are more fully stated by Mr. Justice Morton in Alger v. Thatcher, 19 Pick. 51, 31 Am. Dec. 119.

All restraints of trade were then thought to be unlawful; but in the course of time it was found that so rigorous and far-reaching a rule seriously interfered with ordinary everyday business transactions, and it was gradually relaxed until it is now the law of England and America that contracts in partial restraint of trade are valid, when reasonably necessary to protect the legitimate interests of the covenantee. It must, however, be a restraint which, under all the circumstances and conditions, is reasonable, and, as said by Tindal, Ch. J., in Horner v. Graves, 7 Bing. 735: "We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co. [1894] A. C. 535; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; National Ben. Co. v. Union Hospital Co. 45 Minn. 272, 11 L.R.A. 437, 47 N. W. 806; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419. As stated in a recent English text-book: "The sole test of the validity of a contract in restraint of trade is its reasonableness in the interests of the covenantee," subject to the proviso that "the covenant must not otherwise offend against public policy." Matthews & A. Restraint of Trade (1907) chap. 2, p. 39.

If a contract is unreasonable according to this test, it is invalid at common law; and this, in the particular case, may be because of either or both of the reasons given by the judges in the earlier cases. It restricts the freedom of the individual, limits his capacity to utilize his labor and skill for the benefit of himself, his family, and the public, and prevents him from competing with the covenantee in the trade or business from

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which he is excluded, to the injury of the public, which is thus deprived of the benefits which result from the freedom of trade. But, as said by Judge Taft, in United States v. Addyston Pipe & Steel Co. supra: "Where the sole object of both parties in making the contract, as expressed therein, is merely to restrain competition and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint,—that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is, in such contracts, no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured; but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

We have, then, two distinct kinds of contracts which the common law recognized as in restraint of trade: (1) Contracts *per se* in restraint of trade, whereby an individual contracts himself out of a trade; and (2) contracts which tend to destroy competition and thus create monopolies. Northern Securities Co. v. United States, 193 U. S. 403, 48 L. ed 727, 24 Sup. Ct. Rep. 436. The validity of the first class is determined by the reasonableness of the particular contract, while the second class are against public policy and invalid because of their tendencies, without reference to their reasonableness. The former are generally, if not always, ancillary to a valid principal contract, and, although technically in restraint of trade, are not within the purview of the anti-trust statute. Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; A. Booth & Co. v. Davis (C. C.) 127 Fed. 875; Espenson v. Koepke, 93 Minn. 279, 101 N. W. 168. See Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

The contracts or agreements in restraint of trade which fall under the condemnation of the anti-trust statute are of the second class, and are contrary to public policy because they have a tendency to prevent competition in trade and commerce. The Englishmen of the 1400's, blindly groping for some means of protecting themselves from unconscionable traders, adopted what now seems the absurd device of prohibiting entirely the buying and selling of certain articles for profit. They desired, if possible, to be free to deal with tradesmen who were themselves free to buy and sell without restraint. They therefore made the buying up large quantities of corn and other victuals with the intent to sell them again an indictable offense, because this of course must be injurious to the public by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. It will be observed that this act applied to victuals and breadstuffs only, but Stat. 5 & 6 Edw. VI., chap. 14, made criminal the buying or contracting for any merchandise or victuals coming on the way to markets, or dissuading persons from buying their goods there, or persuading them to enhance the price when there, any of which practices makes the market dearer to the fair trader. Stephen's History Crim. Law of England, vol. 3, pp. 199 et seq. The owners of certain salt works were charged with raising the price of salt, and Lord Mansfield, in granting a motion to file an information against them for conspiracy, said: "If an agreement was made to fix the price of salt or any other necessity of life by people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter whatsoever the complaint came, to show them the sense of the crime, and that what rate soever the price was fixed, high or low, made no difference, for all such agreements are of bad consequence and ought to be discontinued." See Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 672. The act thus commented upon by Lord Mansfield is forbidden by modern anti-trust statutes, and expressly by the second part of the Minnesota statute. The old offenses of regrating, engrossing, and forestalling are no longer known to the law; but modern legislatures are still seeking a solution of the same problem,—how to maintain the right to freely buy and sell the necessaries and conveniences of life in a market which is free from artificial and conventional restrictions.

More objectionable, because more far-reaching and detrimental to the public interests, were the special privileges enjoyed under grants from the Crown, which were known as "monopolies." The technical monopoly, as distinguished from the practical monopoly of modern times, was a license or privilege, granted by the sovereign to an individual for the sole buying and selling, making, working, or using of anything whatsoever, whereby the people in general were excluded from the liberty of manufacturing and trading, which they had before enjoyed. In Hawkins, Pleas of the Crown (6th ed.) vol. 1. p. 470, chap. 79, a monopoly is defined as "an allowance by the King to any person or persons of the sole buying, selling, making, working, or using of any-

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thing whereby any person is sought to be restrained from any freedom which he had before, or hindered from his lawful trade." It differed from engrossing only in that, in the case of monopoly, a patent was had from the King, while engrossing was a transaction between individuals. 4 Bl. Com. p. 459; 3 Coke, Inst. p. 181; Leeper v. State, 103 Tenn. 500, 48 L.R.A. 167, 53 S. W. 962.

The practice of granting privileges of this character has been common in all countries, and still survives to a limited extent even in this country. The abuse of the power by Queen Elizabeth so stirred the people to righteous wrath and indignation that "the coach of the chief minister to the Crown was surrounded by an indignant populace, who cursed the monopolies, and exclaimed that the prerogative should not be suffered to touch the old liberties of England." Macaulay's History of England, vol. 1, p. 50. In the Long Parliament, Sir John Culpepper bitterly declared that the monopolists "are a nest of wasps, a swarm of vermin, which have overcrept the land. . . . These are like the frogs of Egypt, they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye fat, washboul, and powdering pot. They share with the butler in his box. . . . They will not bait us a pin. We may not buy our own cloaths without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker, I have echoed to you the cries of the kingdom. I will tell you their hopes. They look to Heaven for a blessing upon this Parliament." As early as 1602 it was held in Darcy v. Allein (Case of Monopolies) 11 Coke, 84b that such monopolies were void at common law. Darcy had been granted the exclusive right to make, import, and sell playing cards within the realm. The court held the grant void, because it was a monopoly and against the common law, for reasons which, when carefully analyzed, seem to reduce themselves to the single one that monopolies prevent competition and thus control prices. In 1625, Parliament, by Stat. 21 James I., chap. 3, forbade the granting of monopolies save in certain specified cases. Yarmouth v. Darrel, 3 Mod. 75; East India Co. v. Sandys, Skinner, 132 (1684), 10 How. St. Tr. 371. Elaborate and instructive discussions of the history and nature of monopolies will be found in the opinions of Mr. Justice Story in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773, and Mr. Justice Field in the Slaughter-house Cases, 16 Wall. 36, 21 L. ed. 394, and in Senator Nelson's report on the proposed amendment of the Sherman act, Rept. 710, 848, 60th Cong. 2d Sess. (1909).

The modern monopolies, against which the legislatures, courts, and people inveigh, are generally such as result indirectly from the legislative grant of some exclusive privilege, or the right to carry on a business which is dependent upon the existence of some special privilege or franchise. A practical monopoly may exist without the aid of a legislative grant, as it may result from the control of a trade or industry, brought about by means of contracts and combinations between competitors. In the modern sense, and within the meaning of the Federal statute and the Constitution and statute of Minnesota, trade and commerce are monopolized "when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of a commodity, and thus to practically suppress competition." Noyes, Intercorporate Relations, 2d ed. 389, and cases cited; National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379 (McKenna, J.). Like the ancient monopolies, the practical monopoly is under the ban of the law because it tends to prevent competition and enhance the price or deteriorate the quality of the commodity or service to which it relates. National Cotton Oil Co. v. Texas, supra; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577.

From these analogous acts, which were illegal at common law, and under the English statutes which became a part of the common law, it appears that the purpose in all the prohibitions was to preserve the freedom of trade by means of free competition between the traders themselves, in order that the public should not be required to pay exorbitant prices for articles of common use and necessity. It was to prevent any man or set of men from possessing the power to arbitrarily determine the price at which an article of common use shall be sold, because he who controls prices is the master of the world. The well-being of the trader, and the indirect benefit to the community through his activities, was also an important factor; but much of the solicitude for the individual which was manifested in the early decisions seems unnecessary to modern eyes, and plays a minor part in modern cases, which are determined by the test of public policy.

At common law, contracts in restraint

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of trade were not unlawful in the sense of being criminal, nor did their breach give rise to a civil action. They were simply unenforceable. United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Mogul S. S. Co. v. McGregor [1892] A. C. 25; Hornby v. Close, L. R. 2 Q. B. 153. Such contracts could not be enforced, nor could monopolies be legally enjoyed; but neither the making of the one nor the acquiring and enjoying of the other was a crime. A conspiracy to create a monopoly in commodities which constitute the necessities of life, or to enhance the market price thereof, to the prejudice of the consumer, was and is a criminal offense at common law. See Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; Nestor v. Continental Brewing Co. 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; People v. Milk Exchange, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; American Biscuit & Mfg. Co. v. Klotz (C. C.) 44 Fed. 723; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Harding v. American Glucose Co. 182 Ill. 615, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577. A very complete collection of cases decided on common-law principles will be found in notes in (1895) 11 Am. R. & Corp. Rep. 388, 445, and 474. See also Noyes, Intercorporate Relations, 2d ed. chaps. 35, 36.

5. The common-law rules were sufficient under ordinary conditions to protect the public and yet leave ample freedom for legitimate business transactions. But the astonishing material development of this country, with its opportunities for exploitation and the acquisition of great wealth, produced conditions which the common law, with its inadequate remedies, seemed unable to control. Competition was rapidly being eliminated from the business situation, with the result that the prices of most of the articles of everyday use were determined arbitrarily by men who controlled their production and distribution, instead of by the laws which are supposed to operate when trade and commerce are free from artificial restraints. These abuses led to the enactment of a series of statutes which are popularly known as "anti-trust statutes."

(a) The most important of these, because of the nature and magnitude of the interests affected, is the Sherman anti-trust statute of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. Its terms are very general, and its prohibitions are against (1) contracts and combinations in restraint of trade and (2) attempts to monopolize trade or any part thereof. Section 1 provides that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal" and punishable as a crime. Section 2 provides that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor." The statute is made applicable to the District of Columbia and the territories, and its enforcement is provided for through criminal proceedings and the injunctional power of the courts. Individuals who are injured by reason of a violation of this statute are given a remedy by way of damages against the wrongdoer. To aid in its enforcement Congress has enacted statutes providing for the prompt hearing of suits in equity instituted by the government, and providing for special officers, with ample funds under their control. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, pp. 3200 et seq.; 32 Stat. at L. 823, 904, chaps. 544, 755, U. S. Comp. Stat. Supp. 1903, pp. 376, 366, 367. See also the anti-trust provision of the Wilson tariff act (Act August 27, 1894, chap. 349, §§ 73–77, 28 Stat. at L. 570, U. S. Comp. Stat. 1901, pp. 3202, 3203) and the immunity proviso of appropriation act Feb. 25, 1903, chap. 755, 32 Stat. at L. 904, U. S. Comp. Stat. Supp. 1907, p. 884.

The validity of the Sherman act as an exercise of the power to regulate commerce was sustained in United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25. It embraces only agreements and combinations and acts which have direct connection with interstate and foreign commerce; but such commerce comprehends intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different states, and the power to regulate it embraces all the instrumentalities by which such commerce is conducted. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. Its pro-

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hibitions are broader than those of the common law against restraints of trade. United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Continental Wall Paper Co. v. Lewis Voight & Sons Co. 19 L.R.A. (N.S.) 143, 78 C. C. A. 567, 148 Fed. 939. It has therefore been held to apply to railroads and other public-service corporations, and to prohibit all combinations or acts which cause restraint of interstate commerce, whether such restraint is reasonable or unreasonable. United States v. Trans-Missouri Freight Asso. 166 U. S. 328, 41 L. ed. 1023, 17 Sup. Ct. Rep. 540; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667. It makes no distinction between classes of persons, and applies to combinations of laborers as well as capitalists. Loewe v. Lawlor, supra. A combination to restrain a part of interstate commerce, whether reasonable or unreasonable, is as illegal as a successful monopolization of the whole of interstate commerce. The statute prohibits "any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts in that regard the liberty of a trader to engage in business." Ibid. As construed by the circuit court of the second circuit, it makes illegal every combination by which competition is ended or suspended between two or more persons engaged in interstate or foreign trade or commerce. "Disregarding various *dicta*," said Judge Lacombe, "and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small." United States v. American Tobacco Co. (C. C.) 164 Fed. 700.

The following combinations and agreements have been held illegal under the Sherman law: An agreement between certain railroad companies, which provided for establishing and maintaining, for their mutual protection, reasonable rates, rules, and regulations in respect to freight traffic, through and local, and by which free competition between these companies was restricted. United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. An arrangement between certain railway companies with reference to railroad traffic among the states, under which the railroads were not subject to competition among themselves, even though the contracts were in themselves reasonable. United States v. Joint Traffic Asso. supra. An agreement between certain private companies and corporations engaged in different states in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided. Addyston Pipe & Steel Co. v. United States, supra. A combination created by an agreement between certain dealers in titles, grates, and mantels in different states, whereby they controlled, or sought to control, the prices of such articles in these states. W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307. A combination of publishers and booksellers to fix prices and compel publishers and dealers, by means of rewards and punishments, to sell at the prices so fixed. Bobbs-Merrill Co. v. Straus (C. C.) 139 Fed. 155. See Scribner v. Straus (C. C.) 139 Fed. 193.

A contract or agreement whereby a holding corporation was created, to which the stockholders of competing parallel lines of railways, contrary to the laws of the state which created the competing companies, agreed to transfer the stock of both roads, was prohibited by the Sherman act, because it tended to destroy competition among carriers and create a monopoly of the traffic. Northern Securities Co. v. United States, supra. In the so-called Beef Trust Case it was alleged that the defendants were guilty of the following acts: (a) Directing their purchasing agents to refrain from bidding against each other at auction sales of live stock; (b) bidding up the price of such stock for a few days at a time, to influence large shipments, and then ceasing to bid, in order to obtain the stock thus shipped at less than prevailing prices; (c) agreeing upon prices to be adopted by all, and restraining the output or quantity of meat shipped; (d) directing uniform prices for cartage and delivery throughout the United States as a device to increase the price to dealers and consumers; and (e) negotiating with carriers for secret rebates on their enormous shipments, thus bringing about unjust discrimination against other shippers and competitors, for the purpose of stifling and destroying competition. It was held on demurrer that these acts constituted an unlawful combination and conspiracy within the meaning of the Sherman act, because in restraint of trade and commerce. United States v. Swift & Co. (C. C.) 122 Fed. 529, affirmed in Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

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The owner of a patented article may impose restrictions upon its manufacture and sale, and, if the conditions are otherwise not illegal, they will not violate the Sherman act, even though the tendency is to restrain trade. The very object of the patent laws is to create monopoly. E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747. But where the patentee went beyond the rights secured by the patent, in raising and maintaining prices in states where the patent had no practical existence, the contract was held forbidden by the Sherman act. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (C. C.) 142 Fed. 531, but see 154 Fed. 358. Contracts under which a board of trade furnishes stock quotations under certain conditions are not in restraint of trade at common law or under the Sherman act. Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. ed. 1031, 25 Sup. Ct. Rep. 637.

(b) The Federal anti-trust act necessarily applied only to contracts, combinations, and conspiracies in restraint of interstate and international trade and commerce, and soon after its passage the states began to enact similar statutes for the purpose of reaching agreements and combinations which were beyond the reach of the Federal power. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, and National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379, sustain the power of the states to enlarge the common-law rules and prohibit combinations in restraint of trade within their borders, when such combinations limit competition in the production or sale of articles, or increase or reduce prices in order to prevent free competition. The authority to pass such laws arises out of the police power. In Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289, the court, in sustaining the Kansas statute, said: "A secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends."

Anti-trust statutes of the same general character, although differing somewhat in scope and detail, are now in force in Arkansas (act March 16, 1897, p. 60; act March 6, 1899, p. 50); California (Civil Code, § 1673; Laws 1907, chap. 530, p. 984); Florida (Laws 1897, chap. 4534, p. 60, confined to beef and meats); Georgia (Laws 1896, p. 68); Illinois (Laws 1907, p. 216, amending Laws 1891, p. 206, and Laws 1893, p. 89, which were declared unconstitutional in Connoly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431); Indiana (Laws 1907, chap. 243, p. 490; Laws 1899, chap. 148, p. 257); Iowa (Code, §§ 5060–5062); Kansas (act March 8, 1897, chap. 265, p. 481, sustained in Smiley v. Kansas, supra); Kentucky (Ky. Stat. §§ 3915–3921 [Russell's Stat. §§ 3717–3723]); Louisiana (act July 7, 1892, p. 120, No. 90; Const. art. 190); Maine (Rev. Stat. 1903, chap. 47, §§ 53–55); Massachusetts (Laws 1908, chap. 454, p. 409); Michigan (Laws 1899, act No. 255, p. 409); Minnesota (Rev. Laws 1905, §§ 2098, 5168; Laws 1907, chap. 269, pp. 342, 363); Missouri (Laws 1891, p. 186; Rev. Stat. 1899 §§ 8965–8977 [Anno. Stat. 1906, pp. 4150–4156]); Montana (Penal Code 1895, chap. 8, §§ 321, 325 [Rev. Codes, §§ 8285, 8289]); Nebraska (Laws 1897, chap. 79, p. 347); North Carolina (Laws 1907, chap. 218, p. 254); Oklahoma (Laws 1907–08, chap. 83, p. 750); New York (Laws 1899, chap. 690, 727, pp. 1514, 1558; Penal Code, § 168); North Dakota (Rev. Codes 1899, §§ 7480–7484); Ohio (Bates's Anno. Stat. 1904. § 4427–1); South Carolina (act Feb. 26, 1902 [23 Stat. at L. p. 1057]); South Dakota (Laws 1907, chap. 131, p. 196; Rev. Penal Code 1903, §§ 770–781); Tennessee (act March 30, 1891, chap. 218, p. 428; act April 30, 1897, chap. 94, p. 241); Texas (Laws 1907, chap. 12, p. 16; Id. chap. 97, p. 194; Id. chap. 120, p. 221; Id. chap. 173, p. 322, and Laws 2d Sess. 1907, chap. 10, p. 456). The former statute was sustained in Waters-Pierce Oil Co. v. Texas and National Cotton Oil Co. v. Texas, supra; Utah (Rev. Stat. 1898, §§ 321, 1758; Const. art. 12, § 20); Wisconsin (Laws 1893, chap. 219, p. 264; Stat. 1898, §§ 1747e–1747g, 1791). A convenient summary of these statutes will be found in Noyes, Intercorporate Relation, 2d ed. chap. 41. The Constitutions of Idaho (art. 11, § 18), Kentucky (§ 198), Louisiana (art. 190), Maryland (Declaration of Rights, § 41), Minnesota (art. 4, § 35), Montana (art. 15, § 20), Utah (art. 12, § 20), Washington (art. 12, § 22), Wyoming (art. 10, § 8), and Oklahoma (art. 5, § 41), contain provisions concerning monopolies and trusts. See Stimson, Fed. & Stat. Const. § 580.

These statutes vary somewhat in their terms, and many cases have been decided under them. A reference to a few of the decisions will serve to illustrate the construction which has been placed upon the statutes by the state courts. The following have been held prohibited by the statutes:

A combination between corporations engaged in carrying freight and passengers by boat between points in different states, the

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purpose of which was to create a monopoly in the traffic. White Star Line v. Star Line, 141 Mich. 604, 113 Am. St. Rep. 551, 105 N. W. 135 (applies Sherman act). A contract whereby one party agrees to remain out of business, which is broader than is necessary to protect the covenantee, and which tends to restrain trade and create a monopoly. Anderson v. Shawnee Compress Co. 17 Okla. 231, 15 L.R.A.(N.S.) 846, 87 Pac. 315, affirmed in 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572. A contract having for its object the fixing and control of the price of farm machinery. International Harvester Co. v. Com. 124 Ky. 543, 99 S. W. 637. An agreement whereby a corporation secured the exclusive right and privilege of marketing the products of the American Tobacco Company in New York city, the company controlling 90 per cent of the tobacco business of the United States, the effect of which is to destroy competition. Locker v. American Tobacco Co. 121 App. Div. 443, 106 N. Y. Supp. 115. A series of agreements whereby substantially all the building contractors of a particular locality agreed to buy brick exclusively from certain specified manufacturers, and by which the latter agreed to sell brick to such contractors only, and by which all the bricklayers in such locality agreed to handle only the brick of such manufacturers, obtained through such contractors; the purpose being to prevent competition and control the price of brick. Purington v. Hinchliff, 120 Ill. App. 523. The purchase by one corporation of the majority of the stock of another corporation, for the purpose of controlling the latter and preventing competition. Dunbar v. American Teleph. & Teleg. Co. 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 423, 8 A. & E. Ann. Cas. 57. "It is immaterial that it would not result in a complete monopoly,"—citing People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; Bishop v. American Preservers' Co. 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577. An agreement that all salt shall be purchased from a designated company for the period of two years, in connection with an agreement not to import salt and to discourage shipments by other parties. Getz Bros. & Co. v. Federal Salt Co. 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416. A contract limiting the quantity of fish to be caught during the season. Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth & Co. 143 Mich. 89, 106 N. W. 868. A combination the tendency and manifest intent of which was to prevent general competition, and thus control trade in a commodity and enable the members of the combination to dictate prices. "The ultimate object of the combination was to give to its members a monopoly in the retail coal business in their respective localities, thus enabling them to regulate prices independent of legitimate and healthy competition." Sanford v. People, 121 Ill. App. 619. "All the cases, ancient and modern, agree that a combination the tendency of which is to prevent general competition and to control prices is detrimental to the public and consequently unlawful." People v. North River Sugar Ref. Co. 22 Abb. N. C. 164, 2 L.R.A. 33, 3 N. Y. Supp. 401.

The Texas statute (Acts 1903, chap. 94, p. 119), prohibiting trusts, and defining a trust as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business authorized by the laws of the state, or to prevent or lessen competition in transportation, was held to be violated by a contract between a railway company and an express company, whereby the latter was given exclusive privileges and the former bound itself not to contract with others to do an express business on the road, and that, if privileges should be accorded others by legislative or judicial proceedings, the express company should have credit for the sums paid by the other corporations. "The contract in question shows by its own terms that its purpose was to secure to the express companies, as far as it was in the power of the parties to do so, the exclusive right to do an express business upon the railroad, and to exclude other express companies from the enjoyment of like rights. . . . We conclude that there was the purpose to create and carry out a restriction in the free pursuit of a business," and that it was a combination of the capital, skill, and acts of both corporations. State v. Missouri, K. & T. R. Co. 99 Tex. 516, 5 L.R.A. (N.S.) 783, 91 S. W. 214, 13 A. & E. Ann. Cas. 1072.

The Michigan statute (act No. 255, p. 409, Pub. Acts 1899), which made it unlawful to contract not to sell any commodity below a fixed value, or to keep the price of an article at a fixed figure, or to settle the price of any article so as to prevent competition, or to combine or unite any interest connected with the sale of any commodity that its price may be affected, made illegal a contract, embodied in the rules of a master plumber's club, which provided that the price of supplies should be fixed by a committee, at which price all were to sell to the members of the exchange. The tendency was to create monopoly, and the court

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said: "It is no answer to say, that this monopoly has, in fact, reduced the price. . . . That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of [the direction of] this company at any time to raise the price to an exorbitant degree." Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40; Richardson v. Buhl, 77 Mich. 660, 6 L.R.A. 457, 43 N. W. 1102.

The Nebraska statutes (Sess. Laws 1887, chap. 114, p. 675, and Sess. Laws 1897, chap. 80, p. 352), which prohibit combinations of grain dealers to fix the price of grain do not exempt such dealers from the general anti-trust statute. State v. Omaha Elevator Co. 75 Neb. 637, 106 N. W. 979, 110 N. W. 874. The statutes forbid a combination to control and limit the price of milk (Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651), a combination to control the price of beer (Houck v. Anheuser-Busch Brewing Asso. 88 Tex. 184, 30 S. W. 869; Nester v. Continental Brewing Co. 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102), a combination to fix the price of meats (State ex rel. Crow v. Armour Packing Co. 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645), a combination of merchants to compel another to sell goods at a price fixed by it (Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553), a combination to control the production and fix the price of petroleum and its products (State ex rel. Monnett v. Buckeye Pipe Line Co. 61 Ohio St. 520, 56 N. E. 464), an agreement among competing grain dealers that each will account, at so much per bushel, for all grain bought by him in excess of an allotted share (State v. Smiley, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199), an agreement whereby a builder is to add a percentage to his bid and give it to an association of which he is a member (Milwaukee Masons & Builders' Asso. v. Niezerowski, 95 Wis. 129, 37 L.R.A. 127, 60 Am. St. Rep. 97, 70 N. W. 166), an agreement between an association of master plumbers and a manufacturer to buy only from such manufacturer (Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853), and an agreement between such an association and a manufacturer that the latter will sell only to the association (Walsh v. Master Plumbers' Asso. 97 Mo. App. 280, 71 S. W. 455). See Kosciusko Oil Mill. & Fertilizer Co. v. Wilson Cotton Oil Co. 90 Miss. 551, 8 L.R.A. (N.S.) 1053, 43 So. 435; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

Many attempts have been made to bring unobjectionable transactions within these statutes, and a reference to some of the cases will serve to show the proper scope of the prohibitions. A contract not to sell any other whisky of the same brand in the place where the buyer was engaged in business until the buyer had disposed of the quantity purchased was held not in violation of the Texas act of 1899 (Acts 1899, chap. 146, p. 246), which prohibited agreements to fix or regulate the price of any article, to maintain such price when fixed, or to limit or fix the amount or quantity of any article. Norton v. W. H. Thomas & Sons Co. 99 Tex. 578, 91 S. W. 780. This statute was held not to condemn a contract whereby a sleeping-car company was to furnish sleeping cars for a railroad company, and in which the only reference to prices was the stipulation that the sleeping-car company might charge passengers on its cars on the trains of the railway company such fares as were customary on competing lines of railway where equal accommodations were furnished. No one had a right to run cars on the railroad, and therefore "the free pursuit of any business authorized or permitted by law was not restricted." The contract in no way interfered with the rights of any other sleeping-car company, if any existed, to build and furnish its cars to railway companies. Ft. Worth & D. C. R. Co. v. State, 99 Tex. 34, 70 L.R.A. 950, 87 S. W. 336.

An agreement between a carrier and an association of citizens for special rates on excursion tickets does not violate either the state or Federal anti-trust statutes. Lytle v. Galveston, H. & S. A. R. Co. 100 Tex. 292, 10 L.R.A.(N.S.) 437, 99 S. W. 396. In Hartz v. Eddy, 140 Mich. 479, 103 N. W. 852, it was held that a certain lease was not a part of the plan of a salt trust to limit the production of salt, raise the price thereof, and create a monopoly. In State v. Virginia-Carolina Chemical Co. 71 S. C. 544, 51 S. E. 455, it was held that the anti-trust statute should be construed to mean that the contract is against public policy when made with a view to lessen, or which tends to lessen, full and free competition to an unreasonable extent. In Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902, it was said: "A construction of the statute which would make obnoxious every contract which tends in any measure to affect the cost or price of articles to the producer or consumer . . . would probably render the statute liable to the objection that it unnecessarily and unreasonably abridges the freedom of contract, guaranteed by the state and Federal Constitutions. . . . In determining whether a particular contract falls within the inhibition of the statute, the

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court must necessarily consider the tendency or power of the contract to injure the public, either considered in itself or as a part of a scheme to destroy or impede competition and control supply and prices. A contract may be lawful in itself as an isolated matter, but yet be unlawful as a part of a scheme to create a virtual monopoly. . . . Every case, however, alleged to fall within the statute, must be controlled by its own peculiar facts and circumstances, and we will not attempt to state any hard-and-fast rule by which every case must be governed. The main general test should be whether the contract, trust, or combination is monopolistic in purpose and natural tendency. If so, it unreasonably affects competition and prices to the detriment of the public, and is obnoxious to the statute." It appeared that a New York corporation had entered into a contract with a South Carolina corporation whereby the latter bound itself to sell certain articles for use only in G. and vicinity, to canvass the territory named for purchasers, and not to accept the agency for or sell similar articles during the term of the contract. The other party agreed to manufacture the articles and sell them to the South Carolina corporation, and to use reasonable diligence to prevent other agents from making sales of similar articles within the territory. This was held a minor contract in partial restraint of trade only, and not tending to prevent competition and restrain trade.

The rules of a live-stock exchange, which provided for the expulsion of members who were guilty of commercial dishonesty, and forbade members from having any further commercial transactions with the person who had been expelled, were held not within the inhibition of the statute. The exchange, said the court, "does not seek to limit trade, nor to limit competition by refusing to buy from or sell to others for the reason that they are not members of its association. But they can boycott a member, or, rather, they can refuse to deal with him, not because he is not a member of the exchange, but because he has been found guilty and expelled from the association for his wrongdoing." Gladish v. Kansas City Live Stock Exchange, 113 Mo. App. 726, 89 S. W. 77. The case was distinguished from Ferd Hein Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691, where certain brewers had an agreement that they would not sell to anyone indebted to either of the others for beer until he had paid that debt. An agreement of that character, it was said, "tended to establish a monopoly, deprive the debtor of the benefit of competition, and served to impose a penalty on his condition" which was forbidden by the statute against trusts and pools. "The object of the statute," said the court in the Gladish Case (page 733) "is to promote the public welfare, and not to outlaw harmless combinations, or those which are beneficial in their nature. This statute, like every other, should receive a reasonable construction. The purposes of the exchange are to be commended,"—citing Haebler v. New York Produce Exchange, 149 N. Y. 414, 44 N. E. 87; American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; Board of Trade v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. 743; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N. E. 225. Of a contract by which one corporation bound itself to buy all its raw material from, and sell all its manufactured products to, another, the court said: "We do not regard this contract as one in restraint of trade, and therefore illegal and void. Nor do we think it is forbidden by the anti-trust law of this state or by the Sherman act. There is neither allegation nor evidence here that this contract tended to produce a monopoly, or was in restraint of trade, or enabled the parties thereto, or either of them, to monopolize the market, or that it had anything to do with commerce." Heimbuecher v. Goff, 119 Ill. App. 373.

The anti-trust statute does not affect a contract made by a seller of grain to sell to purchasers a certain amount of grain, to be delivered in the future. C. H. Albers Commission Co. v. Spencer, 205 Mo. 105, 11 L.R.A.(N.S.) 1003, 103 S. W. 523. A contract, to run for eight years, whereby an owner of a bed of fire clay agreed to erect a plant and operate it, and several corporations agreed to take a specified amount of the product daily at a fixed price, the first party agreeing not to operate a fire-clay plant on any other land owned or controlled by him in the state, and the second party agreeing not to sell brick to any other parties, and the latter not to buy of any other party in the state, and not to enter into any combination or trust to limit the output of the plant, is not invalid under the statute. After quoting the Illinois statute, Mr. Justice Wilkin said: "The object of these statutes is to prohibit the formation of trusts and combinations, and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals, made to foster or increase trade or business. But a contract may incidentally restrain competition or trade without violating the statutes, if its chief purpose is to promote and increase the business of those who enter into it." The contract was regarded as one

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in partial restraint of trade only. Southern Fire Brick & Clay Co. v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50.

In Yazoo & M. Valley R. Co. v. Searles, 85 Miss. 520, 68 L.R.A. 715, 37 So. 939, a car-service association was held not to be a trust within the meaning of the statute of that state. This decision contains a very full discussion of the general subject. It was said that, in construing anti-trust statutes, the nature of the business contemplated by the contract and the tendency of the contract as affecting the public should be considered, rather than the interests of the parties to the particular contract. But the design of the legislature was to protect the public, not to unnecessarily restrict the transacting of business by either corporations or individuals. "The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. . . . The result desired, the purpose of the entire legislation, was to suppress trusts, secure the benefits arising from competition in trade, prevent monopolies, and protect the people from the possible tyranny and oppression of combined wealth."

A contract for the sale of the entire output of sash weights of a particular foundry at a specified price, and obligating the seller to withdraw a former lower price, is not invalid. Combinations between individuals or firms for the regulation of prices or competition in business are held not to be monopolies and in restraint of trade so long as they are reasonable and do not include all the commodity or trade, or to create such restrictions as to materially affect the freedom of commerce. Over v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Herriman v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660.

6. Where the statute prohibits a specific thing, that fact, of course, furnishes an all-sufficient reason for the decision; and, as the state statutes generally go more into detail than the Federal statutes, the state decisions are less controlled by general considerations. When the legality of the particular act is to be tested by whether it violates general statutory prohibitions upon restraints of trade or commerce, the courts give various reasons for their conclusions. Different forms of expression are used; but, when reduced to the lowest terms, it seems that if any one thing may be said to be the test, it is the effect upon competition. Combinations are not *per se* illegal, any more than are contracts, agreements, and understandings generally; but, when the purpose of either is to destroy competition in trade or commerce, the particular transaction falls within the prohibitions of the anti-trust statute. The acts which are specifically forbidden by the statute are contrary to the public policy of the state because they are thus forbidden (Stewart v. Erie & W. Transp. Co. 17 Minn. 372, Gil. 348), and the effect upon competition furnishes a reasonably accurate test for cases which arise under the general language of the statute. The definition of monopoly involves the same principle, and contracts and combinations which tend to create a monopoly are against public policy, and therefore illegal, because they deprive the community of the benefits of competition, and thus place the power to control production or fix prices in the hands of a few persons.

But it does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions which are unobjectionable and necessary that business shall not completely stagnate. As said in Hopkins v. United States, 171 U. S. 593, 43 L. ed. 296, 19 Sup. Ct. Rep. 40: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce. . . . The act . . . must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." The anti-trust statutes were never designed to forbid such transactions, and it has been universally held that contracts and combinations which tend to promote business, and which only remotely, incidentally, and indirectly restrain competition, are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition, it is under the ban of the law, whatever may have been the intention of the parties. But if "it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effects are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation." Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep.

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court must necessarily consider the tendency or power of the contract to injure the public, either considered in itself or as a part of a scheme to destroy or impede competition and control supply and prices. A contract may be lawful in itself as an isolated matter, but yet be unlawful as a part of a scheme to create a virtual monopoly. . . . Every case, however, alleged to fall within the statute, must be controlled by its own peculiar facts and circumstances, and we will not attempt to state any hard-and-fast rule by which every case must be governed. The main general test should be whether the contract, trust, or combination is monopolistic in purpose and natural tendency. If so, it unreasonably affects competition and prices to the detriment of the public, and is obnoxious to the statute." It appeared that a New York corporation had entered into a contract with a South Carolina corporation whereby the latter bound itself to sell certain articles for use only in G. and vicinity, to canvass the territory named for purchasers, and not to accept the agency for or sell similar articles during the term of the contract. The other party agreed to manufacture the articles and sell them to the South Carolina corporation, and to use reasonable diligence to prevent other agents from making sales of similar articles within the territory. This was held a minor contract in partial restraint of trade only, and not tending to prevent competition and restrain trade.

The rules of a live-stock exchange, which provided for the expulsion of members who were guilty of commercial dishonesty, and forbade members from having any further commercial transactions with the person who had been expelled, were held not within the inhibition of the statute. The exchange, said the court, "does not seek to limit trade, nor to limit competition by refusing to buy from or sell to others for the reason that they are not members of its association. But they can boycott a member, or, rather, they can refuse to deal with him, not because he is not a member of the exchange, but because he has been found guilty and expelled from the association for his wrongdoing." Gladish v. Kansas City Live Stock Exchange, 113 Mo. App. 726, 89 S. W. 77. The case was distinguished from Ferd Hein Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691, where certain brewers had an agreement that they would not sell to anyone indebted to either of the others for beer until he had paid that debt. An agreement of that character, it was said, "tended to establish a monopoly, deprive the debtor of the benefit of competition, and served to impose a penalty on his condition" which was forbidden by the statute against trusts and pools. "The object of the statute," said the court in the Gladish Case (page 733) "is to promote the public welfare, and not to outlaw harmless combinations, or those which are beneficial in their nature. This statute, like every other, should receive a reasonable construction. The purposes of the exchange are to be commended,"—citing Haebler v. New York Produce Exchange, 149 N. Y. 414, 44 N. E. 87; American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; Board of Trade v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. 743; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N. E. 225. Of a contract by which one corporation bound itself to buy all its raw material from, and sell all its manufactured products to, another, the court said: "We do not regard this contract as one in restraint of trade, and therefore illegal and void. Nor do we think it is forbidden by the anti-trust law of this state or by the Sherman act. There is neither allegation nor evidence here that this contract tended to produce a monopoly, or was in restraint of trade, or enabled the parties thereto, or either of them, to monopolize the market, or that it had anything to do with commerce." Heimbuecher v. Goff, 119 Ill. App. 373.

The anti-trust statute does not affect a contract made by a seller of grain to sell to purchasers a certain amount of grain, to be delivered in the future. C. H. Albers Commission Co. v. Spencer, 205 Mo. 105, 11 L.R.A.(N.S.) 1003, 103 S. W. 523. A contract, to run for eight years, whereby an owner of a bed of fire clay agreed to erect a plant and operate it, and several corporations agreed to take a specified amount of the product daily at a fixed price, the first party agreeing not to operate a fire-clay plant on any other land owned or controlled by him in the state, and the second party agreeing not to sell brick to any other parties, and the latter not to buy of any other party in the state, and not to enter into any combination or trust to limit the output of the plant, is not invalid under the statute. After quoting the Illinois statute, Mr. Justice Wilkin said: "The object of these statutes is to prohibit the formation of trusts and combinations, and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals, made to foster or increase trade or business. But a contract may incidentally restrain competition or trade without violating the statutes, if its chief purpose is to promote and increase the business of those who enter into it." The contract was regarded as one

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in partial restraint of trade only. Southern Fire Brick & Clay Co. v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50.

In Yazoo & M. Valley R. Co. v. Searles, 85 Miss. 520, 68 L.R.A. 715, 37 So. 939, a car-service association was held not to be a trust within the meaning of the statute of that state. This decision contains a very full discussion of the general subject. It was said that, in construing anti-trust statutes, the nature of the business contemplated by the contract and the tendency of the contract as affecting the public should be considered, rather than the interests of the parties to the particular contract. But the design of the legislature was to protect the public, not to unnecessarily restrict the transacting of business by either corporations or individuals. "The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. . . . The result desired, the purpose of the entire legislation, was to suppress trusts, secure the benefits arising from competition in trade, prevent monopolies, and protect the people from the possible tyranny and oppression of combined wealth."

A contract for the sale of the entire output of sash weights of a particular foundry at a specified price, and obligating the seller to withdraw a former lower price, is not invalid. Combinations between individuals or firms for the regulation of prices or competition in business are held not to be monopolies and in restraint of trade so long as they are reasonable and do not include all the commodity or trade, or to create such restrictions as to materially affect the freedom of commerce. Over v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Herriman v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660.

6. Where the statute prohibits a specific thing, that fact, of course, furnishes an all-sufficient reason for the decision; and, as the state statutes generally go more into detail than the Federal statutes, the state decisions are less controlled by general considerations. When the legality of the particular act is to be tested by whether it violates general statutory prohibitions upon restraints of trade or commerce, the courts give various reasons for their conclusions. Different forms of expression are used; but, when reduced to the lowest terms, it seems that if any one thing may be said to be the test, it is the effect upon competition. Combinations are not *per se* illegal, any more than are contracts, agreements, and understandings generally; but, when the purpose of either is to destroy competition in trade or commerce, the particular transaction falls within the prohibitions of the anti-trust statute. The acts which are specifically forbidden by the statute are contrary to the public policy of the state because they are thus forbidden (Stewart v. Erie & W. Transp. Co. 17 Minn. 372, Gil. 348), and the effect upon competition furnishes a reasonably accurate test for cases which arise under the general language of the statute. The definition of monopoly involves the same principle, and contracts and combinations which tend to create a monopoly are against public policy, and therefore illegal, because they deprive the community of the benefits of competition, and thus place the power to control production or fix prices in the hands of a few persons.

But it does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions which are unobjectionable and necessary that business shall not completely stagnate. As said in Hopkins v. United States, 171 U. S. 593, 43 L. ed. 296, 19 Sup. Ct. Rep. 40: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce. . . . The act . . . must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." The anti-trust statutes were never designed to forbid such transactions, and it has been universally held that contracts and combinations which tend to promote business, and which only remotely, incidentally, and indirectly restrain competition, are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition, it is under the ban of the law, whatever may have been the intention of the parties. But if "it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effects are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation." Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep.

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40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432, 26 Sup. Ct. Rep. 208; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Welch v. Phelps & B. Windmill Co. 89 Tex. 653, 36 S. W. 71; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91.

7. With these general principles in mind, we proceed to the consideration of the facts of the case at bar. It is reasonably clear that the purpose to be accomplished by rule 26 is not one which is forbidden by the anti-trust statute, and also that, even though it were within the scope of the statute, it is not illegal, because it does not destroy or restrict competition in the business of producing, buying, selling, or distributing any articles dealt in by the board of trade or its members. The requirement with reference to the rates on money advanced by the members and that relating to the division of commissions between members do not require any particular consideration. They clearly are not violations of the statute. The state's case must rest upon the alleged illegality of that provision of the rule which requires members to charge uniform commissions for their services in making sales for their customers. The other provisions are incidental to this, and are designed to secure its observance and enforcement. The board of trade is a combination of men engaged in the same business, who have bound themselves, by contract and agreement, to charge uniform rates for personal services. It is the established law of this state that a man, or any number of men, may, unless under contract obligations, or engaged in an employment which charges them with a public duty, refuse to deal with any man or class of men, and that this right may be exercised singly or in combination with others. In Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119, the court said: "The right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles." In Ertz v. Produce Exchange, 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737, the court said that "within proper limits it is both lawful and commendable for men to combine for the purpose of securing better wages or larger returns from their business ventures."

The right of laboring men to combine for the purpose of regulating their wages can no longer be seriously denied. Five years after the enactment of the Minnesota anti-trust statute this court, in Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172, said: "A strike for the purpose of securing better wages or otherwise bettering the condition of the strikers is not unlawful, though the result thereof is a combination between the striking employees, and results incidentally in injury of others." In Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 A. & E. Ann. Cas. 280, it was held that laboring men have the right "to combine and to co-operate for the promotion of such ends as the increase of wages . . . [so long as they do not] inflict injury upon others or to oppress and crush them by excluding them from all employment unless gained through joining the labor organization or trades union." The right to form a combination for the purpose of fixing wages is now thoroughly established, and numerous cases sustaining it will be found cited in 24 Cyc. Law & Proc. p. 819. A rule of law applicable to men who work with their hands should, when no other principle of public policy contravenes, be equally applicable, when the general purpose to be accomplished is the same, to men whose work is more intellectual.

If a combination for the purpose of regulating what one class of men in the community shall receive for their personal services is valid, because not within the scope of the anti-trust statute, it cannot be that any combination for the same purpose is prohibited because of the character or description of the individuals who enter into the combination. The classification must be along the line of purposes, and not persons. In the light of the history of legislation relating to agreements and combinations to fix and regulate wages, the often-declared rule of public policy with reference thereto, the purposes for which combinations are specifically forbidden by the statute, and the fact that such combinations affect production and prices of commodities but indirectly, we are of the opinion that combinations to fix and regulate the prices

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which shall be charged for wages and other forms of personal service are not within the prohibitions of our statute. Labor, whether physical, intellectual, or a combination of the two, is not, by any fair rule of struction, an "article of trade, manufacture, or use," or an "article, commodity, or utility" which "enters into the manufacture of any article of utility," within the meaning of those words as used in the statute. Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conduct which are in themselves illegal that they come within the purview of the Federal anti-trust law.

In the recent case of Rohlf v. Kasemeier (Iowa) 118 N. W. 276, it was held that under the Iowa statute which prohibits combination to regulate the price of any "article of merchandise, commodity," etc., a union of laborers, or professional men,—in this instance, physicians,—for the purpose of advancing wages or charges, is not unlawful. "If the contention of appellant be correct," said Deemer, J., "the statute covers all kinds of personal labor, both skilled and unskilled, under the term 'commodity.' Indeed, this is the broad claim made by counsel. Now, whilst there is a class of political economists who treat labor as so much merchandise, the wage being regulated simply by supply and demand, there is another class which, taking account of the personal equation, sees in it something more than a commodity, and refuse to subscribe to the doctrine that supply and demand alone regulate the price. This latter class of economists refuses to accept the doctrine that a man is rich because he has stored away within him many days' work, and are convinced that his necessities, quite as often as the demand for his labor, fixes the stipend which he is to receive. In other words, the laborer, skilled or unskilled, is not regarded as standing on an equality with him who barters in goods and merchandise. . . . The only ground upon which appellant can stand with any show of plausibility is that labor is a commodity to be bought, sold, or produced, as merchandise. This is a strained and unnatural construction, and gives to the word 'commodity' a meaning which is perhaps permissible, but it is not the commonly accepted one. . . . It seems to be the almost universal holding that it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain classes of men, or work under a certain price, or without certain conditions. Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Com. v. Hunt, 4 Met. 134, 38 Am. Dec. 346; Rogers v. Evarts, 17 N. Y. Supp. 268; United States v. Moore (C. C.) 129 Fed. 630."

It is possible that under some of the state statutes a combination to fix and regulate the value of wages or personal service is invalid, because included within the specific prohibitions of the statute. But the statutes, almost without exception, are directed to combinations which affect the production or price of some useful commodity, and it is very clear that personal services are not included under such designations. The Michigan statute of 1899 was broader than the Minnesota statute, particularly in that it denounced combinations of capital, skill, or arts. But in Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40, the distinction between wages and articles which are produced, bought, and sold in the market was clearly recognized. It was held that, while agreements between plumbers, fixing the price at which they would sell plumbers' supplies, were illegal, agreements fixing and regulating the price of labor employed in executing lawful contracts were not forbidden. "If that statute," said the court, "forbids such agreements, it follows that it forbids all agreements fixing and regulating the price of labor, and that associations, whether of employees or employers, when endeavoring to fix and regulate the price of labor, are engaged in a criminal undertaking. Does that statute forbid such agreements? In general, it may be said that the statute forbids certain contracts and certain defined trusts. An agreement fixing and regulating the price of labor is not one of these contracts nor one of these trusts. Cleland v. Anderson, 66 Neb. 258, 5 L.R.A.(N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092. If it may be said that an agreement fixing the price of labor violates the statute when it forms part of an undertaking which the statute forbids, it must also be said that it does not violate the statute unless it does form part of some undertaking forbidden by the statute."

There has been some difference of opinion as to whether insurance is an article of commerce or a commodity within the meaning of such statutes. In State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097, and Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428, it was held to be a "commodity." Some statutes expressly specify contracts fixing the rates to be paid for insurance and the commissions to be charged by insurance agents. In Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397, it was

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held that neither under the common law nor the Texas anti-trust statute is it illegal to enter into a combination to establish uniform rates of insurance and of commissions to agents. The court said: "Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable in most civilized communities and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render services below a stipulated rate should be held contrary to public policy and void upon the same ground. Combinations among workingmen to increase or maintain their wages by unlawful means are unlawful. . . . 'Encouragement to workmen in their endeavors to associate themselves into organizations for their mutual benefit have settled beyond question that unemployed workmen may unite and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed. People v. Fisher, 28 Am. Dec. 508, note.'"

More v. Bennett, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888, seems to support the contention that a combination to fix the rate to be charged for personal services is illegal. That case grew out of an attempt of the law stenographers of the city of Chicago to fix the prices at which they would work. It is criticized in Queen Ins. Co. v. State, supra, and the cases cited by the court do not seem to be applicable upon the facts. As a matter of fact, such stenographers furnish more than their personal services, and the compensation is measured by the quantity of the product of their labors. Thus, in the ordinary case of a court stenographer who furnished a transcript of evidence, the party ordering it pays for what he receives at a fixed price per folio. The proposition under consideration in More v. Bennett did not include ordinary stenographers, who work by the day or month, and it cannot be that such persons cannot combine and co-operate for the purpose of fixing or raising their wages, while workingmen generally are permitted to do the same thing, with the approval of the law.

This conclusion is not inconsistent with the decision of the Supreme Court of the United States that the Sherman anti-trust law applies to combinations of workingmen as well as capitalists, or with the cases which have held certain anti-trust statutes unconstitutional because they exempted certain classes of people from their operation. The right of proper classification is conceded, and the statute must apply equally to all members of the class; but our statute is directed to combinations for certain purposes, and we hold that combinations and agreements the sole and only purpose of which is to fix the charges that shall be made for personal services are not within the prohibitions of the statute.

8. But, if it should be conceded that the agreement or combination effected by rule 26 is within the general scope and purpose of the anti-trust statute, it would not violate the statute, because it does not create a monopoly, and its direct and necessary tendency is neither to restrain trade by preventing competition in the business of buying and selling grain on commission, nor to limit, fix, control, maintain, or regulate the price of production of any article of trade, manufacture, or use bought and sold within the state, nor to prevent or limit competition in the purchase and sale thereof. As already stated, the board of trade neither buys nor sells grain. The members act as the agents of the producers and purchasers of the grain, and the regulation of their commissions for such services can have no appreciable effect upon either the production or the price of the grain. It is a fixed charge, which must be paid, and the price which the producer obtains for the grain may be affected indirectly thereby. But the question is whether the production or price is directly or to any appreciable extent controlled or regulated by the rule which makes the charge uniform, instead of variable,—definite and known, instead of uncertain and unknown. So long as the rate of commission is reasonable, as it is conceded to be in this instance, it must be for the benefit of the producer to know in advance what it will cost in commission to have his grain sold. A rule which determines the handling charges, and makes the charge the same per bushel to the farmer who ships 100 sacks and the elevator company which ships 100 cars, cannot be held to be against public policy. In fact, public policy requires that such charges shall be definite, certain, and uniform, and this seems equally true as to commissions for sales when made under the peculiar conditions under which the grain business is conducted. A board of trade which requires its members to treat all its customers exactly alike in the matters of charges for services no more destroys com-

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petition than does a railroad when it charges all shippers the same rate for conveying freight.

It is common knowledge that competition between commission men for the business of the producers is in fact strong, and success in getting the business depends not upon offering to transact it for less than the uniform rate of commission, but upon the skill and facilities possessed for obtaining the highest price for the grain from the elevator and mill men who are generally the purchasers. There is no fixed price at which sales must be made. If A can secure a cent a bushel more for B's grain than can C or any other commission man, he will get the business, and the producer who has selected him to make the sale will get the benefit of his superior skill and energy. Competition of this character exists on all boards of trade and chambers of commerce, and it is inconceivable that a rule which requires all the commision men who are members of the board or chamber to charge the same rate of commission for the same service can materially affect or control either the production of grain or the price at which it sells. Of course, in a remote and indirect way, every charge and item of expense which attaches to the marketing of grain or other products affects, to some extent, the prices received by the producers and paid by the ultimate purchaser. But contracts and agreements for certain and uniform charges, which are for the benefit of all, and operate only indirectly on production and prices, are not within the prohibitions of the statute.

The purpose and effect of this rule is not to stifle competition, but to protect the members of the board, and foster their business and trade, and prevent it from becoming demoralized, to the injury of all parties, including the consumer. The propriety of such rules, indirectly, at least, received the approval of the Supreme Court of the United States in Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, where Mr. Justice Peckham said: "From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to insure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members, by adopting rules for just and fair dealing among them, and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble . . . and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, effect interstate trade or commerce."

We think the same statement may be made with reference to the rules of the Duluth Board of Trade in their relation to intrastate trade and commerce. In a recent text-book written by one of the judges who decided the case of United States v. American Tobacco Co. (C. C.) 164 Fed. 700, which makes the restriction of competition conclusive, it is said that, "in order to come within the provisions of the Federal statute, the direct effect of a combination must be in restraint of interstate commerce;" and "that a voluntary association or 'exchange,' formed by dealers in articles of a similar nature in a particular locality, for the purpose of fairly regulating the methods of conducting business and establishing a general headquarters, and the by-laws of which provide rules for fair dealing among the members, but which exercises no control over prices or production, is not in contravention of the statute. Neither the object nor consequence of such an association is to suppress competition, and its effect upon interstate commerce, if any, is remote." Noyes, Intercorporate Relations, 2d ed. § 395.

Anderson v. United States, supra, and Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, while not exactly in point, tend to sustain the respondents' views as to the legality of this rule of the Duluth Board of Trade. The case which comes the nearest to sustaining the appellant's contention is State v. Wilson, 73 Kan. 334, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737. That was a criminal prosecution of the defendant upon the charge of obtaining money under false pretenses, by selling cattle which he represented to be free from encumbrance when in fact they were covered by a mortgage. The defense was that the mortgage was void, because based upon a transaction which was made criminal by the Kansas anti-trust statute. The defendant offered to prove that the mortgage was given to a member of the Kansas City Live Stock Exchange, which was an association of persons engaged

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in buying and selling live stock for others and practically controlling that business at Kansas City; that a by-law of such association forbade a member from charging a less commission for such services than 50 cents a head; and that a part of the consideration of the notes to secure which the mortgage was given was a charge for the services of the mortgagee in purchasing the cattle covered by the mortgage. This evidence was excluded, and for the error alleged to have thus been committed the defendant demanded a new trial. The statute forbade combinations of "capital, skill, and acts" for various enumerated purposes, one of which was "to create or carry out restrictions in the free and full pursuit of any business authorized or permitted by the laws of this state." It was held that the Kansas City Live Stock Exchange was an illegal organization within the meaning of this section of the statute. The statute was quite specific, and may well have been designed to reach such a case; but it is not a controlling authority in favor of the appellant, under our statute, upon the facts disclosed by this record.

A somewhat extended investigation of the law and careful consideration of the facts of this case have convinced us that the Duluth Board of Trade has not violated the Minnesota statute, and that the decision of the learned trial judge was correct.

The judgment is therefore affirmed.

IOWA SUPREME COURT.

W. A. ROHLF
v.
HENRY KASEMEIER et al., Appts.

(— Iowa —, 118 N. W. 276.)

Monopoly — personal services — combination.

Personal services of a physician are not a commodity within the meaning of a statute relating to pools and trusts, and making guilty of a conspiracy persons who combine to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in the state.

(November 18, 1908.)

APPEAL by defendants from a judgment of the District Court for Bremer County discharging petitioner in a habeas corpus proceeding from custody to which he had been committed for alleged violation of the statute against combinations. Affirmed.

Statement by **Deemer, J.:**

This is a habeas corpus proceeding brought to determine the legality of an indictment returned against the plaintiff by the grand jury of Bremer county, Iowa. A demurrer to the petition was overruled, and the trial judge discharged the plaintiff and released him from the custody of the sheriff, by whom he was held. Defendants appeal.

Messrs. Bernard Stenzel and J. T. Sullivan, for appellants:

Medical and surgical services are a commodity under the provisions of § 5060 of the Code of Iowa.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; United States v. Workingmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994, 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 29 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; Com. ex rel. Chew v. Carlisle, Brightly (Pa.) 40; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

Messrs. **Hagemann & Farwell** and **Sager & Sweet,** for appellee:

The word "commodity" as used in Code, § 5060, does not include within its meaning medical or surgical services.

Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112

Note. — For a case holding that a combination for the purpose of regulating charges for personal services is not within the inhibition of a very similar statute to that considered in the above case, see State v. Board of Trade, ante, 1260, and cases gathered in a note thereto.

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Am. St. Rep. 420, 104 N. W. 40; State v. Henke, 19 Mo. 225; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A.(N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092; Downing v. Lewis, 56 Neb. 386, 76 N. W. 900.

Deemer, J., delivered the opinion of the court:

Plaintiff, who is a physician and surgeon, with thirteen others of like profession, was indicted by the grand jury of Bremer county for the crime of entering into an agreement, combination, or understanding to fix and maintain fees and charges to be exacted for medical and surgical services in said county. Plaintiff was arrested under the indictment, and thereafter brought habeas corpus proceedings before the Honorable C. H. Kelley, Judge, to secure his release from custody, claiming that he was unduly and illegally restrained of his liberty, for the reason that the indictment charges no offense known to our laws, and that, if there be a law forbidding such acts as are charged against him, it is unconstitutional and void, in that it deprives him of his liberty, prevents him from acquiring or possessing property, and deprives him of his safety and the pursuit of his happiness, and deprives him of the right of contract and of the equal protection of the laws. The charging part of the indictment reads as follows: "The said L. C. Kern, Dr. C. T. Brown, Dr. O. L. Chaffee, Dr. W. A. Rohlf, Dr. H. C. Jungblut, Dr. B. C. Dunkelberg, Dr. C. H. Graening, Dr. Stafford, Dr. A. G. Rennison, Dr. Patterson, Dr. J. F. Auner, Dr. Murphy, Dr. Bradford, Dr. Cross, on the 30th day of July, in the year of our Lord one thousand nine hundred and seven, in the county aforesaid, being physicians and surgeons located and practising their professions in the county of Bremer, state of Iowa, did then and there wilfully, unlawfully, and maliciously conspire, combine, confederate, and agree with each other to create, organize, and enter into, and did then and there wilfully, unlawfully, and maliciously enter into, and become a member of, and a party to, a trust, pool, agreement, contract, combination, confederation, and understanding, to fix, establish, and regulate, and maintain the price of a commodity in the county of Bremer, state of Iowa, and did then and there wilfully and unlawfully fix, regulate, and establish the price of medical service and medical skill, and the profit, benefit, fee, and compensation to be received therefor, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Iowa." The demurrer challenges these contentions of plaintiff, and it is stoutly insisted upon this appeal, that the indictment does charge an offense, and that the statute under which it was found is a valid exercise of legislative power.

As the case must turn upon the construction of a statute, we here copy the material parts of the section under which the indictment was found. It is No. 5060 of the Code, reading as follows: "Pools and Trusts.—Any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership, association, or individual, creating, entering into, or becoming a member of, or a party to, any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, shall be guilty of a conspiracy." The first point to be decided is: Do the acts charged constitute a crime under this section of the Code? It will be noticed that it forbids a combination, agreement, or understanding to regulate or fix the price of any article of merchandise or commodity, or of merchandise to be manufactured, mined, produced, or sold in this state. The primary inquiry is: Are the charges of a physician or surgeon for his medical skill or ability an article of merchandise or commodity to be produced or sold in this state? For appellant it is contended that the word "commodity" is broad enough to cover the charge made for professional services or skill, and that the trial court was in error in holding to the contrary. It must be remembered that the word is found in a criminal statute, and that, in the interpretation of such statutes, different rules apply from those which obtain in civil matters or where contracts are involved. Nothing is to be added to such statutes by intendment, and, as a rule, they are to have a strict construction. Moreover, it is well settled that, in construing any statute, all the language shall be considered, and such interpretation placed upon any word appearing therein as was within the manifest intent of the body which enacted the law. Much, of necessity, depends upon the context and upon the usual and ordinary significance of the language used. Now, the word "commodity" is derived from the Latin *commodetas*, and means primarily a convenience, profit, benefit, or advantage; but, in referring to commerce, it comprehends everything movable—that is, bought or sold—except animals. See Webster's Interna-

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tional Dictionary; Best v. Bauder, 29 How. Pr. 489; Barnett v. Powell, Litt. Sel. Cas. 409; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397. This word appearing in another statute (McClain's Code, § 5454) was held to cover insurance, and it was decided that a combination to fix insurance rates was illegal. See Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428. But in that case the parties were not selling their own services. They were, as the opinion says, selling insurance, which was regarded as a commodity as used in the statute then under consideration. Here, the indicted defendants were for a price giving their own services, or perhaps selling them, and the question is: Were these personal services a commodity?

As already indicated, the word must be taken in connection with the others used in the statute, and it is manifest that the commodity referred to must have been such as could be manufactured, mined, produced, or sold in the state, and the price was to be of an article or merchandise or commodity. If the contention of appellant be correct, the statute covers all kinds of personal labor, both skilled and unskilled, under the term "commodity." Indeed, this is the broad claim made by counsel. Now, whilst there is a class of political economists who treat labor as so much merchandise, the wage being regulated simply by supply and demand, there is another class which, taking account of the personal equation, sees in it something more than a commodity, and refuses to subscribe to the doctrine that supply and demand alone regulate the price. This latter class of economists refuse to accept the doctrine that a man is rich because he has stored away within him many days' work, and are convinced that his necessities, quite as often as the demand for his labor, fix the stipend which he is to receive. In other words, the laborer, skilled or unskilled, is not regarded as standing on an equality with him who barters in goods and merchandise. It is not, of course, within the province of courts of justice to adopt or promulgate any particular system of political science; but in the interpretation of statutes they must take notice of current political theory and conviction. If we were to adopt the view so strongly presented by appellant's counsel, it would be on the assumption that the associated words "merchandise" and "commodity" include the wages to be paid for labor, because labor is a sort of merchandise, subject to barter and sale as other goods. A fundamental rule of construction is that, where particular words are followed by general ones, the general are restricted in meaning to objects of a like kind with those specified. State v. Stoller, 38 Iowa, 324; People v. New York & M. R. Co. 84 N. Y. 565; McDade v. People, 29 Mich. 50. Now, the term "merchandise" is special rather than general, and has reference primarily to those things which merchants sell either at wholesale or retail. Jewell v. Sumner Twp. 113 Iowa, 47, 84 N. W. 973. "Commodity" is a broader term, and, when used as in the statute now under consideration, means almost any description of article called movable or personal estate. Barnett v. Powell, supra; Shuttleworth v. State, 35 Ala. 415; State v. Henke, 19 Mo. 225.

Used in connection with the term "merchandise," and qualified as it is in the latter part of the section by the words "manufactured, mined, produced, or sold," it is manifest that the statute was not intended to, and did not, include labor, either skilled or unskilled. It must be remembered that the statute is a criminal one, and that such statutes must be strictly construed; and, in case of doubt, the construction must be adopted most favorable to the party charged. The only ground upon which appellant can stand with any show of plausibility is that labor is a commodity to be bought, sold, or produced, as merchandise. This is a strained and unnatural construction, and gives to the word "commodity" a meaning which is perhaps permissible, but is not the commonly accepted one. Under our statutes, words and phrases are to be construed according to the context and the approved usage of the language. Code, § 48. With this in mind, we are constrained to hold that labor is not a commodity within the meaning of the act now in question. As supporting this conclusion, see Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40, 12 Det. L. N. 264; Queen Ins. Co. v. State, supra. It seems to be the almost universal holding that it is no crime for any number of persons, without an unlawful object in view, to associate themselves together, and agree that they will not work for or deal with certain classes of men, or work under a certain price, or without certain conditions. Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Com. v. Hunt, 4 Met. 134, 38 Am. Dec. 346; Rogers v. Evarts, 17 N. Y. Supp. 268; United States v. Moore (C. C.) 129 Fed. 630.

The statute in question was aimed at unlawful conspiracies or combinations in restraint of trade, and was manifestly not intended to cover labor unions. It is the right of miners, artisans, laborers, or professional men to unite for their own improvement or advancement, or for any other lawful purpose, and it has never been held, so far

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as we are able to discover, that a union for the purpose of advancing wages is unlawful under any statutes which have been called to our attention. As said by Judge Taft in Re Phelan (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803: "Such unions, when rightly conducted, are beneficial in character." And it would be a strained and unnatural conclusion to hold that a statute aimed at pools and trusts should be held to include agreements as to prices for labor, because the word "commodity" is used therein. As the right to combine for the purpose of securing higher wages is recognized as lawful at common law, a statute enacted to prohibit pools and trusts should not be held to apply to combinations to fix the wages for labor, unless it clearly appears that such was the legislative intent. Whatever of doubt there may be regarding the power of the legislature to do so, we do not think that the act in question covers combinations to fix the labor price, whether that labor be skilled or unskilled.

Appellants rely largely upon the celebrated cases of Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815, and Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, and other like cases, in support of their construction of the statute; but in our opinion none of these cases are applicable. The Debs Case is not in point. Others involved a pool between manufacturers, and still others boycotts. In the Loewe Case defendants were engaged in a boycott of plaintiff and its customers, and were in the performance of acts calculated to destroy plaintiff's business by driving away customers, by threats and coercion were driving away plaintiff's employees, and circulating false reports regarding plaintiff and its business, the effect of which was to destroy its interstate trade. These acts were held to be an unlawful interference with interstate commerce and a violation of the anti-trust law known as the "Sherman act" (Act July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200). The statute before us has nothing to do with commerce, nor does it have to do with restraint of trade or commerce, as does the Sherman act. It has to do with pools and trusts organized in this state to fix or regulate the price of any article or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be produced or sold in the state. Surely it has no reference to the amount or quality of labor to be produced or sold. Such a construction would be ridiculous. And, if it will not bear that interpretation, it follows that the word "commodity," when used with reference to prices, should not be held to include labor. No case has been cited which supports appellant's contention, and we have not been able to find any. On the other hand, the following lend support to our conclusions: Cleland v. Anderson, 66 Neb. 252, 5 L.R.A. (N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092; Downing v. Lewis, 56 Neb. 386, 76 N. W. 900; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91. It would be stretching the statute entirely too far to hold that it covers combinations to fix the price of labor. That the practice of medicine and surgery is labor, no one, we think, will question.

The trial court was right in discharging the plaintiff, and its judgment must be, and it is, affirmed.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA, Plff. in Err.,
v.
ROBERT L. DRAYTON.

(82 Neb. 254, 117 N. W. 768.)

Constitutional law — commercial discrimination.

1. The act of the legislature entitled "An Act to Prohibit Unfair Commercial Discrimination between Different Sections, Communities, or Localities, or Unfair Competition, and Providing Penalties Therefor," approved April 3, 1907 (Sess. Laws 1907, chap. 157, p. 490), held not to be in violation of the Constitution.

Same — class legislation.

2. The said act does not prevent persons and corporations dealing in commodities in general use from selling them at such price as such person or corporation may see proper to demand, nor is it class legislation within the constitutional prohibition.

Same — police power.

3. The prevention of discrimination in particular localities, in price of commodities in general use, "for the purpose of destroying the business of a competitor" by selling such commodities at a lower rate in such locality than is charged for the same elsewhere, is within the police power of the state.

Same — power of legislature.

4. Within constitutional limits, the leg-

Headnotes by REESE, J.

Note. — An extended search has failed to disclose any other case which has passed on the power of the legislature to forbid selling a commodity in a particular locality at a lower rate than obtains elsewhere for the purpose of stifling competition.

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islature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised.

(September 16, 1908.)

ERROR to the District Court for Antelope County to review an order sustaining a demurrer to an information charging defendant with having violated an anti-competition law. Reversed.

The facts are stated in the opinion.

Mr. S. D. Thornton, for plaintiff in error:

While the police power cannot be put forward as an excuse for oppressive legislation, yet, when properly resorted to for preserving the public interest and the protection of private parties, a large discretion is vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

State ex rel. Ornstine v. Cary, 126 Wis. 135, 11 L.R.A.(N.S.) 174, 105 N. W. 792.

A statute will not be declared unconstitutional unless it is palpably repugnant to the Constitution, and it is not sufficient that it is unjust and oppressive in some of its provisions, or that it violates the natural, social, or political rights of the citizen, unless it is shown that such injustice is prohibited or that such rights are guaranteed by the Constitution.

National Council, J. O. A. M. v. State Council, J. O. U. A. M. 104 Va. 197, 51 S. E. 166.

An objection that a statute is inequitable and unjust cannot be considered by a court, as that is a matter within the exclusive jurisdiction of the legislature.

Kerr v. Perry School Twp. 162 Ind. 310, 70 N. E. 246; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; Gordon Bros. v. Wageman, 77 Neb. 185, 108 N. W. 1067; Shortall v. Puget Sound Bridge & Dredging Co. 45 Wash. 290, 122 Am. St. Rep. 899, 88 Pac. 212.

A law applying to all persons engaged in an industry ordinarily recognized as a distinct business is not class legislation.

Brady v. Mattern, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; Soon Hing v. Crowley, 113 U. S. 705, 28 L. ed. 1146, 5 Sup. Ct. Rep. 730; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; Iowa Railroad Land Co. v. Soper, 39 Iowa, 112; Iowa Eclectic Medical College Asso. v. Shrader, 87 Iowa, 659, 20 L.R.A. 355, 55 N. W. 24; People v. Smith, 108 Mich. 529, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; Merritt v. Knife Falls Boom Corp. 34 Minn. 245, 25 N. W. 403; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5; State v. Moore, 104 N. C. 714, 17 Am. Rep. 696, 10 S. E. 143; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, 49 Ark. 325, 5 S. W. 297; State Assessors v. Central R. Co. 48 N. J. L. 146, 4 Atl. 578; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 163, 24 L. ed. 95; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Missouri P. R. Co. v. Humes, 115 U. S. 523, 29 L. ed. 466, 6 Sup. Ct. Rep. 110; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

Messrs. W. T. Thompson, G. G. Martin, and W. B. Rose also for plaintiff in error.

Messrs. Jackson & Kelsey, Isaac E. Congdon, and W. D. McHugh for defendant in error.

Reese, J., delivered the opinion of the court:

An information was filed in the district court of Antelope county, in which it was charged that the defendant, the agent of the Atlas Elevator Company, a corporation, incorporated under the laws of the state of West Virginia, and doing business in this state, and engaged in the sale and distribution of lumber, lime, plaster, cement, and brick, commodities in general use in the village of Orchard, in Antelope county, and in the village of Brunswick, in the same county, on the 20th day of August, 1907, in the county and state aforesaid, "did unlawfully, maliciously, and intentionally, for the purpose of destroying the business of a competitor in the village of Orchard, in Antelope county, in the state of Nebraska, discriminate between different sections of the state of Nebraska, to wit, the village of Brunswick, in Antelope county, in the state of Nebraska, and the village of Orchard, in Antelope county, in the state of Nebraska, by selling such lumber, lime, plaster, cement, and brick at a lower rate in the village of Orchard, in said state and county, than is charged by the Atlas Elevator Company for lumber, lime, plaster, cement, and brick in the village of Brunswick, in said county and state, after making due allowance for the difference in the grade, quality, and the

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actual cost of transportation from the point of production of said lumber, lime, plaster, cement, and brick, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." The defendant filed his motion to quash the information, alleging the following reasons and grounds therefor:

"First. Because the legislative enactment by the legislature of the state of Nebraska, under which the said information was filed, contravenes the provisions of the Constitution of the United States of America.

"Second. Because the legislative enactment contravenes the provisions of the Constitution of the state of Nebraska, and that such enactment is unconstitutional and void.

"Third. Because the facts stated in the information are not sufficient to constitute an offense under the laws of the state of Nebraska."

The district court sustained the motion, following the order with the recital that "it appearing to the court that no valid information can be filed against the defendant, under the statute and laws of the state under which the information was filed, it is ordered that the defendant be discharged and his bail released." The county attorney excepted to the ruling and order of the court, and brings the case to this court for review, under the provisions of §§ 483 and 515 of the Criminal Code.

There is no attack made upon the form of the information in the briefs of contending parties, and nothing was said upon the subject in the oral arguments; hence no reference will here be made to it. The whole contention is as to the constitutionality of the act of April 3, 1907, published as chapter 157, p. 490, Sess. Laws 1907. The act is too long to be copied here in full, and we must be content with a reproduction of the 1st section, which is as follows: "Section 1. (Local Unfair Discriminations.) Any person, firm, company, association, or corporation, foreign or domestic, doing business in the state of Nebraska and engaged in the production, manufacture, or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section, community, or city than is charged for said commodity by said party in another section, community, or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from a point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful." The other sections prescribe the penalties for a violation of the law and the methods of its enforcement; but which we need not here notice. We have been favored with able oral arguments at the bar of the court as well as very elaborate briefs, in which a multitude of cases are cited, and with a full discussion of the legal principles contended for, but which it will be impossible for us to refer to in detail without extending this opinion to an unreasonable length. As we understand the contention of counsel for defendant, it may be fairly summarized by the following extract from their brief: "A careful examination of the act reveals that it is directed against persons or corporations doing business in the state and engaged in the production, manufacture, or distribution of 'any commodity in general use;' against persons or corporations dealing in commodities which, until the passage of the act, had universally, and ever since mankind began to trade, been regarded as subjects of legitimate and unrestrained commerce and private enterprise. The act is not directed against dangers to the public health or morals. The act is not directed against so-called natural monopolies or business affected with a public interest. The act attacks trading in commodities in general use. It is the converse of an anti-trust law in being an anti-competition law." The argument is that the object and purpose of the act are not within the police power of the state; that its effect would be to stifle competition and thus foster monopolies; that it takes from the citizen the right to contract and to control his property, destroys freedom in trade, and practically compels the merchant and tradesman to conduct and carry on his business at one place only; that it is class legislation, and "operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place." It is said that "the fundamental error in the act is that it attempts to inquire into a man's intentions with reference to something that is his own private concern, just as much as his religion or politics. Dealing in commodities in general use is something with which the police power of the state has nothing whatever to do. The citizen is a free man, and is the keeper of his own heart and mind." It is contended that the act is violative of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law,

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and that no person shall be denied the equal protection of the laws; and that the similar provision in the Constitution of this state is also violated by this act. Many cases are cited by which it is sought to maintain this contention; but, in the view which we take of the law, we are not able to see that they can be applied. They refer, in the main, to the statutes which seek to control and limit transactions in the ordinary and lawful commerce of the country, such as the issuance of trading stamps, the conferring of presents or gratuities out of one's own property for the purpose of drawing custom, the right of the individual to engage in any line of lawful business he may see proper to follow; that acts which discriminate in favor of one as against another class of persons engaged in the same lawful business are infractions of the Constitution, and therefore void, as well as acts declaring specified transactions unlawful, but exempting from their provisions certain named classes of persons and lines of business; the maintaining by mining or manufacturing companies of stores, truck shops, etc., by which they sell their goods and wares to their employees on credit at a higher price than is charged other customers who buy for cash; that classifications of persons or things must be general, and apply to all similarly situated; acts which seek to destroy the right of every competitor to fix his own price upon commodities which he may lawfully sell or money which he may lawfully loan (subject of course to usury laws), and, in general, such acts as seek to invade the reserved right of every individual to transact and carry on his lawful business according to his own judgment, in his own way, untrammeled by discriminatory laws, by which others similarly situated are given preferences over him. In the foregoing we have sought to fairly outline the contention of the defendant, giving in this limited way the substance of the holdings of the cases cited without further reference to them.

At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that no act of the law-making power of the state can be held unconstitutional unless it is clearly violative of the provisions of the Constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations. That unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that, with reference to the latter subject, the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of the act in question, we are driven to the conclusions that it is not subject to attack upon either of the grounds named. It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of anyone's business, nor prevent the sale of any commodity at any price which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution, and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the possession and use of property, that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others. The whole fabric of civilized, social, and commercial life, and the enjoyment of liberty and ownership of property, are based upon compromises and limitations of the use of one's members and the control of his property. The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, or on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so for the purpose named. It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of prices or abandon their business, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense. As claimed by counsel for the state, the statute under consideration was enacted for the purpose of supplying a defect in the anti-trust laws of the state. It is within the knowledge of all that in many instances persons engaged in the sale of commodities in general use by the people have depressed prices in one locality where there was competition and increased them in others where there was none, thus avoid-

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ing loss, until the competitor was driven out of business, when prices would be raised to an unreasonable and oppressive extent, and the people of the district or community supplied from that point would be the sufferers. It was evidently the intention of the legislature to prevent that course of conduct, if resorted to for that purpose. The law afforded no protection from the injurious effects of such predatory course. If no protection could be furnished to the people who were compelled to purchase the commodities, it would be easily within the range of possibilities for one person or corporation to practically control the whole commerce of a community, a county, or even the state, exacting such prices as greed might dictate, and yet seeing to it that no others should be allowed to engage in a similar business as competitors. It is within the knowledge of all of mature years that, within the last quarter or half century, the meats furnished the people of our cities and towns were supplied by local dealers who purchased their live stock from the near-by farmer or stock grower, slaughtered the animals, and supplied wholesome meats at reasonable prices, and yet paid remunerative prices for the live animals, saving the cost of transportation to and from what are now the exclusive points of manufacture and production. That both the producers and consumers are losers is known to all. That this condition has been brought about by a system of coercion and underselling "for the purpose of destroying the business" of local competitors is also known to all. Is there no power anywhere lodged in the state to prevent this or remedy the evil? If there is, it is with the lawmaking power. If that department of government has the power, it must be by the exercise of the rights of police regulation. Has the legislature that power?

Many writers have sought to define and prescribe the true extent and limitations of the police power, but none have succeeded to the approval and satisfaction of all. It must be conceded that in its operation there is no distinction between persons natural or corporate. Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 642. In Tiedeman's Limitations of Police Power, p. 1, it is said: "The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise,—such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. It involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law, *Sic utere tuo ut alienum non lædas.* The power of the government to impose this restraint is called 'police power.' By this 'general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made so far as natural persons are concerned.'" In 22 Am. & Eng. Enc. Law, 2d ed. pp. 915, 918, it is said: "It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend, and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto. There have been, however, many attemps to define this power in a general way, and the sum of these definitions amounts to this: That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest. . . . The police power is an attribute of sovereignty, and exists without any reservation in the Constitution, being founded upon the duty of the state to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. Upon it depend the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property; and it has been said to be the very foundation upon which our social system rests. It is founded largely on the maxim, *Sic utere tuo ut alienum non lædas*, and also to some extent upon that other maxim of public policy, *Salus populi suprema lex.*"

It is true that the ultimate question of the validity of a statutory enactment by which this power is sought to be exercised is with the courts, and they will not hesitate to discharge the duty of declaring an

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act void if clearly so convinced, but subject to the presumptions and limitations herein referred to. The rule upon this subject can perhaps be no more clearly expressd by us than by the following: "Under the police power the state can interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. But the character of police regulations, whether reasonable, impartial, and consistent with the Constitution and the state policy, is a question for the courts, for the police power is too vague, indeterminate, and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it; and, when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizen's right, for to hold that every act of the general assembly passed under the guise of an exercise of the police power or sought to be defended upon that ground was beyond judicial control would render every guaranty of personal right found in the Constitution of little or no value." 22 Am. & Eng. Ency. Law, 936. The legislature, as we must conclusively presume, acted upon the fullest investigation, and upon what appeared to it to be reasonable grounds, and, as must be also assumed, has determined that the prohibition of the reduction of the price of commodities in general use in any particular locality, "for the purpose of destroying the business of a competitor in such locality," and discriminating "between different sections, communities, or cities" by underselling at the point of competition for the purpose named, would be conducive to "the general welfare" of the people compelled to purchase such commodities, and by the act in question has sought to remedy the evil. Has it not the power to do so? As said in Yick Wo v. Hopkins, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064, and quoted in Powell v. Pennsylvania, 127 U. S. 685, 32 L. ed. 256, 8 Sup. Ct. Rep. 996: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." If the state has not the power to protect its people from the acts of those who have for their "purpose" the destruction of the business of a competitor in order that the wrongdoer may have a monopoly, its powers are much more limited than we had supposed. In Powell v. Pennsylvania, supra, the court, quoting from the Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496, said: "Every possible presumption . . . is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. . . . The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large." Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936, is an instructive and well-considered case upon the general subject involved in this case. When we take into consideration that it is not the act itself, but the act coupled with the purpose of destroying the business and property of others, which is declared to be criminal, we find but little trouble in arriving at the conclusion that the statute is within the power of the legislature, and is therefore valid.

It is contended by counsel for defendant that "the act interferes with freedom of contract," and is therefore violative of the Constitutions of both the Federal and state governments. As we have already indicated, we are wholly unable to see where the previously existing right of the individual to enter into lawful contracts is in the least abridged or impaired. It is not the making of contracts which is forbidden, but the conduct, purpose, and motives of the party in connection with his acts, which brings him within the prohibitions of the law.

It is also contended that the act is void by reason of its classifications, and must therefore be held invalid on the ground of "class legislation." It is said that "the act operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place." That "keepers of but one store may compete, intend to build themselves upon the ruins of their fellows who maintain single stores or stores in several places, and to ruin their fellows in order to build themselves up, and the law applauds; but keepers of more than one store doing the very things and with like intentions as single store keepers are frowned upon, fined, and imprisoned." To this we must be permitted to say that we

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are unable to find any provision in the act which is susceptible of the construction contended for. An individual or corporation may have but one place where the commodity dealt in may be stored or kept in stock, and yet in the "distribution" of that stock may seek to destroy the business of a competitor in another locality, and thus violate the law. There are many cities and villages in this state which are adjacent to each other,—sometimes so near as to cause a stranger, unacquainted with their superficial boundaries, to be unable to say where one leaves off and another begins. A dealer in one may, for the purpose of destroying the business of a competitor in the other, so discriminate as between the two places as to violate the statute. Common experience and observation, within the knowledge of all, is to the effect that many of the strongest and most grasping monopolies of the state have their places of business—their business homes—in but one place, and yet they are "distributing" and "selling" their commodities in practically every city and village within the state. They do not desire competition. They do not hesitate to destroy the business of local dealers wherever found by unjust discriminations. If prompted by that "purpose," the law is violated, and it is within the power of the legislature to prevent the discrimination. Again, it is said that, by the provisions of the law, an act which is of itself lawful may be rendered unlawful by reason of the mind or purpose of the individual accused, and that such mental condition or purpose would be impossible of proof. This is not a question which inheres in the subject before us. The presence or absence of a criminal purpose may or may not be easily ascertained, but with that we now have nothing to do. Each prosecution under the act will have to depend upon its own proved facts. The existence or nonexistence of what is known in criminal law as the criminal mind would be a question for a trial jury under the facts established by the evidence submitted. Questions are discussed in the brief of defendant, which we have incidentally referred to, but without special attention, and which we scarcely think merit a further extension of this opinion.

We find nothing in the act under consideration requiring us to hold it unconstitutional. The District Court erred in holding the act of the legislature invalid. The exceptions of the state are therefore sustained. Judgment accordingly.

Petition for rehearing denied.

23 L.R.A.(N.S.)

PENNSYLVANIA SUPREME COURT.

ZACHARY T. BRINDLEY, Appt.,
v.
EDWIN WALKER et al.

(221 Pa. 287, 70 Atl. 794.)

Corporation — removal of secretary.

A secretary and treasurer of a corporation appointed by the board of directors may be removed at the pleasure of the board, although the statute provides that the corporation shall be managed by a president, a board of directors, a secretary, a treasurer, and such other officers as the corporation authorizes.

(May 11, 1908.)

Case Note. — Power of directors to remove their own appointee who is one of the class of officers to whom the management of the business is confided.

The general rule is that, where the law governing a corporation is silent as to the tenure of the officers thereof, and also as to their removal, the power of amotion is incidental to that of appointment, and the appointing power may remove an officer appointed by them whenever, in their judgment, the best interests of the institution require it. People ex rel. Stevenson v. Higgins, 15 Ill. 110; State ex rel. Danforth v. Kuehn, 34 Wis. 229.

In People ex rel. Stevenson v. Higgins, supra, it is said that the appointing power may remove any officer appointed by them, without assigning any specific cause therefor, if, in their judgment, the best interests of the corporation require it.

While in State ex rel. Danforth v. Kuehn, supra, it is said that this power of amotion does not authorize the removal of an officer by the appointing power arbitrarily and without cause; that the power to remove, when an incident to the power to appoint, is confined to removal for good cause shown, which must be something affecting the character and qualification of the incumbent, or his unfitness, or want of capacity, longer to discharge the duties of his position. And see also to same effect, Fuller v. Academic School, 6 Conn. 532.

This power of removal, where incident to the power to appoint, seems to include all classes of officers, without reference to their position in the corporation, whether executive, managerial, or subordinate. Re A. A. Griffing Iron Co. 63 N. J. L. 357, 46 Atl. 1097 (president); O'Neal v. F. A. Neider Co. 118 Ky. 62, 80 S. W. 451 (treasurer); Granger v. American Brewing Co. 25 Misc. 302, 55 N. Y. Supp. 695 (general superintendent), reversed on a different point in 25 Misc. 701, 54 N. Y. Supp. 590.

This doctrine has also been applied to the power of trustees of public academies and universities to remove their appointees. Fuller v. Academic School, supra;

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APPEAL by plaintiff from a judgment of the Court of Common Pleas for Erie County in defendants' favor in a mandamus proceeding to compel the reinstatement of plaintiff as secretary of the Erie Specialty Company. Affirmed.

The Erie Specialty Company was organized under the act of April 29, 1874, and its supplements. It had a paid-up capital stock of 700 shares, of which plaintiff owned 350. It was managed by a board of three directors, and the board organized by electing plaintiff as secretary and treasurer. After the organization the president called a special meeting, at which plaintiff was deposed and other persons placed in the offices of secretary and treasurer.

Further facts appear in the opinion.

Messrs. **Frank Gunnison, John S. Rilling,** and **Henry E. Fish,** for appellant:

The secretary of an incorporated company is a managing officer of the company, and is not merely an officer of the managers or directors by whom he is appointed.

4 Thomp. Corp. § 4692; Ehrenzeller v. Union Canal Co. 1 Rawle, 181; Coffin v. Reynolds, 37 N. Y. 640.

Messrs. **J. C. Sturgeon, H. M. Sturgeon,** and **T. A. Lamb,** for appellees:

The board of directors of a private corporation have power to remove their secretary and treasurer at pleasure, without alleging a reason therefor and without notice to the party removed, where there is no provision in the law nor in the by-laws of the corporation, fixing the term for which the officer so removed should serve.

1 Thomp. Corp. §§ 804, 805; 4 Thomp. Corp. §§ 4704, 4714; Burr v. M'Donald, 3 Gratt. 215; Adamantine Brick Co. v. Woodruff, MacArth. & M. 318; Re A. A. Griffing Iron Co. 63 N. J. L. 357, 46 Atl. 1097; Hand v. Clearfield Coal Co. 143 Pa. 408, 22 Atl. 709; Wood, Mast. & S. § 37; Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; 2 Cook, Stock & Stockholders, p. 1053, note 1; Bainbridge v. Smith, 60 L. T. N. S. 879; 2 Purdy's Beach, Priv. Corp. § 730; McCullough v. Moss, 5 Denio, 567; Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. ed. 438; Elkins v. Camden & A. R. Co. 36 N. J. Eq. 233; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Hoyle v. Plattsburgh, & M. R. Co. 54 N. Y. 314, 13 Am. Rep. 595; State ex rel. Bornefeld v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

Stewart, J., delivered the opinion of the court:

By the action of the board of directors of the defendant corporation the appellant was removed, without cause being assigned, from the office of secretary and treasurer, to which he had been elected by the board. He seeks by this proceeding to be reinstated, on the ground that in removing him the directors exceeded their power. The general rule with respect to officers in private corporations such as this is that all below the grade of directors, and such other officers as are elected by the corporation at large, hold their offices *durante bene placito*, and are removable by the directors without cause being assigned. The reason for the rule is as obvi-

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Field v. Girard College, 54 Pa. 233; State v. Vincennes University, 5 Ind. 77.

Usually the power to remove is expressly conferred by by-law, charter, or statute, upon the appointing power; where so conferred, it is well settled that the power to remove exists to the extent thus conferred and in the manner provided, if provision is made therefor. Stobo v. Davis Provision Co. 54 Ill. App. 440 (removal of secretary by board of directors); State ex rel. Bornefeld v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265 (also removal of secretary by directors); Douglass v. Merchants' Ins. Co. 118 N. Y. 484, 7 L.R.A. 822, 23 N. E. 806 (also removal of secretary by directors); Solley v. American Lubricator Co. 119 Iowa, 591, 93 N. W. 590 (removal of vice president by directors); Queen v. Second Ave. R. Co. 44 How. Pr. 281 (removal of vice president and general superintendent by directors); Sparks v. Farmers' Bank, 3 Del. Ch. 274 (cashier of bank); Taylor v. Hutton, 43 Barb. 195 (president of national bank).

The power of removal, where conferred in general terms or existing as an incident to the power of appointment, does not authorize the board of directors to remove one of their own number. Com. ex rel. Dickinson v. Detwiller, 131 Pa. 614, 7 L.R.A. 357, 18 Atl. 990; Laughlin v. Geer, 121 Ill. App. 534; Raub v. Gerken, 127 App. Div. 42, 111 N. Y. Supp. 319.

A board of directors, not having power to remove a member thereof, has no power to amend the by-laws to authorize them to remove a director. Raub v. Gerken, supra.

Where the by-laws of an unincorporated association give the executive committee no power to remove the secretary or to appoint his successor, and his election comes from the association itself, and is for a designated term, such committee cannot remove him, since his removal can be accomplished only by the body which elected him. Tanner v. Ranken, 44 Misc. 488, 89 N. Y. Supp. 770.

Where the by-laws of an incorporated savings bank provide that the directors shall elect from their number a president, vice president, and such other assistants as are necessary, the assistants to hold office at the pleasure of the directors, no power to remove the president exists in the board of directors. Archer v. People's Sav. Bank, 88 Ala. 249, 7 So. 53.

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ous as the distinction made. The supreme authority in every corporation resides in its membership. The expressed will of the majority at a regular shareholders' meeting governs in all matters within the limits of the charter. Therefore, when action has been taken by the corporation at such a meeting on any subject pertaining to the affairs of the association, it is beyond the power of any of the agents of the corporation to undo or change what has been done. The directors are the immediate representatives of the corporation, charged with the management of its affairs, and are necessarily invested with large discretionary powers; but they can act only where the corporation has not. Ordinarily, the selection of the secretary and treasurer is committed to the board of directors, as was the case here; but, when the corporation has itself elected these officers, the directors must accept them, and the officers so elected hold on the terms and conditions prescribed by the corporation, and none other. They derive their title to their respective offices from the same source as the directors do theirs, and they can be removed only by the power that appointed them. It is otherwise when the corporation has committed the election to the board of directors. In such case the board stands for the corporation, the officers selected are its appointees, and its power to remove is necessarily implied. "The directors and managing agents of a corporation have undoubted authority to revoke the powers of the inferior agents whom they have appointed. It would be practically impossible to carry on the business of a corporation without this power. It is therefore always implied. The power is a discretionary one, and the rightfulness of its exercise cannot be investigated by the courts. But the directors of a corporation have no implied authority to revoke the power of those agents who are appointed by a vote of the stockholders, or whose office is fixed and regulated by the charter." 1 Morawetz, Priv. Corp. § 541. "The ministerial officers who are not elected by the corporators at large, for stated terms, but who are appointed by the board of directors, and who, therefore, sustain toward the corporation the relation of an employee toward an employer, serving for a compensation, which in general the directors do not receive, have no franchise in their office, and hence are removable at the mere pleasure of the directors, without the assignment of any cause, without the giving of any notice, and without any trial or investigation into the grounds of the removal." 1 Thomp. Corp. § 805.

The secretary and treasurer in corporations such as this are purely ministerial officers. The effort here made to show that, under our act of assembly, they are something more, is unavailing. The act of 1891, under which this corporation is said to have been chartered, provides that corporations chartered under it "shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents, and factors as the corporation authorizes for that purpose." The effect and purpose of this provision is to require of every corporation that it shall have the officers named, *viz.*, a president, directors, secretary, and treasurer, as a necessary part of the equipment of its organization. The act does not attempt to define the powers and duties of any of the officers named, but leaves these to be implied from the established custom and the nature and character of the places filled. The construction that would make the act invest the secretary and treasurer with discretionary power—something which a ministerial officer has not—would extend that discretionary power to all the agents and factors which the act allows the corporation to employ. Manifestly nothing of this kind was intended. From what we have said it follows that, in removing the appellant from the office of secretary and treasurer, the board of directors was exercising a power which rightfully belonged to it. Whether it was wisely or considerately exercised is not for us to determine.

The assignments of error are overruled, and the judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

DANIEL GARRIGAN, Plff. in Err.,
v.
UNITED STATES OF AMERICA.

(89 C. C. A. 494, 163 Fed. 16.)

Appeal — contempt — review.

1. A conviction for disobeying an injunctional order to punish for acts in contempt of the power and dignity of the court is reviewable as a criminal proceeding.

Injunction — notice — disobedience — contempt.

2. The mere publication in newspapers and posting upon wagons of an injunctional order forbidding interference with

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Case Note. — Necessity and sufficiency of notice of injunction to render one not a party guilty of contempt in disobeying it.

This note, as indicated in its title, presupposes that one not a party to a suit in which an injunction is issued may, at least if properly charged with notice of the injunction, be chargeable with contempt for

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teams of a teaming company are not sufficient to charge with knowledge thereof, so as to render guilty of contempt, one not a party to the proceeding who assists in a riot in which such teams are interfered with and those in charge of them assaulted, in opposition to his denial of knowledge and the legal presumption of his innocence.

Same — aiding disobedience — evidence.

3. The mere fact that one not a party to an injunction against interfering with the teams of a teaming association assisted in a riot in which such teams were interfered with and those in charge of them assaulted, is not sufficient to show that he aided and abetted persons named in the bill in violating the injunction, so as to render him guilty of contempt of court.

Same — assault on prisoner.

4. An assault upon a guard of a team, interference with which has been enjoined by the court, after he has been arrested and is in custody of the police, is not directed against a custodian of the team so as to render the act a contempt of the injunction.

(April 14, 1908.)

ERROR to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois to review a judgment adjudging defendant guilty of contempt in violating an injunctional order. Reversed.

Statement by **Seaman**, Circuit Judge:

The plaintiff in error, Daniel Garrigan, was adjudged by the circuit court guilty of contempt, in the violation of an injunctional order issued by that court, in aiding and abetting the parties enjoined and interfering with the business and employees under the protection of such order, and the proceedings and judgment are brought for review by this writ of error.

The judgment recites the proceedings and findings, and reads as follows: "It appearing to the court that on April 28, 1905, the Employers' Teaming Company filed its bill of complaint in equity in said court, in and for said district and division thereof, praying for an injunction, both temporary and permanent, and that on said April 28, 1905, on the application of said the Employers' Teaming Company, said court duly entered of record, in said chancery proceeding, a temporary stay and injunctional order, and that said the Employers' Teaming Company thereafter filed a petition in said chancery proceeding for a rule directing Daniel Garrigan to show cause by a

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violating the same, and deals simply with the question as to the necessity and the sufficiency of the notice in order to charge such a person.

Under some circumstances, at least, a party to an injunction suit may be chargeable with notice of the issuing of the injunction so that his violation thereof will render him guilty of contempt even though he has no actual notice thereof; but it is otherwise as to one not a party. In order to charge such a person with contempt he must have had actual notice of the injunction prior to the performance of the acts upon which the charge of contempt is based.

Thus, a stranger to an injunction if he has notice or knowledge of its terms is bound thereby, and may be punished for contempt for violating its provision: but he cannot be charged with contempt unless a copy of the injunction was served upon him, or it is proved that he had knowledge of its provisions. State ex rel. Thompson v. Lavery, 31 Or. 77, 49 Pac. 852. It was so held, although the injunction in this case ran against the "defendant. . . . his agents, attorneys, and employees, and all persons acting under, by, or through him."

In Stateler v. California Nat. Bank, 77 Fed. 43, an attorney who was not aware of an injunction restraining a certain party, his attorneys, etc., from commencing any further litigation or attempting to take control of any assets of an insolvent bank, and from attempting to settle or allow any attorney's or other fees growing out of past litigation, was held purged of contempt in

violating the order by an affidavit showing that he was not aware thereof.

Klinck v. Black, 14 S. C. 241, held that the act of a deputy sheriff in putting a purchaser into possession, after an order restraining such act had been served on the sheriff, but before the deputy had knowledge of the injunction, was invalid. This was not a proceeding for contempt, but the question involved was as to the validity and effect of the act itself.

The necessity of actual notice in order to charge one not a party with contempt in violating the injunction is very commonly recognized in the statements of the principle that one not a party to the suit may be chargeable with contempt in violating an injunction.

Thus, for example, an injunction is not only binding on persons who were actual parties defendant to the bill, but also on all persons who have actual notice of the contents of the writ, and the latter are liable to punishment for contempt for violating the injunction. O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 A. & E. Ann. Cas. 966.

It will also be observed that the necessity of actual notice of the injunction, in order to charge one not a party with contempt, is recognized in most of the cases cited in the note. There is, however, an exception to the rule requiring actual notice in such cases, where the order or decree granting the injunction operates, so to speak, *in rem* and attaches to certain property, and is not *in personam* merely.

Thus, actual notice of an injunction in

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short day why he should not be attached for contempt of said court for violating said temporary stay and injunctional order; and it further appearing to the court that affidavits were duly filed with and in support of said petition, and that upon the filing and presentation of said petition and affidavits, said Daniel Garrigan was duly ruled by said court, in said chancery proceeding, to show cause by May 31, 1905, at 10 o'clock A. M., why he should not be attached for contempt of said court for violating said temporary stay and injunctional order; and that said Daniel Garrigan was duly and personally served with a certified copy of said rule, and that he thereafter filed an answer thereto, supported by affidavits, and that rebuttal affidavits were filed by said the Employers' Teaming Company; and the court having heard and considered said petition, answer, and all said affidavits, and also oral evidence then and there offered in open court by said the Employers' Teaming Company and also by said Daniel Garrigan; and the court having heard the arguments of counsel for said respective parties, and being fully advised in the premises, and said Daniel Garrigan having been present in open court in person and by counsel at the hearing on said rule, and being also now here present in open court in person and by counsel,—the court finds that said Daniel Garrigan on May 2, 1905, in the city of Chicago, in said district, had full knowledge of the existence of said temporary stay and injunctional order and of the terms thereof, and with such knowledge did then and there knowingly, wilfully, and intentionally violate said stay and injunctional order, and did then and there, with full knowledge of the existence of said temporary stay and injunctional order, and of the terms thereof, knowingly, wilfully, and intentionally aid and abet the defendants, or some of them, to said bill of complaint, in committing acts and grievances complained of in said bill of complaint, and prohibited by said stay and injunctional order. And the court further finds that said Daniel Garrigan on the date and at the place last aforesaid, and with full knowledge of the existence of said temporary stay and injunctional order and of the terms thereof, did knowingly, wilfully, and intentionally and contrary to and in violation of the terms of said stay and injunctional order, interfere with, hinder, obstruct, and aid and abet the defendants, or some of them, to said bill of complaint, in interfering with, hindering, and obstructing the

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proceedings for the abatement of a liquor nuisance is not essential to render a lessee of the property liable for a contempt in maintaining a liquor nuisance on the premises, even though he was not a party to the proceedings, since the judgment operates upon the property as well as upon the person of the defendant, and the lessee necessarily takes the property subject to the restriction and burden imposed thereby. Silvers v. Traverse, 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888; State v. Porter, 76 Kan. 411, 13 L.R.A.(N.S.) 462, 91 Pac. 1073. (See note to latter case in 13 L.R.A. (N.S.) 462, as to the effect of a judgment enjoining the use of real property in a certain manner upon the right of subsequent occupants to use the property in that manner.)

In Buhlman v. Humphrey, 86 Iowa, 597, 53 N. W. 318, it was held that a decree in an injunction proceeding restraining certain persons therein named from keeping a liquor nuisance upon certain premises was not binding upon a subsequent purchaser of the premises or his lessee so as to subject them to punishment for contempt in case of their violation of the same; but this decision was not upon the ground that such purchaser or his lessees did not know of the injunction, but upon the ground that they were not bound thereby, and the court expressly said that it was immaterial whether in fact they knew of the injunction or not, since it was not directed against them and did not attach to the property.

In Newcomer v. Tucker, 89 Iowa, 486, 56 N. W. 499, holding that a tenant of premises could not be charged with contempt for the violation of an injunction which in terms enjoined the owner only from using the premises for the sale of liquor, the court said that the case was in all respects like Buhlman v. Humphrey, though it is also stated in this case that it did not appear that the tenant had knowledge of the injunction.

It is well settled that actual notice of the injunction is sufficient to render even one who was not a party guilty of contempt in violating it, and that it is not necessary, if he had actual notice, that he should have been served with a copy of the injunction or the writ. Re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658, affirming 12 C. C. A. 134, 22 U. S. App. 561, 64 Fed. 320; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; United States v. Sweeney, 95 Fed. 447; Ex parte Richards, 117 Fed. 658; Anderson v. Indianapolis Drop Forging Co. 34 Ind. App. 100, 72 N. E. 277; Koehler v. Farmers' & D. Nat. Bank, 3 Silv. Sup. Ct. 141, 6 N. Y. Supp. 470, affirmed in 117 N. Y. 661, 22 N. E. 1134; Daly v. Amberg, 126 N. Y. 490, 27 N. E. 1038; People ex rel. Aldinger v. Pugh, 57 Hun, 181, 10 N. Y. Supp. 684, affirmed in 132 N. Y. 403, 30 N. E. 745.

So, one though not a party to a bill is sufficiently charged with notice of an injunction to render him guilty of contempt in violating the same, by the reading and giving to him of a copy of the decree, and without service of a copy of the writ. Fowler v. Beckman, 66 N. H. 424, 30 Atl. 1117.

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business of said the Employers' Teaming Company, and also its employees and agents, while they were then and there engaged in the conduct and operation of its business; that said Daniel Garrigan has failed to show cause why he should not be attached and punished as for contempt of this court for violating said temporary stay and injunctional order; that said contempt has tended to defeat and impair the rights and interests of said the Employers' Teaming Company, and to obstruct justice, and bring the administration of justice into contempt. Wherefore, the premises considered, it is hereby ordered, adjudged, and decreed that said rule to show cause be and the same hereby is made absolute. And it is further hereby ordered and decreed by the court that the said Daniel Garrigan was and is, and he hereby is adjudged, guilty of and in contempt of this court, and that said Daniel Garrigan stand committed to and be confined and imprisoned in the county jail of Du Page county, in Wheaton, in said county, in the state of Illinois, for and during the period of three months, unless he shall be sooner discharged therefrom by due process of law, and that a warrant of commitment do now issue in due form for the arrest forthwith of said Daniel Garrigan, directed to the United States marshal for the northern district of Illinois, and that, when arrested by said marshal, said Daniel Garrigan be committed to said jail, and that he be there held for the said period of three months, unless sooner discharged therefrom by due process of law, and that said term of imprisonment shall begin when said Daniel Garrigan is lodged in said jail, as herein provided."

The injunctional order referred to ran against various trade organizations and individuals, named as defendants in the bill filed by the Employers' Teaming Company, —the plaintiff in error not being named therein, nor party of record in any form,— and "each and every of the agents and servants of the said defendants and of each of them, and any and all other persons and associations now or hereafter aiding or abetting or confederating or acting in concert with said defendants, or any or either of them, in committing the acts and grievances, or any of them, complained of in said bill of complaint," and restrained the commission of various acts, including the following: "Hindering, obstructing, or stopping any of the business of the complainant, the Employers' Teaming Company, in the maintenance, conduct, management, or operation of any of its business, barns, stables, horses, wagons, or properties of any kind in the city of Chicago; . . . also, from in any manner interfering with, hindering, obstructing or stopping the passage along and through the streets of said city of any of complainant's wagons, teams, or teamsters in and about the business of complainant: . . . and also from accompanying, following, talking with, or calling upon any person or persons employed by or doing business with said complainant, against the express will of said person or persons, for the purpose of or in such manner as to intimidate, threaten, or coerce any such person or persons; . . . and also, either singly or in combination with others, from picketing, besetting, or patrolling any place or places where said complainant's employees, teams, wagons, stables, barns, or other property may be or happen to be in said city; . . . and also, from ordering, assisting, aiding, or abetting in any manner whatsoever, any person or persons to commit any of the acts aforesaid." It further provided for service of the order upon and in respect of the defendants therein, and that it "shall be binding upon all of said defendants and all other persons whomsoever from and after the time they severally have knowledge of the allowance of this order."

Argued before Baker and Seaman, Circuit Judges, and Sanborn, District Judge.

Messrs. **Daniel L. Cruice and William H. Slack** for plaintiff in error.

Mr. **Levy Mayer** for the United States.

Seaman, Circuit Judge, delivered the opinion of the court:

The plaintiff in error was not a party to the bill filed by the Employers' Teaming Company for injunctional relief, nor a member of either of the associations named as defendants therein, nor named in the restraining order whereof violation is averred in these contempt proceedings, and neither averment nor proof appears of his relation to or privity with either of the parties enjoined, prior to or apart from the alleged acts in violation and contempt of such order. Thus the proceedings and conviction which are brought for review under this writ of error are distinctly criminal in their nature, and reviewable in conformity with the established doctrine of such procedure. Bessette v. W. B. Conkey Co. 194 U. S. 324, 326, 48 L. ed. 997, 1001, 24 Sup. Ct. Rep. 665; Re Christensen Engineering Co. 194 U. S. 458, 459, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729. Whatever of confusion appeared in the authorities, prior to the decisions above cited, as to the distinction in contempt proceedings between those of civil and criminal nature,—the one remedial for the benefit and enforcement of the rights of parties to a

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suit, and the other to punish for acts in contempt of the power and dignity of the court,—that classification has become the settled rule for testing the nature of the proceeding and reviewable questions.

The proceedings against the plaintiff in error were instituted by a petition filed by the Employers' Teaming Company, as complainant in the above-mentioned bill, averring, in substance, the issuance of the injunctional order referred to, its wide publication in newspapers in Chicago, and posting conspicuously on all the wagons of complainant which were engaged in the operation described, and stating "upon information and belief that each of the persons hereinafter named as respondents to this, its said petition, did at the time of the commission of the acts hereinafter complained of have full knowledge and notice of the issuance of said temporary stay or injunctional order, and knew, or by the exercise of ordinary intelligence might have known, of the issuance of said injunctional order." Thereupon the petition charges that the plaintiff in error (and numerous other persons named) "violated said injunctional order as aforesaid, at the time, place, and in the manner set forth in the affidavits of Solon W. Baxter" and seven other persons attached to and made a part of the petition. An answer was filed by the plaintiff in error, under a rule entered and served to show cause why he should not be adjudged guilty of contempt and after raising various objections to the petition and proceeding, which denies under oath commission of the several acts and offenses charged in the petition and affidavits, and denies knowledge or notice of the injunction, or violation thereof "intentionally or otherwise." Motion was made and denied to discharge the rule to show cause upon this sworn answer, and the case proceeded to hearing, with sufficient objections urged and saved on behalf of the plaintiff in error to raise the various propositions on which error is assigned.

The evidence upon which the conviction rests appears in a bill of exceptions, and consists mainly of *ex parte* affidavits, purporting to be made by witnesses of the occurrences in controversy,—with a single witness, one Dimick, produced and testifying in open court,—which affidavits were submitted on behalf of the parties respectively. In the opinion filed by the trial court it is aptly remarked that the opposing affidavits, "as is usual in such controversies, were directly contradictory of each other;" and that, in "such irreconcilable conflict of testimony, it is often impossible to get a clue to the truth." While these affidavits concur in proving a case of mob violence during the attempted movement of complainant's teams and wagons through the streets of Chicago, and riotous interference with the persons guarding them, those introduced for the prosecution and defense are "directly contradictory" in all the facts bearing upon the issues involved, both in respect of the conduct of the parties, collectively and individually, engaged in the riot, and of the part and conduct of the plaintiff in error therein. Assuming, without deciding, that it was within the discretion of the trial court to hear the case upon such affidavits, instead of ascertaining the facts from testimony taken in open court, as was the course adopted in Re Savin, 131 U. S. 267, 268, 33 L. ed. 150, 151, 9 Sup. Ct. Rep. 699, and mentioned as of course in United States v. Shipp, 203 U. S. 563, 575, 51 L. ed. 319, 324, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265, the facts to authorize conviction must nevertheless be clearly established, and the affidavits introduced here exemplify the infirmity of such *ex parte* means for the "legal understanding" of facts in controversy intended by the rules of evidence.

In any view of the charges of contempt and evidence so received, it is unquestionable that the only issues of fact were: (a) Whether the accused had knowledge of the injunction; and if such knowledge appeared, whether he committed acts, either (b) in aid of its violation by the parties enjoined, or (c) in plain defiance of its terms, and thus in contempt of the authority and commands of the court. As it is neither charged nor proven that the plaintiff in error was one of the parties enjoined, he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties. He was bound, alike with other members of the public, to observe its restrictions when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance by interference with or obstruction of the administration of justice; and the power of the court to proceed against one so offending and punish for the contemptuous conduct is inherent and indisputable. Seaward v. Paterson [1897] 1 Ch. 545, 554, 76 L. T. N. S. 215; Re Reese, 47 C. C. A. 87, 90, 107 Fed. 942. We believe the above-mentioned distinction in contempt proceedings, between disobedience of the injunction by parties and privies and the conduct of others in contempt of the authority and commands of the court, to be elementary, and the sufficiency of the evidence in the case at bar to support conviction must be tested thereunder. The question discussed in the briefs, whether the general averment in the petition that the

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business of said the Employers' Teaming Company, and also its employees and agents while they were then and there engaged in the conduct and operation of its business; that said Daniel Garrigan has failed to show cause why he should not be attached and punished as for contempt of this court for violating said temporary stay and injunctional order; that said contempt has tended to defeat and impair the rights and interests of said the Employers' Teaming Company, and to obstruct justice, and bring the administration of justice into contempt. Wherefore, the premises considered, it is hereby ordered, adjudged, and decreed that said rule to show cause be and the same hereby is made absolute. And it is further hereby ordered and decreed by the court that the said Daniel Garrigan was and is, and he hereby is adjudged, guilty of and in contempt of this court, and that said Daniel Garrigan stand committed to and be confined and imprisoned in the county jail of Du Page county, in Wheaton, in said county, in the state of Illinois, for and during the period of three months, unless he shall be sooner discharged therefrom by due process of law, and that a warrant of commitment do now issue in due form for the arrest forthwith of said Daniel Garrigan, directed to the United States marshal for the northern district of Illinois, and that, when arrested by said marshal, said Daniel Garrigan be committed to said jail, and that he be there held for the said period of three months, unless sooner discharged therefrom by due process of law, and that said term of imprisonment shall begin when said Daniel Garrigan is lodged in said jail, as herein provided."

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The evidence upon which the conviction rests appears in a bill of exceptions, and consists mainly of *ex parte* affidavits, purporting to be made by witnesses of the occurrences in controversy,—with a single witness, one Dimick, produced and testifying in open court,—which affidavits were submitted on behalf of the parties respectively. In the opinion filed by the trial court it is aptly remarked that the opposing affidavits, "as is usual in such controversies, were directly contradictory of each other;" and that, in "such irreconcilable conflict of testimony, it is often impossible to get a clue to the truth." While these affidavits concur in proving a case of mob violence during the attempted movement of complainant's teams and wagons through the streets of Chicago, and riotous interference with the persons guarding them, those introduced for the prosecution and defense are "directly contradictory" in all the facts bearing upon the issues involved, both in respect of the conduct of the parties, collectively and individually, engaged in the riot, and of the part and conduct of the plaintiff in error therein. Assuming, without deciding, that it was within the discretion of the trial court to hear the case upon such affidavits, instead of ascertaining the facts from testimony taken in open court, as was the course adopted in Re Savin, 131 U. S. 267, 268, 33 L. ed. 150, 151, 9 Sup. Ct. Rep. 699, and mentioned as of course in United States v. Shipp, 203 U. S. 563, 575, 51 L. ed. 319, 324, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265, the facts to authorize conviction must nevertheless be clearly established, and the affidavits introduced here exemplify the infirmity of such *ex parte* means for the "legal understanding" of facts in controversy intended by the rules of evidence.

In any view of the charges of contempt and evidence so received, it is unquestionable that the only issues of fact were: (a) Whether the accused had knowledge of the injunction; and if such knowledge appeared, whether he committed acts, either (b) in aid of its violation by the parties enjoined, or (c) in plain defiance of its terms, and thus in contempt of the authority and commands of the court. As it is neither charged nor proven that the plaintiff in error was one of the parties enjoined, he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties. He was bound, alike with other members of the public, to observe its restrictions when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance by interference with or obstruction of the administration of justice; and the power of the court to proceed against one so offending and punish for the contemptuous conduct is inherent and indisputable. Seaward v. Paterson [1897] 1 Ch. 545, 554, 76 L. T. N. S. 215; Re Reese, 47 C. C. A. 87, 90, 107 Fed. 942. We believe the above-mentioned distinction in contempt proceedings, between disobedience of the injunction by parties and privies and the conduct of others in contempt of the authority and commands of the court, to be elementary, and the sufficiency of the evidence in the case at bar to support conviction must be tested thereunder. The question discussed in the briefs, whether the general averment in the petition that the

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plaintiff in error "violated said injunctional order" authorized reception of this evidence to establish either class of contempt relied upon for conviction, is not involved in our view of the effect of the affidavits, incorporated in the petition, that they aver such facts and furnish notice for the introduction. The petition is plainly defective, however, in the averments to charge the plaintiff in error with knowledge of the injunction,—stating alternatively that he "knew, or by the exercise of ordinary intelligence might have known, of the issuance;" but laying out of view for the present inquiry the objection raised thereupon, we proceed to consideration of the versions of fact on which the finding and conviction are predicated, to ascertain their bearing and sufficiency.

The present proceedings arose out of notortious conditions of mob violence which attended a strike in Chicago, known as the "teamsters' strike," in April and May, 1905. We are not authorized, however, to consider upon this review, either the serious questions, public or private, which were involved, or the effect of the disturbances and violence upon the business and welfare of the community, as pressed to attention in the argument in support of the judgment. The issues to be determined are not of riotous and unlawful conduct in attack upon the teams and guards, nor whether the testimony tends to show commissions of offenses by the plaintiff in error against the state and public, either by way of inciting a mob to acts of violence or in breaches of the peace. Such offenses are not within the cognizance of the trial court, and the judgment cannot rest on their commission, however convincing the proof may appear. While the "contempt proceeding is *sui generis*," it is distinctly criminal in its nature (Bessette v. W. B. Conkey Co. supra), and the accused is clearly entitled to the benefits of the common-law presumption of innocence, with its strict requirement of proof for conviction, although the pleadings may not be subject to the technical rules of the criminal law.

Taking up the affidavits introduced in support of the charges of contempt, they plainly state a vicious attack upon two teams of the complainant and the persons attending as guards, by a mob and individuals named, for the manifest object of obstructing the teams and injuring the guards. They identify the plaintiff in error as one of the assailants, "in the uniform of a city fireman," and state that he was following up the teams and guards in their passage through the street; that he was observed "throwing stones at the colored men guarding the teams," was swearing at the guards, "calling vile names," and cried out to the crowd to "hang the damned niggers;" and that he ultimately assaulted and struck one of the guards after such guard was arrested by the city police force, was in their custody, and either in a police wagon or "getting into it." The single witness, Dimick, called to testify upon the hearing, states only the last-mentioned assault upon the guard so arrested and in custody in the police wagon. These versions of fact, in substance,—without a fact stated to connect the mob violence or individual attacks with parties named in the injunction, either as associations or individuals, or with express defiance of such injunction, and with no proof tending to show knowledge of the injunction or intent to defy its commands, aside from the alleged publications of the order in the public press and notices thereof borne upon the wagons thus interfered with,—constitute the evidence upon which the plaintiff in error is adjudged guilty of contempt. On the part of the plaintiff in error, his presence when the conflict occurred is admitted, but his testimony is specific in denial of every act of violence or participation above mentioned; and he states in substance that his only part in the disturbance was to assist "the police to protect life and property," and that he did so assist in quelling the riot and arresting rioters, in conformity with his understanding of his duty as one of the city firemen. This version is supported by several affidavits, by policemen and other witnesses, and subsequent proceedings in the criminal court were introduced by way of corroboration. Further statements by these affiants, in reference to the conduct of persons acting as guards, are deemed immaterial in any view of the issues.

With the stories thus contradictory as to the participation and conduct of the plaintiff in error, we are impressed with the view indicated in the opinion of the trial court that it is difficult, to say the least, to ascertain the true version; but solution thereof is not involved here as a reviewable question. The findings by the court stated in the judgment are in general terms, in effect, that plaintiff in error, (a) with full knowledge of the injunction, (b) did wilfully and in violation of its terms interfere with, "and aid and abet the defendants, or some of them, to said bill," in interfering with, "the business of said the Employers' Teaming Company" and its employees and agents engaged therein, and (c) that he "has failed to show cause why he should not be attached and punished as for contempt." While we are not at liberty to refer to the opinion of the court for other or specific findings of fact, we assume for the purposes of the present inquiry that the above-mentioned statements of fact by the wit-

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nesses for the prosecution are adopted by the finding as the true version, and thus made conclusive here for the purposes of review; and it is further assumed that the deductions in the findings, as stated, amount to a finding of both of the classes of contempt above defined, namely, aiding and abetting violation of the injunction by a party, and contemptuous interference as an outsider. Thereupon, the question is presented whether these deductions are sustained by proof.

We are of opinion that each of the findings is unsupported, in any admissible view of the facts so established. The finding that the plaintiff in error had "full knowledge of the injunction"—a fundamental requisite for either charge of contempt—rests alone on the alleged publicity of the issuance, through newspapers and notices thereof which were posted on the wagons intercepted by the mob. No testimony appears of word or action on the part of the plaintiff in error, or in his hearing, in reference to the injunction; nor that his attention was directed to the wagons, their contents, or any notices thereon. He is clearly entitled to the benefit of "the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf" (Coffin v. United States, 156 U. S. 432, 458, 460, 39 L. ed. 481, 492, 493, 15 Sup. Ct. Rep. 394, reaffirmed in the recent opinion of this court in Dalton v. United States, 83 C. C. A. 317, 154 Fed. 461), which arises alike in respect of notice and conduct, as "an instrument of proof created in his favor;" and the mere inference of "full knowledge," derived solely from the above-mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption thus defined. The finding of such knowledge, therefore, is unsupported by the needful proof to authorize conviction, and cannot be upheld under the foregoing view. So the question whether the insufficient averment thereof in the petition constitutes reviewable error does not require solution.

Upon these premises, therefore, that knowledge of the injunction is unproven, and that no proof appears that the plaintiff in error was engaged by or with any person or association enjoined in its violation, we are of opinion that the evidence fails to establish cause for his conviction of contempt of court, within either of the classes found and adjudged against him. The misconduct stated by the witnesses for the prosecution,—in assailing and abusing the guards who were protecting the movement of the teams, and inciting the mob to like interference,—however criminal in its nature and disturbing in purpose and effect, thus standing alone, does not constitute contempt within either definition of such offense. Wilful defiance, and contempt of the authority and order of the court, cannot be intended or committed without information that such authority has been exercised in the issuance of an injunction protecting the movement and services thus interfered with. Nor is the alleged misconduct brought within the finding of violation of the order, in aiding or abetting "the defendants, or some of them, to said bill of complaint, in committing the acts and grievances complained of," for the further reason that it does not appear in evidence that any such parties were engaged in the attack, directly or indirectly. In reference to the alleged subsequent assault upon one of the guards when such guard was under arrest and in the custody of the police authorities, we deem it sufficient to remark that the guard was not then serving as escort, and any offense then committed was against the dignity of the state, and not that of the court issuing the injunction.

For want of evidence that the plaintiff in error was guilty of contempt of court in his alleged misconduct, the judgment of the Circuit Court is reversed, with direction to discharge the rule against the plaintiff in error.

Petition for writ of certiorari denied by Supreme Court of United States [214 U. S. 514, 53 L. ed. 1063, 29 Sup. Ct. Rep. 696].

Petition for rehearing denied June 4, 1908.

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plaintiff in error "violated said injunctional order" authorized reception of this evidence to establish either class of contempt relied upon for conviction, is not involved in our view of the effect of the affidavits, incorporated in the petition, that they aver such facts and furnish notice for the introduction. The petition is plainly defective, however, in the averments to charge the plaintiff in error with knowledge of the injunction,—stating alternatively that he "knew, or by the exercise of ordinary intelligence might have known, of the issuance;" but laying out of view for the present inquiry the objection raised thereupon, we proceed to consideration of the versions of fact on which the finding and conviction are predicated, to ascertain their bearing and sufficiency.

The present proceedings arose out of notortious conditions of mob violence which attended a strike in Chicago, known as the "teamsters' strike," in April and May, 1905. We are not authorized, however, tb consider upon this review, either the serious questions, public or private, which were involved, or the effect of the disturbances and violence upon the business and welfare of the community, as pressed to attention in the argument in support of the judgment. The issues to be determined are not of riotous and unlawful conduct in attack upon the teams and guards, nor whether the testimony tends to show commissions of offenses by the plaintiff in error against the state and public, either by way of inciting a mob to acts of violence or in breaches of the peace. Such offenses are not within the cognizance of the trial court, and the judgment cannot rest on their commission, however convincing the proof may appear. While the "contempt proceeding is *sui generis*," it is distinctly criminal in its nature (Bessette v. W. B. Conkey Co. supra), and the accused is clearly entitled to the benefits of the common-law presumption of innocence, with its strict requirement of proof for conviction, although the pleadings may not be subject to the technical rules of the criminal law.

Taking up the affidavits introduced in support of the charges of contempt, they plainly state a vicious attack upon two teams of the complainant and the persons attending as guards, by a mob and individuals named, for the manifest object of obstructing the teams and injuring the guards. They identify the plaintiff in error as one of the assailants, "in the uniform of a city fireman," and state that he was following up the teams and guards in their passage through the street; that he was observed "throwing stones at the colored men guarding the teams," was swearing at the guards, "calling vile names," and cried out to the crowd to "hang the damned niggers;" and that he ultimately assaulted and struck one of the guards after such guard was arrested by the city police force, was in their custody, and either in a police wagon or "getting into it." The single witness, Dimick, called to testify upon the hearing, states only the last-mentioned assault upon the guard so arrested and in custody in the police wagon. These versions of fact, in substance,—without a fact stated to connect the mob violence or individual attacks with parties named in the injunction, either as associations or individuals, or with express defiance of such injunction, and with no proof tending to show knowledge of the injunction or intent to defy its commands, aside from the alleged publications of the order in the public press and notices thereof borne upon the wagons thus interfered with,—constitute the evidence upon which the plaintiff in error is adjudged guilty of contempt. On the part of the plaintiff in error, his presence when the conflict occurred is admitted, but his testimony is specific in denial of every act of violence or participation above mentioned; and he states in substance that his only part in the disturbance was to assist "the police to protect life and property," and that he did so assist in quelling the riot and arresting rioters, in conformity with his understanding of his duty as one of the city firemen. This version is supported by several affidavits, by policemen and other witnesses, and subsequent proceedings in the criminal court were introduced by way of corroboration. Further statements by these affiants, in reference to the conduct of persons acting as guards, are deemed immaterial in any view of the issues.

With the stories thus contradictory as to the participation and conduct of the plaintiff in error, we are impressed with the view indicated in the opinion of the trial court that it is difficult, to say the least, to ascertain the true version; but solution thereof is not involved here as a reviewable question. The findings by the court stated in the judgment are in general terms. in effect, that plaintiff in error, (a) with full knowledge of the injunction, (b) did wilfully and in violation of its terms interfere with, "and aid and abet the defendants, or some of them, to said bill," in interfering with, "the business of said the Employers' Teaming Company" and its employees and agents engaged therein, and (c) that he "has failed to show cause why he should not be attached and punished as for contempt." While we are not at liberty to refer to the opinion of the court for other or specific findings of fact, we assume for the purposes of the present inquiry that the above-mentioned statements of fact by the wit-

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nesses for the prosecution are adopted by the finding as the true version, and thus made conclusive here for the purposes of review; and it is further assumed that the deductions in the findings, as stated, amount to a finding of both of the classes of contempt above defined, namely, aiding and abetting violation of the injunction by a party, and contemptuous interference as an outsider. Thereupon, the question is presented whether these deductions are sustained by proof.

We are of opinion that each of the findings is unsupported, in any admissible view of the facts so established. The finding that the plaintiff in error had "full knowledge of the injunction"—a fundamental requisite for either charge of contempt—rests alone on the alleged publicity of the issuance, through newspapers and notices thereof which were posted on the wagons intercepted by the mob. No testimony appears of word or action on the part of the plaintiff in error, or in his hearing, in reference to the injunction; nor that his attention was directed to the wagons, their contents, or any notices thereon. He is clearly entitled to the benefit of "the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf" (Coffin v. United States, 156 U. S. 432, 458, 460, 39 L. ed. 481, 492, 493, 15 Sup. Ct. Rep. 394, reaffirmed in the recent opinion of this court in Dalton v. United States, 83 C. C. A. 317, 154 Fed. 461), which arises alike in respect of notice and conduct, as "an instrument of proof created in his favor;" and the mere inference of "full knowledge," derived solely from the above-mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption thus defined. The finding of such knowledge, therefore, is unsupported by the needful proof to authorize conviction, and cannot be upheld under the foregoing view. So the question whether the insufficient averment thereof in the petition constitutes reviewable error does not require solution.

Upon these premises, therefore, that knowledge of the injunction is unproven, and that no proof appears that the plaintiff in error was engaged by or with any person or association enjoined in its violation, we are of opinion that the evidence fails to establish cause for his conviction of contempt of court, within either of the classes found and adjudged against him. The misconduct stated by the witnesses for the prosecution,—in assailing and abusing the guards who were protecting the movement of the teams, and inciting the mob to like interference,—however criminal in its nature and disturbing in purpose and effect, thus standing alone, does not constitute contempt within either definition of such offense. Wilful defiance, and contempt of the authority and order of the court, cannot be intended or committed without information that such authority has been exercised in the issuance of an injunction protecting the movement and services thus interfered with. Nor is the alleged misconduct brought within the finding of violation of the order, in aiding or abetting "the defendants, or some of them, to said bill of complaint, in committing the acts and grievances complained of," for the further reason that it does not appear in evidence that any such parties were engaged in the attack, directly or indirectly. In reference to the alleged subsequent assault upon one of the guards when such guard was under arrest and in the custody of the police authorities, we deem it sufficient to remark that the guard was not then serving as escort, and any offense then committed was against the dignity of the state, and not that of the court issuing the injunction.

For want of evidence that the plaintiff in error was guilty of contempt of court in his alleged misconduct, the judgment of the Circuit Court is reversed, with direction to discharge the rule against the plaintiff in error.

Petition for writ of certiorari denied by Supreme Court of United States [214 U. S. 514, 53 L. ed. 1063, 29 Sup. Ct. Rep. 696].

Petition for rehearing denied June 4, 1908.

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